

INTEGRITY REPORTING SERVICES AGENCY v MASSANDY A J G

2024 SCJ 105

Record No. 1274/2021

Chambers

THE SUPREME COURT OF MAURITIUS

In the matter of:

Integrity Reporting Services Agency

Applicant

v.

MASSANDY André Jordan Gengino

Respondent

In the matter of:

The Commissioner of Police

Co-Respondent

INTERLOCUTORY JUDGMENT

1. This is an application for an Unexplained Wealth Order under the sections 14 and 16 of the Good Governance and Integrity Reporting Act 2015 (“the Act”) against the respondent for the sum of Rs. 2,600,775. This application was initiated in August 2021 and therefore the Act which applies includes only amendments made in 2019 and is not the amended legislation currently in force.

2. The sum in question was seized by Anti Drug and Smuggling Unit (ADSU) officers on 1st February 2021, this is admitted by the respondent (“Mr Massandy”). Mr Massandy has been provisionally charged with money laundering in breach of section 3(1)(b) and 8 of the Financial Intelligence and Anti Money Laundering Act 2002.

3. The present application constitutes civil proceedings and the onus lies on the respondent to establish, on the balance of probabilities, that the cash is not unexplained wealth. This is found in section 3(5) of the Act.

4. Mr Massandy was 25 years old when the application was initiated and has not admitted that the sum in question seized by the Police is his. He does not own any immovable property but is the owner of several motor vehicles including motorcycles.

5. The applicant, Integrity Reporting Services Agency (“IRSA”) has made a Statutory Request to Mr Massandy (on 11th February 2021) under section 5 of the Act for him to explain the source of his assets with due warning that a reply was required within 21 days failing which there would be an application for a Disclosure Order under section 13 of the Act. Mr. Massandy responded by way of a letter (undated) instead of an affidavit in which he states that he is exercising his right to silence and has been advised to await the determination of his trial. He stated that the ADSU would interrogate him further in the matter. It is not disputed that Mr Massandy has failed to account for his assets and that the applicant has secured a Disclosure Order under section 13 of the Act which has been served upon him. The Disclosure Order dated 25th May 2021 has not been complied with to date by Mr Massandy. Following a report submitted under section 5(2) of the Act, the IRSA prays for the confiscation of the sum of Rs. 2,600,775 under section 16 of the Act. The IRSA avers it has reasonable grounds to believe that Mr Massandy has acquired and/or is in possession and/or has custody and/or control of ‘unexplained wealth’ as defined in the Act.

6. The respondent has raised the following preliminary objections and is moving for a permanent stay on the following basis:

1. His Constitutional Rights, namely the right to silence and to a fair trial, have been violated.
2. Several authorities are enquiring on the same matter: the Mauritius Revenue Authority (“MRA”), the Independent Commission Against Corruption (“ICAC”), the Anti Drug and Smuggling Unit (“ADSU”) and the Integrity Reporting Services Agency (“IRSA”) and his explanations are being sought in an oppressive manner.
3. His criminal proceedings are pending and he is running the risk of jeopardising his defence by making statements against his right(s) and defence.
4. The procedure breaches the rules of natural justice especially at the stage of criminal investigation by exposing him to several enquiries driven

towards a single penalty and constitutes oppression towards him as well as an abuse of process of the court.

5. The application is premature given the ongoing police enquiry.

7. In the present matter, it is necessary to set out some of the details found in the affidavits of the applicant, respondent, and the co-respondent because of the nature of the application and the objections raised.

The IRSA's affidavits

8. The affidavit dated 17th August 2021 explains the legislation under which the application is being made, recounts the personal circumstances and details of the respondent and of a search made by the ADSU on the 1st of February 2021 at the dwelling house where he resides. The building is a one storey house in Tombeau Bay and the search was carried out in the presence of respondent's parents. In a transparent plastic bag, a significant amount of money in the Mauritian denominations was secured in the living room from a wooden furniture. Upon being questioned by the officers, Mr Massandy stated that this money belonged to him and that his parents did not know anything about it. Mr Massandy's car which was parked on the road in front of the premises, was also searched and in the boot of the car, two bags were secured each containing huge sums of money. Mr Massandy exercised his right of silence when he was questioned about these two bags. After counting the money, the ADSU officers found that in total there was Rs. 2,600,775 which sum was then secured by the officers. Mr Massandy has remained silent as regards the source of the funds. He has been provisionally charged with money laundering and his parents denied any knowledge as to the money secured.

9. The applicant's investigation has revealed that the respondent is the owner of seven motor vehicles of which three are motorcycles (given total value of Rs. 817,000).

10. The affidavit then provides details as to the statutory request made by IRSA and the reply of Mr Massandy which has already been alluded to in paragraph 4 above.

11. In its second affidavit dated 11th January 2022, IRSA counters the averments of Mr Massandy which are included in its submissions further on and is not reproduced here. It however avers that the objections of Mr Massandy are untenable and frivolous¹.

Mr Massandy's affidavits

¹ Para 7 and 28, p 49 to 52 of applicant's affidavit dated 11 January 2022.

12. As set out in paragraph 6 of this judgment, the respondent has raised preliminary objections. On the merits, he avers that the bag secured at his parent's house contained only about Rs. 300,000. He has been advised that until he is tried, he is not obliged or compelled to give any evidence in any main case that may follow the provisional charge. He is of the view that providing any information as sought by the applicant by way of making a detailed affidavit, would present a real risk that such evidence will prejudice his criminal case, especially as the present application includes the Commissioner of Police as the co-respondent who is concerned with both his criminal prosecution and investigation.

13. Mr Massandy expresses his concern that he will be cross-examined on matters such as the origin of particular funds and assets outside of this period (I presume he is referring to the date of search and seizure of the cash) and that there is a real risk that this will prejudice his rights and open investigations against him or others by co-respondent.

14. Mr Massandy refers to his intention to make an application to discharge the order of 25th May 2021. He avers that though he was the owner of all of the listed motor vehicles, he has been and is currently only the owner of two vehicles at any given time.

15. He does not agree with the ascribed value of movable properties and denies that the sum of Rs 2,600,775 was secured from the dwelling house.

16. Mr Massandy contends that IRSA and police may run concurrent enquiries and that he cannot waive his constitutional rights at the request of IRSA. The affidavit denies salient averments of the applicant.

17. The co-respondent did not initially file an affidavit but submitted in law on the objections raised by the respondent. Upon my request for clarifications, a second affidavit was filed in February 2024².

Mr Massandy's preliminary objections and counsel's submissions

18. In the written submissions, Mr. Juwaheer, learned counsel for the respondent, submits that the powers of the IRSA cannot displace respondent's rights to silence and his constitutional rights which are both guaranteed during criminal proceedings despite the statutory powers of

² See paragraphs 36 and 37 of this judgment

the IRSA in as much as they would amount to an abuse of the process of the court. This is the issue to be determined in the present matter.

19. Mr Massandy states he cannot submit to the disclosure being sought by IRSA as its timing is premature given criminal investigations around the possession of the exhibit are currently proceeding.

20. Learned counsel for the respondent relies on the authority of **Commissioner of the Australian Federal Police v Zhao [2015] HCA (12 February 2015)** as the only authority properly comparable to the facts of the present matter.

Submissions on behalf of IRSA

21. The submissions are not reproduced here. It was emphasised in the submission that there is no principle of law that a civil action should be debarred because of it could lead to a person revealing his defence in criminal proceedings. The case of *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 was referred to as was section 7 of the Criminal Procedure Act.

22. Learned counsel for applicant also submitted that “there was a presumption of constitutionality in favour of a statute which needs to be enforced”.

Conclusions

23. The IRSA has come with an application whereby it contends that there are *prima facie* reasonable grounds to suspect that there is unexplained wealth, and that Mr Massandy has to discharge the balance of probabilities, his ownership of the seized monies.

24. The first objection invokes what is characterised as the following Constitutional Rights: the right to silence and to a fair trial. The right to a fair hearing within a reasonable time is indeed provided for under section 10(1) of the Constitution. The terminology “right to silence” however is not found in the Constitution. What is in section 10(7) of the Constitution is the following:

(7) *No person who is tried for a criminal offence shall be compelled to give evidence at trial.*

25. Although the above subsection refers to evidence at trial, the right to silence does also exist during the police enquiry for a potential criminal offence but is not formulated as such within the Constitution. It is found in the Judges Rules and has been entrenched in case law.

26. When considering the setting out of the different chapters and sections in the Constitution, it is worth stating that in chapter I, section 1 states that Mauritius shall be a sovereign Democratic state which will be known as a Republic of Mauritius. This is followed by section 2, which states that the Constitution is the supreme law of Mauritius, and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. Chapter II, under which section 10 is found, contains sections 4 to 16 which are protective provisions. The rights and freedoms provided for are however subject to public interest, the rights and freedoms of others. The exceptions to the rule are provided for either in the Constitution itself or in specific laws. To conclude, even though there is a right to silence, it applies to criminal investigations and trials. There is no violation of the respondent's constitutional rights to a fair trial and to his right to silence in the present matter which are civil proceedings. I do not agree with the submissions of learned counsel for the respondent that powers of the IRSA displace the rights to silence and his constitutional rights of the respondent. This objection fails and is set aside.

27. I now address the second, third and fourth objections. It would seem that the respondent is making a simple equation based on the fact that there are several authorities enquiring into the same matter as being oppressive. At first sight, this may seem to be so and when weighing the might of several authorities against one individual, it is a matter of concern. The court has a duty to safeguard the right of the individual under certain circumstances. However, this requires in-depth consideration. The question that needs to be answered is whether in the present application, the respondent's preliminary objections and the contents show sufficient precise details to support the contention that there is oppression and abuse of process of the court.

28. I have carefully considered the affidavit of Mr Massandy in this matter and I find that it is far from establishing that the various investigations and enquiries are oppressive and/or there is an abuse of process of the courts. The general averments made are not sufficient.

29. Apart from the averment found that several authorities are enquiring on the same matter, Mr Massandy has not given any further details. For example, as to the date, type of enquiry and stage of enquiry being made by "ICAC" and the "MRA". The starting point seems to be a search

made of the respondent's parents' home by the ADSU on the 1st of February 2021 where a sum of Rs. 300, 000 was found and seized. There is a dearth of details provided by Mr Massandy. It is in the IRSA's affidavit that there are details of the search and various sums of money found as well as what was the reaction of the respondent when he was cautioned: he invoked his right to silence.

30. In Mr Massandy's affidavit, the following averments are relevant to the issues under consideration. This is found at paragraph 10C, where Mr Massandy avers that by making a detailed affidavit or being cross-examined regarding the seized property and source of funds, this would present a real risk that such evidence will prejudice his criminal case. He points out that the co-respondent, the Commissioner of Police, is a party to the present application. Mr Massandy is concerned that he will be cross-examined on the contents of his affidavit relating to the origin of particular funds and assets and that there is a real risk that this will prejudice his rights and may open investigations against him or others and lead to prosecution for suspected offences.

31. True it is that the Commissioner of Police being a party gives him direct access to the information which may be revealed by Mr Massandy and which may be pertinent to the criminal enquiry and trial. However, this contention then leads to the rhetorical question of whether the absence of the Commissioner of Police as a party in this application would have a different effect and therefore outcome. This is not a valid point.

32. Mr Massandy is faced with two situations and a choice: he defends the criminal case by invoking his right to silence and not to give evidence or explanations as to the source of his funds in the present application. This, bearing in mind that a successful criminal prosecution entails a fine and/or imprisonment. By not putting forward an explanation in the present civil matter, a confiscation of the cash will be a most likely outcome. As pointed out by the IRSA in its affidavit, Mr Massandy is supposed to tell the truth in his affidavit when he explains the source of funds. If he does not wish to divulge this information, he should be prepared to forfeit the amount in question. I find that the present application cannot, by the sole fact it has been made, be a violation of his Constitutional rights. I also do not agree that there is an abuse of process of court, breaches of natural justice or oppression.

33. This then leads me to consider the last objection that the application is premature and whether the fact that at a particular point in time, depending on the chronology of the

interventions of separate independent authorities, this can lead to a person losing his shield during a criminal investigation and subsequent court case.

34. The MRA deals with undeclared but possibly legitimate sources of income, the ICAC with corruption and money laundering – as demonstrated in the present matter by the provisional charge brought against the applicant, the ADSU with criminal offences such as drug and smuggling offences. Finally, the IRSA will target the seizing of assets which are not explained and/or legitimate.

35. I am of the view that normally, a person may be investigated by all of the authorities cited above where it is neither oppressive nor against a person's rights. It is possible that the timing of each separate investigation and/or enquiry is done in such manner, that the express right to remain silent is not breached.

36. Following the hearing held in May 2023, I have subsequently ascertained from the parties the exact location of the cash secured and which order (such as a restraining order) if any, it is subject to. A specific request was made to the parties to enlighten me as to whether the cash was subject to any orders under the Act or other legislation. In the affidavit of the co-respondent dated 12th February 2024 it is explained that the amount of Rs. 2,600,775 has been placed in evidence bags and is in the possession of the ADSU in its exhibit room.

37. In the same affidavit, it is averred that in light of sections 3(2B) and 3(2C) of the Asset Recovery Act 2011 ("ARA"), no other applications or orders allowing for criminal or civil recovery shall be granted in relation to property subject to an Unexplained Wealth Order which takes precedence over any existing orders. Therefore, following the Unexplained Wealth Order which takes priority, property cannot be accessed by anyone including the respondent.

38. The application before me is under sections 14 and 16 of the Act (as at August 2021) and is the subject of the present judgment. It is these two sections which provide for obtaining orders prohibiting the transfer, pledging or disposal of property (section 14(3) of the Act) and the confiscation of said property (under section 16 of the Act). Here the property in question being cash.

39. Section 12 of the Act provides for the inscription of a privilege on property of a respondent with the Conservator of Mortgages in favour of the Government. This may be done

at the stage of a report under section 5 (2) and where a statutory request has been served on the respondent in question.

40. From the evidence placed before me there is no restraining order or similar order, whether under the ARA, the Financial Intelligence and Anti Money Laundering Act (“FIAMLA”) or the Act, on the sum of money secured. In the present matter, as explained above, this is not an obstacle as the cash has been secured as an exhibit and is not in the control of Mr Massandy.

41. Based on the facts placed before me in this application, I fail to see, why Mr Massandy should be compelled to give an explanation at this very point in time. It is noteworthy that the search was carried on the 1st of February 2021 and the IRSA was involved soon after and on the 11th of February 2021 served a Statutory Request on the respondent. The cash is presently in the custody of the ADSU as an exhibit. I make this finding, which I need to emphasise, in light of the specific facts and circumstances of this case. I also reiterate that in general, criminal proceedings should not be an impediment to civil proceedings relating to proceedings such as those of forfeiture and confiscation of property.

42. I am comforted in reaching my conclusion in the present matter after similar views were expressed in the Australian case of **Zhao** which considered an application for a stay of forfeiture proceedings. The facts in this case and the legislation are not exactly the same as in Mauritius but it makes interesting and persuasive reading. The Australian legislation, relevant to Zhao’s case, has a section of the law found in its Proceeds of Crime Act 2002 which specifically provided that where there were criminal proceedings instituted or which have commenced, this was not a ground to stay the civil proceedings for forfeiture. In the case, the first instance judge Lacava was concerned with frustrating the clear intentions and purposes of legislation in granting a stay of the forfeiture proceedings. The Court of Appeal of the Supreme Court of Victoria allowed the appeal and stayed the proceedings until the hearing and determination of the criminal proceedings or further order. This decision was further appealed and heard by five judges who agreed with the Court of Appeal’s decision to stay the forfeiture proceedings. The judgment alludes to the concerns of a respondent who would not be able to defend his forfeiture proceedings without “telegraphing”³ his likely defence. The court considered that the risk of prejudice to the respondent is plain if a stay is not granted. It also stated that it was not as

³ Page 6 of the Zhao judgment.

equally clear what was the risk of prejudice to the relevant authority, if a stay was granted⁴. I am of a similar view.

43. The respondent has prayed for a permanent stay which cannot be granted. However, the last objection of the respondent is valid in as much as I find that the application is premature in the present circumstances.

44. Therefore, I stay the present application for the Unexplained Wealth Order until the hearing and determination of the relevant criminal proceedings against the respondent or until any further order.

**R. Teelock
Judge**

06 March 2024

For Applicant: Mr P. Chuttoo, Attorney at Law
Mr A. Hajee Abdoula, of Counsel

For Respondent: Mr J. C. Ohsan-Bellepeau, Attorney at Law
Mr A. Juwaheer, of Counsel

For Co-Respondent: Ms K. Parson, Senior State Attorney
Mr J. Muneesamy, Principal State Counsel

⁴ Page 10 of the Zhao judgment.