

**INTEGRITY REPORTING SERVICES AGENCY
v LOUIS JOHN BRANT VIVIEN & OTHERS**

2023 SCJ 133

In Chambers

Serial No. 1390/2021

THE SUPREME COURT OF MAURITIUS

In the matter of:

Integrity Reporting Services Agency

Applicant

v

Louis John Brant Vivien

Respondent

In the Presence of:

- 1.The Commissioner of Police
- 2.The Financial Intelligence Unit

Co-Respondents

JUDGMENT

This is an application by the Integrity Reporting Services Agency (“the Agency”) under sections 14 and 16 of the Good Governance and Integrity Reporting Act (“the Act”). The applicant is seeking –

- (A) an Unexplained Wealth Order against the respondent under section 16 of the Act for the confiscation of the sum of Rs 5,078,182.20 which was seized from him (“the money seized”) by officers of the Anti Drug and Smuggling Unit (“the ADSU”) on 3 November 2016 at his dwelling house and which was handed over by the ADSU to co-respondent No. 2 to be credited into its account held with SBM Bank (Mauritius) Ltd; and
- (B) an order directing co-respondent No. 2 to remit to the applicant the said sum of money by crediting it into the applicant’s account held at SBM Bank (Mauritius) Ltd bearing account number 50300000116547.

The respondent is resisting the application, while the co-respondents indicated that they will abide by my decision.

It is undisputed that –

1. the sum of Rs 5,078,182.20 was seized from the respondent at his dwelling house following a search by officers of the ADSU on 3 November 2016;
2. a provisional charge of money laundering was lodged against the respondent by the police;
3. the money was handed over by the ADSU officers to co-respondent No. 2 to be credited into its account held with SBM Bank (Mauritius) Ltd;
4. on 17 November 2020, the applicant sent a letter to the Commissioner of Police (“the CP”) for the case to be referred to it (the applicant);
5. the matter was referred by the Deputy Commissioner of Police of the ADSU to the applicant for investigation under the Act on 1 December 2020;
6. on 2 December 2020, the applicant caused a statutory request to be served on the respondent under section 5(1)(a) of the Act requesting him to explain, by way of affidavit, the source of the money seized from his premises;
7. in his reply (by way of an affidavit dated 22 December 2020), the respondent stated that -
 - (a) he has studied up to standard VI and joined the job market in his early teens;
 - (b) he worked in a bakery for some years and, since 2008, he carried out the businesses listed out below from which, yearly he earned the following sums of money -
 - (i) Rs 1,296,000 from his work as stone reseller,
 - (ii) Rs 144,000 from the sale of scrap metal,
 - (iii) Rs 436,800 from running a shop,
 - (iv) Rs 138,000 from the resale of detergents,
 - (v) Rs 72,000 from the cultivation of vegetables, and
 - (vi) Rs 216,000 from the sale of fresh coconuts;
 - (c) the total of his gains and profits up to November 2016 justifies the amount of money which was seized from his dwelling house and constitutes his savings and is not tainted;
8. after considering the above reply, the applicant caused a second statutory request, dated 19 January 2021, to be served on the respondent requesting the latter to (a) specify the periods for which the works were undertaken and (b) provide evidence in his possession, such as tax returns or any other document, which would support his averments;
9. the respondent replied to the second statutory request by way of another affidavit dated 16 February 2021 where he averred that he is willing to make good all his liabilities regarding taxes with the Mauritius Revenue Authority, the sum total of his

gains and profits as at November 2016 justifies the amount of money that was secured at his place and the money secured is not tainted;

10. the respondent also attached to the affidavit dated 16 February 2021 a document which is referred to by the respondent as his “statement of affairs”.

The applicant has further averred that, in a letter dated 18 February 2021 addressed to the respondent’s attorney at law, it informed the latter that the averments in both of the affidavits of the respondent are entirely unsupported and fall short of providing satisfactory explanations for the source of the cash found at the respondent’s premises, the respondent was being granted a further delay of 10 working days as from its letter to provide support for his averments and, if the respondent was unwilling or unable to do so, the applicant would have no alternative but to take measures to apply for an Unexplained Wealth Order. Neither the respondent nor his attorney have responded to the letter dated 18 February 2021.

It is the applicant’s contention that the “statement of affairs” of the respondent is of no probative value, the respondent has failed to satisfactorily account for and/or explain the source of the money seized by the ADSU from his dwelling house. The above facts and circumstances disclose a suspected case of unexplained wealth and the respondent is in possession or control of unexplained wealth.

For his part, in his affidavits filed before me, the respondent has averred that he reiterates the averments made in his affidavit dated 16 February 2021 submitted to the applicant (where the “statement of affairs” is annexed). In addition, he has averred that, “*due to the nature of [his] businesses coupled with [his] lack of proper formal education, [he has] faithfully disclosed the sums [he] derived on average from [his] businesses*”. He has been unable to keep proper records due to his level of education and cannot be deprived of his hard-earned money. The respondent has also annexed a report from his accountant to the second affidavit filed before me and averred that the sums seized have been legally obtained as per the accountant’s report.

I, now, have to determine whether I should grant the application and make an Unexplained Wealth Order which is an order issued under section 16 of the Act for the confiscation of property which constitutes unexplained wealth. I have duly considered the affidavits filed on record and the documents attached thereto as well as the written and oral submissions of Counsel.

The term “unexplained wealth” is defined as follows under section 2 of the Act -

“unexplained wealth” includes any property –

- (a) under the ownership of a person to an extent which is disproportionate to his emoluments and other income;*
- (b) the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of the property; or*
- (c) held by a person for another person to an extent which is disproportionate to the emoluments or other income of that other person and which cannot be satisfactorily accounted for;”*

It goes without saying that in order to make a confiscation order, I have to be satisfied that the money which has been seized in the present case falls within the purview of the term “unexplained wealth”. Before considering the above issue, I find it important at the outset to turn to section 3 of the Act which is entitled “*Application of Act*” and which sets out the parameters of the Act.

It is relevant to refer to section 3(6) and (7) which are reproduced below-

“(6) This Act shall not apply to –

- (a) any property acquired or having come in the possession or under the custody or control of a person more than 7 years before 1 January 2016*
- (b) unexplained wealth of less than 10 million rupees, other than to unexplained wealth of at least 2.5 million rupees in cash which has been seized by an enforcement authority during a criminal investigation.*

(7) No application for an Unexplained Wealth Order shall be made under section 14 in relation to any property acquired or having come in the possession or under the custody or control of a person more than 7 years before the date on which a request under section 5(1)(a) is made.”

The above provisions assume all their importance in the present case, given that they have been amended between the time when the money was seized and the present application was lodged. The Act itself came into operation on 1 January 2016. The jurisdiction of the Judge in Chambers derives from section 16(1) of the Act which provides that where the Agency makes an application for an Unexplained Wealth Order and the Judge in Chambers is satisfied that the respondent has unexplained wealth, he shall make an Unexplained Wealth Order or an order for the payment of its monetary equivalent.

Prior to the amendment of the Act (by Act 5 of 2020 which came into operation on 9 July 2020), it did not apply to unexplained wealth of less than 10 million rupees. However, the Act now applies to unexplained wealth of at least 2.5 million rupees in cash which **has been seized** by an enforcement authority during a criminal investigation and section 2 of the Act was also amended by Act 5 of 2020, and, as from 9 July 2020, now defines “enforcement authority” as including the Commissioner of Police. Given the wording of section 3(6), it is clear that as from 9 July 2020, the Act also applies to unexplained wealth of at least 2.5 million rupees in cash which has been seized by an enforcement authority during a criminal investigation even where the seizure has been effected prior to 9 July 2020.

In so far as section 3(7) is concerned, it is tied to the date on which the statutory request for explanations is made under section 5(1)(a) of the Act. It takes outside the purview of the Act any property which was acquired or came in the possession or under the custody or control of any person more than 7 years before the date on which the statutory request under section 5(1)(a) is made. In the present case, the applicant caused a statutory request to be served on the respondent on 2 December 2020 requesting him to explain the source of the sum of Rs 5,078,182.20 which was seized at his premises. The case of the respondent, as disclosed in his affidavits and annexed documents, is that the money was derived by him from his businesses which were carried out by him as from 2008. Part of the money seized would therefore fall outside the purview of the Act if the version of the respondent regarding the years in which the money was allegedly derived were to be believed.

Before turning to the explanations regarding the source of the sum seized put forward by the respondent, I must turn to the relevant extracts of sections 5, 9 and 14 of the Act which are set out below:

“5. Powers of Agency

(1) (a) On receipt of a report under section 9(1) or (2), or on its own initiative, the Agency may, in writing, request any person to explain, by way of affidavit within 21 working days or any such longer period which the Director may determine, the source of any funds which the person owns, possesses, has custody or control of, or which are believed to have been used in the acquisition of any property.

(2) The Agency shall, after making such enquiry as it may determine following a request made under subsection (1)(a), report the matter to the Board.

(3) Where the Agency has reported a matter to the Board, it shall not initiate any action in respect of that matter, unless directed by the Board.

9. **Duty to report unexplained wealth**

- (1) *Notwithstanding any duty of confidentiality or any other provision under any other enactment, where, in the exercise of his functions –*
- (a) *the Commissioner of Police;*
 - (b) *a judicial officer;*
 - (c) *the Ombudsman;*
 - (d) *the Director of Audit;*
 - (e) *the Director of the Financial Intelligence Unit;*
 - (f) *the Director-General of Independent Commission Against Corruption;*
 - (g) *the Director-General of the Mauritius Revenue Authority;*
 - (h) *the Governor of the Bank of Mauritius;*
 - (i) *an integrity reporting officer nominated by a public interest entity;*
or
 - (j) *an officer of a statutory corporation, or body corporate,*

has reasonable ground to suspect that a person has acquired unexplained wealth, he shall make a written report of the matter to the Agency.”

A perusal of the above provisions shows that the power of the Agency to make a statutory request may either be exercised at the Agency’s own initiative or following a referral under section 9(1) by one of the persons referred to in the said section.

Under section 9(1)(a) of the Act, the CP is specified as one of the persons who has a duty to make a report to the Agency where, in the exercise of his functions, he has reasonable ground to suspect that a person has acquired unexplained wealth. In the present case, the money was already seized by the CP since 3 November 2016. However, at the relevant time, there was no duty on the CP to make any report to the applicant, since it is only as from 6 August 2019, following the amendment brought through Act 13 of 2019, that the CP is listed as one of the persons who has to make a report to the applicant where in the exercise of his functions, he has reasonable ground to suspect that a person has acquired unexplained wealth. However, it is noteworthy that section 9 makes no reference to the date on which the enforcement authority makes a seizure but casts a duty on the CP to make a written report to the Agency **at any time where during the exercise of his functions** he has reasonable ground to suspect that a person has acquired unexplained wealth.

In the circumstances, I consider that, pursuant to section 5(1) of the Act, the CP can at any time after 6 August 2019, make a written report to the Agency provided that he has reasonable grounds to suspect that a person has acquired unexplained wealth. At any rate, even if he could not have made the written report in the present case, the applicant has the power to make a statutory request for explanation of the source of any funds which are in the *possession, custody or control of a person* at its own initiative.

As can be gleaned from the affidavits on record and documents produced before me, the respondent's version is that the sum seized consists of money derived from his savings from business activities which he has been carrying out since 2008. The applicant has averred that Rs 750 in Mauritian bank notes and Rs 185,282.20 in coins were found in a hole inside a concrete structure in the kitchen and the remaining sum of money was found concealed in the false bottom of a wooden furniture. The CP has admitted that the Rs 750 in Mauritian bank notes and Rs 185,282.20 in coins were found in a concrete structure in the form of a kitchen table and confirmed that the rest of the Rs 5,078,182.20 was found in the false bottom of a wooden furniture.

The respondent simply took note of the above averments and reiterated the averments in the affidavit which he has filed with the applicant. In the said affidavit, he averred that he derived the money subject matter of the present application from the businesses which he has allegedly been carrying out. Although he has averred that he has been unable to keep proper records due to his level of education, he went on to aver that he has faithfully disclosed the sums he derived on average from his businesses and provided a "statement of affairs" for the years 2008 to 2016 and a report of an accountant with a view to establish that the money is not unexplained wealth.

I have closely examined the "statement of affairs". It shows that the applicant derived a total yearly income of Rs 5,651,200 for each of the years 2009 to 2014 and 2016. In the year 2015 he derived exactly half of that income, that is Rs 2,825,600. The total expenses incurred by the respondent in relation to his business activities for each of the years 2009 to 2014 and 2016 are identical (Rs 4,368,800), while for the year 2015 it is exactly half of the above sum, that is Rs 2,184,400. The statement of affairs also reveals that the respondent derived exactly the same yearly income from each of his business activities for the years 2008 to 2014 and 2016 (apart from the year 2008 where he derived a different amount from the sale of scrap metals) and half of that yearly income for the year 2015 as set out below-

1. sale of rocks – (a) 2008 to 2014 and 2016 - Rs 2,520,000;
(b) 2015 - Rs 1,260,000;

2. sale of scrap metals – (a) 2008 – Rs 576,000;
(b) 2009 to 2014 and 2016 - Rs 720,000;
(c) 2015 – Rs 360,000;
3. sale of coconuts – (a) 2008 to 2014 and 2016 – Rs 540,000;
(b) 2015 – Rs 270,000;
4. revenue from retail shop – (a) 2008 to 2014 and 2016 – Rs 1,456,000;
(b) 2015 – Rs 728,000;
5. sale of vegetables – (a) 2008 to 2014 and 2016 – Rs 360,000;
(b) 2015 – Rs 180,000;
6. commission on sale of “crest” – (a) 2008 to 2014 and 2016 – Rs 55,200;
(c) 2015 – Rs 27,600.

It is relevant to note that according to the “statement of affairs”, for each of the years 2008 to 2014 and 2016, the respondent incurred exactly the same yearly expenses for the purchase, labour and transport of (a) rocks; (b) scrap metals; (c) coconuts; and (d) for the cost of sales for retail shop and for the cost of sales of vegetables. In other words, the yearly expenses for the purchase, labour and transport of rocks were exactly the same for the years 2008 to 2014 and 2016; the yearly expenses for the purchase, labour and transport of scrap metals were exactly the same for the years 2008 to 2014 and 2016; and the yearly expenses for the purchase, labour and transport of coconuts were exactly the same for the years 2008 to 2014 and 2016. Similarly, the cost of sales for the retail shop was exactly the same for the years 2008 to 2014 and 2016 and the cost of vegetables was exactly the same for the years 2008 to 2014 and 2016.

The statement of affairs depicts that the revenue and expenses have remained identical for each year over a period of 9 years (apart from the year 2015 where the revenue and expenses were each halved without any reason being advanced therefor by the respondent and for the year 2008 where the only sums that differed were those derived from the sale and the expenses relating to scrap metals).

The information provided in the statement of affairs is, to say the least, **inherently implausible** since it is obvious that the yearly income from the different business activities allegedly carried out by the respondent and the yearly expenses incurred in relation thereto cannot remain static over a period of 9 years. Moreover, absolutely no documentary or other evidence to substantiate the above figures has been provided by the respondent. In addition, he provided very scanty details about the businesses which he had allegedly been carrying out simultaneously and continuously for the years 2008 to 2016. Further, it is clearly stated in

the report from the accountant that it is of limited use and cannot be used for any other purpose but only as a matter of tax preparation for declaration of income tax purposes. More importantly, the report provides that it is based on average figures as disclosed by the taxpayer and that the veracity thereof could not be verified due to the lack of evidence and information provided.

Now, the Act provides that when an application is made thereunder for an Unexplained Wealth Order, the onus lies on the respondent to establish, on a balance of probabilities, that any property is not unexplained wealth. Once an application for an unexplained wealth order is made against a respondent, it is not sufficient for him to make bare averments regarding the property subject matter of the application. He must put forward such facts and circumstances to enable the Judge to determine whether there is any veracity in his averments regarding the source of his property.

In the written submissions filed by learned Counsel for the respondent, she argued that this matter cannot be determined on affidavit evidence and should be referred to the competent Court. She argued that the matter is a complex one which requires the hearing of viva voce evidence and that the respondent cannot be deprived of his lawful earnings based simply on affidavit evidence. He should be given the opportunity to tender his accountant and officers of the ADSU to whom he provided documents to buttress the averments made in his first affidavit filed before me. In the written submissions, one can also read the following: *“the Applicant have (sic) not taken cognisance nor inserted any of the statements given by the Applicant (sic) where he justified his source of income and produced documents. The Respondent will have no alternative than to summon the Commissioner of Police to produce those documents, which the Applicant did not insert in the Application, to justify his source of income.”*

The submissions of Counsel for the respondent are clearly untenable. Nowhere in his affidavits did the respondent allude to any explanation given to ADSU officers regarding the source of the money seized; the affidavits filed before me and those submitted to the applicant following the statutory requests make no mention of any statement given to officers of the ADSU or to any document provided to the ADSU, let alone a document where he justified the source of his income. In fact, in the affidavits filed by the respondent before me, there is no mention whatsoever of anything having to do with the CP.

In any event, if the respondent wanted to adduce any evidence from his accountant, he was at liberty to request his accountant to swear an affidavit containing whatever evidence the accountant could have provided and to annex same to his affidavit. As a matter of fact, he did annex an affidavit dated 23 May 2022 from his accountant to the second affidavit filed on his behalf before me. The affidavit of the accountant simply recites that his services have been retained by the respondent and that he affirms to the veracity of his report annexed to the affidavit. However, this report does not in any manner account for the money seized. On the contrary, it states that “[t]he report is of limited use and cannot be used for any other purpose, [but] only as a matter of tax preparation for declaration of income to the revenue authority.”

I am fully alive to the fact that I am here concerned with an application which has far reaching consequences and that constitutional protection is afforded to property rights by our Constitution. I also take into consideration that the Act provides that where the Judge in Chambers considers that an application for an Unexplained Wealth Order cannot be granted on the basis of affidavit evidence, he shall refer the matter to the Supreme Court.

It is trite law that the Judge in Chambers is ill-placed to determine the veracity of the contentions of parties where he is confronted with conflicting affidavit evidence. However, I do not find that I can attach any weight to the respondent’s averments regarding the source of the money seized or the years in which the money was allegedly derived. The question of referring the matter to the competent Court would only arise if I were in presence of cogent evidence from the respondent and conflicting versions from the applicant and the respondent regarding the money seized. But, in the present case, on the evidence before me, it is clear that the respondent has failed to provide any cogent explanation regarding the source of funds. As stated above, the respondent had the burden of satisfactorily accounting for his possession of the money seized. However, he has utterly failed to adduce any evidence to satisfy me on a balance of probabilities of the source of the money seized.

The explanation provided through the statement of affairs which is inherently implausible can clearly not be relied upon, be it regarding the years in which the income was allegedly derived or the sources from which the income was allegedly derived. In the circumstances, I find that the respondent has failed to adduce sufficient evidence to satisfy me of his contention that the money seized is made up of income derived from the sources as set out in his “statement of affairs” and in his affidavits or that it was derived during the years set out therein. Taking all the above into consideration, I find that the respondent has failed to adduce sufficient evidence to establish that the money seized was indeed derived more than 7 years before 2 December 2020, the date on which applicant caused the statutory request to

be served on the respondent. I therefore find that the money seized does not fall within the purview of section 3(7) of the Act so as to preclude the applicant from making an application for unexplained wealth order in respect thereof.

For all the reasons given above, I grant an Unexplained Wealth Order against the respondent under section 16 of the Act for the confiscation of the sum of Rs 5,078,182.20 which was seized from the respondent by ADSU officers on 3 November 2016 at the respondent's dwelling house. I also order and direct co-respondent No. 2 to remit to the applicant the said sum of money by crediting the applicant's account held at SBM Bank (Mauritius) Ltd bearing account number 50300000116547.

K. D. Gunesh-Balaghee
Judge

24 March 2023

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For Applicant	:	Mr. A. Hajee Abdoula, of Counsel Mr. P. Chuttoo, Attorney at Law
For Respondent	:	Ms. T. Shamloll, of Counsel
	:	Mr. K. Bokhoree, Attorney at Law
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