REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A99/2009

In the matter between:

ANTONIO VINCENTE	**FIRST APPLICANT**
ANTONIO DE FREITAS RAMOS	**SECOND APPLICANT**
VALDEMIRO CORREIA	**THIRD APPLICANT**

and

MAGISTRATE D UUSIKO	**FIRST RESPONDENT**
MAGISTRATES COMMISSION	**SECOND RESPONDENT**

PROSECUTOR GENERAL **THIRD RESPONDENT**

MINISTER OF FINANCE **FOURTH RESPONDENT**

BANK OF NAMIBIA **FIFTH RESPONDENT**

Neutral citation: *Vincente v Magistrate D Uusiko* (A99-2009) [2013] NAHCMD 365 (29 November 2013)

Coram: VAN NIEKERK J

Heard: 8 March 2010

Delivered: 29 November 2013

Flynote: **Review** – Forfeiture by regional court magistrate of foreign currency in terms of section 35(1) of the Criminal Procedure Act, 51 of 1977 ("the CPA") – Forfeiture by the Treasury under regulation 3(5) of Exchange Control Regulations, 1961 discussed - Section 35(1) is clear that the discretion contemplated in the section is only available in cases where the article concerned was seized under the provisions of the CPA - As it is common cause on the papers that the currency was seized under the provisions of the Exchange Control Regulations, 1961, the discretion to declare the currency forfeit under section 35(1) was not available to the

first respondent - By exercising the discretionary power under section 35(1) the magistrate exceeded her jurisdiction, thereby acting illegally and committing an irregularity, which clearly prejudiced the applicants – Order of forfeiture under section 35(1) set aside

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ORDER

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1. The order made by the first respondent on 8 August 2008 in case no. RC97/08 forfeiting to the State the foreign currency found in possession of the applicants in terms of section 35 of the Criminal Procedure Act, 1977 (Act 51 of 1977), is hereby reviewed and set aside and substituted with the following order:

> ‘It is recorded that the foreign currency, to wit US$253 610 and Angolan Kwanza 1 700, which was seized in terms of regulation 3(3) of the Exchange Control Regulations, 1961 and handed in as Exhibit “1” during the trial, shall, by operation of regulation 3(5) be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized.’

2. The first, second, third and fourth respondents shall pay the costs of this application, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK J:

Introduction

[1] This is an application for review of the first respondent's decision as the presiding magistrate in the regional court to declare US$253 610 and Angolan Kwanza 1 700 forfeited to the State in terms of section 35 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA'). No relief is sought against the other respondents, who are cited only because of any interest they might have in the matter.

[2] According to the papers before me the applicants are Angolan citizens who also reside there. During 2008 they appeared in the regional court on charges of contravening regulation 3(1)(a), alternatively regulation 3(3), of the Exchange Control Regulations, 1961, as amended. The description of the main charge refers to the export of foreign currency from Namibia, whereas the description of the alternative charge refers to a failure to declare or produce foreign currency. However, the particulars of the charge allege that –

> '...upon or about the 16th day of July 2008 at or near Hosea Kutako Airport .... the accused did wrongfully and unlawfully, without permission granted by the Treasury or a person authorized by the treasury (*sic*), undertake to take out of

> the Republic of Namibia Foreign (*sic*) *currency*, to wit U$253 610.00 (*sic*) and 1 700-00 Kwanzaa's (*sic*)'.

[3] The applicants pleaded guilty to this charge and were duly convicted. Although the founding affidavit and the transcribed record of the criminal proceedings before me do not expressly state so, it can be assumed, based on the above-quoted particulars in the charge, that the conviction was on the main count.

[4] The applicants allege further in paragraph 30 of the founding affidavit that it was 'common cause and/or not in issue' that the foreign currency was seized in terms of the Exchange Control Regulations. They further state that, in spite thereof that the first respondent's attention was directed to, *inter alia*, the provisions of regulation 3(3) and 3(5), she committed an irregularity by proceeding to act in terms of section 35 of the CPA. They further state that the first respondent 'was obliged to have acted in terms of regulation 3(5)' and that the first respondent 'could not have applied the provisions of section 35' of the CPA.

[5] The applicants set out details of further complaints allegedly giving rise to grounds for review which I do not deem necessary to repeat in any detail for reasons which will become apparent.

[6] The applicants pray in their notice of motion, *inter alia*, for an order in the following terms:

> '1. Reviewing and/or setting aside the ruling made by the First Respondent on 8 August 2008 under case no RC97/08 when she forfeited the monies seized .....to the state (*sic*) in terms of section 35 of the Criminal Procedure Act instead of having the monies forfeited to the treasury in terms of regulation 3 (5) of the Exchange Control Regulations.'

[7] The application is opposed by the first, second, third and fourth respondents. They did not file any affidavits, but state in their notice of opposition that they intend

to raise certain issues of law, which they set out. I shall mention these when I deal with the arguments presented on behalf of the parties.

The applicants' point *in limine*

[8] At the hearing Mr *Mouton* on behalf of the applicants raised a point *in limine* which is that the respondents are not properly before the Court because they did not file any affidavits in opposition as required by rule 53(5). Rule 53(5)(b) provides that the presiding officer or any party affected who desires to oppose the granting of the order prayed in the notice of motion 'shall deliver any affidavits he or she may desire in answer to the allegations made by the applicant.' In my view the wording indicates that affidavits are not compulsory. If they would, in any event, only consist of legal argument there is no point in filing them. It is always open to an opposing party to merely argue the matter on the applicant's papers. The point raised is accordingly dismissed.

The respondents' first point of law

[9] The first, second and fourth respondents were represented during the hearing by Mr *Ncube*. He argued the matter on heads of argument drawn by Mr *Small*, who appeared on behalf of the third respondent.

[10] The respondents submitted that the matter is not reviewable because of the fact that the grounds of review are not clearly set out in the application and because the complaint relates to an error of law which is a matter for appeal, not review.

[11] Counsel on their behalf referred to section 20(1) of the High Court Act, 1990 (Act 16 of 1990) which states on which grounds the proceedings of a lower court may be brought under review by this Court. They are (a) absence of jurisdiction on the part of the court; (b) interest in the cause, bias, malice or corruption on the part of the

presiding judicial officer; (c) gross irregularity in the proceedings; or (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[12] Counsel pointed out that the applicants only mentioned that the first respondent committed ‘an irregularity’ and did not mention that it was a ‘gross irregularity in the proceedings’. They further point out that the applicants also did not mention any of the other grounds contained in section 20(1).

[13] They referred to several decisions in which the distinction between appeal and review proceedings is set out and emphasised that the applicants’ complaint relates to an alleged mistake of law made by the first respondent when she interpreted section 35(1) and the Exchange Control Regulations, 1961. In this regard they referred, *inter alia,* to *S v Bushebi* 1998 NR 239 (SC) at 241D-242A in which the phrase ‘irregularity in the proceedings’ was discussed and it was, *inter alia*, stated that the phrase as a ground for review relates to the conduct of the proceedings and not the result thereof.

[14] It is so that rule 53(2) requires of the applicants to set out the grounds and the facts and circumstances upon which they rely to have the decision or proceedings set aside or corrected. I also agree that the founding affidavit should have been drafted with greater clarity, stating expressly and in so many words what the grounds of review are. However, it is abundantly clear that what the applicants are alleging amounts to a complaint that the first respondent acted without the necessary jurisdiction and therefore irregularly and that reliance is not placed on a gross irregularity ‘in the conduct of the proceedings.’ To ignore the clear indication in the affidavit would be putting form over substance. The respondents were not

prejudiced in any way because they argued the matter fully on the basis discerned. In the circumstances I hold that the application is not defective.

The respondents' second point of law

[15] It is convenient at this stage to consider the second point of law raised by the respondents, which is based on the common cause fact that the applicants have also filed an appeal against the first respondent's decision based on the same facts and seeking the same relief. The submission is that this is vexatious, constitutes an abuse of process and may not be done. However, the contrary is clear from what was stated in *R v Parmanand* 1954 (3) SA 833 (A) at p838B-E:

> 'There is a well-recognised distinction between an appeal against a decision in a magistrate's court and a review of the proceedings in such a court (see *Gardiner and Lansdown*, 5th ed., vol. 1, p. 586); so far as it is relevant in the present case, apart from the difference in the form, in an appeal the Court ordinarily has regard only to the record of the proceedings in the inferior court, whereas in review proceedings other information can be placed before the Court. But in practice this distinction has not always been observed (see *Rex v Zackey,* 1945 AD 505 at pp. 509 - 10) and it is open to the appeal Court in any case, if the circumstances warrant it, to grant relief in appeal proceedings where the proceedings ought to have been by way of review. Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant, in view of the law as laid down in *R v D. and Another, supra*, to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings .....'.

(See also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at p368H-369F).

In view hereof the point raised by the respondents cannot be upheld.

The review application

[16] I now turn to a consideration of the merits of the application. In view thereof that there are no opposing affidavits alleging the contrary, the application must be approached on the basis as stated in paragraph 30 of the founding affidavit namely that it was 'common cause and/or not in issue' that the foreign currency was seized in terms of the Exchange Control Regulations. Indeed, there is nothing in the record of the criminal proceedings which expressly indicates the contrary. It is therefore necessary to consider the relevant legal provisions.

The Exchange Control Regulations, 1961

[17] The Exchange Control Regulations, 1961 are promulgated by virtue of section 9 of The Currency and Exchanges Act, 1933 (Act 9 of 1933), as amended, which provides that the President may make 'regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges'. Section 9(2) states that provision may be made for the application of any sanctions, whether civil or criminal, and for the forfeiture and disposal by the Treasury of any money referred to in the regulations and in respect of which an offence against any regulation has been committed.

[18] Regulation 3(1) (read with regulation 22 which criminalizes any contravention or failure to comply with any provision of the regulations and provides for the applicable penalty), sets out the offence of which the applicants were convicted:

> '3. (1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose:-

(a) take or send out of the Republic any bank notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere;'.

[19] Regulation 3(3) provides:

'(3) Every person who is about to leave the Republic and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall –

(a) declare whether or not he has with him any bank notes, gold, securities or foreign currency; and

(b) produce any bank notes, gold, securities or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any bank notes, gold, securities or foreign currency, and may seize any bank notes, gold, securities or foreign currency produced or found upon such examination or search unless either:-

(i) the appropriate officer is satisfied that such person is, in respect of any bank notes, gold, securities or foreign currency which he has with him, exempt from the prohibition imposed by sub-regulation (1); or

(ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any bank notes, gold, securities or foreign currency which he has with him does not involve a contravention of that sub-regulation.

No female shall be searched in pursuance of this sub-regulation except by a female.

[20] Regulation 3(5) provides:

> (5) All bank notes, gold, securities and foreign currency seized under sub-regulation (3) or (4) shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any bank notes, gold, securities or foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized.'

[21] The following definitions should also be noted:

> ' "appropriate officer" means any officer of customs or excise, any immigration officer, any member of the [***Namibian Police***], or any person authorised by the Treasury to act as such;
>
> "Treasury", in relation to any matter contemplated in these regulations, means the Minister of Finance or an officer in the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister of Finance.'

The forfeiture provision contained in regulation 3(5)

[22] Mr *Small* referred to various forfeiture provisions in other laws, e.g. section 77 of the Diamond Act, 1999 (Act 13 of 1999) and section 6(6) of the repealed Sea Fisheries Act, 1973 (Act 58 of 1973), which provide that certain articles 'shall be forfeited to the State' without requiring a declaration of forfeiture by a court (see e.g. *S v Pineiro (2)* 1993 NR 49 (HC) at p55A-D). Such forfeiture operates *ex lege* and is sometimes referred to as 'automatic forfeiture'. He referred to the fact that regulation 3(5) does not require a declaration of forfeiture by a court and further tentatively suggested that by this provision it was contemplated to provide for

forfeiture *ex lege*. If this is so, it would mean that, by the time the first respondent considered the application for forfeiture, the currency effectively would already have been forfeited.

[23] However, Mr *Small* also referred to the decision of *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC), which does not support the notion of an automatic forfeiture *ex lege*. In this matter the Constitutional Court of South Africa considered the provisions of regulation 3(5) of the South African Exchange Control Regulations, which are identical to the provisions of the Namibian regulation 3(5). The Court approved of certain *dicta* in the Full Bench decision of *Van der Merwe v Nel* 2006 (2) SACR 487 (C) (at paras [20] and [23]) which considered the same provisions and stated (at p566D-567H):

> '[39] In my view, the foreign currency is not forfeited for the benefit of the National Revenue Fund immediately upon seizure. Nor is it correct that the Treasury decision whether to return the currency occurs after forfeiture and at a time when the foreign currency is already being held for the benefit of the Fund. On a proper interpretation, forfeiture only occurs after the Treasury decision not to return the currency has been made. This conclusion is based on four reasons.
>
> [40] First, the regulations draw a distinction between seizure and forfeiture. Regulation 3(3) provides for seizure while reg 3(5) is concerned with forfeiture. This implies that forfeiture is seen as something different from seizure. Any analysis that equates forfeiture and seizure would in my view be incorrect. Seizure is what happens when the currency is taken under reg 3(3). Regulation 3(5) provides that forfeiture of the seized items will follow. Forfeiture does not occur at the same time as the seizure but after the seizure has taken place. Regulation 3(5) expressly provides for 'currency seized' to be 'forfeited'.
>
> [41] In addition, reg 3(5) further carves out a proviso to forfeiture. The proviso is to the effect that forfeiture will not occur in the circumstances covered by it: where the Treasury in its discretion directs return of the seized currency. As the Full Court correctly pointed out, reg 3(5) expressly provides for the return

of seized currency, not forfeited currency. This again implies that forfeiture will not occur until the Treasury has determined whether or not to return the currency in terms of the proviso.

[42] Third, it must also be kept in mind that the decision to refund money seized is at odds with the idea that forfeiture had occurred immediately upon seizure. Forfeiture as a concept indicates finality. There cannot be incomplete forfeiture: an item is either forfeited or not. The suggestion of the third and fourth respondents that forfeiture is only completed when the decision whether to return what had been seized has been made, is accordingly contrary to the notion that forfeiture occurred immediately upon seizure.

[43] Finally, forfeiture immediately upon seizure is constitutionally objectionable. While it is understandable that foreign currency found to be in the possession of someone at the airport must be seized immediately, there can be no reason to justify forfeiture immediate upon seizure. Immediate forfeiture would mean that the property is forfeited without giving the person concerned an opportunity to be heard. The Legislature could not have contemplated this. In my view, regs 3(3) and 3(5) set in train a process. It begins with the seizure of foreign currency followed by a decision by the Treasury whether or not to return what had been seized and ends with forfeiture immediately that decision has been taken.

[44] .....

[45] When foreign currency is seized in terms of reg 3(3), the Treasury cannot neglect to make a decision whether what has been seized ought to be returned. The regulations cannot mean that the absence of a conscious decision on the part of the Treasury would lead to forfeiture by default as it were. The person from whom the foreign currency was taken is entitled to a decision. Forfeiture does not occur until and unless that decision has been made. Further, it is common cause that the decision to return or not to return is an administrative one with the result that the person concerned must be given a fair opportunity to be heard before the decision is taken.

[46] I prefer the approach of the Full Court and conclude that forfeiture does not occur immediately upon seizure. I therefore hold that forfeiture only occurs when a decision of the Treasury is made in relation to the return of the foreign currency seized only after a fair hearing has been afforded the person concerned.'

[24] As I understand the submissions before me counsel were ultimately *ad idem* that the interpretation and approach as set out above should be approved and followed *in casu,* which I respectfully do. This is subject to the *caveat* that the constitutionality of the forfeiture provision is not before me and no submissions were made in this regard. I therefore make no finding on this aspect. The import of my following the *Armbruster* case is, *inter alia*, that the tentative suggestion by counsel for the third respondent alluded to earlier is effectively dismissed.

The decision by the first respondent

[25] In her very brief judgment on the forfeiture application the first respondent found that the foreign currency was the 'subject matter' of the proceedings before her and that as such she has the discretion to order its forfeiture in terms of the provisions of section 35 of the CPA.

[26] Section 35 of the CPA provides (the underlining is mine):

> '**35 Forfeiture of article to State**
>
> (1) A court which convicts an accused of any offence may, without notice to any person, declare-
>
> (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
> (b) if the conviction is in respect of an offence referred to in Part I of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,
>
> and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right

referred to in subparagraph (i) or (ii) of subsection (4)(a) if it is proved that the person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

(2) A court which convicts an accused or which finds an accused not guilty of any offence, shall declare forfeited to the State any article seized under the provisions of this Act which is forged or counterfeit or which cannot lawfully be possessed by any person.

(3) Any weapon, instrument, vehicle, container or other article declared forfeited under the provisions of subsection (1), shall be kept for a period of thirty days with effect from the date of declaration of forfeiture or, if an application is within that period received from any person for the determination of any right referred to in subparagraph (i) or (ii) of subsection (4)(a), until a final decision in respect of any such application has been given.

(4) (a) The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question-

(i) is the property of any such person, the court shall set aside the declaration of forfeiture and direct that the weapon, instrument, vehicle, container or other article, as the case may be, be returned to such person, or, if

the State has disposed of the weapon, instrument, vehicle, container or other article in question, direct that such person be compensated by the State to the extent to which the State has been enriched by such disposal;

(ii) was sold to the accused in pursuance of a contract under which he becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof-

(aa) the court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or

(bb) if the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, he may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

(c) When determining any rights under this subsection, the record of the criminal proceedings in which the declaration of forfeiture was made, shall form part of the relevant proceedings, and the court

> making the determination may hear such additional evidence, whether by affidavit or orally, as it may deem fit.

[27] The first respondent stated in her judgment:

> 'The same Section, that is Section 35 of the Criminal Procedure Act, also makes provision for an Appeal as if it were a conviction by the Court making a determination. It is therefore in my opinion clear that even if this money is to be forfeited to the Namibian State, the Accused persons still have a chance or there is a recourse to Appeal against the order that I am just about to make on the issue of the forfeiture of the money, which is the subject matter of the proceedings.'

[28] I note in passing that in this regard the first respondent misdirected herself as the appeal under section 35(4)(b) is only available to an applicant 'other than the accused' (see section 35(4)(a)). However, an accused may appeal the decision to forfeit under section 35(1) by recourse in the ordinary way to section 309(1) (*S v Marais* 1982 3 SA 988 (A) 999A-C).

[29] From the underlined words in section 35(1) it is clear that the discretion contemplated in the section is only available in cases where the article concerned was seized under the provisions of the CPA. As it is common cause that the currency was seized under the provisions of the Exchange Control Regulations, 1961, the discretion to declare the currency forfeit under section 35 was not available to the first respondent. By exercising the discretionary power under section 35(1) she exceeded her jurisdiction, thereby acting illegally and committing an irregularity, which clearly prejudiced the applicants in that they have been deprived of the opportunity to make representations to the proper functionary entrusted with the power to refund or return the foreign currency to them.

The decision in S v Candimba

[28] During argument the I was informed that a criminal appeal from the regional court was pending before this Court consisting of two appeal judges, which appeal also concerns a forfeiture order in terms of section 35(1) of foreign currency after conviction upon, *inter alia*, a charge of contravening regulation 3(1)(a) of the Exchange Control Regulations, 1961. Judgment in that matter was delivered on 9 April 2010 and, by agreement between the parties, made available to me. It has since become reported as *S v Candimba and Others* 2013 (1) NR 70 (HC). The Court was of the opinion that '[N]othing in section 35 suggests that it does not cover the circumstances under which the foreign currency in possession of the appellants was seized' in the context of rejecting an argument that the currency was not 'an article by means whereof the offence in question was committed or which was used in the commission of such offence' as contemplated in section 35(1) (at p73H). Although this argument was also floated in the matter before me, it is not necessary to consider it as the issue simply does not arise on the papers. I pause here merely to note that, although both counsel for the respondent were of the view that foreign currency involved in circumstances contemplated by regulation 3 would be covered by the description in contained in section 35(1), they did not argue that the first respondent was correct in applying section 35(1) in the face of the specific forfeiture provision contained in regulation 3(5). On the other hand, they also did not expressly concede that she was wrong.

[29] In any event the *Candimba* case, in my view, is distinguishable from the present case in that the matter was decided on the basis that (i) the currency was seized by virtue of the provisions of section 20 of the CPA (see p73H-I); (ii) the regional magistrate made a wrong 'concession' that the appellants were the owners of the currency and that, as such, she could not have forfeited the currency under section 35 (at p76B-C read with p77A-B); and (iii) that the regional magistrate in any event did not have sufficient information necessary for her to exercise a discretion under

section 35 (at p77B-C). These are not the circumstances of the instant case. However, should the basis on which the matter is sought to be distinguished prove to be doubtful, I shall consider certain aspects of the judgment in more detail.

[30] In *Candimba* the learned Judge stated at p74:

> ‘[11] In my opinion reg 3(5) does not exclude a forfeiture under s 35, it is the circumstances of the case which should determine whether s 35 should prevail or the forfeiture provision in any legislation, which distinction will always be difficult to draw. However, clear forfeiture cases I can think of under s 35 would be money obtained illegally and money used to commit crime. I see no reason why money to which a claimant cannot prove ownership, cannot be forfeited in terms of s 35. In my view, forfeiture provisions in specific legislations are provided *ex abundanti cautela* because forfeiture under s 35 is not obligatory but rather discretionary. Regulation 3(5) mandates a forfeiture *ex lege* upon a seizure with a discretionary proviso to the Treasury. In *Van der Merwe and Another v Nel and Others* 2006 (2) SACR 487 (C) ([2006] 4 All SA 96), Waglay J in a similar matter stated, '(f)oreign currency seized must be seen to be concerned with or believed to be concerned with the suspected contravention of reg 3(1)(a) if it is found upon a person who is charged with contravening that Regulation, which deals with taking foreign currency out of the Republic without authorisation' (at 495a).’

[31] While it is so that regulation 3(5) does not contain any provision which could be construed to exclude forfeiture under section 35(1), section 9(3) of Act 9 of 1933 provides that the President may by any of the regulations provided for in section 9(1) and 9(2) –

> ‘suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with

> any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation.'

[32] It seems to me that, where Act 9 of 1933 specifically gives the President the widest powers to make 'regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges' which includes the power to impose civil and criminal sanctions and for the forfeiture of any money referred to in the regulations *inter alia* in respect of which an offence under the regulations has been committed, and he does make such a regulation as is the case with regulation 3(5), any Act of Parliament affecting or having any bearing upon currency which is in conflict or inconsistent with this regulation shall be deemed to be suspended. If section 35(1) can be construed as granting the power to forfeit foreign currency in circumstances where the Exchange Control Regulations, 1961 are being contravened, it would in my view be in conflict with or inconsistent with regulation 3(5). The reason is obviously that the discretion to forfeit the currency is exercised by a criminal court and not by the Treasury. It is also probable that the grounds for and considerations playing a role in the exercise of such discretion are bound to be different, depending on the functionary as well as the factual and legal context within which the enabling power is exercised.

[33] Apart from section 9(3) of Act 9 of 1933, there are the provisions of section 19 of the CPA, which read as follows:

> '**19 Saving as to certain powers conferred by other laws**
>
> The provisions of this Chapter shall not derogate from any power conferred by any other law to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter.'

[34] The reference in the section to 'this Chapter' is to Chapter 2 of the CPA which contains sections 19 – 36 and refers to search warrants, entering of premises,

seizure, forfeiture and disposal of property connected with offences. This saving provision clearly fully retains the power conferred in any other law to search, seize, forfeit and dispose of ‘any matter’. The word ‘law’ is defined in the CPA as including a law as defined in "The Interpretation of Laws Proclamation, 1920" (Proclamation 37 of 1920), which in turn defines the term to ‘mean and include any law, proclamation or other enactment having the force of law’. This definition does not include regulations. However, its seems to me that by virtue of section 9(3) of Act 9 of 1933, the Exchange Control Regulations, 1961, could be equated with an Act of Parliament (cf *R v Maharaj* 1966 (3) SA 679 (RA); *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A)).

[35] Applying the maxim *generalia specialibus non derogant* which is to the effect that ‘when the legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provisions, unless it manifest that intention very clearly’ (*R v Gwantshu* 1931 EDL 29 at 31), it seems to me that Act 51 of 1977 cannot be construed as intending to interfere with the specific power given to the Treasury under regulation 3(5).

[36] The Court in *Candimba’s* case did not refer to section 9(3) of Act 9 of 1933 or section 19 of the CPA and it would appear that these provisions were not brought to its attention. In view hereof the remarks made in paragraph [11] of that judgment which suggest that the power in section 35(1) may be used in cases where the regulations were contravened are, in my respectful view, made *per incuriam* and are not binding.

[37] My earlier adoption of the approach in the *Armbruster* case could be interpreted as being in conflict with the sentence in paragraph [11] of *Candimba’s* case which

reads, ‘Regulation 3(5) mandates a forfeiture *ex lege* upon a seizure with a discretionary proviso to the Treasury,’. However, later in his judgment the learned Judge conveys that this statement is merely based on an impression as he states the following (at p76H-J):

> ‘In actual fact, on a reading of reg 22B, notwithstanding the provisions of reg 3(5), which creates an impression that on seizing money or goods in terms of the regulations they are automatically forfeited to the state, it appears that forfeiture only takes place when the conditions in reg 22B(3) have been complied with and a period of 90 days as from the date of publication of notice in the *Gazette* has expired or where court proceedings were instituted and final judgment has been given in the proceedings.’

[38] Therefore, although the forfeiture procedure provided in regulation 22B is not applicable to forfeiture under regulation 3(5), it does seem to me that no definite and binding opinion was expressed by the learned Judge in the above-quoted sentence in paragraph [11].

[39] In *Candimba’s* case the Appeal Court stated (at p75G-75A) (the underlining is mine):

> ‘[14] Appellants in mitigation stated that they brought the money from Angola into Namibia. They were on their way to Dubai to buy goods for their businesses and the money found on them was their money. Except for the fact that the money was found in their possession, they did not satisfy the court that they were in fact the owners of the foreign currency seized from them. A factual proof of ownership is a pre-requisite for any claims that the appellants may have on the money in question. The argument that the state did not prove that the money did not originate from Angola is nonsensical. Appellants pleaded guilty to exporting foreign currency from the Republic

> without authorisation and it was incumbent on them to prove that it was their money which was legally generated. The cases of this nature are becoming too many and the courts will have to consider these cases in a very serious light to stamp out possible money laundering. Where at the stage of sentencing the accused cannot prove ownership of the money or circumstances mentioned above exist, the court may order forfeiture in terms of s 35 of the Criminal Procedure Act. Where ownership is proved forfeiture must be referred to the Treasury unless the Treasury had placed evidence before the court making it unnecessary to make a referral to the Treasury.'

[40] In my respectful view there is nothing in section 35 of the CPA which states or implies that failure by an accused to prove ownership of an article is a factor allowing for forfeiture of the article in terms of section 35. There is also no legal provision which requires or permits the 'referral of forfeiture to the Treasury' or for a court to consider evidence by the Treasury 'making it unnecessary to make a referral to the Treasury.' Moreover, 'ownership' of the foreign currency is not the determining factor because regulation 3(5) does not provide that the money may be returned or refunded to the owner, but that the Treasury may direct that the money be returned or refunded 'to the person from whom they were taken, or who was entitled to have the custody or possession of the money at the time it was seized.' It seems therefore, with great respect, that the remarks were made *per incuriam* and that I am not bound to follow the appeal judgment in these respects in the matter before me.

The order

[41] In their notice of opposition the respondents requested that the Court should, if the matter is reviewable, refer the matter back to the first respondent to order the forfeiture in terms of the Exchange Control Regulations, 1961. In argument this request was modified in that the Court should record that the foreign currency shall

be forfeited subject to the discretionary power by the Treasury. This request is based on the suggestion made in *Hiemstra's Criminal Procedure* where the author deals with forfeiture *ex lege* where no court order is required and says that making a note about the forfeiture would avoid any misunderstanding by persons who are not quite aware of the distinction. I agree that this is a useful suggestion, but I prefer to word the order slightly differently to what counsel suggested. As costs were claimed only in the event of opposition, no order of costs is made against the fifth respondent.

[42] The order is as follows:

1. The order made by the first respondent on 8 August 2008 in case no. RC97/08 forfeiting to the State the foreign currency found in possession of the applicants in terms of section 35 of the Criminal Procedure Act, 1977 (Act 51 of 1977), is hereby reviewed and set aside and substituted with the following order:

> 'It is recorded that the foreign currency, to wit US$253 610 and Angolan Kwanza 1 700, which was seized in terms of regulation 3(3) of the Exchange Control Regulations, 1961 and handed in as Exhibit "1" during the trial, shall, by operation of regulation 3(5) be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized.'

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2. The first, second, third and fourth respondents shall pay the costs of this application, such costs to include the costs of one instructing and one instructed counsel.

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K van Niekerk

Judge

APPEARANCE

For the applicants: Adv C J Mouton
Instr by Ellis & Partners

For the first, second and fourth respondents: Mr Ncube
Office of the Government-Attorney

For the third respondent: Adv D F Small
Office of the Prosecutor-General