HIGH COURT OF KIRIBATI

Civil Case Nº 23/2019

ATTORNEY-GENERAL *Applicant*

v

EF *Respondent*

Tewia Tawita for the applicant
Kiata Kabure for the respondent

Date of order: 3 May 2019

ORDER

[1] The applicant seeks an order for the continued detention of seized currency pursuant to section 117(2) of the *Proceeds of Crime Act* 2003 ("the Act"). The application is opposed by the respondent.

[2] This application was originally filed in the name of the Republic as a miscellaneous application. This approach is flawed for 2 reasons. Proceedings cannot be commenced by miscellaneous application – a substantive cause or action must already be under way before such an application can be made. Under the *High Court (Civil Procedure) Rules* 1964, civil proceedings are commenced either by writ of summons (Order 2) or by originating summons (Order 57). This matter should have been commenced by originating summons. Furthermore, it is inappropriate for the Republic to be the named applicant – it should be the Attorney-General, under section 13 of the *Proceedings By and Against the Republic Ordinance* (Cap.76A).

[3] For present purposes I am prepared to treat this matter as having been commenced by originating summons with the Attorney-General as applicant.

[4] It is perhaps helpful to start by setting out in full sections 116 and 117 of the Act, which appear in Part 7, "Suspicious currency movements":

> **116 Seizure and detention of suspicious imports or exports of currency**
>
> An authorised officer may seize and detain any currency that is brought into or taken out of Kiribati if—
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> (a) the amount is not less than the equivalent of $5000 (or a higher amount prescribed by regulation for this paragraph); and

(b) there are reasonable grounds for suspecting that it is—

(i) derived from a serious offence; or

(ii) intended by any person for use in the commission of a serious offence.

117 Detention of seized currency

(1) Currency detained under section 116 may not be detained for more than 24 hours after it is seized.

(2) However, the Court may order its continued detention for a period not exceeding 3 months from the day it is seized, upon being satisfied that—

(a) there are reasonable grounds for the suspicion mentioned in section 116(b); and

(b) its continued detention is justified while—

(i) its origin or derivation is further investigated; or

(ii) consideration is given to the institution (in Kiribati or elsewhere) of criminal proceedings against a person for an offence with which the currency is connected.

(3) The Court may subsequently order the continued detention of the currency if satisfied of the matters mentioned in subsections (2)(a) and (b), but the total period of detention may not exceed 2 years from the date of the first order made under subsection (2).

[5] Section 107(2)(b) of the Act obliges financial institutions to report suspicious transactions to the Financial Intelligence Unit (FIU) of the Kiribati Police Service. According to an affidavit from Senior Constable Bunaua Abaua from the FIU, a suspicious transaction report was received from the ANZ Bank on 18 April, concerning a request from the respondent for a telegraphic transfer of $58,828.30 to a Hong Kong account. Senior Constable Bunaua instructed the bank to "detain" the funds, purportedly in exercise of her powers as an authorised officer under section 116. It is not clear from her affidavit as to when the instruction was given, but she does say that it was "[u]pon receiving the report", so I will assume that it was given on or shortly after 18 April.

[6] Section 117(1) of the Act only authorises detention of currency seized under section 116 for 24 hours from the time of seizure. An application to the High Court under section 117(2) to order the continued detention of the currency must therefore be brought within 24 hours of the seizure, otherwise the detention of the currency beyond that period is *prima facie* unauthorised. This application was not filed until 30 April, long after expiration of the period provided for under section 117(1). Even if the instruction from the FIU to the bank was lawful, the bank would not have been able to continue to refuse to process the transfer application beyond the 24-hour period without a court order extending the time.

[7] That is not the only problem confronting this application. There is a more fundamental reason for why, in my view, it must fail. Section 3(1) of the Act defines currency as "coin and paper money that is legal tender in its country

of issue". It is clear therefore that the seizure power conferred upon an authorised officer by section 116 relates only to physical cash that is being imported or exported. I do not see how the section can possibly relate to an electronic transfer of funds. Where money is held in a bank account, there is no physical cash to seize and nothing to detain. Furthermore, currency can only be detained by an authorised officer – there is nothing to suggest that the bank is an authorised officer, and the Act does not permit the detention of currency by someone other than an authorised officer.

[8] Counsel for the applicant referred me to 2 orders of the Chief Justice in *Republic* v *Kwok Hou Ng*,[1] where a proposed telegraphic transfer of almost $900,000, together with $600,000 held by the bank on deposit, was ordered to be "detained" by the bank in purported exercise of the Court's power under section 117 of the Act. With respect to the Chief Justice, it is difficult to see how such an order is justified. It appears that counsel for the respondent in that case did not challenge the power of the Court to make the orders sought, so that the issues discussed above were not squarely before the Court.

[9] The rationale for confining the powers of seizure and detention to physical cash is easily understood – it is very difficult for law enforcement agencies to establish the provenance of cash, or to track it 'in the wild' (as it were). This is not so much of a problem where the funds are being moved through recognised financial institutions. It is not necessary to prevent the movement of those funds in order to investigate whether the money is in any way tainted. In any event, if it is considered essential to prevent the transfer of funds that are suspected of being tainted, the applicant has the option of applying for a restraining order under section 56 of the Act. To my knowledge she has not done that.

[10] All of the above matters were raised with counsel in chambers. At the same time I informed counsel that I know the respondent very well, such that I would ordinarily recuse myself from the hearing of any case in which they are involved. However, given the urgency of the matter, and the absence of the Chief Justice (who is sitting on Kiritimati this week), I wanted to give counsel for the applicant an opportunity to consider her position. It was agreed that, if she wanted to proceed, she would inform the Court no later than 4:15pm, in which case the file would be referred to the Chief Justice on Kiritimati for determination. Late this afternoon counsel informed my clerk that she wished to withdraw the application.

[11] The application having been withdrawn, the matter is struck out. Any direction to the bank to refrain from processing the subject application for

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[1] Unreported decisions of the High Court: Criminal Case 30/2018, dated 7 June 2018; and Miscellaneous Applications 144/2018 and 9/2019, dated 27 March 2019.

transfer of funds is no longer of any effect. A copy of this order is to be provided to the bank for its information and any necessary action.

[12] Given the nature of this case, any publication of this order must not reveal the identity of the respondent. The version of this order that will be released to the public will use initials to identify them. Any publication that reveals (or tends to reveal) the identity of the respondent may result in the publisher being liable for contempt of this Court.

Lambourne J
Judge of the High Court