ICAC v Anderson Ross & ors

2014 INT 35

Cause Number: 210-2012

In the Intermediate Court of Mauritius
(Criminal Division)

In the matter of:

Independent Commission Against Corruption
v.
1. Anderson Ross Consulting LTD (ARCL)
2. Balraj APPANAH
3. Ahmad Parwise MUNGROO
4. Paradise Pearl LTD
5. Mrs. Nundhanee Devi SANTBAKSHSING

RULING

At this stage whilst Chief Investigator Kullootee is being examined in chief and requested by the Prosecution to produce a statement from one of the Accused no.1 company's representative, Learned Counsel for Accused no.1 company objected to same being produced on the ground that the said statement as well as any other statement from any other of Accused no.1 company's representative are inadmissible in law.

The Prosecution resisted the said motion and insisted on same being produced.

In the same breath, Learned Counsel for Accused no.1 company as well as Accused no.2 also objected to the production of any of the documents which have been secured by the Independent Commission Against Corruption ('ICAC') following Supreme Court Orders upon application by Attorney Sohawon of ICAC on the ground that these would also be inadmissible.

The Prosecution again resisted the said motion and insisted on same being produced as well.

The learned Counsel of the other Accused parties joined in the objection raised by Learned Counsel for Accused nos.1 and 2.

Learned Counsel for Accused nos.1 and 2 raised other issues in law which the Prosecution resisted so that at the end of the day, this Court has now to address the following objections in law and deliver its ruling:

1. The admissibility of all documents secured upon an order from the Supreme Court following an application by Attorney Sohawon of ICAC;
2. The admissibility of all statements of the Accused parties involved in so far as they all contain reference to the documents obtained following an application by Attorney Sohawon of ICAC;
3. The potential procedural impropriety since there has been no compliance with section 47 of the Prevention of Corruption Act ('POCA') whilst carrying the investigations;
4. The nature of the Code on prevention of money laundering and terrorist financing ('FSC Code') issued by the Financial Services Commission ('FSC') (Document AD refers) and whether non compliance with measures mentioned therein may lead to criminal sanction or otherwise, and
5. The nature and extent of exempt transaction and whether it applies to offences under section 3 of the Financial Intelligence and Anti Money Laundering Act 2002 ('FIAMA')

Both sides of the bar offered submissions as well as referred to authorities to support their able submissions.

At the end of the day, although not clearly formulated by the Defence, it became obvious that the objections raised by the Defence have a bearing with the whole fairness of the proceedings and whether there has been a breach of the Accused parties fundamental rights to protection of law as set out under sections 3 and 10 of our Constitution.

Thus, should there be any such breach found, this Court would have to exercise its residual discretion to prevent its process from being abused and order a stay of proceedings. This is in light of the Supreme Court decision in **State v Wasson 2008 SCJ 209** which reads as follows:

The Court's exercise of its jurisdiction to prevent abuse and to stay proceedings has been explained and set out in a number of decisions in the United Kingdom. In the

words of Lord Devlin in Connelly v. D.P.P. [1964 A.C. 1254] "The Courts have an inescapable duty to secure fair treatment for those who come or are brought before them" and at page 1296 Lord Reid said "…… there must always be a residual discretion to prevent anything which savours of abuse of process." The views expressed in Connelly (Supra) were further considered in D.P.P. v. Humphrys [1977 A.C.1] where Lord Salmon stated the following at p. 46.

"…… a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has power to intervene." (Emphasis added).

After having considered the respective submissions in the light of the authorities referred, I now propose to deal with each objection in law raised by the Defence, starting with the issue as regards any procedural impropriety.

- ***The potential procedural impropriety since there has been non-compliance with section 47 of the Prevention of Corruption Act ('POCA') whilst carrying the investigations***

According to the Defence, whenever there is a suspicion that an act of corruption or money laundering offence has been committed, there is a need to follow an established statutory procedure as set out under section 46 of the POCA, as a result of which a preliminary investigation should be the starting point consistent with section 46(1)(a) of POCA. The Commission would then have two options upon completion of the preliminary investigation which are spelt out under section 46(3) of the POCA, namely a discontinuance of the investigation or proceed with further investigation.

He then submitted that should there be further investigation, the Commission would have no other options but to proceed by way of a hearing as per the statutory procedure set out under section 47 of POCA and more particularly under section 47(3) of POCA, one of the requirements of which is that the hearing should be conducted in presence of the Chief Legal Advisor of ICAC. He submitted that adherence to this statutory procedure was

mandatory despite the fact that section 47(3) of POCA reads ***'…may conduct such hearings as it considers appropriate…'*** and such a hearing is even more essential when the offence being investigated is one of money laundering. He then referred to the recent case of **Dowarkasing v ICAC 2013 SCJ 138A** to buttress his argument and was adamant that apart from proceeding under section 47 and 50 of POCA, there was no other option the Commission (i.e., ICAC) could conduct an investigation.

On the other hand, learned Counsel for the Prosecution was equally adamant in opposing the submission of the Defence. He submitted that his reading of section 47 of POCA made it clear that there was a discretion as to how the ICAC could proceed as regards the investigation since the Legislature has used the word 'may' under section 47(3) of POCA.

It is apposite here to refer to the said **section 47 of POCA** and the relevant subsections for the purpose of this argument which read as follows:

(1) Where the Commission proceeds with any further investigation under section 46(3), the investigation shall be carried out under the responsibility of the Director-General.
(2) For the purposes of such investigation, the Director-General may delegate such of his powers as he thinks fit to the Director of Corruption Investigation Division or to any other officer.
(3) In carrying out an investigation under this section, the Commission may conduct such hearings as it considers appropriate and, for that purpose –
(a) the hearing shall be conducted by the Director-General or such officer as the Director-General thinks fit;

…

To be able to understand **section 47 of POCA**, reference should be made to **section 46(3) of POCA** under which the Legislator has written the following:

(3) Upon receipt of a report under subsection (1)(b) or 2, the Commission shall -
(a) proceed with further investigations; or
(b) discontinue the investigation.

Thus, upon completion of the preliminary investigation under section 46 and submission of a report to the Commission, the latter would decide as to whether to discontinue the investigation or to proceed with further investigation. I note here that the legislator has used the word ***'shall'*** which therefore according to **section 5(4)(a) of the Interpretation and General Clauses Act** may be read as imperative, and therefore a mandatory requirement. In any event when the particular section as well as the whole Act is read in context, it is clear that the intention of the Legislator was to give only two options to the Commission upon completion of the preliminary investigation, as spelt out under **section 46(3) of the POCA**.

Now, when **section 47 of POCA** is read in its proper context and in line with the intention of the Legislator, the only clear mandatory requirement is that such further investigations are to be carried out under the responsibility of the Director General or by delegated powers to the Director of Investigations or any of his officers. This is confirmed from a reading of section **47(1)(2) of the POCA**.

When the evidence on record is considered, it is clear that this mandatory requirement has been satisfied since it is Ms. Kullottee, a chief investigator of the ICAC, therefore also an officer of the Director of the Investigations, was responsible of the investigation.

As regards the requirement to conduct a hearing during the further investigation, I find that the legislator has not made it a mandatory requirement. A close reading of **section 47(3) of POCA** shows clearly that the Legislator has left discretion as to how to conduct the investigation and permitted the use of hearing amongst others. The word 'may' expressly used by the Legislator gives the Commission the power to also adopt any other mode of investigative process.

This is consistent with the meaning given to '***may***' under **section 5(4)(b) of the Interpretation and General Clauses Act** where one reads:

(b)The word "may" shall be read as permissive and empowering.

Thus, the only reading possible from **section 47(3) of POCA** is that the Commission is not bound to hold a hearing but is surely permitted and empowered by the said legal provision to conduct such a special mode of investigation in its discretion.

The case of **Dowarkasing M v The Independent Commission Against Corruption [2013] SCJ 138 A,** referred to by the Defence is of no support to the Defence.

On the other hand, I find it relevant here to cite **Rule VI of the Judges' Rules** which reads as follows:

"Rule VI: Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules."

Since one of the statutory functions of the Commission under **section 20(1)(d) of POCA** is to detect and investigate any act of corruption, it goes without saying that its officers are expected to investigate such offences and hence endowed with the duty of investigating such offences. Thus, whilst investigating offences, they are entitled under Rule VI of the Judges Rule to conduct such investigative process in accordance with Judges Rules, as an alternative to a hearing in their entire sole discretion.

I therefore find that there is no procedural impropriety whatsoever should the Commission decide in its discretion to proceed by a mode, other than by a hearing under section 47(3) of the Act.

I will now deal with the fifth objection in law raised.

- ***The nature and extent of exempt transaction and whether it applies to offences under section 3 of the Financial Intelligence and Anti Money Laundering Act 2002 ('FIAMA')***

According to the Defence, once a person is already in the banking circuit, there is no need to do 'Know your customer' ('KYC') procedure again so that the transactions of that person are also exempts transactions. It is submitted that all the transactions under the present information against Accused no.1 company as well as Accused no.2 are exempt transactions, since they all occurred between one bank and the other. The Defence submitted that these transactions could not be termed as a suspicious transaction pursuant

to section 2 of FIAMA. The Defence argued that Accused no.1 company is a financial institution and Accused no.2, one of its director and since all the transactions were between banks from England and Mauritius, they amounted to exempt transaction pursuant to section 2 of FIAMA.

On the other hand, the Prosecution argued that the definition of 'exempt transaction' is limited to section 5 of FIAMA, and therefore not applicable to an offence under section 3 of FIAMA.

However appealing the submission put forward by the Defence, I find that nevertheless the Prosecution has rightly submitted that an exempt transaction is limited only to **section 5 of FIAMA**. The said **section 5 of FIAMA** reads as follows:

5. Limitation of payment in cash

(1) Notwithstanding section 37 of the Bank of Mauritius Act 2004, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence.

(2) Subsection (1) shall not apply to an exempt transaction.

In fact when **section 5 of FIAMA** is carefully read, it is as clear as footprints in snow that **section 5(2)** is in relation to a defence in law provided for by the Legislator as regards to an offence under section 5(1) of FIAMA only. There cannot be any other reading of this section except the above which gives effect to the clear intention of the Legislator, without any ambiguity. An offence is committed whenever there is a payment in cash in excess of 500,000 rupees unless the party so charged can prove that subsection (2) is applicable and that the transaction is an exempt one within the definition given under section 2 of FIAMA. This has been amply explained recently in the case of **Beezadhur v ICAC 2013 SCJ 292**, the relevant extract of which reads as follows:

It is compellingly clear to us from the wording of section 5 of the Act that Parliament had not intended the impugned transaction being a non exempt transaction to be a constitutive element of an offence under that section. In fact, the elements of the offence which the prosecution is required to prove are (i) the making or accepting of any payment, (ii) in cash, and (iii) beyond a prescribed amount which was Rs 350,000

and which figure was amended and substituted in 2006 for Rs 500,000. The prohibited conduct contemplated by the legislator in enacting section 5, therefore, is the making or accepting a cash payment over and above the prescribed limit.

However, the legislator has also deemed it fit to provide a statutory defence to what would otherwise be an absolute prohibition. Subsection (2) of section 5 of the Act provides that subsection (1), which creates the offence, shall not apply to an "exempt transaction". And what constitutes an "exempt transaction" has been specifically and exhaustively defined in section 2 (above)…
However, this prohibition is subject to a statutory exception, namely the nonapplication of section 5(1) to an "exempt transaction". Section 2 sets out exhaustively the specific instances where a transaction would constitute an "exempt transaction" (above).
Whether a cash transaction carried out by a person would be an "exempt transaction" within the meaning of the Act would be within the peculiar or exclusive knowledge of that person.
In other words, section 5(2) affords a complete defence to an accused party but the facts needed to be proved to avail himself of such a defence are within his peculiar and exclusive knowledge.

Thus, **section 5(2) of FIAMA** provides a statutory defence to an offence committed under section 5(1) of FIAMA, without more. Such statutory defence provided by the Legislator to an offence under section 5 of FIAMA cannot be imported into another section of the Act, namely section 3(2) of FIAMA, which provides for a wholly distinct and separate offence. Any other construction would be reading against the clear express intention and words of the Legislator.

Moreover, by providing such a statutory defence under section 5(2) of FIAMA, the Legislator has also created an exception to the principle of presumption of innocence in respect to an offence under **section 5(1) of FIAMA**. In effect, the burden of proof is not on the Prosecution to disprove that the transaction is not an exempt one as per definition provided under section 2 of FIAMA. The Supreme Court in **Beezadhur (Supra)** explained:

Once the prosecution has adduced prima facie evidence of the elements of the

offence, the burden shifts to the accused party to prove the defence of "exempt transaction" on a balance of probabilities if he wishes to avail himself of such a defence. Of course, once an accused party has raised the defence as a live issue, it is open to the prosecution to adduce such evidence as it deems fit in order to disprove such defence.

Thus, the offence under **section 5 of FIAMA** falls under one of the exceptions to the **'Woolmington principle'** that the Prosecution has the burden to prove each and every elements of an offence. Once the prosecution has proved that there has been payment in cash in excess of 500,000 rupees, it has proved a prima facie case against an Accused party and the burden of proof shifts on the latter to prove on a balance of probabilities that the transaction was an exempt one, should it be the case. Otherwise, the Prosecution has proved its case against such an Accused party.

The reversal of burden of proof is such a serious consequence in law affecting the constitutional rights of presumption of innocence that if the Legislator would have really intended to provide 'exempt transaction' as a defence under section 3 of FIAMA, it would have no doubt clearly and unambiguously provided for same.

Moreover, it is an elementary rule of constructions of statutes that the meaning of a section may be controlled by other individual sections in the same Act so as to understand and give effect to the intention of the Legislator. Thus, in **C.H.W (Huddersfield) ltd. v. I.R.C [1963] 1 W.L.R 767**, it was stated that the fact that one section of the Income Tax Act 1952 makes express reference to income from assets as having 'accrued from day to day' indicates that under a section which contains no such express reference shareholders will not be regarded as entitled to income until the end of the relevant accounting period.

Similarly, the intention of the Legislator writing FIAMA is very clear and express when section 3 and section 5 are considered properly. The fact that section 5 of FIAMA makes express reference to 'exempt transaction' as a statutory defence to an offence under section 5(1) of FIAMA indicates so expressly that under section 3 which contains no such express reference to such a defence, an Accused party cannot avail himself of the definitions of 'exempt transaction' as a defence to an offence under section 3 of FIAMA.

Therefore, there can be no doubt whatsoever of the clear intention that the definition given to exempt transaction under section 2 of FIAMA as well as the particular statutory defence of 'exempt transaction' is solely and exclusively applicable to an offence under section 5 of FIAMA.

In the light of the above, I find that the Defence submission that the defence of 'exempt transaction' is also available under section 3 of FIAMA holds no water and is set aside.

I will now consider points 1 and 2 together since they in fact question the procedure adopted by the Prosecution in obtaining 'confidential documents' as well as its effect on admissibility of those documents and statements making mention of those documents.

- ***The admissibility of all documents secured upon an order from the Supreme Court following an application by Attorney Sohawon of ICAC;***
- ***The admissibility of all statements of the Accused parties involved in so far as they all contain reference to the documents obtained following an application by Attorney Sohawon of ICAC;***

The defence submitted that the confidentiality in the banking sector is a very essential element and referred to the Supreme Court decision in **State Bank International Ltd v Pershing Limited 1996 SCJ 331**.

Learned Counsel then referred to sections 2 and 83(6) of the Financial Services Act 2007 ('FSA') as regards the duty of confidentiality enshrined in the laws of Mauritius. He thereafter argued that the disclosure of documents following a Supreme Court order is not in conformity with the stringent requirements set out under section 83(6) of the FSA 2007 since the application for disclosure was not made by the Director of Public Prosecutions but by an Attorney posted at ICAC.

He therefore submitted that since the conditions as set out under section 83(6) of the Act for such a disclosure were not complied with, the documents so disclosed have been illegally obtained, hence inadmissible before a Court of law. He also referred to sections 13, 33(1), 33(6) of the now repealed Financial Services Development Act 2001 ('FSDA') as being equivalent to section 83(6) of the 2007 Act.

A relevant extract from Blackstones Criminal Practice 2007 paragraph F2.7 was also referred to as regards the inadmissibility of documents obtained in breach of statutory requirements.

The learned Counsel for the Prosecution refuted the above arguments by submitting that section 83(6) of the FSA 2007 had no application to the present case as the said legal provisions relates to duty of confidentiality by members of the board or officers employed by the Financial Services Commission ('FSC').

According to him, there is nothing improper in the procedure adopted by the Commission to seek the disclosure of those documents since the Commission acted pursuant to section 51 of POCA in relation to the search and to section 64 of Banking Act as regards the disclosure.

The record shows that there has been a disclosure ordered by the Supreme Court (Document Z refers) dated 29-09-09 and this was obtained following an application by Attorney Sohawon of ICAC. The said disclosure order was directed to banks as well as to non-bank financial institutions. CI Kullootee also confirmed that a search was effected at the premises of Accused no.1 company following a search order issued by the Supreme Court dated 08-10-09 (Document AC refers) upon application by Attorney Sohawon of ICAC. She added that following the search, several documents were secured. There is also no dispute to the effect that the statements from the various representatives of the Accused no.1 company make reference to those documents, subject matter of the disclosure order. In fact, CI Kullootee confirmed that Accused no.2 was confronted with those documents.

First and foremost, although the decision in **Pershing** (supra) may be a good starting point when one refers to the duty of confidentiality, both at common law and statutory, one should nevertheless be aware that since the said landmark decision, there have been several developments and amendment to the laws regulating this duty so that the laws referred to in Pershing have been repealed and replaced by new legislations with a view to obviously better the protection afforded to confidentiality particularly to the banking and offshore sectors.

As stated above, the defence has referred to **section 83(6) of the FSA** to support their submission that the documents have been obtained in contravention with statutory requirements laid down by the Legislator. In fact, **section 83(6) of the said Act** reads as follows:

Notwithstanding any other enactment, the Supreme Court shall, in relation to a corporation holding a Category 1 Global Business Licence or a Category 2 Global

Business Licence, not make an order for disclosure or production of any confidential information except on the application of the Director of Public Prosecutions, and on being satisfied that the confidential information is bona fide required for the purpose of any enquiry or trial into or relating to the trafficking of narcotics and dangerous drugs, arms trafficking or money laundering under the Financial Intelligence and Anti-Money Laundering Act 2002.

In particular, the Defence has relied on the specific words 'Notwithstanding any other enactment' as well as the fact that in respect of a company holding category 1 global business license as is the case of Accused no.1 company. According to the Defence, the Supreme Court can only order disclosure or production of documents upon application of the Director of Public Prosecutions in the case of such companies.

Now, it is a cardinal principle of construction of statutes that the Courts should give effect to the intention of the Legislator. It is a basic rule that construction is to be made of all the parts together and not of one part only by itself- **vide Attorney General v Brown [1920] 1 K.B 773, per Sankey J**. Thus, this subsection should at the very least be read together with the other subsections of this section of law. In the light of such construction, I find that under **section 83(1) of the said Act**, it reads as follows:

(1) Every member of the Board, the technical committee, the Enforcement Committee, the Chief Executive, and every employee of the Commission shall –
(a) before he begins to perform any duties under the relevant Acts, take an oath of confidentiality in the form set out in Part II of the Third Schedule; and
(b) maintain during or after his relationship with the Commission, the confidentiality of any matter relating to the relevant Acts which comes to his knowledge.
(1A) Subsection (1) shall also apply to a person referred to in section 88(1)(fa), (g) and (h).

Thus, when the whole section is read in its proper context, it is clear that this section of the law refers to the duty of confidentiality upon those persons involved at the Financial Services Commission, from the members of its Board to its officers.

It is also a rule of construction that, in order to determine the meaning of a section, the whole scheme of the Act should be regarded in general. It is here recalled that Lord Evershed stated in **Re Newspaper Proprietors' Agreement (1964) L.R. 4 R.P 361, at 389**, ***'there is solid and respectable authority for the rule that you should begin at the beginning and go***

on till you come to the end: then stop; and in my opinion, the rule is …peculiarly proper when construing an Act of Parliament and seeking to discover from the Act the parliamentary intention'.

Now, when the subsection in question is read in context of the whole section as well as the whole Act, it cannot be clearer to the reader that when the Legislator made reference to an application to the Supreme Court for disclosure, it was in fact referring to a situation where a request for disclosure or production has been made to the persons referred to section 83(1) of the Financial Services Act working at the Financial Service Commission. The Commission cannot disclose directly but upon proper application by the Director of Public Prosecutions to the Supreme Court. It is in such situations and such situations alone that the Legislator has deemed it fit to have such an application made by the Director of Public Prosecutions as a safeguard to the duty of secrecy and confidentiality. This is made obvious when the following **section 83(5) of FSA 2007** is also considered:

Except where ordered by the Supreme Court for a reason specified in subsection (6), no person referred to in subsection (1) shall, in relation to a corporation holding a Category 1 Global Business Licence or a Category 2 Global Business Licence be required to produce or divulge to any court, tribunal, committee of enquiry or other authority in Mauritius or elsewhere any document, information or other matter coming to his notice, or being in his possession or control for any reason.

Thus, it goes without saying that the situation provided for under **section 83(6) of the 2007 Act** is not applicable to the present facts and circumstances of the case since no such request was ever directed to the FSC by the ICAC for disclosure or production.

In fact, this whole issue of disclosure of such confidential documents is governed by **section 64(9) of the Banking Act** as rightly submitted by the Prosecution. This is the more so when the disclosure order is directed against financial institutions as per the definitions given to such institutions by **section 2 of the Banking Act** to the effect that ***"financial institution" means any bank, non-bank deposit taking institution or cash dealer licensed by the central bank***. It is recalled here that the disclosure order (Document Z refers) is directed against such financial institutions. The said section reads as follows and is without any ambiguity:

(9) The Director-General under the Prevention of Corruption Act 2002, the Chief

Executive of the Financial Services Commission established under the Financial Services Act 2007, the Commissioner of Police, the Director-General of the Mauritius Revenue Authority established under the Mauritius Revenue Authority Act, the Enforcement Authority under the Asset Recovery Act 2011, or any other competent authority in Mauritius or outside Mauritius who requires any information from a financial institution relating to the transactions and accounts of any person, may apply to a Judge in Chambers for an order of disclosure of such transactions and accounts or such part thereof as may be necessary.

When the above subsection is read together with the whole section, it is obvious that the whole section deals with the duty of confidentiality and the exceptional circumstances when a disclosure of such confidential documents may be made as well as the stringent conditions and procedure attached to such disclosure.

Section 64(10) of the Banking Act makes it clear that such an order is not granted by its mere asking but rather there are considerations laid down by the legislator for the Supreme Court to consider before granting such disclosure. Thus, the duty of confidentiality as held in **Pershing** is more alive than ever in view of the stringent procedure imposed by the Legislature for its disclosure.

In addition to the unambiguous nature of this legal provision, any residual dispute as to the power of the ICAC through its director general to make such application for disclosure directed against financial institutions as per definition given to this entity under Banking Act without having to knock at the door of the Director of Public Prosecutions is resolved fully and finally by **section 64(16) of Banking Act**, which reads as follows:

(16) In the event of any conflict or inconsistency between any provision of this section and the provisions of any other enactment, other than the Bank of Mauritius Act 2004, section 45(4) of the Dangerous Drugs Act, the Financial Intelligence and Anti-Money Laundering Act 2002, section 123 of the Income Tax Act and the Mutual Assistance in Criminal and Related Matters Act 2003, the provisions of this section shall prevail.

Since **section 83(6) of Financial Services Act** forms part of 'the provisions of any other enactment', it is crystal clear that **section 64(9) of the Banking Act** shall prevail and this is

the express intention of the Legislator which this Court or any other Court of law is duty bound to give effect.

Now as regards the search order, there can be no dispute as to the propriety of the procedure adopted by the ICAC to obtain same since the Commission is legally entitled to seek such search order. The relevant legal provision .i.e., **section 51(1)(2) of POCA** reads as follows:

(1) Subject to subsections (3) and (4), where, upon notification or after consultation with the FIU, the Commission has reasonable grounds to believe that -
(a) a bank, financial institution or cash dealer has failed to keep a business transaction record as required under section 17 of the Financial Intelligence and Anti-Money Laundering Act 2002;
(b) a bank, financial institution, cash dealer or a member of a relevant profession or occupation, has failed to report any suspicious transaction as required under section 14 of the Financial Intelligence and Anti-Money Laundering Act 2002; or
(c) a bank, financial institution, cash dealer or a member of a relevant profession or occupation is in possession of documents, books or records or other information which may assist the Commission in an investigation,
the Commission may apply to a Judge in Chambers for an order allowing the Commission, or any officer delegated by it, to enter premises belonging to, or in the possession or control of, the bank, financial institution, cash dealer or member of a relevant profession or occupation and to search the premises and remove therefrom any document or material.
(2) An application under subsection (1) shall be supported by an affidavit by the Director-General disclosing the reason why an order is sought under this section.

It has been averred under counts 1, 2 and 3 respectively that the Accused company no.1 is a Private Category 1 global Business company issued with a management company license. There is evidence to the effect that the said Accused company holds such a license as confirmed by the memo from the Companies Division (Document Y refers).

Such a global business license as well as management license held by the Accused no.1 company is issued by the Financial Services Commission under **sections 72 and 77 respectively of the Financial Services Act 2007** and consequently regulated by the said Act.

Now, when the definition of financial institution under **section 2 of POCA** is considered, there can be no dispute that the Accused no.1 company is a financial institution within the meaning of **section 2 of POCA** so that such a search warrant under **section 51 of POCA** can be issued against it.

Section 51 of POCA sets down the procedure for an application for such a search order and a priori, in the light of evidence on record as well as after considering the search order issued (Document AC refers), I find no procedural impropriety. The Commission is entitled to make such an application and obtained such an order as well as remove any documents. Thus, it cannot be said that documents secured following such a search order issued under section 51 of POCA are inadmissible before this Court on the ground that these were obtained other than in accordance with a procedure prescribed by a statute.

I therefore find that these confidential documents have been properly secured in accordance with the statutory procedural requirements pursuant to section 64(9) of the Banking Act and section 51 of POCA, so that these documents as well as any statements from any representative of Accused no.1 company or any other Accused parties wherein reference has been made to the documents in lite in this case are perfectly admissible and can be produced as evidence before this Court.

I am therefore left to consider the only point remaining as regards the nature of the code issued by the FSC and whether its non compliance may lead to criminal sanction under **section 3(2) of the FIAMA**.

- ***The nature of the Code on prevention of money laundering and terrorist financing issued by the Financial Services Commission ('FSC') (Document AD refers) and whether non compliance with measures mentioned therein may lead to criminal sanction or otherwise***

The Prosecution has submitted that there is no definition of 'measures' under section 2 of the FIAMA so that the question arises as to the nature of those measures which an Accused should have taken but failed to reasonably take. According to Prosecution, the source of the 'measures' is the Code issued by the FSC (Document AD refers) which as the Supervising Authority, is empowered to do so pursuant to section 18 of the FIAMA. The Prosecution submitted that the Code sets out several measures which are being referred to by the Prosecution for the purposes of prosecution under section 3(2) of the FIAMA.

The Prosecution argued that the Court has to assess whether the management company had taken those measures or failed to reasonably take them. Learned Counsel for the Prosecution added in his submission that the word 'measures' should carry its literal meaning and then referred to the particulars of the offences as regards the measures the Prosecution would be relying upon as those which the Accused parties have allegedly failed to take which they should have reasonably taken. He emphasized that these measures were not thought of overnight but that the management companies are well aware of them. He also added that non compliance with directions issued by the FSC may lead to criminal sanction but conceded that the case in hand is not about non compliance with directions.

On the other hand, the Defence argued that the FSC may only issue guidelines as the Supervisory authority under section 18 of the FIAMA so that the codes and guidelines issued under the said section can only be regulatory in nature and not compulsive. The Defence submitted that non compliance with those measures referred to in the code cannot lead to criminal sanction and referred to a part of the introductory part of the Code which states that the Code is a standard of minimum criteria. Learned Senior Counsel for the Defence therefore submitted that the Code can only be a matter of regulation of how to conduct a business.

The Defence then referred to actions which may be taken in case of non compliance with those measures as set out in the now repealed section 7(1) of Financial Services Development Act ('FSDA'), now replaced by section 7(1) of the Financial Services Act 2007.

At the outset, this point in law concerns the offences under counts 1, 2 and 3 respectively against Accused company no.1 as well as offences under counts 4, 5 and 6 respectively against Accused no.2. Moreover, the FSC Code on the prevention of money laundering and financial terrorism ('FSC code') referred to in this case was issued on 15 July 2005 pursuant to powers under section 7(1) of the FSDA and section 18(1)(a) of FIAMA. The said FSC Code was subsequently replaced in March 2012 by the FSC. However, for the purposes of this case and since the offences are alleged to have been committed in prior to March 2012, the FSC code issued in 2005 will be referred to.

The starting point of this legal analysis is the legal provision under which Accused concerned are being prosecuted, namely **section 3(2) of the FIAMA** which reads as follows:

A bank, financial institution, cash dealer or member of a relevant profession or occupation that fails to take such measures as are reasonably necessary to ensure that neither it nor any service offered by it, is capable of being used by a person to commit or to facilitate the commission of a money laundering offence or the financing of terrorism shall commit an offence.

It is evident from the above that 'fails to take such measures as are reasonably necessary' is an essential element of the said offence so that it becomes all the more necessary to understand the intention of the legislator when it used the word 'measures'.

This word has not been defined by the Act itself, hence the submission by the Prosecution that the source of measures referred to is the FSC Code. Therefore, it is essential to consider the nature and extent of the said FSC Code. The Prosecution sought to restrict the meaning of 'measures' to the FSC Code and incidentally, the particulars reflect this intention of the Prosecutor since the particulars of the measures furnished under each of the counts in question refer to the measures specified in the code namely at paragraphs 5.10, 5.1, 7.1 and 5.6 of the FSC Code 2005 respectively. In the case of the last measure as regards 'having a track record of client..', it may be found in the new FSC Code 2012 at paragraph 6.1.

I have to add that the use of 'inter alia' under the particulars may cause uncertainty as to whether the Prosecution would rely on other measures not referred to under the information and therefore create uncertainty as to the case which the Defence has to meet.

Be that as it may, by virtue of the **section 7(1) of the FSDA**, The FSC was given the legal power to issue such guidelines. In fact, the relevant section reads as follows:

(1) The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular -
(a) issue guidelines and codes of practice for the proper conduct of business in the financial services, sector;

Section 18 of the FIAMA also empowers the FSC to issue such guidelines as the supervisory authority for financial institutions and it reads as follows:

(1) (a) The supervisory authorities may issue such codes and guidelines as they consider appropriate to combat money laundering activities and terrorism financing, to banks or cash dealers subject to their supervision, or to financial institutions, as the case may be.

Hence, the FSC code was issued under the aegis of these two legal provisions. It is important now to gauge the nature of such a code.

The answer is to be found in the title itself to **section 18 of FIAMA** which reads as follows:

18. Regulatory action in the event of non-compliance

Thus, the nature and extent of these measures mentioned in the FSC Code is for the proper conduct of the business of the financial services so that in case of non-compliance, only regulatory actions can be contemplated. This is further confirmed by the following legal provision under **section 18 of the FIAMA**:

(c) The Financial Services Commission shall supervise and enforce compliance by financial institutions with the requirements imposed by this Act, regulations made under this Act and such guidelines as it may issue under paragraph (a).

…

(3) Where it appears or where it is represented to the Financial Services Commission that any financial institution has refrained from complying or negligently failed to comply with any requirement of this Act or regulations, the Financial Services Commission may proceed against the financial institution under section 7 of the Financial Services Act 2007 on the ground that it is carrying on its business in a manner which is contrary or detrimental to the interest of the public.

Now, under the old Financial Services Development Act, it is provided under **section 7** that:

(1) The Commission shall have such powers as are necessary to enable it to effectively

discharge its functions and may, in particular -

(d) give directions to a licensee to observe any guideline or code of practice;
(e) revoke any licence issued under any relevant Act where the Commission is satisfied that the licensee is carrying on his business in a manner which threatens the integrity of the financial system of Mauritius or is contrary or detrimental to the interest of the public.
(2) Any person to whom a direction has been given under subsection (1)(d) shall comply with the direction.

Thus, the extent of non compliance with the measures stipulated in the FSC Code is merely regulatory and administrative. It has to be added here that it is only in the event of non compliance with a direction from FSC that a person may incur criminal liability under section 43(1) of the FSD Act.

The same regulatory action in case of non compliance with measures in Codes and guidelines have been retained, albeit with more details as regards the nature of action. The relevant subsection under **section 7 of the FSA** reads as follows:

7. Powers of Commission
(1) The Commission shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular -
(a) make FSC Rules, set standards and provide guidelines;
(b) give directions to any person to ensure compliance with a relevant Act or guideline;
(c) with respect to a present or past licensee or any person who is a present or past officer, partner, shareholder, or controller of a licensee –
(i) issue a private warning;
(ii) issue a public censure;
(iii) disqualify a licensee from holding a licence or a licence of a specified kind for a specified period;
(iv) in the case of an officer of a licensee, disqualify the officer from a specified office or position in a licensee for a specified period;
(v) impose an administrative penalty;
(vi) revoke a licence;

...

(3) (a) Any person to whom a direction has been given under subsection (1)(b) shall comply with the direction.

(b) Any licensee who fails to comply with a requirement under subsection (3)(a) shall commit an offence.

Even when one reads the FSC Code issued in 2005 under 'purpose and status of this Code', it is clearly stated that, ***'…Non compliance with the code will expose the licensee to regulatory action which may include a direction under section section 7(1)(d) of the FSD Act to observe the code. Failure to comply with the direction may lead to criminal sanction and to regulatory action under section 7(1)(e) and 24(5) of the Act'***.

Thus, it cannot be clearer that the non compliance with the measures under the FSC Code may only lead to a direction to comply and to regulatory actions but not to a criminal sanction outright.

The law creating the power to issue such a Code as well as the FSC Code itself are both very clear as well as unambiguous as to the nature and extent of non compliance with the Code and the persons observing such a Code for the proper conduct of the financial business activities as well as every other reasonable and intellectually honest person must surely have the same reading of the law and know in the event of non compliance there may be directions issued first and regulatory actions if need be.

It is a cardinal principle of criminal law that the law creating an offence has to be certain so that a person knows fully well that breach of a particular action may lead to criminal liability. It is the duty and power of the Legislature to create offences and not the executive, i.e.,the Prosecution authority.

It is here apposite to refer to the following decision of the European Court of Human Rights in the case of **Kokkinakis v Greece (application no. 14307/88), at paragraph 52** where **article 7(1) of the European Convention of Human Rights ('ECHR')** was being dealt with:

52. The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.

The said **article 7(1) of ECHR** referred to reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

It is to be noted here that the equivalent of article 7(1) of the ECHR has been included under **our Constitution under section 10(4)** in almost identical language which reads as follows:

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

It has also been stated by the Privy Council in **Hurnam v The State 2004 PRV 53** that:
This is not surprising since, as has been pointed out, Chapter II of the Constitution reflects the values of, and is in part derived from, the European Convention: **Neeyamuthkhan v Director of Public Prosecutions** ***[1999] SCJ 284(a);*** **Deelchand v Director of Public Prosecutions** ***[2005] SCJ 215, para 4.14;*** **Rangasamy v Director of Public Prosecutions** ***(Record No 90845, 7 November 2005, unreported). It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown Colony, before it became independent under the 1968 Constitution: see European Commission of Human***

Rights, Documents and Decisions (1955-1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, "have existed and shall continue to exist" within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention or bound by its terms, the Strasbourg jurisprudence gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy.

Thus, this Court can seek persuasive guidance from the European jurisprudence as to the extent and nature of rights extended from the ECHR and included in our Constitution.

It therefore follows that it is the constitutional right of a person not to be held guilty of an offence which at the time of the offence did not constitute an offence as per the wordings of the law. The offence has to be clearly defined in law and a law creating an offence cannot be extensively construed to the Accused's detriment.

In this particular case, the Legislator was very clear and unambiguous when it drafted and passed the FIAMA that non compliance with measures in the Codes issued by the FSC would only entail regulatory actions, as confirmed by section 18 of the FIAMA and section 7 of FSDA. The prosecution cannot therefore read into 'measures' under section 3(2) of the same Act another meaning and import the 'measures' under the FSC Code into the definition of 'measures' under section 3(2) to suit its cause. The law has to be precise and clear pursuant to section 10(4) of the Constitution as well as article 7(1) of the ECHR and article 15 of the International Covenant on Civil and Political Rights.

It is clearly against the basic rules of criminal law as well as the constitutional rights of a person to read more into the meaning of a criminal offence created by legislation than it really is and create an offence when it was never the intention of the Legislator at the time of passing the law.

The learned Counsel for Prosecution has submitted that the source of 'measures' under section 3(2) of FIAMA is the FSC Code and this is also reflected under the particulars of each count where the Accused is charged with the said offence. But in the light of above, I find that the Prosecution cannot rely on the FSC Code as a source of measures under section 3(2) to define 'measures'.

Would it mean therefore the Legislator has legislated in vain? The answer is in the negative since it never legislates in vain. But to include into the meaning of measures under section section 3(2) of FIAMA the proposition of the Prosecution would be contrary to the clear intention of the legislator that non compliance or failure to observe measures under the FSC Codes would entail only regulatory actions.

True it is that there are some measures under the FSC Code such as failure to raise a Suspicious Transaction Report as well as failure to keep records entail in themselves a criminal liability under sections 14, 17 and 19 of FIAMA. But this fact only confirms that when the Legislator intended to make any failures or non compliance with such measures referred in the FSC Code a criminal offence, it clearly made express legal provisions for same to make its intention as clear as a hair floating in milk. Had it also intended that the other measures be of the same nature, it would have clearly spelt it out the more so when criminal sanction is being contemplated.

No doubt, the word 'measures' may be given its ordinary dictionary meaning when the basic rule of literal construction is applied. As stated in **Maxwell on Interpretation of Statutes, 12th edition, Butterworths Wadhwa, chapter 2, page 28,** this 'rule of construction is "to intend the Legislature to have meant what they have actually expressed." The object of all interpretation is to discover the intention of Parliament…'.

Thus, when the ordinary concise oxford dictionary meaning is given to the word in question, the most appropriate meaning in the present context would be 'a means of achieving a purpose'.

But this construction, although it gives an air of simplicity, nevertheless renders the word 'measures' ambiguous since it does also include the measures contemplated under the FSC Codes.

Such a reading would not be possible in the light of the above conclusion as regards the clear intention of the Legislator to rather contemplate regulatory action in case of non compliance of measures under the FSC Code pursuant to section 18 of the FIAMA as well as section 7(1) of the FSD Act.

Should such a reading be adopted, it would then encompass within its meaning those measures which a person would not have known carry criminal liability in case of non compliance at the time he read the FSC Code as well as section 18 of FIAMA.

One should also bear in mind that **section 3(2) of FIAMA** is of penal nature creating a criminal offence and penalty applicable, hence the need for strict construction.

One reads from **Maxwell on the Interpretation of Statutes (Supra) at page 239**, ***'the principle applied in construing a penal act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty. "If there is a reasonable interpretation which will avoid the penalty in any particular case," said Lord Esher M.R, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for construction of penal sections." Or as Plowman J. has said more recently: In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted." The Court must always see that the person to be penalized comes fairly and squarely within the plain words of the enactment'.***

When the above principles are applied to the present situation, it is clear that whilst, 'measures' in its ordinary meaning would encompass the measures under FSC code, such an interpretation would nevertheless be contrary to the clear intention of the legislator as stated above not to make non-compliance of such measures under FSC Code criminal in nature, except where expressly specified otherwise.

One can also read from **Maxwell (Supra) at p.240** that, ***'no act is to be deemed criminal unless it is clearly made so by the words of the statute concerned' and that 'if there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether an act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged'***.

Thus, in the light of the above principles of strict construction of penal statutes and since the ambiguity here lies in the fact that the word 'measures' in its ordinary meaning would also encompass the FSC Code measures which is I find to be contrary to the intention of the Legislator for reasons mentioned above, such ambiguity should be therefore resolved in favour of the Accused parties concerned.

I have in this regard also considered the Model law on Money Laundering offences, terrorist financing, preventive measures and proceeds of crime prepared by the UNODC together with Commonwealth secretariat and International Monetary fund (dated April 2009)[1] in which FATF recommendations have been referred to. A reading of this model legislation shows that it does include criminal liability for non- compliance of some preventive measures but it makes very clear as to what are those preventive measures which may incur criminal liability. Thus, those measures which might incur criminal liability under the Model legislation have been clearly defined and are no doubt consistent with the basic human rights of a person. But the same conclusion cannot be reasonably reached as regards section 3(2) of FIAMA.

In short, the present issue can be resolved by answering the following question: Would a reasonable, objective person know when he reads section 3(2) of FIAMA what are those 'measures', which if he fails to reasonably take might amount to an offence? I find that this question can only be answered in the negative, or at the very least there would be uncertainty and ambiguity as to the extent and definition of this word since it could be very wide and all encompassing, including those measures in the FSC Code which the Legislature expressly meant to have only regulatory consequences, except those which it expressly stated to be otherwise.

Thus, such uncertainty and unclear definition in the law is in breach of section 10(4) of the Constitution.

Moreover, in the light of the rules of constructions of a penal statute, such ambiguity should be resolved in favour of the Accused.

1Â http://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf, last accessed 30-01-14.

Since it is clear from the submission of the Prosecution that it relies on the FSC Code as the source of those 'measures' under section 3(2) in the prosecution of the said Accused parties under the counts each stands respectively charged and since this reliance is also reflected under the particulars of the offence, such proceedings if allowed to continue against Accused no.1 company under counts 1, 2 and 3 respectively as well as against Accused no.2 under counts 4, 5 and 6 respectively would be in breach of section 10(4) of the Constitution so that it amounts to an abuse of process.

It is in such situations that the Court should exercise its residual discretion as contemplated in **Connelly v DPP (Supra)** to prevent an abuse of process.

I therefore exercise my discretion to stay the present proceedings against Accused no.1 company under counts 1, 2 and 3 respectively as well as against Accused no.2 under counts 4, 5 and 6 respectively.

Since the other objections taken by the Defence have failed, the proceedings under the other counts against the respective Accused parties charged shall proceed so that the matter is put for proforma to be fixed for continuation.

Neerooa M.I.A
Magistrate, Intermediate Court.
This 30 January 2014.