REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 98/2011

In the matter between:

MACHADO ANDRE PINTO **APPLICANT**

and

FIRST NATIONAL BANK OF NAMIBIA LIMITED **1ST RESPONDENT**

STANDARD BANK NAMIBIA LIMITED **2ND RESPONDENT**

Neutral citation: *Pinto v First National Bank of Namibia Ltd* (A 98/2011) [2012] NAHCMD 43 (31 October 2012)

Coram: GEIER J

Heard: **24 July 2012**

Delivered: **31 October 2012**

Flynote: Contract – terms implied by law – test be applied in the determination of whether statutory provisions are to be implied in a contract - such enquiry entails a consideration of the circumstances of the particular case, the '*naturalium*' of the agreement, whether or not the contract is of the type in which the law implies the term and whether or not the parties have expressly excluded such term and whether or not the legislature intended to use its overriding power to nullify or control any attempt by the parties to exclude a term imposed by statute or the common law in their contract –

Banker - relationship between banker and client - traditionally viewed as based in contract - being essentially one of creditor and debtor, with the underlying nature of mandate – question arising whether or not the provisions of the Financial Intelligence Act 2007 and the Prevention of Organised Crime Act 2004 had superimposed any residual terms on the traditional contractual relationship between banker and client which would exonerate respondents actions in refusing the applicant's demand for payment and reversing funds standing to the credit of the applicant in the first respondents books of account and to repatriate such funds to the second respondent were they eventually became subject to the confiscation and forfeiture proceedings in terms of POCA – court finding that certain provisions of FIA and POCA are to be regarded as terms imposed by law on the traditional banker-client contractual bond – actions of respondents justified – application dismissed

Summary: Applicant had participated in a lottery operated by Scratch- A- Million Enterprise CC and won N$ 250 000.00 – the lottery paid his winnings by cheque – drawn on first respondent – which cheque was paid into applicant's account held with second respondent – after the cheque had been cleared the applicant attempted to withdraw N$ 80 000.00 – the transaction seemed suspicious given applicant's account history and was investigated – second respond informed first respondent that at least 80% of the credit card transactions in Scratch-A-Million CC account related to fraudulent transactions – first respondent requested second respondent to reverse the credit entry on applicants banking account and return the funds to first respondent against the furnishing of an indemnity –first respondent heeded the request – Prosecutor-General subsequently obtaining court order freezing all funds standing to the credit of Scratch-A-Million Enterprises CC and others inclusive of applicant – rule nisi granted against applicant only discharged against him eventually - Prosecutor-General also subsequently applying for forfeiture order in terms of POCA – this effectively meant that all affected funds inclusive of the N$ 250 000.00 continue to be frozen – applicant then bringing an application for declaratory relief and an order that his account be once again credited with the amount of N$ 250

000.00 plus interest – question to be determined was whether the Financial Intelligence Act 2007 and the Prevention of Organised Crime Act 2004 had superimposed any residual terms on the traditional contractual relationship between banker and client which would exonerate respondents actions -

Held: Relationship between banker and client traditionally a contractual one of debtor and creditor with the underlying nature of a mandate –

Held: The enquiry whether the Financial Intelligence Act 2007 and the Prevention of Organised Crime Act 2004 had superimposed any residual terms on this contractual relationship entailing a consideration of the circumstances of the particular case, the '*naturalium*' of the agreement, whether or not the contract is of the type in which the law implies the term and whether or not the parties have expressly excluded such term and whether or not the legislature intended to use its overriding power to nullify or control any attempt by the parties to exclude a term imposed by statute or the common law in their contract –

Held: there was no express agreement between any of the parties which expressly excluded the operation of *Prevention of Organised Crime Act* 2004, (Act 29 of 2004), (*POCA*) or the *Financial Intelligence Act*, 2007, (Act 3 of 2007) (*FIA*) from their agreement –

Held: The '*naturalium*' of the underlying agreement regulated the banker- client relationship-

Held: That the underlying agreement was of the type on which the *Prevention of Organised Crime Act* 2004, (Act 29 of 2004), (*POCA*) or the *Financial Intelligence Act*, 2007, (Act 3 of 2007) implies its terms –

Held :That the legislature had intended to use its overriding power to nullify or control any attempt by the parties to exclude the terms imposed by *Prevention of Organised*

Crime Act 2004, (Act 29 of 2004), (*POCA*) or the *Financial Intelligence Act*, 2007, (Act 3 of 2007) from their contract –

Held: That in view of such residual terms superimposed on the agreement between applicant and first and second respondents actions exonerated –

Held: As applicant's cause of action based on the traditional banker-client agreement – failing to take into account the residual terms imposed by law – application could not succeed and thus fell to be dismissed.

ORDER

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1. The application is dismissed with costs –

2. Such costs are to include the costs of one instructed- and one instructing counsel, as far as the first respondent is concerned, and the costs of one instructed counsel and one instructing counsel – up to the stage of the drawing of the second respondent's heads of argument – the remainder of the costs awarded to second respondent are awarded on the scale of one instructing counsel.

JUDGMENT

GEIER J:

[1] The applicant participated in a lottery offered by Scratch-A-Million Enterprise CC in that he purchased two batches of scratch cards at a total amount of N$3 000.00.

[2] Amongst the scratch cards so purchased was a card indicating that he was the lucky winner of N$ 250 000.00. He approached Scratch-A-Million Enterprise CC who issued a cheque for the corresponding amount in his favour, which cheque he deposited with his bank, being the first respondent.

[3] The applicant's account was duly credited with such amount as per normal banking practice.

[4] With effect of 6 November 2009 these funds were also cleared.

[5] The applicant learnt of this fact on 7 November 2009 when he attempted to withdraw N$ 80 000.00 from his account.

[6] Instead of releasing the requested amount to applicant the first respondent however refused to so. The applicant all of a sudden found himself in the focus of an interrogation by the bank's employees and by officers of the Namibian Police.

[7] The applicant's funds were practically frozen from that date until a provisional restraining order was obtained on 22 December 2009 by the Prosecutor-General against one Nalisa Situmbeko, Scratch-A-Million Enterprise CC, Keneilwa Langa, Florence Situmbeko and the applicant under the Prevention of Organised Crime Act 2004 in Case 2/2009.

[8] This provisional order was discharged *vis a vis* the applicant on 7 September 2010.

[9] In the interim and without applicant's knowledge or consent, so it is alleged - and without any authorisation to do so - the first respondent effected a debit entry of N$ 250 000.00 against the applicant's account.

[10] The applicant in turn launched this application in which he claims that the

first respondent's reversal of the amount of N$ 250 000.00 in the applicant's account was not authorised was unlawful and that such reversal be declared null and void *ab initio* and that the first respondent be ordered to credit the applicant's account again with the winnings together with interest as would have accrued in the interim in the applicant's favour.

[11] In answer to the applicant's claims, Mrs Ingrid Veuza Katjiuka, a manager in the first respondent's forensic department, confirmed that the applicant's deposit was initially cleared for payment but that it was not paid out to applicant on the request of the second respondent.

[12] She explained that the officials of the second respondent had apparently informed the first respondent that the amount related to fraudulent transactions and that legal action would be instituted against Scratch-A-Million Enterprise CC in terms of the 'Prevention of the Organised Crime' legislation. Second respondent also requested that the amount of N$ 250 000.00 be repaid to it, in respect of which the second respondent would provide an indemnity to first respondent.

[13] The requested repayment was then made to second respondent after the promised indemnity had been provided.

[14] It should possibly be mentioned at this juncture that the said indemnity contained a proviso to the effect that the indemnity would be honoured only in the event that a person, making a claim, has a valid claim in law not affected by fraud or illegality.

[15] The second respondent's case was made under cover of an answering affidavit deposed to by Mr. Pumba Munjua, a forensic investigator employed at the second respondent's internal audit department.

[16] Mr Munjua firstly set out the factual background to the relevant transaction involving the account of Scratch-A-Million Enterprise CC held with the second

respondent and the background to the subsequent transaction between first and second respondents concerning the reversal of the N$ 250 000.00, initially credited to applicant's account. He confirmed that initially the transaction was considered as normal and that in terms of the latest applicable Bank of Namibia Directive on cheque- clearing the applicant could access the N$250 000.00 deposited as of Friday, 6th of November 2009.

[17] On 7 November 2009, a forensic investigator of first respondent however raised an initial concern with second respondent's Head of Financial Crime Control concerning the applicant's deposit, when the applicant sought to withdraw the amount of N$ 80 000.00 from his account, which was unusual given the applicant's account history. First respondent's concern apparently also lay with the reputation of Mr. Situmbeko and the surrounding circumstances of Scratch-A-Million Enterprise CC in respect of which the first respondent's suspected that the funds standing to the credit in Scratch-A-Million Enterprise CC's account were the proceeds of unlawful activities.

[18] It was felt that if the banks would allow the transaction to proceed they might make themselves guilty of money laundering in contravention of the provisions of sections 5 and 6 of the Prevention of the Organised Crime Act 29, of 2004, which had come into operation on 5 May 2009.

[19] The initial suspicions were investigated further. In order to avoid falling foul of the provisions of the POCA legislation the first respondent deliberately avoided making any payments from the N$ 250 000.00 standing to the credit of the applicant's account.

[20] Further investigation established by 12 November 2009 that at least 80% of the credit card transactions in the Scratch-A-Million Enterprise CC account were fraudulent. On the strength of that information the second respondent requested first respondent against the furnishing of the aforesaid indemnity to reverse the credit entry on applicant's account as these funds were to the best of the second

respondent's knowledge the proceeds of unlawful activities. It is common cause that the first respondent complied with this request.

[21] On 1 December 2009 the second respondent notified the head of Commercial Crimes Investigations subdivision of the Namibian Police of this suspicion in writing.

[22] On 16 December 2009 the Governor of the Bank of Namibia gave a direction to second respondent not to proceed with any transactions in respect of the Scratch-A-Million Enterprise CC account.

[23] On 22 December 2009, the Prosecutor-General secured the interim restraining order referred to above. In terms of this order all funds, inclusive of the N$ 250 000.00 of the applicant, were thus frozen.

[24] Although the provisional order was eventually discharged *vis a vis* the applicant, the confirmation thereof *vis a vis* the other respondents effectively meant that the N$ 250 000.00, which had been returned to the second respondent, continued to be frozen.

[25] On 27 May 2011 the Prosecutor-General also obtained a preservation order in terms of section 51 of the POCA Act, as a result of which the credit balance in the Scratch-A-Million Enterprise CC account with second respondent now stands to be forfeited to the state.

[26] It must be mentioned that the applicable court order also directs that '*all persons with knowledge of this order are, other than as required or permitted by this order, prohibited from removing, and taking possession of or control over, dissipating ... or dealing in any other manner with any property to which this order relates'*.

[27] Finally it should be mentioned that the Prosecutor-General's office was

informed by second respondent of the bringing of this application. The Prosecutor-General's stance is reflected in a letter dated 16 June 2011. It reads:

'16 JUNE 2011

TO: STANDARD BANK
Risk, Compliance and Legal
Attention: Undjii Kaihiva

RE: MA Pinto / FNB and Standard Bank

1. *We refer to our letter dated 16 June 2011 and the telephone conversation between yourself and Adv Boonzaier;*

2. *During February 2011 the criminal case against Mr Situmbeko was struck from the roll due to the fact that the investigation was not finalised.*

3. *On 30 March 2011 brought an urgent application under case number A70/11 to rescind the restraint order due to the fact that the criminal charges were withdrawn. However, the matter was struck from the roll due to lack of urgency.*

4. *The same application was also launched on 8 April 2011 under case number A79/11 and was also struck due to lack of urgency.*

5. *On 27 May 2011 a preservation order under POCA 3/11 was obtained in respect of the money held in the Standard bank account relating to this matter. This means that the money is frozen even though there is also a restraint application freezing the money. The difference is that the success of a preservation application and the forfeiture application that will follow is not dependant on a successful criminal prosecution.*

6. *Once this preservation order was obtained this office then rescinded the restraint order due to the fact that the money is protected under the preservation order.*

7. *It is important to note that once a bank suspects that money is the proceeds of crime and they still pay the money to the person requesting it, they make themselves guilty*

of money laundering in terms of section 5 of the Prevention of Organized Crime Act.

8. *Even though FNB may claim that they had a contractual obligation to Mr. Pinto, they can never claim that they are obliged to pay over the proceeds of crime due to the contractual relationship. A legal agreement can never justify the payment of the suspected proceeds of crime, because the definition in section 5 specifically refers to 'ought to have known'. It is irrelevant when the freezing orders came into operation.*

9. *FBN were informed by Standard Bank that the money might be the proceeds of crime. With this knowledge FNB can never claim that it would have been obliged in terms of an agreement to pay the money to Pinto as they would have committed a criminal offence if they did. The contract between FNB and Pinto with respect to this transaction would not be binding as it contravenes a law of Namibia.'*

[28] It was thus averred that the first and second respondents conduct and the reasonableness thereof should be measured against the provisions of Chapter 5 and 6 of the POCA legislation and with reference to which the second respondent particularly relies in justification of its actions in this matter.

[29] In this regard it was further pointed out that the initial suspicions in this regard were confirmed at every juncture. The funds standing to the credit of Scratch-A-Million Enterprise CC were to the best of the respondents' and the applicant's knowledge the proceeds of unlawful activities, or at the very least that this could reasonably be suspected.

[30] In such circumstances the respondents considered themselves justified in withholding the funds in their the endeavour not to allow Scratch-A-Million Enterprise CC to settle, what may be a lawful debt, to the applicant, with stolen money.

THE APPLICANT'S ARGUMENT

[31] It was against this background that Mr. Narib, who appeared on behalf of

applicant, pointed out that the first respondent did not offer any defence on the merits but instead instituted only a conditional counterclaim against the second respondent. The essence of the first respondent's case was that it stands to be indemnified by second respondent against any order which the court may make against it. It thus became apparent that the merits of the second respondent's defence should become the focus of this decision in respect of which reliance was placed on sections 5 and 6 of the POCA legislation.

[32] He argued that second respondent was unable to counter certain factual allegations pertaining to the circumstances under which the scratch card in question was issued to the applicant. He submitted further that it has long been judicially recognised that the relationship between a bank and its customer is one of debtor and creditor and that once a customer deposits money in his/her bank account ownership thereof passes to the bank, subject to the bank's obligation to honour cheques validly drawn by the customer.[1]

[33] In terms of these authorities once money has been paid over it becomes unidentifiable, and rights of ownership, if any, are lost - money can be therefore not be vindicated. It was on the strength of such authority then submitted further that once the funds were deposited into the applicant's account they should have been credited to the applicant and could not be withdrawn, (ie the credit reversed), without the applicant's consent.[2] The funds in question accordingly became the property of the first respondent after having collected same from second respondent who then had a duty in terms of the debtor/creditor relationship with applicant to honour the instructions from the applicant in respect of such funds provided that such funds stood to the credit of the applicant.[3]

[34] The first respondent could simply not unilaterally debit the account of the

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[1] *Swanepoel v The Minister of Home Affairs and Others* 2000 NR 93 (HC) at 96 - *S v Kearney* 1964 (2) SA 495 (A) at 502-503

[2] *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at 9B - *Joint Stock Co Varvarinskoye v ABSA Ltd and Others* 2008 (4) SA 287 (SCA) at 296

[3] *ABSA Bank Ltd v Standard Bank of SA* 1998 (1) SA 242 (SCA) at 251 - *Dantex Investment Holdings v National Explosives* 1990 (1) SA 736 (A) at 748 - *ABSA Bank Ltd v Intensive Air (Pty) Ltd and Others* 2011 (2) SA 275 (SCA) at 280

applicant, without the applicant's consent, even if it chose to "repatriate" funds to the second respondent.[4]

[35] The funds standing to the credit of the applicant was money owed by the first respondent to the applicant.[5]

[36] In the circumstances the first respondent had transferred its own funds to the second respondent as it did not have the right, without the consent of the applicant, to debit the applicant's account with the amount to be transferred. The first respondent appears to accept this as the correct legal position.

[37] Once the first respondent had collected the funds from the second respondent on or about 7 November 2009, so the argument ran further, all the obligations Scratch-A-Million Enterprise CC had towards to applicant had been discharged and first respondent became indebted to the applicant in the amount standing to the credit in the applicant's account.[6]

[38] It was also pointed out that the first respondent was admittedly honouring its subsequent agreement with the second respondent, to which the applicant was not a party, when it allegedly "repatriated" funds to the second respondent and no obligations or implications towards the applicant could flow from such an agreement.

[39] In such circumstances the orders sought in the notice of motion should be granted with costs against both respondents, such costs to include the costs occasioned by employment of one instructing and one instructed counsel.

THE FIRST RESPONDENT'S CASE

[40] Not surprisingly – given these circumstances - Mr. van Vuuren's argument,

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[4] *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) at 193-194

[5] *Meihuizen Freight (Pty) Ltd v Transportes Maritimos De Portugal Lda and Others* 2005 (1) SA 36 (SCA) at 44 para [20]

[6] *Vereins- und Westbank Ag v Veren Investments and Others* 2002 (4) SA 421 (SCA)

on behalf of the first respondent, was brief. He mainly pointed out that the first respondent essentially relied on its conditional counter- application, based on the indemnity granted to it by second respondent, in the event of the court making a finding in favour of the applicant.

[41] Also on behalf of first respondent it was submitted that the general governing common law position regarding this transaction and the traditional relationship between banker and client in this instance had been affected by the POCA legislation - in terms of which – and once certain background knowledge had been obtained pertaining to the nature of the funds in question - also the first respondent would have made itself guilty of a transgression of the POCA statute in respect of which it would have become a guilty party if it would have made the requested funds available to the applicant . This, so Mr. van Vuuren's argument ran further, justified the first respondent's actions in refusing to honour the applicant's request for payment and the subsequent reversal of the amount of N$ 250 000.00 in the banking account of the applicant.

[42] He finally submitted that in terms of the applicable case law the first respondent had in any event become the owner of the funds in question and that the first respondent was therefore entitled to deal with the money in accordance with the obligations imposed on it by the POCA legislation – the granting of the plaintiff's claim would ultimately defeat the intention of the POCA legislation which should therefore be refused.

THE SECOND RESPONDENT'S ARGUMENT

[43] Mrs. Angula, who appeared on behalf of third respondent, forcefully argued that the court, in deciding this matter, would have to take into account firstly the provisions of the POCA legislation which was not considered in the case law relied upon by applicant and that the court should contextualise the present matter accordingly also when considering these authorities.

[44] Secondly the court should take cognisance of the relationship between first

and second respondents being that of a drawing bank and a collecting bank.

[45] Finally the relationship between first respondent and applicant should be considered. In this regard it should be taken into account what the responsibility of a bank is if it comes to its knowledge that a fraudulent deposit was made. A bank was obviously under a duty to deal with such a situation with due diligence and that the applicant's reliance on the standard relationship was therefore misplaced as this would be tantamount to turning a blind eye to the duty of the collecting bank not to honour its client's requests for a withdrawal of funds if informed by the drawing bank that the monies in question constituted the proceeds of time. Both the drawing and collecting bank, in such circumstances, were clearly under an obligation to stop payment forthwith - the knowledge of the banks in this instance - disclosed a legitimate reason to reverse the entry.

[46] She submitted further that the second respondent's right of reversal in this instance rested on an implied term - imposed by operation of law – which term impacted on the standard banking customer and banker relationship. She submitted this regard further that the fact - that the funds had been cleared - was immaterial - and that - on the facts of this matter - and by operation of the said implied term - the bank would be entitled to reverse the credit entry in its client's book of account at any stage. On the facts of such matter the particular reversal was justified in terms of section 5 of the POCA legislation.

[47] All credits in a client's banking account would always be subject to the requirement of legality. She submitted thus that any claim the applicant might have would rest with Scratch-A-Million Enterprise CC and not against the bank. In any event the monies were presently retained in a preservation fund and in terms of the applicable legislation the applicant could even reclaim such funds in accordance with the governing legislation.

[48] Finally she submitted that it was not in the public's interest to allow the reversal sought by the applicant.

[49] In fairness it should be mentioned Mrs Angula's argument was based on heads of argument drawn on behalf of second respondent by Mr. Coleman.

[50] In these written heads the following further submissions were made:

'The Law

The series of events that brought this application about occurred in a highly regulated environment. The facts engage the following legislation:

a) POCA
b) The Financial Intelligence Act, 2007, (Act 3 of 2007) (FIA)
c) The Bills of Exchange Act, 2003 (Act 22 of 2003) (the Act)
d) The Payment System Management Act, 2003 (Act 18 of 2003) (PSMA)
e) The Lotteries Act, 2002 (Act 15 of 2002) - to some extent and which appears not to be in force yet - this may render the "lottery" activity of applicant also unlawful.

POCA

The following provisions of POCA should be considered for the purpose of this dispute:

a) The definition of 'proceeds of unlawful activities' which includes any advantage or benefit derived or received directly or indirectly and includes property which is mingled with property that is proceeds of unlawful activity;
b) The definition of 'property' which includes money;
c) Section 4 which creates the offence of money laundering by disguising or assisting in disguising proceeds of unlawful activities;
d) Section 5 which create the offence of assisting in money laundering;
e) Section 6 which provides that any person who, amongst others, acquires or has possession of property and who knows or ought reasonably to have known that it is or forms part of proceeds of unlawful activities commits the offence of money laundering. Significantly these offences can be committed 'negligently' [see section 10(1) of POCA];
f) Section 9 relating to reporting (in terms the FIA) of suspicious transactions;

g) Definitions of 'affected gift' and 'realisable property' in section 17(1) read with sections 20(1)(b) & 22 - the arrangement of paying N$ 3 000.00 for N$ 250 000.00 falls in the definition of 'affected gift';

h) Sections 43 & 44 creating remedies for person who suffered damages as a result of an offence - Sections 44(2) & (3) gives this Court the power to order payment to an applicant who suffered damages - This could be applicant's remedy –

i) Section 51 which standard asserts applies to the money in question - Section 51(4) stipulates the money must be dealt with in accordance with the directions of the High Court - also relief which applicant can pursue because the money he lays claim to is in this preservation fund.

One of the primary objectives of POCA is to divest criminals of the proceeds of their criminal activities.[7] It also does not intend to take away the common law rights of ordinary concurrent creditors to claim satisfaction of their debts from restrained property.[8]

The Financial Intelligence Act, 2007 (Act 3 of 2007) (FIA)

The FIA imposes various duties on banks. Relevant provisions are:

a) The definitions of 'accountable institution' which includes a bank, 'business relationship' and 'client' which refers to the relationship between bank and client amongst others;

b) Sections 20, 21 & 23 which impose reporting obligations on banks;

c) Section 27 which provides that a bank may continue with a transaction unless directed by the Bank of Namibia (BON) not to proceed with it;

d) Section 28 empowers the BON to direct a bank not to proceed with a transaction - this happened in this matter on 16 December 2009 in respect of transactions involving Scratch-A-Million CC. The quick action by Standard and FNB to refuse payment of the N$ 80 000.00 contributed to the preservation of the funds;

e) Section 49 contains an indemnity for the BON or any other person performing a function in terms of this Act;

The Bills of Exchange Act 2003 (Act 22 of 2003) (the Act)

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[7] *ABSA Bank Ltd Fraser and Another* [2005] JOL 16131 (SCA) para [1]

[8] *ABSA Bank Ltd supra* para [24]

Although no one mentions the Act in this matter it is pivotal to any dealings involving cheques. Relevant provisions are:

a) The definitions of ‘bearer’, ‘bill’ (and ‘bill of exchange’ in section 2 ‘holder’ and ‘collecting bank’ in section 1;
b) Section 39 which stipulates that if a bill is dishonoured by non-acceptance a right of recourse accrues against the drawer (herein Scratch-A-Million Enterprise CC) to the holder - this clearly contemplates that the drawee bank itself can refuse payment on a cheque;
c) Section 42 - which provides that a cheque may be presented for payment to the drawee by a collecting bank (FNB) on behalf of the holder (applicant) - this section [especially sub-section (3)] demonstrates that no liability is imposed on the collecting bank in this process - this is obviously subject to the various duties (expounded on the latter herein) imposed by common law on the collecting bank in this context;
d) Section 44 (1) (a) stipulates that a bill (which includes a cheque by virtue of the definitions referred to above) is dishonoured by non-payment if it is presented for payment and payment is refused or cannot be obtained. Section 44 (2) stipulates that in such event a right of recourse against the drawer accrues to the holder;
e) Part VI sets out the liabilities of parties in respect of a bill of exchange. It stipulates that the drawee (Standard in this case) only assumes liability of it accepts the bill. It is submitted that on the facts of this matter Standard should be treated as not to have accepted the bill;
f) Section 52 creates a liability for the drawer on a cheque;
g) Section 55 stipulates that if a bill is dishonoured the holder may recover damages from any party liable on the bill. This does not included the collecting bank (FNB);
h) Section 71 provides that the duty and authority of a bank to pay a cheque drawn on it by its customer are revoked when it receives a countermand of payment. This demonstrates that it is conceivable that the drawee bank can be relieved of the duty to honour a cheque drawn on it by its customer. From this follows that the collecting bank equally will have no duty to allow its client (the payee in respect of the cheque) to access the money to be paid in terms of the cheque in question.

Bank/client relationship

The relationship between a bank and its client is based on contract and is essentially that of

creditor and debtor with the underlying nature of mandate.[9] The following is accepted in respect of this relationship:

a) The right of reversal of a credit based on a cheque which is dishonoured is implied by law as well as by banking custom and usage.[10] In general a credit can be reversed for any legitimate reason.[11]
b) When as a result of some conduct of the bank the client believes his account has a credit in the amount of the cheque deposited and he withdraws money the bank my under certain circumstances be stopped from reclaiming the money.[12] This principle does not prevent the bank from reversing the entry, especially when it transpires the money may be proceeds of crime.
c) It is a fundamental principle that the risk of non-payment, for whatever reason, of a cheque deposited for collection, falls on the customer and not on the bank.[13]
d) Money paid into the bank account of a client becomes the property of the bank. This only happens if the bank has no reason to believe it had been stolen or obtained by fraud.[14] Ownership never vests in the client.
a) A collecting bank owes a duty towards the drawee bank to ascertain that payment is being collected on behalf of a person who is entitled to it.[15] It is submitted this implies that once the collecting bank is informed that a cheque is drawn in respect of proceeds of crime it is under a duty to ensure its client does not have access to the money.
b) In general a collecting bank should exercise reasonable care in the collection of cheques on behalf of its customers.[16]
c) Although the underlying agreement is one of mandate the contract between the bank and its client must yield to applicable legislation regardless of whether the statute applies to contract or it has become a contractual term imposed by the statute.[17] It is

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[9] *CHHC Trading (Pty) Ltd v Standard Bank of SA and Anothe*r [2011] JOL 27339 (GSJ) paras [16] and: *Harding and Others NNO v Standard Bank of South Africa* 2004 (6) SA 464 (C) at p 467-468
[10] *Standard Bank of SA Ltd v SARWAN* [2002] 3 All SA 49 (W) at p 55
[11] *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) at para [9]
[12] *ABSA Bank Ltd v I W Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 684-485
[13] *SARWAN supra* p 55
[14] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N) at p 208 H-I; *S v Kearney* 1964 (2) SA 495 (A) at 502-503. See also: *ABSA Bank Ltd v Intensive Air (Pty) Ltd and Others* 2011 (2) SA 275 (SCA)
[15] Malan *op.cit* p 434-435
[16] Malan *op.cit* p 442-443
[17] *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) S 386 (A) and CHHC Trading *supra* at para [19]

submitted this means that POCA, FIA and the Act inform the relationship.

d) Public policy considerations are also at play here. It is submitted that even if applicant had a 'right' to the money (which he does not in this case) the supervening illegality of him accessing it excused FNB of any obligation to permit him to do so:

"The role of public policy in cases of supervening illegality is discussed in depth by Treitel in his recent work to which reference was made earlier, at 326, on the strength of various decided cases illustrating the point, the learned author emphasises the difference between supervening impossibility and supervening illegality as grounds of a contract's discharge. The payment of money, he says, cannot in law become impossible, but the contract is discharged on the ground of public policy by the preventing prohibition. That is the basic principle. The ratio is that the parties must not be given the incentive, which they might have if the contract remained in force, to violate the prohibition which gives rise to the illegality."[18]

e) Finally it is submitted the following dictum is also applicable here:

"As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature.

To these may be added examples given by Wessels on Contract (vol 2) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances"[19]

'Submissions

Against this background it is submitted:

a) FNB acting as collecting bank for applicant did nothing wrong.

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[18] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) at 1213H-1214B

[19] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378H-379A

b) In fact had FNB ignored Standard's caveat on 7 November 2011 and allowed applicant to withdraw the N$ 80 000.00 it may have found itself being liable in negligence as well as under POCA.

c) The bank-client relationship does not require the bank qua collecting bank to obtain the client's authority to reverse an unpaid cheque. In fact it has a duty towards the drawee bank to ensure the money does not go where it should not.

d) Applicant's remedy (assuming he has one) lies against the drawer on the cheque. He also has remedies under POCA against the preservation fund. He does not explain why he does not follow either of these routes.

e) Furthermore this is a matter where public policy comes to play. Neither FNB nor Standard should be made to pay the debt of someone who is suspected of laundering money. The money applicant lays claim to sits in an identified fund and bears the attributes of 'earmarked money'.[20] He should pursue his relief there.

f) In the final analysis applicant does not make out a case for the relief he claims.'

WHERE THE RESPONDENT'S ENTITLED TO CAUSE A REVERSAL OF THE AMOUNT STANDING TO APPLICANT'S CREDIT IN THE FIRST RESPONDENT'S BOOKS

[51] The parties were *ad idem* that the relationship between a bank and its client is based on contract and that is essentially one of creditor and debtor, with the underlying nature of mandate.

[52] Also Mr Narib did not dispute that a bank may, in certain instances, reverse a credit standing to a client's credit in a bank's books of account.

[53] The general underlying position was aptly summed up by Griesel AJA in *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA):

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[20] *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and others* 2003 (3) SA 268 (W) at para [30] & [31]

'[8] It is well established that, in general, entries in a bank's books constitute prima facie evidence of the transactions so recorded. This does not mean, however, that in a particular case one is precluded from looking behind such entries to discover what the true state of affairs is.[21] Some examples where a credit may be validly reversed by a bank were mentioned by Zulman JA in Oneanate: [22]

(I)f a customer deposits a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer's account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So, too, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries it can again not be successfully contended that the bank would be precluded from reversing the credit entry.

[9] Further examples where a credit may be validly reversed, include cases where a cheque has been deposited into a client's account and the resultant credit entry is treated as provisional (or conditional), subject to a hold period in terms of 'standard banking practice';[23] or where the client came by the money by way of fraud or theft;[24] or where a wrong account was erroneously credited.[25] Absent some legitimate reason for reversal, however, the general principle is that once an amount has been validly transferred by A to the credit of B's bank account, the credit belongs to B and the bank has to keep it at B's disposal; it cannot simply retransfer the money back into the account of A without the concurrence of B.'[26]

[54] It will have been noted immediately that even the general principle, enunciated above, is qualified to the extent that it is only applicable in the absence

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[21] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) ([1998] 1 All SA 413) at 823B - *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) ([2001] 3 All SA 331) para 32

[22] at 823B - D

[23] *Burg Trailers SA (Pty) Ltd and Another v Absa Bank Ltd and Others* 2004 (1) SA 284 (SCA) para 9. See also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 693G - H; *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) ([1997] 4 All SA 673) at 252A - F

[24] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) ([2006] 4 All SA 120) para 23; Perry's case

[25] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others op cit*

[26] At pages 193 -194

of a legitimate reason for reversal.

[55] The question therefore arises whether or not the reasons advanced by the respondents amount to such a legitimate reason?

[56] Put more succinctly – and given the defences raised - the question that will have to be answered is whether or not the cited statutory provisions have impacted on the traditional banker client relationship, to such an extent that they afforded the second respondent a legitimate reason to request the first respondent to return the funds standing to the credit of the applicant in first respondents books and for the first respondent to heed such request?

[57] As the relationship between banker and client is essentially a contractual one it needs to be examined further whether – in the absence of any express or tacit agreement to the effect – the statutes impose any residual[27] conditions onto this contractual relationship.

[58] According to Prof RH Christie[28] 'the nature of terms implied by law has never been better expressed than by Corbett AJA in his dissenting judgment' in *Alfred McAlpine & Son (PTY) LTD v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531:

'In legal parlance the expression "implied term" is an ambiguous one[29] in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally

[27] The term 'residual' is used here in the sense that it means ' a term implied by law'

[28] *The Law of Contract* 5th Ed at p159

[29] It is to be noted that despite the problem of ambiguity of language Professor RH Christie elects to stay with the 'traditional usage' and calls them terms 'implied by law' (see the discussion at p 160 *The Law of Contract op cit)* – whereas Professor AJ Kerr prefers, wherever possible to use the word "implied" in order to describe provisions which the parties had in mind but did not express," and the word "residual" in order to describe provisions which the law adds to the contract in the absence of agreement (expressed or unexpressed) of the parties." (See the discussion at pages 337 - 340: '*The Principles of the Law of Contract' 6th Ed op cit*

implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale, e.g. the seller's implied guarantee or warranty against defects; in the law of lease the similar implied undertakings by the lessor as to quiet enjoyment and absence of defects; and in the law of negotiable instruments the engagements of drawer, acceptor and endorser, as imported by secs. 52 and 53 of the Bills of Exchange Act, 34 of 1964. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a naturalium of the contract in question.'[30]

[59] In his helpful discussion of terms implied by law Professor Christie goes on to state:

'To say that terms are implied by law without reference to the actual intention of the parties does not mean that the actual or presumed intention of the parties has been ignored in the historical process by which the law was made. The origin of many terms now implied by law was no doubt the idea that any, or at least any honest party entering into a particular type of contract would want to include such a term in it …

But once the law has settled on a particular term it is fruitless to inquire into the intention of the parties except to the extent of ascertaining whether they have exercised their privilege of expressly excluding the term that would otherwise be implied, as when a sale is made voetstoots. A term that would normally be implied by law may also be excluded because it would conflict with the express terms of the contract.' …

'Once the law has been settled, its application in a particular case will depend upon whether the contract is of the type in which the law implies the term …

A term implied by law in a written contract is just as much a term of that contract as the

[30] This dictum has found approval in a string of subsequent cases too numerous to list here

written terms, and equally resistant to variation by parol evidence.' [31]

[60] Professor AJ Kerr's[32] analysis of the nature of 'residual' provisions then amplifies Professor Christies commentary in the following respects:

'Residual provisions are contractual provisions which the law provides and imposes in the absence of express or implied agreement of the parties. Their number and importance depend upon the nature of the contract in question and upon the extent of the parties' agreement …

Residual provisions are part of the contract but they are not added at the beginning or at any particular point in the contract …

That it is the law which provides and imposes residual obligations is clear in principle and is reflected in much of the language used by the courts. Thus in *Ace Motors v Bamard*,[33] Dowling J said:

There are in the special contract of sale, which is perhaps the most frequendy recurring contract in human affairs, a number of established 'incidentals' of the contract which, unless they are excluded by agreement, form part of it by operation of law.

… Holmes JA, with whom all the other members of the court concurred,[34] said that in the case of a merchant seller of latently defective goods who publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it.[35]

Clearly residual provisions differ in their origin from implied provisions, the latter not being imposed *ab extra*. Residual provisions are often not in the minds of the parties when negotiations take place and would frequently not pass the hypothetical bystander test …

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[31] *The Law of Contract* 5th Ed at p160 -161
[32] *The Principles of the Law of Contract* op cit at pages 370 - 372
[33] 1958 (2) SA 535 (T) at 537E
[34] *Kroonstad Westelike BoereKo-operatiewe Verenigng Bpk v Botha & Ano* 1964 3 SA 561 (A)
[35] At 571H – 572A

It is not argued that provisions expressing residual obligations are never in the minds of parties, only that the circumstances of each case in which the question arises should be examined…

Because residual provisions differ from implied provisions and because the application of the test for implied provisions would often lead to the rejection of residual provisions in cases in which they are in fact enforced as part of the contract, the point of view put forward by many authorities that all residual provisions are to be called implied provisions ought not to be adopted. *Voet* expresses the point of view of such authorities clearly:

> [N]o one can have any doubt that one who contracts in the most unqualified terms is understood to have also made an implied agreement in regard to the making good of all those things which the public law directs must be made good on such a contract, so often as no covenant has in so many words been made to the contrary.'[36]

THE APPLICABLE TEST

[61] It has thus appeared that - in the enquiry – of whether or not any statutory terms will be superimposed on a contract - one will have to consider the circumstances of the particular case, the '*naturalium*' of the agreement, whether or not the contract is of the type in which the law implies the term and whether or not the parties have expressly excluded such term.

[62] To this one might add that one would also have to consider whether or not the legislature intended to use its overriding power to nullify or control any attempt by the parties to exclude a term imposed by statute or the common law in their contract.

[63] Reverting to the facts.

[64] It is without doubt that there exists no express agreement between any of the parties which expressly excludes the operation of *Prevention of Organised Crime*

[36] Voet, 23.2.85

Act 2004, (Act 29 of 2004), (*POCA*) or the *Financial Intelligence Act*, 2007, (Act 3 of 2007) (*FIA*) from their agreement.

[65] If one considers the '*naturalium*' of the underlying agreement it is clear that it regulates the banker- client relationship.

IMPACTING LEGISLATION : THE FINANCIAL INTELLIGENCE ACT 2007

[66] From the provisions of Financial Intelligence Act 3 of 2007 *(FIA)* it appears firstly that *FIA* does indeed make a bank an 'accountable institution' on which, in terms of Sections 20, 21 & 23 reporting obligations are imposed. The term 'business relationship' is defined in Section 1 to mean "an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis' - that would obviously include banking transactions - the word "client" is defined to mean 'a person who has entered into a business relationship or a single transaction with an accountable institution' – it is clear that a person who holds a bank account with a banking institution has entered into such a business relationship with the particular bank in question. Additional factors such as that the banker client relationship is contractual, in terms of which the bank will conduct banking transactions with or on behalf of the client and that a client has to pay banking charges for the banking services so rendered are all indicative that the relationship between banker and client is also a 'business relationship' which would fall within the ambit of the referred to definitions.

[67] It is to be noted secondly that in terms of Section 25 accountable institutions, ie. also banks, must adopt, develop and implement a customer acceptance policy, internal rules, programmes, policies, procedures and controls as prescribed to protect its systems against any money laundering activities An accountable institution must designate compliance officers at management level who will be in charge of the application of the internal programmes and procedures, including proper maintenance of records and the reporting of suspicious transactions.

[68] In this conjunction sight must not be lost of the concept of "money laundering"

or "money laundering activity" as defined[37]. Two facets of that definition are, in the main, of relevance in this instance : a) there must be a transaction[38] which involves the proceeds of unlawful activity - as may be inferred from objective factual circumstances - and were a person knows, or has reason to believe, that the property is proceeds from any unlawful activity - or were in respect of the conduct of a person – engaged in a transaction which directly or indirectly involves the proceeds of unlawful activity - such person - without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity – or – b) there must be activity which constitutes an offence as defined in section 4, 5 or 6 of the Prevention of Organised Crime Act, 2004 (Act 29 of 2004);

[69] Importantly it is to be noted that Section 21 of *FIA* imposes reporting obligations on accountable institutions as well as 'reporting procedures'[39] – which – as far as accountable institutions are concerned may attract - on non-compliance a fine not exceeding N$500 000 or, in the case of an institution which is an individual, to imprisonment for a period not exceeding 30 years or to both such fine and imprisonment.

[70] Finally it is of relevance to note that – an accountable institution that has made a report to the Bank of Namibia concerning a suspicious transaction, may continue with and carry out the transaction in terms of Section 27 - unless the Bank

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[37] "money laundering" or "money laundering activity" means-
(a)the act of a person who-
(i) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
(ii) acquires, possesses or uses or removes from or brings into Namibia proceeds of any unlawful activity; or
(iii) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where-
(aa) as may be inferred from objective factual circumstances, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
(bb) in respect of the conduct of a person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity; and
(b) any activity which constitutes an offence as defined in section 4, 5 or 6 of the Prevention of Organised Crime Act, 2004 (Act 29 of 2004);

[38] It will already have been noted that this includes banking transactions

[39] Section 26

of Namibia directs such accountable institution in terms of section 28 not to proceed with the transaction. The Bank of Namibia – in turn – is afforded the right in terms of Section 28 to direct the accountable institution in writing not to proceed with the carrying out of a suspicious transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period determined by the Bank in order to allow the Bank of Namibia to make the necessary inquiries concerning the transaction; and if the Bank deems it appropriate, to inform and advise an investigating authority and the Prosecutor-General.

THE LINK BETWEEN *FIA* AND *POCA*

[71] One of the main aims of the Financial Intelligence Act 2007 is the combating of money laundering.[40] The Prevention of Organised Crime Act 29 of 2004 *(POCA)* was also enacted, inter alia, to introduce measures to combat money laundering[41]. It is not surprising therefore that the definition of 'money laundering' – as contained in Section 1 of *FIA* - then contains a direct link to *POCA,* which Act then reciprocates the link to *FIA* in Section 9.

IMPACTING LEGISLATION : THE PREVENTION OF ORGANISED CRIME ACT 2004

[72] From the definition of 'proceeds of unlawful activities' as contained in Section 1 of *POCA* it appears that this concept includes any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity - the definition of 'property' includes money.

[73] Section 4 which creates the offence of disguising the unlawful origin of property. More particularly this section brings within the ambit of that Act any person

[40] See Preamble to *FIA* for instance
[41] See preamble to *POCA* for instance

who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or any person who performs any other act in connection with that property, whether it is performed independently or in concert with any other person, and that agreement, arrangement, transaction or act has or is likely to have the effect of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or that the arrangement enables or assists any person who has committed or commits an offence, whether in Namibia or elsewhere to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence commits the offence of money laundering. The section is thus couched in extremely wide terms.

[74] In terms of Section 5 a person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into an agreement with anyone or engages in any arrangement or transaction whereby-the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way,commits the offence of money laundering.

[75] Even a person who has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering in terms of Section 6.

[76] In terms of Section 7 the liability of persons under section 4, 5 or 6 is extended to a directors, managers, secretaries or other similar office holders of corporations

[77] Lastly it should be mentioned that severe penalties are imposed for

contraventions of Sections 2(1) to 7 of *POCA* in terms of Section 3.[42]

IS THE CONTRACT BETWEEN BANKER AND CLIENT THE TYPE OF CONTRACT ON WHICH THE LAW IMPOSES ITS TERMS

[78] Given the fact that *FIA* is expressly made applicable to accountable institutions such as banks and the transactions it concludes with and for clients - imposing on a commercial bank the duty to put anti-money laundering mechanisms in place – as well as reporting obligations, it does not take much to conclude the contract is of the type on which this statute superimposes its terms. It has appeared that at least Sections 20 to 23 and 25 and 26 are to be imported into the contract in question.

[79] The traditional banker- client relationship is also directly affected by Section 28 in terms of which the Bank of Namibia is afforded the right to direct a bank in writing not to proceed with the carrying out of a suspicious transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period determined by the Bank of Namibia in order to allow the Bank of Namibia to make the necessary inquiries concerning the transaction; and if the Bank of Namibia deems it appropriate, to inform and advise an investigating authority and the Prosecutor-General. Also this right and the banks corresponding obligations – and thus the effect that Section 28 has for the client in question – will surely also form part of any agreement between banker and client.

[80] In addition it needs to be taken into account that the above cited provisions have created a direct link between *FIA* and *POCA*.

[81] In terms of *POCA,* transactions - which involve money – and which thus

[42] (1) Any person convicted of an offence referred to in section 2(1) to (7) is liable to a fine not exceeding N$1 billion, or to imprisonment for a period not exceeding 100 years, or to both the fine and imprisonment.

include money standing to the credit of a particular client in a bank's books of account – fall within the ambit of *POCA*.

[82] If a banker therefore knows or ought reasonably to have known that such money is or forms part of the proceeds of unlawful activities and engages in any arrangement or transaction with anyone, (inclusive of his or her clients), in connection with such moneys - or if a banker performs any other act in connection with that money and the transaction is likely to have the effect of concealing or disguising the nature, origin, source, location, disposition or movement of the money or its ownership, or that the arrangement enables or assists any person who has committed or commits an offence to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, the banker – and one would imagine the client as well – would commit the offence of money laundering in terms of Section 4.

[83] In terms of Section 5 a banker who knows or ought reasonably to have known that another person - such as a client - has obtained the proceeds of unlawful activities, and if the banker would perform a transaction whereby-the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way, a banker would commit the offence of money laundering.

[84] Even a bank which has possession of money and whose officials know or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering in terms of Section 6 as read with Section 7.

[85] In conjunction with this it is to be noted that also in terms of Section 9 of *POCA* reporting obligations are imposed on bankers.

[86] From all these provisions it must again be concluded that also POCA imposes its terms on the type of contract that traditionally is styled as being ‘essentially one of creditor and debtor, with the underlying nature of mandate’. This would at the very least be true in regard to the reporting obligations and in respect of the duty not to commit any offence in terms of Sections 4,5,6 and 7 in the course of conducting any banking business. This duty translates itself into the obligation to not honour a demand for payment made by a client – such as in this instance – where the heeding of demand would contravene the provisions of *POCA.*

[87] To illustrate: if Mr Narib’s argument were correct that the funds - that were deposited by way of a cheque drawn against the account of Scratch-A-Million Enterprise CC, held with first respondent - became the property of applicant and that second respondent therefore became duty bound to honour the applicant’s demand for payment this would mean that the money obtained by illegal means by Scratch-A-Million Enterprise CC would become legal the moment the clearance period for cheques would have expired or the moment such moneys would become unidentifiable. Surely this would amount to money laundering in the clearest terms. Surely this can never be and was never intended to be permissible and surely a banker cannot be expected to commit an offence – or even to expose him- or herself to potential criminal liability in the course of executing a client’s instructions, such as in this instance.

[88] The cumulative effect of the referred to provisions is thus ultimately to the effect that a bank may lawfully refuse to honour a client’s instructions for payment in the given circumstances. It follows that a particular credit entry may thus also be validly reversed by a bank on that same account.

ARE THE PARTICULAR RESIDUAL TERMS OF SUCH A NATURE THAT THE PARTIES COULD HAVE OPTED TO EXCLUDE THEM EXPRESSLY OR IMPLIEDLY

[89] In the quest to determine whether or not the applicable provisions of *FIA* and *POCA* are to be regarded as contractual terms implied by law, which would thus have to be superimposed on the standard banker- client agreement in this instance

it remains to be established whether or not the parties have expressly excluded the operation of *FIA* and *POCA* from their underlying agreement and/or whether the legislature has intended to use its overriding power to nullify or control any attempt by the parties to exclude the terms imposed by *FIA* and *POCA* on their contract.

[90] It follows as a matter of logic that if the answer to latter enquiry is in the affirmative, the need to determine the former, falls away.

[91] The following factors are indicative of the legislature's intention:

a) all the above listed provisions of FIA and POCA have expressly been made applicable to banking transactions and thus also on the banker and client relationship and on any business they may transact;
b) all the above listed provisions of FIA and POCA impact directly of indirectly on banking business and thus on the banker– client relationship in the respects listed above;
c) all contraventions of both FIA and POCA attract severe penalties; it would have been absurd for the legislature to exclude banks – whose business operations very often lie at the core of money laundering activities - from the operation of these Acts and its penalties – to have done so would have dramatically reduced the effectiveness of the common underlying purpose to both statutes, namely the combating and prevention of money laundering activities – surely this could never have been intended ;
d) it would have been an easy matter for the legislature to have provided for the exclusion of certain categories of persons and entities – such as bank and bankers and their clients - from the operation of these statutes – which it did not do for obvious reasons. [43]

[92] In my view there can be no question that Parliament has not intended to use

[43] it is to be noted however that only *FIA* has limited exemption provisions in terms of Section 51 'The Minister may, on the recommendation of the Bank, if he considers it consistent with the purposes of this Act or in the interest of the public, by order published in the Gazette, exempt a person or class of persons from all or any of the provisions of this Act for such duration and subject to any conditions which the Minister may specify.'

its overriding power to nullify any attempt by parties to any agreement to exclude the terms imposed by *FIA* and *POCA* contractually.

[93] It follows from such conclusion that the aforementioned provisions of *FIA* and *POCA* are to be regarded as terms imposed by law on the traditional banker- client relationship and the contractual bond that exists between them.

[94] This finding in turn exonerates the complained actions by first and second respondents – who in terms of the residual obligations imposed by the FIA legislation – not only had the obligation to report the suspicious transaction – but who were also obliged to honour the Bank of Namibia's request, received in writing, not to proceed with the carrying out of the suspicious transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for the period determined by the Bank of Namibia in order to allow the Bank of Namibia to make the necessary inquiries concerning the transaction and to inform and advise an investigating authority and the Prosecutor-General thereof.

[95] It is common cause that, as a result, on 22 December 2009, the Prosecutor-General secured an interim restraining order in terms of which all funds, inclusive of the winnings of N$ 250 000.00 of the applicant, were frozen. Although the provisional order was eventually discharged *vis a vis* the applicant, the confirmation thereof *vis a vis* the other respondents effectively meant that the N$ 250 000.00, which had been returned to the second respondent, continue to be frozen.

[96] The preservation order obtained by the Prosecutor-General in terms of section 51 of the POCA Act on 27 May 2011 means that the credit balance in the Scratch-A-Million Enterprise CC account with second respondent[44] now stands potentially to be forfeited to the state. Such a result would never have been achieved if the first and second respondents would not have assumed the responsibility to withhold payment of the amount the applicant sought to withdraw on 7 September 2009 or if the second respondent would not have effected the

[44] Of which allegedly at least 80% of the credit card transactions in the Scratch-A-Million Enterprise CC account were fraudulent

subsequent reversal of the credit entry in the second respondent's books of account or if the repatriation of the total sum deposited to first respondent would not have been effected by second respondent.

[97] Viewed holistically this result is also in line with the fundamental principle that no one is to benefit from the proceeds of crime and the recognised principle that it is legitimate for a state to introduce measures – even if they would impact on the freedom to contract one might add - that would ensure that no one can benefit from criminal activity and to induce members of the public – in this case bankers – to act vigilantly in relation to the business transactions which they conduct – so as to inhibit crime.[45]

[98] Ultimately I come to the conclusion that the applicant's case for relief, which was essentially founded on the traditional banker-client relationship, as regulated by contract, cannot succeed in view of the residual terms which the law has imposed thereon and which terms exonerate the first and second respondent's actions herein.

[99] It follows that the application falls to be dismissed with costs, such costs are to include the costs of one instructed- and one instructing counsel, as far as the first respondent is concerned, and the costs of one instructed counsel and one instructing counsel – up to the stage of the drawing of the second respondent's heads of argument – the remainder of the costs awarded to second respondent are awarded on the scale of one instructing counsel.

H GEIER

Judge

[45] See for instance : *NDPP v RO Cook Properties* [2004] 2 All SA 491 (SCA) at para 28

APPEARANCES

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2nd RESPONDENT: EN Angula

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