

Hackl v Financial Intelligence Unit

(2010) SLR 98

Basil HOAREAU and Frank ALLY for the petitioner
Ronny GOVINDEN and David ESPARON for the respondents

Judgment delivered on 1 June 2010

Before Egonda-Ntende CJ, Gaswaga, Burhan JJ

Read on behalf of the Chief Justice (who was absent) by the Honourable Mr Justice Duncan Gaswaga on 1 June 2010.

EGONDA-NTENDE CJ: The petitioner is both Seychellois and German. He brings this action against the respondents seeking to challenge the constitutionality of:

- (a) orders made against the petitioner and another person by the Supreme Court in Civil Side no 143 of 2009 under the Proceeds of Crime (Civil Confiscation) Act, (Act 19 of 2008) (hereinafter referred to as POCA);
- (b) section 3(9)(c) of of the Anti-Money Laundering Act as amended by Act 18 of 2008 (hereinafter referred to as AMLA) and
- (c) sections 3(1), 4(1) and 9 of the POCA.

Respondent no 1 is a creature of statute under section 16 of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008 (AMLA). Respondent no 2 is the Attorney-General and is joined by virtue of rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994. Both respondents oppose this action.

The facts that give rise to these proceedings are substantially not in dispute. Respondent no 1 started proceedings against the petitioner and another person on 17 June 2009 under Civil Side No 143 of 2009 based on the POCA in the Supreme Court. The Supreme Court made a number of interim orders -

- (a) An inhibition was placed pursuant to section 76(1) of the Land Registration Act, prohibiting the disposal of, or other dealing with the whole or any part of the following parcels of land until further orders of the Supreme Court, namely land parcels PR 1478, PR 1479, PR 2380, PR 2378 and PR 1466 at Anse Kerlan, Praslin, and land parcels H 415 and H 876 at Mare Anglaise, Mahe;
- (b) An order of prohibition was placed on the sale of or any other dealing with motor vessels catamaran named "Storm", "Monsun" and motor

vehicles bearing no S18826 and S18827 registered in the names of Hans Josef Hackl until further order of the Supreme Court; and

- (c) An order prohibiting Barclays Bank and or any other person from disposing or otherwise dealing with the whole or any part of the amounts of US\$ 600,956 and US\$ 587,279 standing to the credit of Hans Hackl at Barclays Bank.

The said orders were made as a result of ex parte proceedings based on the affidavit of Declan Barber, Director of respondent no 1.

It is contended for the petitioner that the petitioner's right to property as protected under article 26(1) of the Constitution has been contravened by the order of the Supreme Court of 17 June 2009 and the provisions of section 3(1) of the POCA on the following grounds –

- (a) the interim order in relation to the land, vehicles and vessels was made despite the absence of any averments and evidence in the affidavit of Mr Barber, upon which the Court could have been satisfied that there were reasonable grounds for the belief and for it to appear to the Court on a balance of probabilities that the said land, vehicles and vessels constitute benefits from criminal conduct or that they were acquired wholly or partly in connection with property that directly or indirectly constitute criminal conduct.
- (b) section 3(1) of POCA is contrary to article 26(1) of the Constitution as it is not a provision of law that is necessary in a democratic society on any one of the grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution.

The petitioner further states that respondent no 1 has commenced proceedings against the petitioner under section 4 of the POCA requesting an interlocutory order. Should that application be allowed it is likely that the respondent will institute proceedings under section 5 of POCA requesting for a disposal order. The application under section 4 of the POCA is supported by an affidavit sworn by Mr Liam Hogan on 9 July 2009 which relies on the affidavit of Mr Barber referred to earlier.

It is contended for the petitioner that these proceedings are likely to contravene his right to property as protected by article 26(1) of the Constitution in so far as -

- a) the two affidavits do not contain any averments and evidence upon which the Court could be satisfied that there were reasonable grounds for the belief and for it to appear to the Court on the balance of probabilities that the said land, vehicles and vessels constitute benefits from criminal conduct or that they were acquired wholly or partly in connection with property that directly or indirectly constitutes criminal conduct.
- b) Section 4(1) of the POCA is contrary to article 26(1) of the Constitution as it is not a provision of law that is necessary in a

democratic society on any one of the grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution.

The petitioner contends that the proceedings leading to the interim order and the provisions of the POCA contravened the petitioner's right to a fair hearing under article 19 of the Constitution. The petitioner contends that, given the degree and severity of the interim order that the proceedings against the petitioner are criminal in nature, in spite of the fact that the acts complained of at the time they occurred were not an offence, contrary to article 19(4) of the Constitution. The POCA defines benefit from criminal conduct and criminal conduct to include acts that were committed prior to the coming into force of the POCA thereby contravening the provisions of article 19(4) of the Constitution. The petitioner obtained the property in question, the subject of the interim order before the coming into force of the POCA.

Further under this head it is contended for the petitioner that the proceedings leading to the interim order were ex parte and the only evidence relied upon was affidavit evidence. The petitioner was thereby denied notification of hearing of the same, the opportunity to be present and put its case including the cross-examination of the maker of the affidavits relied upon. This contravened article 19(2) (b), (c), (d), (e) and (f) of the Constitution.

In the alternative if the proceedings leading to the interim order were civil in nature it is the contention of the petitioner that they contravened article 19(7) of the Constitution, in so far, as the proceedings were ex parte and solely relied on affidavit evidence, following section 9 of POCA.

In the further alternative the petitioner contends that before an order for confiscation of property is made it must be proved on a balance of probabilities that the property is reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime. Therefore there must be both proof of the crime (criminal conduct) and proof that the property was acquired by the proceeds of crime. As the property which is the subject of the interim order was acquired before the enactment of the POCA, the interim order contravenes article 19(4) of the Constitution. Similarly in so far as the provisions of the POCA permit the confiscation of property acquired before the coming into force of the POCA, those provisions contravene the petitioner's right to property under article 19(4) of the Constitution.

With regard to the pending interlocutory application the petitioner avers on the basis of section 9 of the POCA that it will be solely decided on affidavit evidence. In addition under section 21 of the POCA the petitioner is not entitled to further particulars, inspection, disclosure or discovery prior to the filing and delivering of an affidavit setting out the evidence intended to be adduced by him, which affidavit must be filed not later than 21 days from date of service of the application of him.

All the foregoing matters contravene the petitioner's right to a fair trial as the petitioner is not entitled to cross-examine the maker of the affidavits on which the application against him is based. At the same time the petitioner would require further and better particulars of the averments made against him, inspection, disclosure or discovery prior to the filing and delivering his affidavit in reply more so as the proceedings would be determined on affidavit evidence. The time limit for delivering his affidavit is too short.

In the further alternative to the foregoing the petitioner contends that his right to equal protection of the law under article 27 of the Constitution has been contravened by section 3(9)(c) of the AMLA as proceedings under sections 3 and 4 of POCA have been instituted against him. The provisions of section 3(9)(c) of AMLA grant unfettered discretion to the Attorney-General to commence or not to commence proceedings against anyone given the definition of criminal conduct under the AMLA as amended. This provision is inherently discriminatory.

At the same time this provision contravenes the principle of separation of powers enshrined in the Constitution (articles 85 and 89 of the Constitution) in so far as it confers legislative powers on a member of the executive by allowing him to determine whether an act or omission in a foreign country shall or shall not be in a particular case a serious crime in Seychelles.

The petition is supported by an affidavit sworn by Mr Chang-Sam as an attorney in fact and agent of the petitioner. The affidavit basically regurgitates the contents of the petition.

The respondents opposed this action. They filed a reply supported by an affidavit sworn by Liam Hogan of the FIU. The respondents deny that the interim order of 17 June 2009 by the Supreme Court unconstitutionally deprived the petitioner of the property in question. They contend that on the basis of all evidence submitted to the court by the respondent no 1 there was sufficient evidential basis for the order made by the Supreme Court. If there was an infirmity in the proceedings resulting in the interim order the petitioner had a remedy within the statutory scheme of the POCA and in particular under section 3(3) thereof. The petitioner did not avail himself of this remedy. He is therefore precluded from seeking relief from the Constitutional Court.

With regard to the interlocutory proceedings the respondents contend that no constitutional issues arise and that there is sufficient evidence before the court for it to make the orders sought on the basis of applicable law. The respondents contend that it is an impermissible presumption that the court will act other than reasonably and properly on the evidence before it and in accordance with the law and the Constitution.

With regard to section 4(1) of POCA the respondents contend that it is perfectly constitutional, and does not contravene article 26(1) of the Constitution. It is law that is reasonably necessary in a democratic society.

As to the challenge concerning the petitioner's right to a fair hearing under article 19 of the Constitution, the respondents contend that neither the proceedings under sections 3(1) and 4(1) of POCA nor sections 3(1) and 4(1) of the POCA contravened or contravene the petitioner's right as alleged. The proceedings are civil in character against specific property and therefore articles 19(1) to (6) and 19(2) (b) (c) (d) (e) and (f) of the Constitution do not apply to the said proceedings which are not criminal proceedings. Article 19(1) to (6) inclusive apply only to criminal proceedings.

The respondents specifically denied that article 19(4) of the Constitution was breached in relation to the petitioner by reason of the definition of benefit from

criminal conduct which includes property acquired before the coming into force of the POCA. The statutory scheme that allows the freezing, and disposal of assets obtained from criminal conduct irrespective of when that criminal conduct was committed in civil proceedings is constitutionally permissible.

Section 9(1) of the POCA permits calling of oral evidence with the permission of the court. Ex parte applications are, in appropriate circumstances, available and justifiable to ensure that justice is done between the parties. The rules of procedure and evidence applied in respect of the proceedings under the POCA are necessary to achieve the objectives of the POCA.

The petitioner's right to a fair hearing has not been contravened nor will it be contravened in the interlocutory proceedings as it will be up to the judge to determine the matters in issue based on the law and evidence. The person best placed to adduce evidence by affidavit as to whether the property in question is the benefit from criminal conduct is the petitioner (the respondent in proceedings before the Supreme Court).

The respondents further contend that the provisions of section 9 of the POCA allowing the admissibility of statutory belief of the Director and Deputy Director is a proportionate and necessary provision to secure the objectives of the POCA. Section 21 of the POCA is intended to ensure the integrity of the proceedings under the POCA and deny a respondent assistance from the knowledge and material available to the FIU. The necessity for such a law is the experience of other agencies and court practice in other jurisdictions.

The respondents further contend that as the provenance of the property in question is particularly within the knowledge of the respondent 21 days provided for him to file an affidavit is adequate and should he need more time the court may for good cause extend such time. The petitioner in this case has been afforded more than 21 days and has applied for, and been granted, from time to time, more time.

The respondents contend that the intention of the Legislature was to ensure that the benefit of criminal conduct would not be enjoyed by person in Seychelles nor would Seychelles provide a safe haven for such proceeds. That explains the definition of criminal conduct including the impugned provision of being contrary to the law of another state whether committed in that state or elsewhere unless it would not be in the public interest to take action in Seychelles in relation to such criminal conduct.

The discretion granted to the Attorney-General in this respect does not infringe the concept of separation of powers and the basis upon which it is exercised is clearly set out to be 'public interest'. The Attorney-General is the appropriate officer to be entrusted with such discretion in light of his constitutional authority under article 76(4) of the Constitution. Allegations of discrimination by the Attorney-General are an impermissible presumption. The discretion granted is limited strictly to not intervene in appropriate cases. It is not tenable to suggest that the Attorney-General has wrongly exercised his discretion not to intervene in respect of the property in question.

The respondent contends that articles 85 and 89 of the Constitution have no

relevance to proceedings under the POCA. That the petitioner has no locus standi to challenge any provision of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008.

The respondents answer finally sets out 8 issues that this Court should, in the public interest, consider and determine, which form part of the 18 issues that the petition seeks to have determined.

Submissions of counsel

At the hearing of this petition Mr Basil Hoareau appeared with Mr Frank Ally. They relied on the written submissions filed in court earlier on in accordance with the order of this Court. Mr Basil Hoareau led with oral submissions for petitioner. The Attorney-General, Mr Ronny Govinden assisted by Mr David Esparon, principal State counsel, led the oral arguments for the respondents, in addition to relying on their written submissions filed prior to the hearing of the petition.

In his address to the court, Mr Hoareau was guided, if I may call it that, by the constitutional rights of the petitioner which it is contended have been breached and then brought in the alleged breaches of the same by the respondent. He submitted on the right to property, under article 26(2) of the Constitution; the right to a fair hearing under article 19 of the Constitution; the right of equal protection of law under article 27 of the Constitution; and abdication of legislative authority by the National Assembly in favour of the Attorney-General contrary to articles 85 and 89 of the Constitution. Discussing the case for and against the petitioner under those heads will provide an orderly manner to resolve the matters in issue in these proceedings.

The right to property

Mr Basil Hoareau submitted that the petitioner's right to property protected under article 26(1) of the Constitution had been violated by the interim order issued by the Supreme Court in relation to the properties of the petitioner without the production of sufficient evidence that linked those properties with any criminal conduct save for PR 2378 and PR 1466. He further submitted that section 3(1) of the POCA contravened the petitioner's right to the property under article 26(1) in so far as it exceeded the limitations allowed to the right to the property by article 26(2) of the Constitution.

In particular he contended that though the limitation in this case was provided for by law that law in the form of section 3(9)(c) of the AMLA fails the accepted test which is whether there is 'pressing social need' that is proportionate to the legitimate aim pursued. He contended that to include in the definition of serious crime, an offence which is not an offence in Seychelles that was committed in a foreign country, is not based on any interests that ought to be protected in Seychelles. The criminal conduct relied upon against the petitioner in the case before the Supreme Court was not an offence in Seychelles and was not committed in Seychelles.

These same arguments applied *mutatis mutandis* to the proceedings for an interlocutory order that were commenced in the Supreme Court and to section 4 of the POCA under which they were commenced. It was therefore argued that those proceedings were likely to contravene the petitioner's right to property and section 4

of POCA was in contravention of article 26(1) of the Constitution.

Counsel for the petitioner further contended that in enacting section 3(9)(c) of the AMLA the Legislature abdicated its legislative authority to foreign legislatures to determine what is a serious crime in Seychelles. This cannot be, especially in light of a Court of Appeal decision *Kim Koon v Republic* (1965-1976) SCAR 60. He also referred to *Basu on Administrative Law*, *Silver v United Kingdom* (1983) 5 EHRR 347 (ECHR), and *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245 (ECHR) to explain what limitations to fundamental rights are permissible.

Mr Hoareau urged this court not to follow the case of *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) from the United States which he argued was merely persuasive. With regard to *Alan Clancy v Ireland* Irish High Court, 4 May 1988, he submitted the Constitution of Ireland was different from our Constitution and therefore that case was not persuasive at all.

In answer to the foregoing submissions the respondents submitted, in the written submissions and the oral submissions by Mr Govinden, the Attorney-General, and Mr Esparon, principal State counsel, that the petitioners had a remedy before the Supreme Court, in which they could have applied to set aside the interim order within 30 days but which they did not exercise under section 3(3) of the POCA. In the premises, the respondents contend that in accordance with article 46(4) of the Constitution this action against the interim order should not be entertained by the Constitutional Court as other means of redress are available or have been available to the petitioners. Reference was made to *Amesbury v Chief Justice* Constitutional Case No 6 of 2006 in support of this proposition.

Secondly the respondents submitted that there was, in any case, sufficient evidence to support the orders that were made and there would be sufficient evidence for the orders that may be made in the interlocutory proceedings but that would be for the court to decide. They pointed to the full record of the proceedings in the interim application in support of this proposition. The proceedings leading to the interim order or the interlocutory order were civil proceedings that lacked any indicia of criminal proceedings. The respondents cited the cases of *Gilligan v Criminal Assets Bureau* [1997] IEHC 106, *Murphy v GM, PB* (4 June 1999), as heard before the High Court of Ireland and on appeal as a consolidated appeal before the Supreme Court of Ireland [2001] IESC 82 in support of its submission that the impugned proceedings are civil and not criminal in nature.

Thirdly the respondents submitted that sections 3(1) and 4(1) of the POCA were not unconstitutional in so far as there is no constitutional entitlement to property derived from criminal conduct. Secondly those provisions are permitted derogations under article 26(2) of the Constitution in so far as they amount to law necessary in a democratic society and it is in the public interest under article 26(2)(a) in the case of property reasonably suspected to be the proceeds of drug trafficking or serious crime under article 26(2) (d) of the Constitution.

The Attorney-General submitted that laws similar to the POCA exist in many jurisdictions, including Ireland, United Kingdom, United States of America and the states of Australia. The aim is to restrain not only enjoyment of the benefits of crime

but to fight crime as well. Extensive materials including reports on similar laws from other jurisdictions were provided to the court. Such laws are necessary in a democratic society given the ability of those engaged in criminal conduct to avoid prosecution or detection.

It was submitted for the respondents that the petitioner's contentions that the only permissible derogation under article 26(2) in relation to criminal activity must be a matter that is a crime in Seychelles was untenable on two fronts. Firstly, it was orally submitted that in the matters in issue in this particular case, the offence in question is both an offence in Germany and here in Seychelles and that is the offence of money laundering. Secondly that the evil that this legislation is directed to address is the possession and control of the proceeds from criminal activity in Seychelles or by a person amenable to jurisdiction of the Supreme Court of Seychelles. Seychelles shall not be a haven for such proceeds of criminal activity even if the criminal activity was outside of Seychelles and is not a crime in Seychelles.

The right to a fair hearing

According to the written submission for the petitioner the interim order was a penal offence over property that had been acquired well before the ALMA and the POCA came into force. To that extent it infringed the petitioner's right to a fair hearing contrary to article 19(4) of the Constitution. Article 19(4) of the Constitution bars retrospective legislation creating penal consequences.

Secondly the interim order was made following ex parte proceedings in the absence of the petitioner based only on affidavit evidence. This was contrary to article 19(2) or 19(7) of the Constitution though during oral submissions Mr Hoareau appeared to soften his position and suggested that the attack against the proceedings was not essentially because they were ex parte. The attack was directed to these proceedings as at this stage a judge is able to conclude, without hearing from the other party that the property in question was the benefit of criminal conduct. At that stage what would be acceptable is finding of a prima facie case and the final finding of whether or not the property is the benefit from criminal conduct is made after the inter partes hearing.

Given that the decision was made on affidavit evidence following sections 3 and 9 of the POCA, the petitioner was denied the right of cross-examination of the deponents of affidavit evidence contrary to his right to a fair hearing. He referred to *Davis v R* [2008] UKHL 36, a decision of the House of Lords in support of this point.

The foregoing arguments applied *mutatis mutandis* to the interlocutory proceedings initiated against the petitioner as well as sections 3(1) and 4(1) of POCA, all of which are unconstitutional and in violation of the petitioner's right to a fair trial. Reference was made to article 19(2) of the Constitution and *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 (ECHR) and *Ozturk v Germany* (1984) 6 EHRR 409 (ECHR), decisions of the European Court of Human Rights.

The respondents submit that no right to a fair hearing under article 19 has been infringed by the proceedings for an interim order or is likely to be infringed by proceedings for an interlocutory order. Neither do sections 3(1) and 4(1) of the

POCA contravene article 19 of the Constitution. The respondents submit that article 19(4) of the Constitution only applies to criminal proceedings and proceedings for an interim order or for an interlocutory order are not criminal proceedings. Neither is article 19(2) applicable to the proceedings in question under the POCA as those proceedings are not criminal proceedings.

The fact that AMLA and POCA apply to property that was acquired before the coming into force of the AMLA and the POCA does not render the provisions retrospective. The object relates to possession and control after the coming into force of the POCA and not before but covers property obtained before the coming into force of the POCA or the AMLA if it was obtained as proceeds of crime or the benefit of criminal conduct. Such activity was not legal prior to the enactment of the AMLA and the POCA. Reference was made to *Gilligan v Criminal Assets Bureau* [1997] IEHC 106 for support of this proposition.

The respondents submit that article 19(7) of the Constitution which provides for a fair trial in relation to civil proceedings is not contravened in any way by proceedings under the POCA. The ex parte proceedings for an interim order are necessary by the very nature of the subject matter to ensure that it is preserved at the commencement of the proceedings. This is not uncommon in civil proceedings. The Civil Procedure Code abounds with instances in which ex parte applications can be made and orders made prior to the hearing inter partes.

Under section 3(3) of the POCA it is possible for the petitioner (or respondent in the Supreme Court proceedings) to apply to court to discharge or vary the interim order. The petitioner did not take advantage of this remedy and is thus precluded from constitutional challenge. With respect to interlocutory proceedings under section 4 of the POCA though the parties submit affidavit evidence, it is possible with the permission of the court to call oral evidence.

The respondents further submitted that the duty placed on the respondent under section 21 of the POCA to disclose in affidavit the evidence he/she intends to adduce if any at the hearing of the application does not breach any constitutional provisions. The respondent would be the best person to know how he/she acquired the property in question and the nature of available evidence to provide proof thereof. At that stage the respondent would be in possession of the evidence against him. The bar against further particulars, inspection, disclosure or discovery prior to the filing of the respondent's affidavit is necessary at this stage but the respondent may after he/she files an affidavit, with the permission of the court ask for further particulars, inspection, disclosure or discovery.

The respondents further submit that the 21 days provided for the respondent to file his affidavit is sufficient and in any case the petitioner has not adduced any evidence or provided any reason why it would not be possible for him to provide that affidavit within 21 days.

The right to equal protection of the law

The third head of attack is that section 3(9)(c) of the AMLA was inherently discriminatory in relation to the petitioner and contravened article 27 of the

Constitution in so far as it grants unfettered discretion to the Attorney-General not to take any action against any person in respect of an act that occurred outside of Seychelles. No grounds are provided upon which the Attorney-General may exercise this discretion. He referred to the Indian case of *Ajay Hasia v Khalid Mujib* (1981) AIR SC 487 in support of this ground.

The respondents' counsel submit that no question of discrimination arises with the exercise of the discretion by the Attorney-General as provided under section 3(9)(c) of the POCA. At the same time, as the Attorney-General has not exercised the discretion in relation to the criminal conduct alleged in the proceedings in the Supreme Court, the petitioner has no locus standi to challenge the constitutionality of the definition of proceeds of criminal conduct as it applies to the instant proceedings.

It is further submitted that the Attorney-General is the proper officer to be vested with the discretion under section 3(9)(c) of the POCA given that he is the person vested with the discretion to institute, take over, or discontinue criminal proceedings under article 76(4) of the Constitution.

It is submitted for the respondents that no offence was created by the Legislature punishable in Seychelles but the intention of the Legislature was to ensure that benefits of criminal conduct would not be enjoyed by any person within Seychelles nor would Seychelles be permitted to be a safe haven for such proceeds.

Abdication of legislative power

The petitioner contends that the National Assembly, the body vested with legislative authority, abdicated its legislative responsibility and passed it on to the Attorney-General, contravening articles 85 and 89 of the Constitution, to the detriment of the petitioner. The National Assembly did so by granting the Attorney-General unfettered discretion whether or not to take action against a person in respect of criminal conduct that has occurred outside of Seychelles. Reliance was placed on the case of *Ali and Rasool v State of Mauritius* [1992] 2 All ER 1.

The respondents' counsel submit that there is no contravention of articles 85 and 89 of the Constitution.

Discussion and decision

Discussion of the matters in issue and my findings and conclusions shall follow the same order as I have done with the submission of counsel. I must start though with the burden of proof, standard of proof and principles of constitutional interpretation that must guide this court.

Ordinarily in civil matters the burden of proof is upon the party wishing to prove a certain fact and the standard of proof is on a balance of probabilities. In constitutional matters this subject is now governed by article 130 (7) which states -

Where in an application under clause (1) or where the matter is referred to the Constitutional Court under clause (6) the person alleging the contravention or risk of contravention establishes a prima facie case,

the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the state.

The duty on the petitioner is to establish a prima facie case in respect of the allegations of contravention or risk of contravention of the constitutional provisions, upon which the evidential burden would shift to the State to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

With regards to principles of interpretation we need not go further than the decision of the Court of Appeal on appeal from this court in *Frank Elizabeth v The Speaker of the National Assembly* SCA 2 of 2009, LC 334 in which Domah J stated, with the other members of the panel concurring –

42. We have had a couple of occasions in the recent past to state that the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See *John Atkinson v Government of Seychelles and Attorney General* SCA 1 of 2007. The Constitution is not to be treated as legislative text. The Constitution is a living document. It has to be interpreted 'sui generis.' In the case of *Paul Chow v Gappy and Ors* SCA 10 of 2007, we also emphasised on the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such. In as much as the Constitution enshrines the freedoms of the people, the constitutional provisions have to be interpreted in a purposive sense. Foreign material on the same matter aid interpretation but it should be from jurisdictions which uphold the bill of rights which our Constitution enshrines.

43. We need, admittedly, to go to foreign source for persuasive authority. At the same time, we need to recall that paragraph 8 of the Schedule 2 of the Constitution makes it so eloquent as to the manner in which we should interpret our constitutional provisions:

“For the purposes of interpretation—

- (a) the provisions of this Constitution shall be given their fair and liberal meaning;
- (b) this Constitution shall be read as a whole; and
- (c) this Constitution shall be treated as speaking from time to time.

44. We need not, likewise, overlook the existence of Article 48 which requires that the rights enshrined in Chapter 111 shall be interpreted in such a way as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of the Constitutions of the other democratic states or nations and the decisions of the courts of the States or nations in respect of their Constitutions.

The right to property

The right to property is constitutionally protected under article 26(1) of the Constitution. I shall set out article 26(1) as well as article 26(2) which permits derogations therefrom -

(1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

(2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by the law and necessary in a democratic society -

- (a) in the public interest;
- (b) ...
- (c) ...
- (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;...

Similarly I should bring into view at the outset the provisions of sections 3 and 4 of the POCA which are at the heart of the petitioner's complaints in these proceedings.

....

As noted above in the facts of this case respondent no 1 commenced proceedings against the petitioner and another person for which an interim order was granted in respect of certain properties. This order is impugned for contravening article 26(1) of the Constitution. The answer of the respondents is that the petitioner had a remedy under section 3(3) of the POCA which he did not pursue and is therefore not entitled to pursue this constitutional litigation. Reference is made to article 46(4) of the Constitution and *Germaine Amesbury v Chief Justice* Constitutional Case No 6 of 2006 for authority for that proposition.

I shall bring in view article 46(4) of the Constitution at this stage -

Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other court under any other law, the Court may hear the application or transfer the application to the appropriate court for grant of redress in accordance with the law.

In the *Germaine Amesbury v Chief Justice* (supra) the Constitutional Court considered a petition in which the petitioner had brought an action against a judge and others seeking to declare unconstitutional an ex parte order made by that judge. The Constitutional Court held that the petitioner had a remedy of applying for that order to be set aside before the Supreme Court or appealing to the Court of Appeal. Perera CJ, stated for the court -

As the means of redress for the alleged contravention have been available to the petitioner under other law, this court cannot permit a

collateral petition for redress under the Constitution to a court of co-ordinate jurisdiction. Accordingly, subject to the objections that may be raised by the 2nd respondent, the petitioner may, if so advised, seek to set aside the ex parte order of 30th June 2006 in case no. CS185 of 2006, either before the Supreme Court, or before the Court of Appeal, so that her executorship is restored, and consequently to proceed with the prosecution of case no CS 262 of 2001.

Case law of this court has interpreted article 46(4) of the Constitution to mean that where a petitioner has a remedy under any other law which he/she may have pursued or may still pursue the Constitutional Court will decline to hear the petition. I am in agreement with that position. Applying that position to this case it is obvious that the petitioner when served with an interim order had an opportunity to apply to set it aside which he did not use. The proceedings are currently at the level of proceedings for an interlocutory order and he is free to pursue the remedy provided therein. If the challenge rested only on the interim order having breached his constitutional rights or that an interlocutory order is likely to breach his constitutional rights it would have been possible for this court to decline to hear the petition under article 46(4) of the Constitution as the petitioner clearly has remedies under the POCA.

However, there is at the same time a challenge to the constitutionality of sections 3(1), 4(1) and 9 of the POCA and section 3(9)(c) of the AMLA, which only this Court can determine. In the result I would hold that we must proceed to determine the constitutionality of those provisions of the law.

The interim order made under section 3(1) of the POCA is to prohibit -

the person in the order or any person having notice of the making of the order from disposing of, or otherwise dealing with the whole or any part of the property or diminishing its value during the period of 30 days from the date of the making of the order.

The order is intended to last 30 days only and it prohibits disposing of or otherwise dealing with the property for the duration of the order. At this stage the ownership, occupation, use and enjoyment of the property stays the same, save for the fact that it cannot be disposed of.

The right to property protected under article 26(1) of the Constitution extends only to property lawfully acquired. It does not protect property unlawfully acquired. The restriction against disposal of specified property, at the commencement of proceedings that will determine, whether such property is the benefit from criminal conduct, is necessary in order not to render those proceedings nugatory. If no restraint was imposed on the current holder of such property, it could be possible to dispose of the property, as soon as one got wind of the commencement of such proceedings. Restraint is imposed for only 30 days and the affected person has a right to apply to court to discharge or vary such order.

Restriction of disposal is without doubt an interference with the right of ownership of property under article 26(1) of the Constitution. The question is whether it is

permitted derogation under article 26(2) of the Constitution. It is contended for the petitioner that section 3(1) of the POCA fails the test as it permits the encroachment on the right to property in respect of proceeds of crime or benefit of criminal conduct arising from a crime committed outside of Seychelles and which is not a crime in Seychelles. The respondents do not show that there is a pressing social need for such restriction.

Article 26(2) of the Constitution is clear. The right to property can be restricted in a limited number of situations. The respondents rely on article 26(2) (a) and (d). That is whether it is in the 'public interest' and or the property is 'reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime'. Under article 26(2)(d) of the Constitution it is permissible to restrict the right to property in cases where that property 'is reasonably suspected' of being acquired by the proceeds of serious crime.

Section 2 of the POCA provides in the definition of criminal conduct that it shall have the meaning set out in the AMLA. Section 3(9)(c) of the AMLA defines criminal conduct as -

shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50,000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of the relevant provisions of this Act, unless the Attorney General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this subsection.

Section 2 of the POCA defines 'benefit from criminal conduct' in the following words -

means any property obtained or received at any time (whether before or after the passing of this Act) by, or as a result of, or in connection with the commission of criminal conduct.

It is this definition of property that forms benefit from criminal conduct and definition of criminal conduct that is the subject of constitutional attack by Mr Hoareau. He contends that in so far as it includes criminal conduct which is not a crime within Seychelles committed outside Seychelles, including criminal conduct before the passing of the Act, it does not pass constitutional muster. Similarly he attacks the fact that the benefit of crime includes property obtained before the passing of the POCA or the AMLA specifically as a penal statute that is retrospective contrary to article 19(4) of the Constitution. He asserts that these provisions cannot be in the public interest under articles 26(2)(a) or 26(2)(d) of the Constitution.

As noted above, the POCA is not a penal statute. It does not possess the commonly known aspects of criminal legislation. No offence is created. No one is charged with an offence. No one is tried for any offence. Its thrust is to deprive ownership, possession, and control of property derived from criminal conduct from those that hold that property in the manner described at the time of initiating proceedings under

the POCA. To that extent it is not retrospective at all. It speaks to the present not to the past. Property acquired from criminal conduct is not constitutionally protected. Article 19(4) of the Constitution is not contravened in any way by the provisions impugned.

Orders under section 3 of the POCA are of temporary and limited duration, intended only to preserve the property in question pending further proceedings between the parties when all the parties to the proceedings will be given an opportunity to press their cases before the court before a final decision is made. As noted above, proceedings of such a nature are not alien to the civil procedure in Seychelles and are employed often to preserve either the subject matter in dispute or assure a party of an ability to satisfy its anticipated judgment (see sections 280 and 281 of the Seychelles Code of Civil Procedure).

A somewhat similar challenge, as in the case before us, was mounted in *Gilligan v Criminal Assets Bureau* [1997] IEHC 106, a decision of the High Court of Ireland in which provisions, in *pari materia*, as those under attack in the instant case. The court observed, inter alia -

134. It appears to me that the State has a legitimate interest in the forfeiture of the proceeds of crime. The structure of the Act, in a similar way to ordinary civil injunction proceedings, allows for the temporary freezing of assets and for various actions to be taken on an interlocutory basis. The Respondent at any time may intervene to show good title to the assets. If he does so not only must they be returned, but the Court may order the State to pay compensation to him. It is also provided at Section 3 that the Court shall not make an Interlocutory Order "if it is satisfied that there would be a serious risk of injustice". The same provision applies to the making of a disposal order under Section 4.

135. While the provisions of the Act may, indeed, affect the property rights of a Respondent it does not appear to this Court that they constitute an "unjust attack" under Section 40.3.2, given the fact that the State must in the first place show to the satisfaction of the Court that the property in question is the proceeds of crime and that thus, prima facie, the Respondent has no good title to it, and also given the balancing provisions built into Sections 3 and 4 as set out above.

136. This Court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.

This decision was appealed to the Supreme Court of Ireland (that country's court of last resort), and it was affirmed in a combined appeal of *Murphy v GM and Gilligan v Criminal Assets Bureau* [2001] IESC 82.

South Africa has its own version of the Proceeds of Crime Act. Its specific structure and thrust is different from the Seychelles POCA. However, the purpose is somewhat similar to the Seychelles POCA. The constitutionality of that Act was discussed in the case of *Prophet v National Director of Public Prosecutions* Case CCT 56/05 and the comments of the Constitutional Court below are, in my view, apposite -

58. Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.

59. The POCA is an important tool to achieve the goal of reducing organised crime. Its legislative objectives are set out in its Preamble which observes that: (a) criminal activities present a danger to public order and safety and economic stability and have the potential to inflict social damage; and (b) South African common law and statutory law fail to deal adequately with criminal activities and also fail to keep pace with international measures aimed at dealing effectively with such activities. Its scheme seeks to ensure that no person convicted of an offence benefits from the fruits of that or any related offence, and to ensure that property that is used as an instrumentality of an offence is forfeited.

60. The POCA uses two mechanisms to ensure that property derived from an offence or used in the commission of an offence is forfeited to the State. The mechanisms are set out in Chapters 5 and 6. Chapter 5, in sections 12 to 36, provides for the forfeiture of the benefits derived from the commission of an offence but its confiscation machinery may only be invoked once a defendant has been convicted, while Chapter 6, in sections 37 to 62, provides for forfeiture of the proceeds of and properties used in the commission of crime. This case involves the mechanism set out in Chapter 6.

The United Kingdom and several jurisdictions in Australia have enacted civil forfeiture statutes with the objective of fighting organised crime. Seychelles is not alone in this approach.

The legislature in Seychelles has decided in the POCA that Seychelles should not become a haven for property that is acquired from the proceeds of criminal conduct, whether committed in Seychelles or outside of Seychelles. This is permissible under article 26(2)(a) of the Constitution, that is in the public interest. It is equally permissible under article 26(2)(d) of the Constitution. Depriving people in receipt, ownership, possession and control of such property is not unconstitutional in my

view. It is a legitimate restriction to the right to the property. Civil forfeiture of illicitly gained property is one of the latest ways in which governments are fighting crime. I have no hesitation to find that fighting crime is a pressing social need. It is ultimately about the safety of the population. I would therefore hold that sections 3(1) and 4(1) of the POCA pass constitutional muster and do not contravene article 26(1) of the Constitution.

The right to a fair hearing

I shall start by setting out the provisions of the Constitution that are contended by the petitioner to have been violated under this head of claim. These are articles 19(2) (b), (c), (d), (e) and (f); 19(4); and 19(7). Article 19 states in part -

(1) Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with an offence –

(a) is innocent until the person is proved or has pleaded guilty;

(b) shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail, of the nature of the offence;

(c) shall be given adequate time and facilities to prepare a defence to the charge;

(d) has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person's own choice, or, where a law so provides, by a legal practitioner provided at public expense;

(e) has a right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person's behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

(f) shall, as far as is practicable, have without payment the assistance of an interpreter if the person cannot understand the language used at the trial of the charge;

(g) ...

(h) ...

(i) ...

(3) ...

(4) Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

(5) ...

(6) A person shall not be tried for an offence if the person shows that the person has been pardoned for that offence in accordance with an Act made pursuant to article 60 (2).

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

I have already noted above that the interim proceedings leading to the interim order were not penal proceedings. The respondent was not charged with any offence. Those proceedings were civil proceedings related to certain properties. Articles 19 (2) (b), (c), (d), (e) and (f) as well as 19(4) of the Constitution clearly apply only to criminal proceedings and are therefore not applicable to the interim proceedings, to the interlocutory proceedings and to the provisions under sections 3(1) and 4(1) of the POCA. Consequently *Davis v R* [2008] UKHL 36, cited by the petitioner's counsel is unhelpful in this particular case as it deals with criminal proceedings.

It is the contention of the petitioner that even if the proceedings under sections 3(1) and 4(1) of the POCA are held to be civil proceedings the petitioner's constitutional rights under article 19(7) were contravened in so far as the proceedings for an interim order were ex parte and based on affidavit evidence. The proceedings under section 4(1) of the POCA are attacked on the basis that they are based on affidavit evidence and the petitioner will be denied the right of cross-examination. Secondly the right to a fair trial is further infringed by the provisions of section 21 of the POCA which bars the respondent in proceedings under section 4(1) from further particulars, inspection, disclosure or discovery from the applicants.

Section 21 of the POCA states -

A respondent who is served with an application for an interlocutory order or a disposal order shall not be entitled to further particulars, inspection, disclosure or discovery prior to the filing and delivering an affidavit setting out the evidence intended to be adduced by him as contemplated in section 4(1) (b), which affidavit shall be filed within 21 days of the service of the application on him unless the Court shall have for good cause otherwise determined.

The petitioners further contend that the 21 days within which they are to file an affidavit is too short a time for the respondents to be able to do so and as a result their right to a fair trial is contravened.

The right to a fair trial in civil matters is fundamental. It has several constituent elements including the right for each party to be heard and present its case in an open and public trial before an independent and impartial court established by law. There must be adequate time for preparation and presentation of one's case. Discovery and inspection of documents relevant to one's case that may be in the hands of the opposite party is another element of the right to fair trial. This is provided for in section 84 of the Seychelles Code of Civil Procedure with a proviso that -

Provided that the order shall not be made when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

It is clear that this right [to discovery or inspection of documents] by a party to a civil proceeding is not absolute. It is in the discretion of the court. It is available with in-built restrictions.

As was noted by Lord Bingham in *Brown v Stott* [2003] 1 AC 681, at page 693E -

What a fair trial requires cannot, however, be the subject of a single varying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European court has consistently done.

This view was repeated by Baroness Hale in *Secretary of State for the Home Department v MB* [2007] UKHL 46, at paragraph 57-

Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject matter and nature of the proceedings.

Disclosure of documents as an ingredient of the right to a fair trial was considered in the case *Bisher Al Rawi v Security Services* [2010] EWCA Civ 482 by the Court of Appeal for England and Wales. The English courts have to apply the European Convention of Human Rights. The Court was, inter alia, considering the application of article 6 (1) of the European Convention of Human Rights in relation to UK domestic legislation. Lord Neuberger MR stated [paragraph 32] in part -

A litigant's right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge's decision. Quite apart from this, if PII, [public interest immunity], legal professional privilege or "without prejudice" privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all the parties are in the same position in that none of them can rely on the document.

The restriction placed on possible requests for further and better particulars, inspection, disclosure or discovery prior to the filing of the affidavit required under section 21 of the POCA is intended, according to the respondents herein, to avoid a situation for a respondent to be mendacious. It would be permissible after the filing of the affidavit in question.

As noted above the right to a fair trial has several elements and not all of them bear the same weight. In the circumstances of proceedings under the POCA, in order to ensure a truthful and timely answer by a respondent, the respondent's ability to delay or drag out the proceedings is curtailed with postponement of requests for further particulars, inspection, disclosure or discovery, until the respondent has disclosed the evidence he or she intends to rely on to show how it acquired a particular property. In my view this restriction is only for a specific period of time but the right is otherwise available to the respondent once the respondent has complied with certain conditions. The restriction is not so fundamental as to be taken to have impaired the respondent's right to a fair trial.

The restriction is provided for in law to achieve a legitimate objective. It has not impaired the right to a fair trial in the circumstances of proceedings of this nature. It has simply reordered the procedure that may be followed prior to commencement of requests for further and better particulars, inspection, disclosure or discovery.

Turning to the issue of adequate time I note that the Supreme Court has the jurisdiction to enlarge time if it is not sufficient. Given the fact that the matters upon which the respondent would be required to depone are matters that peculiarly would ordinarily lie within his knowledge I do not think 21 days is too short. In any case the petitioners have not, apart from asserting that it is not enough time, provided any evidence in support of the claim that 21 days is intrinsically inadequate or was inadequate in the particular circumstances of this case.

Though evidence may be adduced by affidavit in the proceedings under sections 3(1) and 4(1) of POCA, oral evidence may adduced with the permission of the court. I am unable to see any restrictions in the provisions complained of about the right to cross-examine a maker of an affidavit, should the adverse party require to do so.

The petitioner, other than asserting a general contravention of the right to fair trial, has not established, prima facie, on evidence, in which specific manner that he has suffered in his enjoyment of the right to a fair trial.

The right to equal protection of the law

The petitioner has contended that section 3(9)(c) of the AMLA is discriminatory in so far as it grants unfettered discretion to the Attorney-General not to take any action against any person in respect of an act that occurred outside of Seychelles contrary to article 27 of the Constitution. The petitioner impugns the provisions aforesaid on the basis that no grounds are provided upon which the Attorney-General can exercise the discretion so granted.

Article 27 reads -

(1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination *on any ground* except as is necessary in a democratic society.

(2) Clause (1) shall not preclude any law, programme, or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.
[Emphasis is mine.]

Mr Hoareau asserts that no grounds are provided upon which the Attorney-General can exercise the discretion when in fact, as the Attorney-General pointed out, 'public interest' was provided as the ground upon which the Attorney-General would exercise that discretion. It is disingenuous for Mr Hoareau to claim that no grounds were provided in the law when in fact a ground has been provided.

In order to claim to be the victim of discrimination under article 27 it is imperative that you provide a ground, or 'any ground' upon which you have suffered discrimination and therefore not offered equal protection of the law as available to other people. Discrimination denotes being treated differently, and often to one's detriment, from others on the basis of a certain ground.

The provisions set out above do not define or set out the grounds upon which discrimination is not permitted. It bars discrimination on any ground whatsoever without cataloguing a list of such grounds. If one alleges infringement of that provision it is necessary to assert, at the same time, the ground upon which one has suffered discrimination. Is it sex, sexual orientation, gender, race, colour, religion, age, height, or some other ground? It appears to me that the ground upon which someone has suffered discrimination must be articulated.

The petitioner has not shown on its petition and supporting affidavit how he has been treated differently and to his detriment, by the-Attorney General from persons who are in his situation or other citizens of Seychelles or those with dual nationality and thus denied equal protection of the law. Neither has he alleged a ground upon which he has been treated differently. Was it based on sex, colour, religion, nationality, or age? There must be a ground upon which the discrimination is alleged to have been based. The petitioner's claim under this head is entirely without merit.

Abdication of legislative power

It is the contention of the petitioner that articles 85 and 89 of the Constitution have been contravened by section 3(9)(c) of the Act. I shall therefore begin by setting out those provisions of the Constitution.

Article 85 states -

The Legislative power of Seychelles is vested in the National Assembly and shall be exercised subject to and in accordance with this Constitution.

Article 89 states -

Articles 85 and 86 shall not operate to prevent an Act from conferring on a person or authority power to make subsidiary legislation.

As we have seen above and in fact set out the provisions of section 3(9)(c) of the AMLA it confers on the Attorney- General, in 'the public interest', discretion to take or not take any action in respect of benefits of crime or criminal conduct arising out of an act which is not an offence in Seychelles and was committed outside of Seychelles. Those provisions do not confer on the Attorney-General any legislative role.

I conceive the role of the Attorney-General under the impugned provisions to be akin to that described by Lord Bingham in *Regina v H* [2004] UKHL 3 when speaking for the House of Lords on the role of the Attorney-General in appointing Special Advocates. He stated (at paragraph 49) -

It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, *but as an independent, unpartisan guardian of the public interest in the administration of justice.*

I see no abdication of legislative power at all by the National Assembly in providing that the Attorney-General shall be the guardian of the public interest in relation to the matters in question, that is whether or not to take any action against property that finds its way into Seychelles which is the benefit from criminal conduct committed outside of Seychelles while at the same time the acts in question did not amount to an offence in Seychelles but were an offence in a jurisdiction outside of Seychelles.

No legislative power is abdicated by the National Assembly to the Attorney-General by section 3(9)(c) of the AMLA. The claim is without basis.

Disposition

For the reasons set out above I find that this petition has no merit. As both Gaswaga and Burhan JJ agree, this petition is dismissed accordingly. Each party shall bear its own costs in order not to discourage constitutional litigation.

BURHAN J: The petitioner in this case has invoked the jurisdiction of this court under article 46(1) of the Constitution seeking relief that his constitutional rights under articles 19, 26 and 27 of the Constitution have been contravened by the respondents. He has further sought relief under article 130 (1) of the Constitution alleging that articles 85 and 89 of the Constitution too have been contravened by the respondents in this case.

The salient facts of this case are that the first respondent, the Financial Intelligence Unit (FIU) filed proceedings against Hans Josef Hackl (the petitioner in this case) and one Dominic Dugasse in the Supreme Court under the Proceeds of Crime (Civil Confiscation) Act (Act No 19 of 2008, hereinafter referred to as the POCA) seeking inter-alia:

- a) An order pursuant to section 3 of the POCA prohibiting the respondents or such persons as may be specified in the order or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or any part of the property described therein or diminishing its value, and
- b) An order providing for notice of any such order to be given to the respondents and any other person as directed by court.

The said application before the Supreme Court was supported by an affidavit (annexed to this petition marked as document HH2) sworn by Declan Barber the director of the FIU. The affidavit set out in great detail the investigations carried out by the said unit in respect of the respondents Hans Josef Hakl (hereinafter referred to as the petitioner) and Dominic Dugasse. It stated that the petitioner was of dual nationality and held two passports one German and the other a Seychelles passport.

It further stated that the petitioner in this case had pleaded guilty and been convicted in Germany and sentenced to a term of six years imprisonment and had been ordered to pay a sum of €705,00. The criminal conduct for which he was convicted included the illegal trading into Iran of prohibited material namely high quality graphite, which due to its quality was suitable to be used in the production of medium and long range ballistic missiles, and also could be used within the scope of a nuclear weapons program.

In paragraph 7 of the said affidavit Mr Declan Barber stated inter alia, that this unlawful activity by the petitioner amounted to criminal conduct on the part of the petitioner for the purpose of these proceedings as in terms of section 34 of the German Foreign Trade Act, the said criminal conduct was punishable by a prison sentence of up to 5 years and a fine. The affidavit further stated that the petitioner had confessed to the court that the proceeds of the said criminal conduct had been channelled into Seychelles.

Ag Chief Justice Bernadin Renaud made his order dated 17 June 2009 (annexed to the petition as document HHI) in favour of the applicant granting -

- a) An inhibition order pursuant to section 76(1) of the Land Registration Act, prohibiting the disposal or otherwise dealing with the whole or any part of the parcels of land mentioned in the application until a further order was made by court,
- b) An order of prohibition on the sale of or any other dealings with motor vessels catamaran named "Storm" and "Monsun" and motor vehicles bearing no S18826 and S18827 presently registered in the name of Hans Josef Hackl, with the Seychelles Licensing Authority until further order was made by court,
- c) An order prohibiting Barclays Bank and or any other person from disposing or otherwise dealing with the whole or any part of money set out in the table of the application.

It is from these orders and the related provisions of the law on which the said orders were based, that the petitioner as stated in the prayer of his petition, seeks the following declarations, that the petitioner's constitutional rights namely -

- a) The right to property as set out in article 26(1) of the Constitution has been contravened by the said orders of court and that sections 3(1) and 4(1) of the POCA contravene article 26(1) of the Constitution, as the said provisions are not provisions which are necessary in a democratic society on any grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution and should thus be declared void;
- b) The right to a fair hearing as set out in articles 19(2) (b), (c,) (e), 19(4) and 19(7) of the Constitution have been contravened by sections 3, 4 and 9 of the POCA;
- c) The right to equal protection in law as set out in article 27 of the Constitution had been contravened by section 3(9)(c) of the Anti-Money Laundering (Amendment) Act, Act No 18 of 2008 (hereinafter referred to as the AMLA); and further that
- d) Articles 85 and 89 of the Constitution and the principle of separation of powers have been contravened, as the legislative power of Seychelles which is vested in the National Assembly had been abdicated in favour of the Attorney-General by section 3(9)(c) of the AMLA.

Having thus outlined the background facts of this case at the very outset it would be pertinent and necessary for this court, prior to deciding the issues raised by counsel, to first determine the nature of the proceedings in the aforementioned case, instituted before the Supreme Court under the POCA. In doing so it would be relevant to consider the approach of other jurisdictions to this issue as provided for in article 48(d) of the Constitution.

In the case of *Murphy v M (G)* [2001] IESC 82 at para 125 Keane CJ of the Supreme of Ireland held -

The court is satisfied that the United States authorities lend considerable weight to the view that *in rem* proceedings for the forfeiture of property, even where accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events, *are civil in character and that this principle is deeply rooted in the Anglo-American legal system* [emphasis added].

In *Walsh v The Director of the Assets Recovery Agency* (2005) NICA 6, the Court of Appeal concluded that the effect of the application of the tests in *Engel v Netherlands* (No 1) (1976) 1 EHRR 647 at 678-679 was to identify the proceedings as civil proceedings.

In the Republic of Seychelles the legislative objectives of the POCA were set out in the Bill which reads as follows -

This Bill seeks to put in place a regime of civil confiscation which will provide a statutory process whereby the benefits from criminal conduct will be identified in a court process and then ultimately transferred to the Republic of Seychelles on the civil standard of proof as set out in the Bill.

Referring further to the objectives of the Bill it is to be noted that -

The Bill envisages a civil process in the Supreme Court whereby the FIU. will be responsible for the of civil confiscation cases and will be the applicant in court.

Further section 9(3) of the POCA reads as follows -

The standard of proof required to determine any question arising under this Act, other than proceedings for an offence contrary to section 23 shall be that applicable to civil proceedings.

Therefore in all inter partes applications under this Act, the required standard of proof would be on a balance of probabilities, which further supports the fact that the proceedings under this Act are essentially intended to be civil in nature and character.

Considering the aforementioned factors, it is clear that the proceedings under the POCA are civil in nature and the proceedings are governed by the civil law in respect of procedure and determination.

The Seychelles Code of Civil Procedure Cap 213 recognises and provides for ex parte procedure and further ex parte applications may be made in civil litigation in instances of provisional attachment and in cases of urgency, to preserve the status quo and to ensure that a litigant would not be deprived of the fruits of his litigation. Ex parte applications are an established and recognised procedure in civil litigation not only in the Seychelles but in other jurisdictions as well. Having concluded the proceedings under the POCA are essentially civil in nature it cannot therefore be contended, that ex parte procedure under the said Act is unlawful or unconstitutional.

On the basis of the aforementioned finding that the POCA is essentially civil in nature, this court will now proceed to consider the contraventions complained of by the petitioner.

Contravention of the right to property of the petitioner

Counsel for the petitioner submitted that in this instant case there was “no link or connectivity between the property and the alleged criminal conduct” and despite there being no link or connectivity, the said order was issued which was a clear

breach of the petitioner's right to property. Counsel for the petitioner further submitted that the affidavits filed by the respondent did not contain sufficient evidence to satisfy court on a "balance of probabilities" that there were reasonable grounds to believe that the specified properties were acquired from criminal conduct.

Firstly, the said application being an ex parte application, counsel's contention that in an ex parte application the standard of proof required by an applicant seeking an interim order is on a "balance of probabilities", cannot be accepted as the question of a "balance of probabilities" does not arise at this stage, as only one party is present and heard in an ex parte application and such orders are always made on a prima facie basis. Furthermore it is relevant to mention at this stage that a judicial order made erroneously cannot be said to breach a constitutional right of a person. It is settled law that the remedy would lie in an appeal or by way of judicial revision.

In *Edmond Adeline v The Family Tribunal* Const Case No 3 of 2000, the court held that the character of judicial process and judicial decisions, does not permit challenge of any error or omission in a judgment of a court as violations of fundamental rights and that the remedy remains in a right of appeal.

In *Germaine Amesbury v The Chief Justice and ors* Const Case No 6 of 2006, a case referred to by counsel for the respondents, Perera CJ held -

As means of redress for the alleged contravention had been available to the petitioner under other law, this court cannot permit a collateral petition for redress under the Constitution to a court of co-ordinate jurisdiction.

Article 46(4) of the Constitution reads -

Where the Constitutional Court on an application under Clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available, the court may hear the application or transfer the application to the appropriate Court for grant of redress in accordance with law.

Furthermore as submitted by the Attorney-General section 3(3) of the POCA itself, provides an opportunity for the respondent or any other person claiming to have an interest in any of the property concerned of having the said interim order issued ex parte discharged or varied. It is apparent that the petitioner has not availed himself of this opportunity but instead has sought to petition this court.

For the aforementioned reasons, as collateral remedies exist and are available to the petitioner for the alleged contravention this court will not permit a petition for redress under the Constitution in respect of any alleged erroneous findings made by a trial judge. It is the duty of the petitioner to avail himself of the opportunities provided by law for redress, without circumventing those opportunities and seeking redress under the Constitution.

Counsel for the petitioner further contended that the law contained in sections 3 and 4 of the POCA, in permitting the Court to prohibit the person specified in the order

from disposing of or otherwise dealing with in whole or any part of the property, is unconstitutional as it cannot be justified under any of the limitations contained in article 26 (2) and therefore it infringes the constitutional right to property under article 26(1) which guarantees the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

Counsel however admits, that the right is subject to the limitations as may be prescribed by law and is necessary in a democratic society in the instances provided for in article 26(2) (a) to (i) but submits, that this law does not fall within any of the necessities provided for in article 26(2). More specifically counsel submitted, that the prescribed law namely the POCA limiting the right of an individual to property is not based on the prevailing necessities contained in article 26(2)(a) namely public interest nor article 26(2)(d) in respect of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime which (serious crime) counsel contended should be committed *in the Seychelles*.

He further contended that the crime committed in the instant case namely selling an embargo of heavy duty graphite to Iran was a crime which occurred in another jurisdiction and was not a serious crime within this jurisdiction and thus article 26 (2)(d) could not be considered as a limitation necessary in a democratic society to cover the forfeiture of proceeds of serious crimes committed out of this jurisdiction and thus the grounds of criminal conduct as relied on by the respondents, in terms of section 3(9)(c) of the AMLA was void.

Once again referring to the legislative objectives of the POCA as set out in the Bill, it is obvious that it was *necessary* to enact the POCA to put in place a regime of civil confiscation which would provide a statutory process whereby the *benefits from criminal conduct* would be identified in a court process and then ultimately transferred to the Republic of Seychelles. It cannot be contended that the Constitution seeks to protect the rights of parties in regard to properties which are the benefits from criminal conduct. Thus it is in the public interest that the necessary laws should be enacted in order that such proceeds or property which is the benefit from criminal conduct should be identified and forfeited or transferred to the State.

The term “benefit from criminal conduct” referred to above has the same meaning as defined in section 2 of the Anti-Money Laundering (Amendment) Act and means any money or property that is derived, obtained or realised, directly or indirectly, by any person, while the term “criminal conduct” contains the same meaning as that set out in section 3(9) of the AMLA and reads as follows -

In this Act criminal conduct means conduct which-

- (a) constitutes any act or omission against any law of the Republic punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, and/or by a fine exceeding R 50,000 and, without prejudice to the generality of the above, including the financing of terrorism as referred to in the Prevention of Terrorism Act 2004, and for the avoidance of doubt includes the offence of money laundering established by sections 3(1) and 3(1) of this Act and whether committed in the Republic or elsewhere and whether

before or after the commencement of the relevant provisions of this Act;

- (b) where the conduct occurs outside the Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs;
- (c) shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of Rs 50,000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of the relevant provisions of this Act, unless the Attorney General shall certify in writing that it should not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section; and
- (d) includes participation in such conduct, including but not limited to, aiding, abetting, assisting, attempting, counselling, conspiring, concealing or procuring the commission of such conduct.

It is apparent from the said definition of criminal conduct itself that while sections 3(9)(a) and 3(9)(b) of the AMLA state the criminal conduct must be common to Seychelles, section 3(9)(c) refers to criminal conduct in any country only. Therefore in terms of section 3(9)(c) of the AMLA it is not necessary that the criminal conduct in any country should be common to Seychelles as well.

The Attorney-General contended that the said serious crime that fell within the scope of article 26(2) was the serious crime of money laundering and the limitations prescribed by law in section 3 of the POCA arose as a necessity in regard to the confiscation of proceeds from the serious crime of money laundering which was an offence within this jurisdiction in terms of section 3(4) of the AMLA.

A serious crime is in itself defined in section 2 of the AMLA and reads as follows -

Serious Crime means any act or omission against any law of the Republic punishable by a term of imprisonment exceeding 3 years and/ or fine exceeding 50,000 whether committed in the Republic or elsewhere, and where the conduct occur outside the Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs.

Section 3(4) of the AMLA sets out that a person found guilty of money laundering is liable on conviction to a fine not exceeding R 5,000,000 or to imprisonment for a term of not exceeding 15 years or to both.

This clearly indicates the offence of money laundering falls within the definition of a serious crime within the jurisdiction of Seychelles.

Further section 3 of the AMLA defines money laundering as -

A person is guilty of money laundering if, knowing or believing that property is or represents the benefit from criminal conduct or being reckless as to whether the property is or represents such benefit, the person without lawful authority or excuse (the proof of which shall lie on him)

- a) converts, transfers or handles the property or *removes it from the Republic* [emphasis added]
- b) conceals or disguises the true nature, source, location, disposition, movement or ownership of the property or any rights with respect to it or
- c) acquires, possesses or uses the property.

It is to be noted that section 3(2) of the AMLA reads -

Removing it from the Republic shall *include* references to *removing it from another country or territory as referred to in subsection (9) (c)* and moving property within the Republic or a country or territory in preparation for or for the purpose of removing it from the Republic or the country or territory in question. [emphasis added]

Thus the very definition of money laundering includes removing it from another country or territory as envisaged in section 3(9)(c) which clearly demonstrates the extra-territorial application of the AMLA.

In *Murphy v M (G)* (supra) at para 124 the Supreme Court of Ireland held -

The issue in the present case (forfeiture under the PCA) does not raise a challenge to a valid constitutional right of property. It concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such forfeiture is not punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, *a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use.* [emphasis added]

Therefore it is clear that sections 3 and 4 of the POCA is a prescribed law necessary in a democratic society as envisaged and permitted under the limitations contained in article 26(2) of the Constitution to limit the right to property which is derived from the benefit from criminal conduct.

For the aforementioned reasons the petitioner's contention that sections 3 and 4 of

the POCA are in contravention of article 26 (1) bears no merit.

Contravention of the right to fair hearing of the petitioner

It is the petitioner's contention that sections 3, 4 and 9 of the POCA contravene articles 19(2) (b), (c), (e) and 19(7) of the Constitution.

Firstly as it has already been decided that the proceedings under the POCA are civil in nature, thus as correctly submitted by the Attorney-General, articles 19(2) (b), (c), (e) are not applicable as article 19(1) and 19(2) specifically refer to a person charged with an offence which entitles such person to the right to a fair and public hearing and articles 19 (2) (a) to (i) refer to such persons charged of an offence and are not applicable to proceedings which are essentially civil in nature. Therefore counsel for the petitioner's contention that sections 3, 4 and 9 of the POCA contravene articles 19(2) (b), (c), (e) of the Constitution bears no merit.

With regard to counsel's submission that sections 3 and 4 contravene article 19(7) of the Constitution it is to be noted that section 3(1) of the POCA reads -

When on an ex-parte application to court in that behalf by the applicant, *it appears to court* [emphasis added], on evidence, including evidence admissible by virtue of section 9 tendered by the applicant, that

The term "it appears to court" on a reading with clause 2 of the aforementioned Bill, shows the said term should be read in the context of "reasonable grounds" which appears to be, according to the objects of the Bill, the underlying principle governing orders being made under this Act. Therefore it follows that in an ex parte application, if it appears to court on reasonable grounds the person is in possession or control of specified property as mentioned in section 3(1) (a) and (b) of the POCA and the value of the property is in accordance with section 3(1)(b) of the Act, then the court could make an interim order as specified in the said section.

Further a reading of section 3(2)(a) of the POCA provides that the Court may impose such conditions and restrictions necessary or expedient in respect of the interim order issued, and section 3(2)(b) of the POCA makes it a mandatory requirement, that notice of such an ex parte order be given to the respondent in the application or any party affected by such order who may come to Court and have the said order discharged or varied. Section 3(3) of the POCA provides ample opportunity for a party aggrieved by the said order to come to Court and have the said interim order set aside.

Further the law as a control measure specifically provides that the interim order shall automatically lapse after a period of 30 days in the event of an application for an inter partes interlocutory order under section 4 of the Act not being made by the applicant.

The ex parte order made under section 3(1) of the POCA is only to be issued by Court on being satisfied that reasonable grounds exist. Further the said order is subject to such conditions and restrictions necessary as decided by the Court. It is a mandatory requirement that the said order be served on the aggrieved party unless not reasonably possible and would lapse automatically if no further steps are initiated

by the applicant. Finally the law most importantly provides ample opportunity for the aggrieved party to come to Court and be heard and have the ex parte interim order discharged or varied. Thus an analysis of section 3 reveals that even though the application is an ex parte application, the law itself provides many measures to ensure that the petitioner's right to a fair hearing is safeguarded.

Counsel for the petitioner further submitted that section 9 of the POCA limited the evidence to evidence by affidavit which he contended contravened the petitioner's right to a fair hearing. However a closer reading of both sections 3(1) and 4(1) of the POCA shows that both sections contain the phrase -

.... it appears to the court, on evidence, *including* evidence admissible by virtue of section 9 tendered by the applicant.... [emphasis added]

It is clear that neither section 3(1) nor 4(1) seeks to limit the evidence to affidavit evidence but seeks to include it together with the other evidence.

Further section 3(8) provides that oral evidence may be adduced during an application made under section 3. Thus it cannot be contended that the law limits the evidence to affidavit evidence thus contravening the right of the petitioner to a fair hearing as the law specifically provides that oral evidence may be adduced. The discretion is vested with the courts and if aggrieved by the decision of the court the remedy does not lie before the Constitutional Court.

Similarly section 4 of the POCA deals with the application for an interlocutory order made inter partes. It provides for evidence to be led by parties which includes evidence by affidavit. This section too does not seek to shut out any oral evidence being led by any party and like section 3 contains a specific provision section 4(8) which provides for oral evidence to be adduced in an application under section 4 at the discretion of court. Once again the discretion is vested with courts and if aggrieved by the decision of court, the remedy does not lie before the Constitutional Court.

Therefore the petitioner cannot seek to complain that his constitutional rights under 19(2) (b), (c), and (e) and 19(2)(7) of the Constitution have been contravened by the provisions of sections 3 and 4 of the POCA.

Contravention of article 19(4) of the Constitution

Counsel in his further material skeleton heads of argument has raised the issue that the criminal conduct which forms the basis of this case was committed prior to the coming into force of the POCA. He further states "the creation of this new offence could not be given retrospective effect by virtue of article 19(4) of the Constitution". Further on page 3 of his skeletal heads of argument, he states "the serious crime must exist first before you have proceeds from it. Proceeds received before 25 August 2008 cannot be proceeds of serious crime."

Article 19(4) of the Constitution is applicable to criminal and not to civil proceedings. Thus it is not applicable to the POCA. The property or proceeds derived from criminal conduct remain continuously "soiled" even though attempts may be made at

laundering same. The Act seeks not to punish the offender of the criminal conduct but to ensure that such soiled or tainted benefits derived from such criminal conduct are subject to scrutiny and forfeiture if necessary. Therefore although the criminal conduct may have been committed prior to the coming into effect of this piece of legislation, the proceeds and property namely the benefits derived from such criminal conduct, continue to remain soiled or tainted as it will always remain benefits from criminal conduct and thereby be subject to forfeiture, even if the legislation regarding forfeiture of such property has been enacted subsequent to the criminal conduct being committed. The emphasis should be not on the “criminal conduct” but the “benefits” derived from such criminal conduct which would always remain soiled or tainted and would be subject to forfeiture.

In *Simon Prophet v National Director of Public Prosecutions* CCT 56/05 the South African Constitutional Court held -

Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law [emphasis added]. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive.

In the case of *Walsh v Director of the Assets Recovery Agency* (supra) the Court of Appeal stated -

We do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific events as committed by the appellant. We consider that it would be open to the Agency to adduce evidence that the Appellant had no legal means of obtaining the assets without necessarily linking the claim to the particular crime.

Therefore counsel’s contention that proceeds of serious crime received before 25 August 2008 (the date the AMLA came into effect) cannot be proceeds of a serious crime as envisaged by the Act as it would be conflicting with article 19(4) of the Constitution bears no merit.

Contravention to right to equal protection before the law

Counsel for the petitioner while admitting that in certain cases in order to maintain the status quo ex parte proceedings are necessary, states that having brought such ex parte proceedings court decides “behind the back” of the party that the said property is a benefit from criminal conduct and then places a burden on the respondent to the application to rebut it. He argues that such an order should be made after inter partes proceeding and after oral evidence has been led and the right to cross-examine being given, otherwise the petitioners right to equal protection as contained in article 27 would be contravened.

It would not be necessary to once again analyse the procedure set out in section 3 of the POCA but one must keep in mind the main objective in obtaining an ex parte order under section 3(1) of the POCA would be to maintain the status quo. In order

to do so the law provides that on an ex parte application an interim order be issued by court in terms of section 3(1) of the POCA which is of a temporary nature and for the limited purpose of maintaining the status quo. As referred to earlier the law lays out many safeguards to ensure that justice prevails for both parties even though one may not be present at the time of making of the order. Therefore it cannot be said that this procedure is unconstitutional, as what is issued on an ex parte application is an interim order which is of a temporary nature as its term denotes and for limited purposes and is only issued once the applicant in the absence of the respondent, has established that reasonable grounds exist for the issue of such interim order. The law then provides that the burden shifts on the aggrieved party to satisfy the court that the said interim order should be vacated, as the reasonable grounds on which the interim order was issued are non-existent.

The next step which is for all purposes a fresh application, is for the applicant to make an inter partes application to court in terms of section 4(1) of the POCA. The court in this instance issues an interlocutory order after evidence either by way of affidavit or oral evidence in terms of subsection (8) is led in the presence of both parties as this is an inter partes application. Therefore a party cannot seek to complain that his or her rights are being infringed as he or she has been given the opportunity of being heard prior to the interlocutory order being made. At this stage a court is free to use its discretionary powers to decide on whether or not to call for oral evidence, documentary evidence, in the interest of justice and could even permit cross-examination if the necessity demands as this is an inter partes application. However such discretionary powers are vested strictly with the trial court. Once again in an inter partes application the burden is first placed on the applicant to first satisfy court in the presence of the respondent, the requisites contained in section 4(1) (a) (i) (ii) and (b) and the respondent to the application or aggrieved party is next given an opportunity to satisfy court that such an order should not be made in terms of section 4(1)(b) (i) and (ii) of the POCA. Thereafter the court if satisfied on a balance of probabilities may issue an interlocutory order in terms of 4(1)(b). Analysing the procedure it is obvious that the applicant must first establish that reasonable grounds exist for such an interlocutory order to issue before the burden shifts to the respondent to the application. The final decision of court would be based on the civil standard of proof namely balance of probabilities, this standard of proof and recognised procedure being in no way unfair or unconstitutional.

Contravention of articles 85 and 89 of the Constitution

Counsel next contended that the wording of section 3(9)(c) of the AMLA is inherently discriminatory because it leaves too much discretion in the hands of the Attorney-General and therefore leaves it to the whims and fancy of the Attorney-General, to decide without stating any controls or policies or mentioning as to when the Attorney-General will exercise such power. He states that this is a breach of articles 85 and 89 of the Constitution affecting the interest of the petitioner, as the legislature has abdicated its powers to the Attorney-General and the legislature has granted the Attorney-General a member of the executive to decide whether proceedings will be taken in respect of an act or omission.

It is pertinent at this stage to draw attention to article 76(4)(a) and (c) of the Constitution which gives the power to the Attorney-General to institute and undertake

criminal proceedings and to discontinue same.

The Attorney-General therefore has the complete discretion and power according to article 76(4) if he “considers it desirable so to do” to institute, undertake and discontinue criminal proceedings against any person in respect of any offence alleged to have been committed by that person. The discretion is not fettered in any way and therefore counsel’s contention that controls and policies are necessary when the Attorney-General is exercising such discretionary powers is not acceptable, as the Constitution does not seek to control the powers in relation to the institution of actions by the Attorney-General in any way.

This is further supported by a reading of article 76(10) of the Constitution, which states that in the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not be subject to the direction or control of any person or authority. It is to be observed that the Attorney-General derives such powers from the Constitution itself and therefore the discretion vested with the Attorney-General in terms of section 3(9)(c) which is not to prosecute on the grounds of public interest is consistent with article 76(4) of the Constitution.

If counsel for the petitioner contends that the said article conflicts with articles 85 and 89 of the Constitution it is a recognised principle of constitutional interpretation that if such a conflict arises the “principle of harmonisation” must be applied and the entire constitution read as an intergrated whole with no one provision destroying another as held in the case of *Mtikila v Attorney-General* (1996) 1 CHRLD 11.

Therefore the power given to the Attorney-General by section 3(9)(c) cannot be said to be an abdication of the legislative functions of the National Assembly as the Attorney-General’s power to discontinue proceedings is consistent with article 76(4) and therefore the said provision cannot be said to be conflicting with any other provision of the Constitution.

On a reading of section 3(9)(c) of the AMLA it is apparent that the legal sanction to prosecute emanates from the section itself and is based on public interest and the discretion vested with the Attorney-General is only not to prosecute if it would not be in the public interest to do so. It is to be noted that the section in fact limits the discretion of the Attorney-General not to prosecute to the grounds of public interest only. Therefore it cannot be considered as a situation where wide discretion has been given to the Attorney-General to act on his whims and fancies as claimed by counsel.

When the Attorney-General in his official capacity, acts on the laws passed by the legislature, within the powers provided to him by the Constitution, it cannot be said that he is usurping the powers of the legislature nor could it be said that the legislature has abdicated its powers to the Attorney-General in any way.

Therefore counsel’s contention that section 3(9)(c) of the AMLA is inherently discriminatory because it leaves too much discretion in the hands of the Attorney-General or that the legislature has abdicated its powers to the Attorney-General and therefore violates articles 85 and 89 of the Constitution bears no merit.

For the aforementioned reasons this court holds that the claim of the petitioner that his constitutional rights have been contravened by the respondents bears no merit. The petition is accordingly dismissed. No order is made in respect of costs.

GASWAGA J: I have read in draft the judgments of my Lords FMS Egonda-Ntende CJ, and M Burhan J.

I entirely agree. I have nothing useful to add.

Record: Constitutional Case No 1 of 2009