Bhurtun Chambers

Monthly newsletter

Issue No 4: November 2021

Introduction

Mauritius has a written constitution. It provides for a Parliament to make laws for the peace, order and good government of Mauritius. Any Act of Parliament is applicable law unless declared unconstitutional given that the Constitution is the Supreme Law of Mauritius.

A direct consequence of this is that an act may appear to be "innocent" but may still be prohibited by a particular legislation. In such cases, persons may be surprised by criminal charges brought against them as they did not know the law. However, ignorance of the law is no excuse.

The Briand Case[1] illustrates one such type of offence: the limitation of payment in cash under section 5 of the Financial Intelligence and Anti-Money Laundering Act. The case is further analysed below in our review of Supreme Court decisions.

Some details about the death penalty in Mauritius are also mentioned in this newsletter in light of relevant provisions of the Constitution.

The present newsletter contains as usual, a brief summary of decisions of the Assessment Review Committee and of selected decisions of the Supreme Court delivered in October 2021.

[1] Briand G. S. v The Independent Commission Against Corruption & Anor 2021 SCJ 336.

Table of Contents

Decision Delivered by the Assessment Review Committee

1. **Media Space Company Ltd v The Director General, Mauritius Revenue Authority ARC/CUS/40-17**

The Applicant imported goods and Customs observed that there were excess payments made to the supplier. As such, a notice was issued under section 19 of the Customs Act, subsection (1) of which reads as follows:

> **19. Under or over valuation of goods**
>
> (1) Where the Director-General finds that goods have been declared at a value different from their true value he may, on the basis of the information provided by the importer and on such other information as is available to the Director-General, determine the value of those goods and the importer shall pay duty, excise duty and taxes, if any, on the value so determined.

The Applicant argued that section 19 was not the proper section to issue the Notice of Claim to the Applicant by the Respondent

The Committee concluded that "section 19 constitutes a stand-alone enabling provision with the clear purpose to confer power upon the Respondent" and ruled that the said section provided for a proper basis to raise the Notice.

Selected Decisions Delivered by the Supreme Court of Mauritius.

1. **Briand G. S. v The Independent Commission Against Corruption & Anor 2021 SCJ 336.**

The Appellant accepted cash payments and effected cash deposits into his bank accounts. He was prosecuted under section 5 of the Financial Intelligence and Anti-Money Laundering Act (FIAMLA) which read as follows:

> 5. Limitation of payment in cash[2]
>
> (1) Notwithstanding sections 30 and 31 of the Bank of Mauritius Act, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 350,000 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.

The first issue was whether the bank deposits amounted to "payments". Whilst the dictionary meaning would tend to exclude deposits as payments, the Supreme Court took onto consideration the overall objective of the FIAMLA and the definition of "deposit" in the Banking Act to conclude that "payment" include "deposit in bank."

The second issue was whether the sums paid or received needed to have a tainted origin. It was concluded that the sums paid or received need not have a tainted origin to prove the case against the Appellant. However, whether the money had a tainted origin or not would have a bearing on the sentencing, given that sums having a tainted origin would be liable to forfeiture.

The third issue was whether the transaction was an exempt transaction under section 5(2) of FIAMLA.

[2] To note that this section was subsequently amended, see page 8.

The definition of an exempt transaction includes a transaction between a bank and a customer where the customer was an established customer of the bank, *where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer*. The Court therefore analysed whether Appellant was an established customer of the banks concerned. It was clear that the Appellant was an established customer of a bank in which he maintained an account. Even with a bank in which the Appellant did not maintain a bank account, it was concluded that he was an established customer in view of the numerous transactions concluded with the said bank.

The Supreme Court next addressed its mind to the issue as to whether the transactions of the Appellant did not exceed an amount that was commensurate with his lawful business activities. The Court observed that it was for the Appellant to prove such element and that in the present matter he failed to do so.

The fourth issue was whether the Independent Commission Against Corruption (ICAC) had a duty to refer the matter to the Financial Intelligence Unit (FIU) before prosecution. Upon a reading of section 46(4) of the Prevention of Corruption Act, the Supreme Court concluded that ICAC had no such obligation.

On the sentence imposed by the Intermediate Court, the Supreme Court observed that the Magistrate did not address her mind to the fact that the limit for cash transactions was subsequently increased to Rs500,000 and that the definition of "exempt transaction" was amended by replacing "lawful business activity" by "lawful activity". The Supreme Court, in the circumstances reduced the fines imposed by the Intermediate Court.

This judgment illustrates one of the mechanisms put in place to combat money laundering. Please see further below a highlight of some amendments brought to FIAMLA since its promulgation.

2. Asedor Finance Limited v Weston International Asset Recovery Company Ltd 2021 SCJ 339

The Applicant was praying for an order to appoint the Official Receiver as the Provisional Liquidator of the Respondent.

An affidavit was signed on behalf of the Respondent by one Mr Liegey and it was the contention of the Applicant that such affidavit should be disregarded given that he was not authorised by the Respondent to swear such affidavit. The Supreme Court observed that:

> In view of the provisions of the Companies Act and the authorities on the issue of delegation of powers by a Board of directors it can be concluded that a person has no authority to represent a company and to swear affidavits on its behalf unless this power has been specifically conferred upon him by the Board of directors by means of a resolution to that effect.

Given that the Board of the Respondent did not sign any resolution to authorise Mr Liegey to swear the affidavit, the Court concluded that it would not consider the said resolution.

With the regard to the question as to whether a provisional liquidator had to be appointed, the Supreme Court relied on authorities to the effect that such appointment was a very serious step to be taken after giving the most anxious consideration. The threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition.

The Court analysed the facts and considered that, in the circumstances, it would not be safe to rely on the evidence in support of the case for the Applicant and the application was set aside.

3. SBM Bank (Mauritius) Ltd v The Independent Commission Against Corruption 2021 SCJ 366

The Judge in Chambers had previously ordered the Applicant to disclose certain banking details to the Respondent. The Applicant appeal against the order and the present matter relates to an application made by the Applicant to stay the order against it pending the appeal.

The principles applicable to the concept of stay of judgment were set out in the case of **Ex Parte: S. M. Rashad Maudarbocus & Anor [2019 SCJ 118]** as follows:

> In an application for stay of execution, there are competing interests which have to be weighed. On the one hand **the winning party should not, without good reason, be prevented from benefitting from the fruits of a judgment** pronounced by the Judge after due process of law. Further, **any potential**

> **abuse of the court process by an appellant in an attempt to delay the execution of the judgment, has to be kept to a minimum**. On the other hand, **the losing party should not as far as possible be deprived, in the exercise of his legitimate right to appeal against the judgment, of any possible outcome in his favour, on appeal**.
>
> **An order for stay of execution is within the court's discretion** and the Judge has to try as far as possible, to adopt the course that will best enable the appellate court to do justice between the parties whatever the outcome of the appeal.

The Supreme Court then went on to ascertain whether the Applicant had established that there were "good reasons" to justify a stay of execution. Given that the grounds of appeal did not appear to have any serious 'arguability', no prejudice would be caused to the Applicant if the stay was not granted and that prejudice would be caused to the Respondent if the stay were granted, the Court declined to grant the stay of execution.

Some of the amendments brought to the Financial Intelligence and Anti-Money Laundering Act

The offence of money laundering under section 3 of FIAMLA involved the proceeds of a crime. When the Act was passed in 2002, the term “crime” had the same meaning as under the Criminal Code, as follows:

> Crimes are offences punishable by –
>
> a) penal servitude;
> b) a fine exceeding 5000 rupees.

Following an amendment brought by the Finance (Miscellaneous Provisions) Act 2009, with effect as from 30 July 2009, the above definition was replaced by:

> "crime" –
>
> a) means an offence punishable by –
> i. penal servitude;
> ii. imprisonment for a term exceeding 10 days ;
> iii. a fine exceeding 5,000 rupees;
> b) …

The acts which now would constitute money laundering fall into a broader category as the underlying “crime” under FIAMLA will not be restricted to “crime” as defined under the Criminal Code, but will also include “misdemeanours”.

The Finance Act 2006 amended section 5 of FIAMLA by increasing the Limitation of Payment in Cash from Rs350,000 to Rs500,000, with effect as from 07 August 2006.

The sentence that may be imposed on a person found guilty of a money laundering offence increased from fine not exceeding Rs2 million and penal servitude not exceeding 10 years to fine not exceeding 10 million and penal servitude not exceeding 20 years, as from 29 May 2019.

The Death Penalty

By virtue of the Abolition of Death Penalty Act with effect as from 4 December 1995, the death penalty was abolished in Mauritius.

Wherever the death penalty was imposed under any enactment, the Courts shall instead impose a sentence of penal servitude for life.

However, as we have seen above, the Constitution is the Supreme Law of the Island and it still does not prohibit any enactment to impose the death sentence. Section 4(1) of the Constitution reads as follows:

> No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The death sentence may therefore theoretically be provided by Parliament without having to make any amendment to the Constitution.

Ahmed Richard Bhurtun

Barrister and Founder of Bhurtun Chambers

Email: ahmedbhurtun@gmail.com

Phone: +230 59045181