IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA.
[CRIMINAL APPLICATION NO: WA-44–143–06/2019]

In the matter of section 56(1) and section 61(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [*Act 613*];

And

In the matter of section 25 of the Courts of Judicature Act 1964 [*Act 91*].

BETWEEN

PUBLIC PROSECUTOR ... APPLICANT

AND

1. **SARAWAK UNITED PEOPLE'S PARTY**
   (No. PPM-001-13-06121959)

2. **SIM KUI HIAN**
   (NRIC No. 650818-13-5759)

3. **RICHARD RIOT AK JAEM**
   (NRIC No. 511201-13-5089)

4. **SEBASTIAN TING CHIEW YEW**
   (NRIC No. 550124-13-5529)

5. DING KUONG HING
(NRIC No. 550120-13-5193)
(as the office bearers of Sarawak United People's Party Registration No. PPM-001-13-06121959) **... RESPONDENT**

JUDGMENT

Introduction

[1] This is an application by the Public Prosecutor under section 56 of the AMLATFPUAA for an order to forfeit from the respondent the sum of RM188,138.26 together with all the accrued interest in the 1st respondent's Hong Leong Bank Berhad Account No. 01600203488. A freezing order dated 25.06.2018 was issued against the respondent's account and the account was seized on 21.09.2018.

[2] On 12.07.2019, the Court allowed for the notice to be published in the *Gazette*. The notice was published in the *Gazette* vide P.U.(B) 13535/2019. No third party has come forward to stake any claim against the seized property.

Brief background facts

The information

[3] The Malaysian Anti-Corruption Commission ("MACC") received information that the former Prime Minister, Dato' Sri Mohd Najib bin Abdul Razak ("DSNR") is suspected to have committed an offence under section 23 of the Malaysian Anti- Corruption Commission Act 2009 ("MACC Act 2009"). It involved the sum of RM3.217 billion related to 1Malaysia Development Berhad ("1MDB")

which has been remitted into various accounts of DSNR at AmPrivate Banking AmBank (M) Berhad. A report was then lodged vide MACC Report No. 0203/2018 on 17.05.2018.

1Malaysia Development Berhad ("1MDB")

[4] 1MDB is a sovereign wealth fund and is owned by the Federal Government through the Minister of Finance (Incorporated) ("MoF Inc."). 1MDB came directly under the purview of DSNR as the Minister of Finance. DSNR also held the position as the Chairman of the Board of Advisors for 1MDB.

Investments and business ventures

[5] 1MDB entered into various investments and business ventures as follows:

(a) 1MDB-Petrosaudi Limited ("1MDB-Petrosaudi"),

(b) a joint venture with Petrosaudi Holding (Cayman) Limited ("Petrosaudi Cayman"),

(c) a joint venture with Aabar Investment PJS ("Aabar"),

(d) the acquisition of Tanjong Energy Holdings Sdn Bhd ("Tanjong Energy"), and

(e) the acquisition of Mastika Lagenda Sdn Bhd ("Mastika Lagenda").

The investments and business ventures of 1MDB resulted in the following events:

The 1MDB-Petrosaudi in a joint venture with PetroSaudi International Limited of the Saudi Arabia

[6] Under this joint venture, the sum of USD1 billion was to be paid into the account of 1MDB-Petrosaudi at JP Morgan (Suisse) SA. However, the following events had instead transpired:

(a) 1MDB only transferred USD300 million into the account of 1MDB-Petrosaudi at JP Morgan (Suisse) SA and the balance sum of USD700 million was instead transferred into the account of one Good Star Limited ("Good Star") at the RBS Coutts Bank Limited, Switzerland,

(b) an additional loan of RM1 billion (equivalent to USD330 million) to 1MDB-Petrosaudi was approved by 1MDB through the subscription of "Murabaha Notes" in exchange of a 40% equity for 1MDB in 1MDB- Petrosaudi,

(c) there were 4 transfers of funds for the total sum of USD330 million to Good Star's account at RBS Coutts Bank Limited between 20.05.2011 and 25.10.2011,

(d) between 18.02.2011 and 10.06.2011, the sums of USD12.5 million and USD12 million were transferred from Good Star's account to the joint account of Prince Faisal bin Turki Al-Saud and Prince Saud bin Abdulaziz Al-Saud at the Riyad Bank, Riyadh, Saudi Arabia ("Riyad Bank Account"),

(e) on 24.02.2011 the sum of USD10 million (equivalent to RM30,449,929.97) was transferred from the Riyad Bank Account into the account of DSNR at AmPrivate Banking Account No. 2112022009694 ("First Account"), and

(f) on 14.06.2011 the sum of USD10 million (equivalent to RM30,179,909.46) was transferred from the Riyad Bank Account into the First Account.

The joint venture with Aabar

[7] The joint venture with Aabar was named Abu Dhabi Malaysia Investment Company (ADMIC). Pursuant to the joint venture agreement, each party was required to make a capital injection of USD3 billion into ADMIC. For this purpose, 1MDB incorporated 1MDB Global Investment Limited ("1MDB GIL") to issue international bonds for USD3 billion with a letter of support from the Government of Malaysia.

[8] Goldman Sachs International ("Goldman Sachs") was appointed to arrange for the issuance of the bonds. 1MDB GIL opened an account at the BSI Bank in Lugano, Switzerland ("BSI Bank") and later, 1MDB issued the international bonds for USD3 billion. However, after issuance of the bonds there was no capital injection into ADMIC made by Aabar. The joint venture too did not kick-off and was not operational.

[9] Pursuant to the issuance of the bonds, 1MDB GIL received the total of USD2,721,000,000.00 in its account at the BSI Bank. None of this money was used for the purposes of the approved joint venture. Instead, 1MDB GIL made a number of transactions for investment purposes to Cistenique Investment Fund, Enterprise Emerging Market Fund, Devonshire Capitol Growth Fund, Tanore Finance Corporation ("Tanore"), and Granton Property Holding Limited.

[10] Between 22.03.2013 and 10.04.2013, DSNR received transfers from Tanore for the total sum of RM2,081,476,926.00 in the First Account through 9 transactions.

The acquisition of two power producers, Tanjong Energy Holdings Sdn Bhd. and Mastika Lagenda Sdn Bhd.

[11] The acquisition of Tanjong Energy was carried out through a special purpose vehicle ("SPV"), namely, 1MDB Energy Limited ("1MEL"). 1MEL is wholly owned by 1MDB. After factoring in the debts, Tanjong Energy was eventually acquired at RM8.5 billion. Goldman Sachs was appointed as the bookrunner and arranger to prepare proposals to fund the acquisition.

[12] Goldman Sachs proposed for the acquisition to be financed through —

(a) a bridging loan of RM6.17 billion jointly facilitated by Maybank Berhad and RHB Bank Berhad, and

(b) the issuance of USD bonds for USD1.75 billion through 1MDB Labuan with a coupon rate of 5.99% per annum redeemable in the year 2022.

[13] Mastika Lagenda was acquired for RM2.75 billion. The acquisition was done through another wholly-owned SPV, 1MDB Energy (Langat) Limited ("1MELL"). 1MDB entered into an agreement to acquire the power asset of Genting Sanyen Power Sdn Bhd at RM2.75 billion and pursuant to the Private Placement Memorandum, 1MDB will issue guaranteed notes in the sum of USD1.75 billion by private placement with Goldman Sachs. The coupon rate for the guaranteed notes was 5.75% per annum redeemable in the year 2022.

[14] Pursuant to the arrangement, the net proceeds from the guaranteed notes after deducting the fees of Goldman Sachs, commission and expenses, were to be partly used to finance the

acquisition of Mastika Lagenda and partly for general corporate purposes.

[15] For the acquisition of these two power producers, 1MDB through 1MEL and 1MELL has issued bonds to the tune of USD3.5 billion. From these business ventures, the following transactions had taken place:

(a) on 22.05.2012, the sum of USD576,943,490.00 was transferred from the account of 1MEL at Falcon Private Bank Limited, Hong Kong ("Falcon Bank") to the account of Aabar Investment PJS Limited ("Aabar BVI") at BSI AG, Lugano, Switzerland ("BSI Bank"),

(b) on 19.10.2012, the sum of USD790,354,855.00 was transferred from the account of 1MELL at Falcon Bank to Aabar BVI's account at BSI Bank,

(c) between 25.05.2012 and 14.12.2012 Aabar BVI transferred the total sum of USD637 million from its BSI Bank to the account of Blackstone Asia Real Estate Partners at the Standard Chartered Bank, Singapore under the name of one Tan Kim Loong ("Blackstone Standard Chartered Account"),

(d) on 31.10.2012, DSNR received from Blackstone Standard Chartered Account the sum of USD5 million (equivalent to RM15,149,963.64) in the First Account, and

(e) on 20.11.2012, DSNR received from Blackstone Standard Chartered Account the sum of USD25 million (equivalent to RM60,599,963.64) in the First Account.

Loans from Deutsche Bank AG

[16] In the year 2014, 1MDB planned to carry out an initial public offering ("IPO") of 1MDB Energy Group in Bursa Malaysia. The object was to redeem the 49% equity of Aabar ("Aabar Options") in each 1MEL and 1MELL during the acquisition phase of the two power producers. 1MDB agreed to terminate the Aabar Options and the bridge loan facility made by 1MDB Energy Holdings Limited from Deutsche Bank AG amounting to not more than USD300,000,000.00 so that the IPO could proceed as planned.

[17] On 28.05.2014, 1MEHL made a loan of USD250 million from Deutsche Bank AG and eventually received USD239,939,970.00. That money was remitted into the account of 1MDB Energy Holdings Limited at Falcon Bank. On 01.09.2014, 1MEHL made another loan of USD975,000,000.00 from Deutsche Bank AG to repay the earlier USD250 million loan and to cover the shortfall in payment for the termination of the Aabar Options. After receiving the money from 1MEHL, Aabar made a number of money transfers to Affinity Equity International Partners Limited and Vista Equity International Partners Limited.

[18] Between June and December 2014, DSNR received the total sum of RM49,930,985.70 in his account at AmPrivate Banking Account No. 2112022011880 ("Second Account").

The money received by DSNR in his account

[19] Chronologically, DSNR received the following monies in his account:

(a) USD10 million (equivalent to RM30,449,929.97) in the First Account on 24.02.2011,

(b) USD10 million (equivalent to RM30,179,909.46) in the First Account on 14.06.2011,

(c) USD5 million (equivalent to RM15,149,963.64) in the First Account on 31.10.2012,

(d) USD25 million (equivalent to RM60,599,963.64) in the First Account on 20.11.2012,

(e) the total of RM2,081,476,926.00 in the First Account between 22.03.2013 and 10.04.2013, and

(f) the total of RM49,930,985.70 in the Second Account between June and December 2014.

[20] Investigations by MACC Superintendent Wong Yee Nee shows—

(a) that the following transfer of funds took place from the First Account to the Second Account:

(i) RM150,000,000.00 on 27.08.2013, and

(ii) RM12,436,711.87 on 30.08.2013.

(b) that the following transfer of funds took place from the Second Account to DSNR's current account at AmIslamic Bank Berhad Account No. 2112022011898 ("Third Account"):

(i) RM25,000,000.00 on 27.08.2013,

(ii) RM20,000,000.00 on 23.01.2014,

(iii) RM10,000,000.00 on 17.03.2014,

(iv) RM10,000,000.00 on 26.03.2014,

(v) RM2,000,000.00 on 19.05.2014,

(vi) RM1,000,000.00 on 23.06.2014,

(vii) RM10,000,000.00 on 08.07.2014,

(viii) RM1,000,000.00 on 23.07.2014,

(ix) RM5,000,000.00 on 23.10.2014,

(x) RM5,000,000.00 on 13.11.2014,

(xi) RM3,000,000.00 on 04.12.2014, and

(xii) RM6,000,000.00 on 11.12.2014.

(c) that the following transfer of funds took place from the Second Account to DSNR's current account at AmIslamic Bank Berhad Account No. 2112022011906 ("Fourth Account"):

(i) RM75,000,000.00 on 27.08.2013,

(ii) RM20,000,000.00 on 23.01.2014,

(iii) RM10,000,000.00 on 19.05.2014,

(iv) RM2,000,000.00 on 23.06.2014,

(v) RM2,000,000.00 on 23.07.2014,

(vi) RM10,000,000.00 on 08.07.2014,

(vii) RM15,000,000.00 on 23.10.2014,

(viii) RM5,000,000.00 on 24.11.2014,

(ix) RM3,300,000.00 on 13.01.2015,

(x) RM1,000,000.00 on 15.01.2015,

(xi) RM10,000,000.00 on 10.02.2015, and

(xii) RM1,500,000.00 on 05.02.2015.

The money received by the 1st respondent in its account

[21] The 1st respondent was registered as a political party on 12.06.1959 under section 5 of the Societies Ordinance 1957. The 2nd respondent is the President, the 3rd respondent is the Deputy President, the 4th respondent is the Secretary-General and the 5th respondent is the Treasurer of the 1st respondent. Investigations by the I.O. AMLATFPUAA reveals that the 1st respondent received the total sum of RM1 million in its Hong Leong Bank Berhad Account No. 01600203488 vide two cheques issued from the First Account of DSNR. They are —

(a) AmIslamic Bank Berhad Cheque No. 572001 dated 09.02.2012 for the sum of RM500,000.00, and

(b) AmIslamic Bank Berhad Cheque No. 571968 dated 25.02.2013 for the sum of RM500,000.00.

After the 1st respondent's Hong Leong Bank Berhad account was frozen, the account balance stands at RM188,138.26 as at 13.05.2019.

Subject matter of the application

[22] The subject matter of the present application is the sum of RM188,138.26 and all its accrued interest in the 1st respondent's Hong Leong Bank Berhad Account No. 01600203488 of the Electra House branch in Kuching, Sarawak.

The affidavits

[23] The affidavits filed for and against the application are as follows:

(a) "Afidavit Sokongan" affirmed on 18.06.2019 by Allan Suman Pillai (Enclosure 2) for and on behalf of the applicant,

(b) "Afidavit" affirmed on 18.06.2019 by Nur Aida binti Arifin (Enclosure 3) for and on behalf of the applicant,

(c) "Afidavit" affirmed on 18.06.2019 by Sekhar a/l Mariappan (Enclosure 6) for and on behalf of the applicant,

(d) "Afidavit Jawapan Responden" affirmed on 26.07.2019 by Lim Kwang Sze @ Lim Kheng Sze (Enclosure 11) for and on behalf of the 1st respondent,

(e) "Afidavit Jawapan Responden" affirmed on 26.07.2019 by Lim Kwang Sze @ Lim Kheng Sze (Enclosure 12) for and on behalf of the 1st respondent,

(f) "Afidavit Balasan Pemohon" affirmed on 21.08.2019 by Allan Suman Pillai (Enclosure 13) for and on behalf of the applicant,

(g) "Afidavit Balasan Pemohon" affirmed on 21.08.2019 by Nur Aida binti Arifin (Enclosure 14) for and on behalf of the applicant, and

(h) "Afidavit Balasan Pemohon" affirmed on 21.08.2019 by Sekhar a/l Mariappan (Enclosure 15) for and on behalf of the applicant.

Brief deliberations

Brief contention of the applicant

[24] In support of the application for forfeiture, the contention of the learned DPP may be summarized as follows:

(a) there is sufficient evidence to show the commission of an offence by DSNR under section 23 of the MACC Act 2009 and receipt of gratification by DSNR in the First Account as well as his other personal accounts;

(b) the offence under section 23 of the MACC Act 2009 falls under the category of "serious offence" as defined under section 3(1) of the AMLATFPUAA,

(c) the 1st respondent received from DSNR the total sum of RM1 million in two cheques which were issued from the First Account of DSNR and this fact was never disputed by the respondents,

(d) both the cheques for the total sum of RM1 million were remitted into the 1st respondent's account at the Hong Leong Bank Berhad and when the account was frozen and seized, the account balance stood at RM188,138.26,

(e) the sum of RM188,138.26 in the account of the 1st respondent at the Hong Leong Bank Berhad is the proceeds of an unlawful activity as it originated from the First Account of DSNR,

(f) it was not shown in the affidavits of the respondents that the account of the 1st respondent was ever audited at least once a year to ascertain whether the political funds it received originated from lawful sources,

(g) the onus lies on the 1st respondent to prove that the RM1 million it received from DSNR has been expended in its ordinary course and that there was nothing out of the ordinary,

(h) even if the 1st respondent is able to show that the seized sum of RM188,138.26 in its account originated from lawful sources, that sum has intermingled with the proceeds from an unlawful activity and thus fits the definition of "proceeds of an unlawful activity" pursuant to section 3(1) of the AMLATFPUAA,

(i) this Court should issue a pecuniary penalty order pursuant to section 59 of the AMLATFPUAA against the 1st respondent to recoup the sums of money which has been expended,

(j) the respondents are not *bone fide* third parties as envisaged by section 61 of the AMLATFPUAA to enable them to claim the seized sum of RM188,138.26 and further, they have failed to prove the conjunctive conditions under paragraphs *(a)* to *(e)* of section 61(4) of the AMLATFPUAA to have the money returned, and

(k) DSNR himself did not affirm any affidavit to dispute the applicant's averment that the sum of RM1 million donated to the 1st respondent is the proceeds of an unlawful activity.

Brief contention of the respondents

[25] In resisting the application, the contention of the respondents may be summarized as follows:

(a) the 1st respondent received the total sum of RM1 million from DSNR vide the two cheques dated 09.02.2012 and 25.02.2013 respectively, at a time when the controversy of 1MDB has yet to surface. As such there was no reasonable basis then for the 1st respondent to be concerned let alone reasonably harbour any suspicion as to whether the funds originated from the proceeds of an unlawful activity,

(b) the two cheques received by the 1st respondent were issued by a local bank and once cleared into its account the 1st respondent is entitled to assume that whatever rules and regulations in that regard as may be set or prescribed by the Central Bank of Malaysia must have been duly complied with,

(c) it is natural for the 1st respondent to receive donations in its capacity as a political party and being a component of the Barisan Nasional, a donation by DSNR as the head is perfectly normal,

(d) when the factual circumstances relating to the receipt of the sum of RM1 million from DSNR is viewed objectively, the 1st respondent did not in any manner conduct itself as described in paragraph *(a)* or *(b)* of section 4(2) of the AMLATFPUAA,

(e) the charges against DSNR has yet to be proved and as such it is premature for the applicant to allege that the two cheques originated from the proceeds of an unlawful activity, and

(f) whatever monies in the 1st respondent's account which could be traced back to the two impugned cheques have already been fully expended and exhausted.

Analysis and findings

[26] The right to property is guaranteed under Article 13(1) of the Federal Constitution. Admittedly, it is by no means absolute and may only be subjugated in accordance with constitutionally valid law. (See: *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 FC; [2020] 5 MLJ 277; [2020] 5 MLRA 636). The AMLATFPUAA is one such laws and since the law touches on one of the constitutionally guaranteed rights, it must be strictly followed in that regard before that right may be taken away. (See: *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47 SC; [1994] 3 MLJ 285; [1994] 1 MLRA 375; [1994] 3 AMR 2047).

[27] Section 56 of the AMLATFPUAA deals with forfeiture of property in cases where there is no prosecution or conviction for a money laundering offence or a terrorism financing offence. Subsection (1) deals with the circumstances under which an application may be made by the Public Prosecutor to the High Court to forfeit any property seized under the Act. Subsection (2) deals with the circumstances under which a judge may order for the seized property to be forfeited.

[28] Other than the requirement under paragraph *(b)* of section 56(2) of the Act for the judge to determine that there is no purchaser in good faith for valuable consideration in respect of the seized property, the requirements under paragraphs *(a)* to *(d)* of section 56(1) are the same as the ones under subparagraphs (i) to (iv) of section 56(2)*(a)*. Each requirement is disjunctive by reason of the conjunction "or" appearing before the last requirement. (See: *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517 CA; [1999] 1 MLJ 593; [1999] 1 MLRA 127, *Mary Colete John v. South East Asia Insurance Bhd* [2010] 8 CLJ 129 FC; [2010] 6 MLJ 733; [2012] 6 MLRA 89; [2010] 6 AMR 785).

Whether there is a prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence

[29] An application under section 56 of the AMLATFPUAA may only be made by the Public Prosecutor if there is no prosecution or conviction under section 4(1) of the AMLATFPUAA or of a terrorism financing offence in respect of the seized money. In the present application, the applicant at paragraph 9 of Enclosure 2 made averments to that effect. This is not disputed by the respondents. In this regard, I find that this condition under section 56(1) of the AMLATFPUAA has been fulfilled.

Whether the application is made within the prescribed time

[30] Section 56 prescribes the period within which the application for forfeiture may be made, namely before the expiration of the period of 12 months from the date of the seizure or from the date of the freezing order. Failure of the Public Prosecutor to act within that 12 months period necessitates the release of the seized property. (See: *Raqeem Rizqin Enterprise & Yang Lain lwn. Ketua Polis Negara & Satu Lagi* [2019] 8 CLJ 41 FC; [2019] 5 MLJ 693; [2019] 5 MLRA 475).

[31] In the present application, a freezing order was issued and served on 25.06.2018 whereas the application was filed on 19.06.2019. In this regard, I find that the application has been made within the period prescribed by section 56(1) of the AMLATFPUAA.

Publication of third party notice in the Gazette

[32] Section 56 of the AMLATFPUAA is preceded in subsection (1) by the requirement that section 61 be complied with. A reading of section 61 of the AMLATFPUAA shows that subsection (2) makes it

mandatory for a notice to be published in the *Gazette* calling upon any third party who claims to have an interest in the seized property to attend court.

[33] In this regard, His Lordship Ab Karim Ab Jalil JCA in delivering the judgment of the Court of Appeal in *PP lwn. Taiko Fertiliser & Yang Lain* [2019] 4 CLJ 480 CA; [2019] MLJU 88; [2019] MLRAU 36, held, *inter alia,* as follows:

> "(1) Based on the provisions of ss. 56(1) and 61(2) of the AMLATFPUA, it is clear that the use of the mechanism under s. 56, for the issuance of the forfeiture order by the trial judge against the properties in question, must first make way for s. 61(2). This proposition is made appropriate with the use of the phrase 'Subject to s. 61...' at the beginning of s. 56(1). The phrase 'Subject to s. 61...' under s. 56(1) refers to s. 61 as a whole and not s. 61(2) only. The entire s. 61, specifically s. 61(2), must be given priority. The validity of this interpretation is further fortified by the use of the phrase '... the judge to whom an application is made under... s. 56(1) shall cause to be published a notice in the *Gazette*...' in s. 61(2). The use of the word 'shall' in s. 61(2) makes it a requirement that must be mandatorily complied with before any order of forfeiture under s. 56 could be made.".

[34] At prayer (b) of the Notice of Motion, the applicant prays for a third party notice pursuant to section 61(2) of the AMLATFPUAA to be published in the *Gazette* to be allowed. When the matter was specifically fixed for hearing of this prayer on 12.07.2019, the 1st respondent did not raise any objections. The Court accordingly allowed prayer (b) for publication of the third party notice in the *Gazette*. The third party notice was later published in the *Gazette* vide P.U.(B) 13535/2019. In this regard, I find that the applicant has

satisfied the mandatory requirement under section 61(2) of the AMLATFPUAA.

[35] After publication in the *Gazette* of the third party notice, no third party came forward to stake any claim against the seized money.

Whether the applicant has satisfied the necessary conditions for the property to be forfeited

[36] In order to succeed in an application made under section 56(1) of the AMLATFPUAA, the court must be satisfied that the seized property is one which falls under any of the disjunctive categories mentioned in subparagraphs (i) to (iv) of section 56(2)*(a)*. Additionally, the court must also be satisfied that there is no purchaser in good faith for valuable consideration in respect of the seized property. (See: Section 56(2)*(b)* of the AMLATFPUAA).

[37] In its affidavits, the applicant appears to suggest that the application is made on dual grounds, namely that the seized money is the subject matter or evidence relating to the commission of an offence under section 4(1) and that the seized money is the proceeds of an unlawful activity. This is apparent from a reading of paragraphs 10 and 11.6 of Enclosure 2 and paragraph 15 of Enclosure 6 which seem to suggest that the application is based on both paragraphs *(a)* and *(c)* of section 56(1) of the AMLATFPUAA.

[38] A glance at the intitulement for this Notice of Motion did not clear the air. In the Notice of Motion, the applicant simply state in the intitulement that the application relates to section 56(1) of the AMLATFPUAA and section 25 of the Courts of Judicature Act 1964. There is no specificity as to which particular paragraph of section 56(1) of the AMLATFPUAA that the applicant was relying on.

[39] It is a salutary practice for a party to be precise in his application. It sends a clear message to the court that he knows exactly what he is doing. More importantly, it is the duty of DPPs and lawyers alike, as officers of the court, to ensure that the correct provisions of the law are immediately brought to the attention of the court at the onset. A wrongly cited or unclear intitulement would cause an embarrassment and set the adverse party on a completely different tone when responding to the application.

[40] In this context, His Lordship Abdul Wahab Patail JCA in his majority judgment in *Score Option Sdn Bhd & Anor v. Duar Tuan Kiat & Ors* [2012] 1 LNS 812 CA; [2013] 5 MLJ 716; [2013] 4 MLRA 319, said "It is incumbent upon a party to set out the intitulements in clear and unambiguous terms and not leave it to the court to make a preference." And in *Chong Siew Choong v. Public Prosecutor* [1996] 2 CLJ 823; [1996] 5 MLJ 65; [1996] 2 MLRH 339, His Lordship Abdul Malik Ishak J held, *inter alia*, as follows:

> "[3] Just like originating summonses that have to be intituled, so too would miscellaneous criminal applications. Such applications require an intitulement which must state, *with sufficient particularity*, the statute or sections of the law under which the Court is being moved failing which the applications were liable to be dismissed.".

[Emphasis added]

[41] Upon reading the written submissions filed by the learned DPP, it became clear that the applicant is actually contending that the seized money is the proceeds of an unlawful activity thereby bringing the application within paragraph *(c)* of section 56(1) of the AMLATFPUAA.

Proceeds of an unlawful activity

[42] The expression "proceeds of an unlawful activity" is defined in section 3 of the AMLATFPUAA as follows:

> "Interpretation
>
> 3. (1) In this Act, unless the context otherwise requires—
>
> "proceeds of an unlawful activity" means any property, or any economic advantage or economic gain from such property, within or outside Malaysia —
>
> *(a)* which is wholly or partly —
>
> (i) derived or obtained, directly or indirectly, by any person from any unlawful activity;
>
> (ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or
>
> (iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or
>
> *(b)* which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph *(a)*(i), (ii) or (iii), can be

reasonably believed to be property falling within the scope of subparagraph *(a)*(i), (ii) or (iii);".

[43] Although in her written submissions the learned DPP refers to the definition of the expression "proceeds of an unlawful activity" under section 3 of the AMLATFPUAA, the learned DPP did not single out exactly under which particular part of the definition the applicant seeks to anchor its application on. It is by no means a plain definition. It has many limbs and different subcategories.

[44] When the averments of facts contained in the affidavits of the applicant in support of the application are considered in light of the definition, it can reasonably be said that the applicant is in fact referring to paragraph *(a)*(i) of the definition. In the context of paragraph *(a)*(i) of the definition, the term "proceeds of an unlawful activity" simply means any property within or outside Malaysia which is obtained from any unlawful activity. "Unlawful activity" in turn is defined as any activity which constitutes a serious offence or one which is of such a nature or occurs in such a circumstance that lead to the commission of a serious offence. (See: Section 3 of the AMLATFPUAA).

[45] Thus, in order to determine whether the seized property is the proceeds of an unlawful activity, a determination must first be made as to whether, on the balance of probabilities, there is any evidence to show the commission of a serious offence as a predicate. This determination is made on the balance of probabilities. (See: Section 56(4) of the AMLATFPUAA, *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305 FC; [2018] 2 MLJ 4017; [2018] 1 MLRA 357).

The predicate offence

[46] It is the applicant's case that the predicate offence which forms the basis for the serious offence and consequently the present

application for forfeiture, is the offence of using office or position for gratification under section 23(1) of the MACC Act 2009. The ingredients of the offence under section 23(1) of the MACC Act 2009 are as follows:

(a) the accused is officer of a public body; and

(b) the accused uses his office or position for any gratification, whether for himself, his relative or associate.

[47] The fact that at the material time DSNR was an "officer of a public body" as defined under section 3 of the Act is not in dispute. He was the Prime Minister and the Minister of Finance. The facts as disclosed by the affidavits filed on behalf of the applicant shows that there were various remittances made into the First Account, the Second Account, the Third Account and the Fourth Account of DSNR. This is sufficient to show that DSNR received gratification as defined under section 3 of the MACC Act 2009.

[48] The rebuttable presumption under section 23(2) of the MACC Act 2009 requires evidence to show that the impugned decisions of 1MDB were actuated by certain interests of DSNR. It is discerned from the affidavits of the applicant that the interests of DSNR in the impugned decisions of 1MDB are found in the following instances:

(a) the 1MDB-Petrosaudi joint venture entered into on 26.09.2009 saw the following monetary transactions ultimately took place:

(i) the receipt of USD10 million (equivalent to RM30,449,929.97) in the First Account on 24.02.2011, and

(ii) the receipt of USD10 million (equivalent to RM30,179,909.46) in the First Account on 14.06.2011,

(b) the acquisition of Tanjong Energy had resulted in the following monetary transactions:

(i) the receipt of USD5 million (equivalent to RM15,149,963.64) in the First Account on 31.10.2012, and

(ii) the receipt of USD25 million (equivalent to RM60,599,963.64) in the First Account on 20.11.2012,

(c) the Abu Dhabi Malaysia Investment Company (ADMIC) joint venture landed the following monies in DSNR's account:

(i) the receipt of the total sum of RM2,081,476,926.00 in the First Account between 22.03.2013 and 10.04.2013,

(d) the termination of the Aabar Options and the bridge loan facility made by 1MDB Energy Holdings Limited from Deutsche Bank pursuant to the planned IPO 1MDB Energy Group in Bursa Malaysia brought about the following monetary transaction:

(i) the receipt of the total sum of RM49,930,985.70 in the Second Account between June 2014 and December 2014.

[49] In considering these averments as supported by documentary evidence exhibited, I am satisfied, on the balance of probabilities, that

the applicant has established sufficient facts to show that DSNR had pecuniary interests in the impugned decisions of 1MDB. These facts fulfil the necessary conditions to invoke the presumption under section 23(2) of the MACC Act 2009 for use of office or position for gratification. I thus find that the applicant has succeeded, on the balance of probabilities, to prove the predicate offence under section 23(1) of the MACC Act 2009.

Whether the property seized is the proceeds of an unlawful activity

[50] In the present application, it is the applicant's case that the sum of RM188,138.26 which was seized from the account of the 1st respondent and being made the subject of this application is the proceeds of an unlawful activity. In other words, the applicant is seeking for an order of forfeiture on the basis of section 56(1)*(c)* of the AMLATFPUAA. Thus, the applicant shoulders to burden of prove, on the balance of probabilities, that the sum of RM188,138.26 which is the subject of the present application has been obtained from the commission of the offence under section 23(1) of the MACC Act 2009.

[51] It is crucial for the applicant to show proof, on the balance of probabilities, that that when the freezing order was issued, the money which is the subject of the freezing order is the very proceeds of the unlawful activities, namely the proceeds of the offence under section 23(1) of the MACC Act 2009. In this context, it is not sufficient for the applicant to merely show that the sum of RM1,000,000.00 which the 1st respondent received in its Hong Leong Bank Berhad account vide AmIslamic Bank Berhad Cheque No. 572001 and AmIslamic Bank Berhad Cheque No. 57168 is the proceeds of the offence under section 23(1) of the MACC Act 2009. But it is incumbent on the applicant to show that the sum of RM188,138.26 in the 1st

respondent's account is in fact the proceeds of the unlawful activity when the freezing order was served and when the account was eventually seized. In order for the applicant to succeed in the present application, the seized sum of RM188,138.26 must not lose its character as the proceeds of an unlawful activity.

[52] In refuting the applicant's position, the 1st respondent in its affidavit (Enclosure 11) at paragraph 17 avers that the sum of RM1,000,000.00 is received from DSNR has been expended and that the sum of RM188,138.26 in its Hong Leong Bank Berhad account which was seized by the applicant is the balance of other remittances which are not related to the two impugned cheques. This is supported by Exhibit "LKS – 1".

[53] In response to this averment, the applicant in its affidavit (Enclosure 15) avers at paragraph 6 that it is for the 1st respondent to prove that the sum of RM1,000,000.00 has been expended in the ordinary course of expenditure and that there was nothing out of the ordinary in respect of those expenditures. At paragraph 7, the applicant avers that the reason why the 1st respondent managed to accumulate the account balance amounting to RM188,138.26 in its Hong Leong Bank Berhad account is attributed to the receipt of the sum of RM1,000,000.00 from DSNR. The applicant further contends that the 1st respondent's account balance is intermingled with the money received from DSNR which is the proceeds of an unlawful activity.

[54] The statement of account appended by the 1st respondent as Exhibit "LKS – 1" detailing the deposits and withdrawals from the account from the month of February 2012 to September 2014 illustrate that the 1st respondent received varying amounts of deposits other than the impugned sum. The first impugned cheque of RM500,000.00 was deposited on 13.02.2012. From the month of February 2012 to

December 2012, the amount of withdrawals exceeds RM1.2 million against the total deposit of slightly more than RM2 million. The second impugned cheque of RM500,000.00 was deposited on 04.03.2013. From the month of March 2013 to September 2013, the withdrawals were close to RM1 million against the total deposit of more than RM900,000.00.

[55] From this statement of account, I do not find that merit in the applicant's averment that the 1st respondent owes its account balance to the receipt of the sum of RM1,000,000.00 from DSNR. Even if for a moment this Court were to accede to the position taken by the applicant that the sum of RM188,138.26 in the 1st respondent's Hong Leong Bank Berhad account has intermingled with the impugned sum of RM1,000,000.00 received from DSNR, the question remains as to answered is this; Is the seized sum of RM188,138.26 consists of proceeds of an unlawful activity?

[56] It is also interesting to reflect that despite having pursued the application under paragraph *(c)* of section 56(1) of the AMLATFPUAA, the learned DPP in his oral submissions conceded that the money has already been spent when the freezing order was served. If the money allegedly being the proceeds of unlawful activity has, as of the date when the freezing order was served, been spent, how could it be the very same money which may be categorized as proceeds of an unlawful activity?

[57] In considering whether the applicant has succeeded in proving that the money in the account of the 1st respondent is the proceeds of an unlawful activity, I find that the applicant has not adduced sufficient evidence to support this contention.

Whether there is any purchaser in good faith for valuable consideration in respect of the seized property

[58] The 1st respondent is a political party and admits that the sum of RM1 million it received from DSNR is a political donation. In that regard, there is nothing to show whether any consideration is provided by the 1st respondent and I am inclined to find that the 1st respondent does not fit in the category of a purchaser in good faith for valuable consideration. In this regard, I find that the condition under paragraph *(b)* of section 56(2) of the AMLATFPUAA has been satisfied on the balance of probabilities.

Whether a pecuniary penalty order should be made against the respondent

[59] The learned DPP argues that this application should not be dismissed simply on the basis that the impugned property has been expended and it is unfair for the 1st respondent to be let off the hook. As a remedy, this Court should make an order under section 59(2) of the AMLATFPUAA to impose a pecuniary penalty against the respondent.

[60] I find that this was never part of the prayer included in the applicant's application. There is also no averment in this regard in the applicant's affidavit to support this. To allow the applicant the liberty to pray for this remedy would be prejudicial to the respondent who obviously is caught off-guard as it was never part of the affidavits filed by the applicant thereby denying the opportunity for the respondent to rebut that fact. I find that the learned DPP has not shown sufficient basis for this Court to make such an order.

[61] An application under section 56 of the AMLATFPUAA is not a tool for the prosecution to "recover" monies from the party who had

received them and never meant to compel that party to "repay" or "refund" them in the event the monies have been spent or no longer resides in that party's account. It paints a completely misleading position of the law on forfeiture of property in the present application. The property, or in this case the money, which may be forfeited must be one which was seized by reason of it being the proceeds of an unlawful activity. If the money which was seized is not proved on the balance of probabilities to be the proceeds of an unlawful activity, the law does not allow it to be forfeited.

Conclusion

[62] After analysing the affidavits of the parties together with the relevant exhibits and considering the submissions of the learned DPP and learned counsel, I find that, on the balance of probabilities, the applicant has not succeeded in proving the requirements under section 56 of the AMLATFPUAA to have the sum of RM188,138.26 in the 1st respondent's account forfeited. In the circumstances, I hereby dismiss prayer (a).

[63] An order for a pecuniary penalty under section 59 of the AMLATFPUAA may only be made if the property is forfeited. Since the application for forfeiture is dismissed, there cannot be a valid order made under section 59 of the AMLATFPUAA for a pecuniary penalty.

Dated : 28 OCTOBER 2020

(AHMAD SHAHRIR MOHD SALLEH)
Judicial Commissioner
High Court Kuala Lumpur

COUNSEL:

For the applicant - Samihah Rhazali & Abdul Rashid Sulaiman, Deputy Public Prosecutors; Malaysian Anti-Corruption Commission

For the respondent - Michael Chow Keat Thye & Yeong Wen Ling; M/s Michael Chow

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3, 4(1), 56(1)(c), (2)(a)(b), (4), 59(2), 61(2)

Malaysian Anti- Corruption Commission Act 2009, ss. 3, 23(1) (2)

Courts of Judicature Act 1964, s. 25

Federal Constitution, art. 13(1)