



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 13/2015

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

ALEXES PAULO

FIRST RESPONDENT

RHAPSODY CLOSE CORPORATION

SECOND RESPONDENT

Neutral citation: *The Prosecutor-General v Paulo* (POCA 13/2015) [2021]
NAHCMD 112 (17 March 2021)

Coram: ANGULA DJP

Heard: 24 September 2020

Delivered: 17 March 2021

Flynote: Applications and Motions – Prevention of Organized Crime Act, 29 of 2009 (POCA – Application for forfeiture of property order – Sections 1 and 61 – Proceeds of unlawful activities — Contravention of regulation 2(1) of the Exchange Control Regulations, 1961 – Contravention of s 30 of Immigration Control Act No. 7 of 1993 – Fraud – Money laundering in contravention of ss 4 and 6 of POCA – Plascon-Evans rule – Standard of proof – Balance of probabilities.

Summary: Applications and Motions – A preservation of property order was granted on 24 December 2015 – That order was served on the respondents who then opposed the grant of a forfeiture of property order and filed opposing affidavits – On 29 April 2016, the Prosecutor-General launched the forfeiture application on account that the properties are proceeds of the unlawful activities – The respondents raised certain points *in limine*, some of which were upheld by the court and the application for the preservation property order was dismissed – The applicant then appealed to the Supreme Court – The appeal was upheld and the matter was remitted to this court to deal with the merits.

Held; the applicant failed to prove on a balance of probabilities that the respondents unlawfully traded in foreign currency in contravention of regulation 2 (1) the Exchange Control Regulations, 1961.

Held; the applicant failed to prove on a balance of probabilities that the respondents contravened s 30 of the Immigration Control Act, 1993 and that the profit or benefit derived from and retained was as a result of the contravention of the said section.

Held; that the applicant failed to prove on a balance of probabilities that the respondents had committed an offence of fraud.

Held; that the applicant failed to prove on a balance of probabilities that the respondents had committed the offence of money laundering in that there was no causal connection between the offence of fraud and the properties.

Accordingly, the application for the forfeiture of property order was dismissed with costs.

ORDER

1. The application to declare the respondents' property held under a preservation order issued by this court on 24 December 2015 is dismissed.

2. The *curator bonis* Warrant Officer Green or in his absence Warrant Officer Nambadi under whose control the property was placed by the preservation of property order, is directed to release the said property under his control into the hands of the respondents.
3. The applicant is to pay the respondents' costs.
4. The matter is removed from the roll and is regarded as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an application in which the applicant seeks an order to have declared certain properties held under a preservation of property order issued by this court on 24 December 2015, forfeited to the State in terms of s 61 of the Prevention of Organised Crime Act, 29 of 2004 ('POCA'). The preservation of property order was served on the respondents who then opposed the grant of the forfeiture order sought in the present application.

[2] In addition to opposing the granting of the forfeiture order on merits, the respondents raised three points *in limine* which were all upheld by this court. Subsequent thereto the Prosecutor-General appealed to the Supreme Court which appeal was upheld and referred the matter back to this court to deal with the merits. It is unnecessary for the purpose of this judgment to go into the detail of the appeal judgment save to say that it is reported.¹

The parties

¹ *Prosecutor-General v Paulo & Another* Case No. SA 73/2017, delivered on 24 June 2020.

[3] The applicant is the Prosecutor-General, appointed in terms of Article 32(4)(a) (cc) read with Article 88 of the Constitution of Namibia.

[4] The first respondent is Mr Alexes Paulo, an adult male Angolan national. It would appear that when he is in Namibia he resides at No. 8, Raven Court, Hochland Park. Back in Angola, however he says he resides at Rua Antonio Saldanha 3, Luanda, Angola.

[5] The second respondent is Rhapsody Investments CC, a close corporation registered as such in terms of the laws of Namibia, with its registered address situated at 3rd Floor, Maerua Mall Office Tower, Jan Jonker Road, Windhoek, Republic of Namibia. Mr Paulo and his wife Ms Judite Meli Francisco are members of the second respondent in equal shares. Mr Paulo's wife is not a party to the present proceedings.

[6] In this judgment the applicant will be referred to as such. The first respondent will be referred to as 'Mr Paulo' and the second respondent as 'the CC'.

Relief sought

[7] In these proceedings the applicant seeks an order for the forfeiture of certain properties being the positive bank balances in the respondents' banks accounts which are held under the preservation order. The properties are described as:

- (a) the positive balance in the Standard Bank, Namibia business banking account number 60001553274 held in the name of the CC;
- (b) the positive balance in Standard Bank Namibia, Premium call account number 60001400222 held in the name of the CC;
- (c) the positive balance in Bank Windhoek Namibia, cheque account number 8003095691 held in the name of Mr Paulo; and
- (d) the positive balance in Bank Windhoek Namibia account number 8004741004 held in the name of the CC.

all of which are hereafter jointly referred to interchangeably as 'the properties' or simply 'money'.

The applicant's case

[8] The facts relied upon by the applicant, for the relief sought are based on the affidavits filed during the first stage of the proceedings namely, the application for the preservation of property order. To that end the applicant requests that the affidavits filed in support of the preservation order be considered and read as if incorporated in the present application. In addition, further affidavits have been filed in the present application, deposing to the facts which, are alleged to have come to light since the granting of the preservation of property order. I should mention in this regard that a few additional affidavits and documents have been filed. The main founding affidavit and supporting affidavits filed in the application of the preservation of property order form the foundation for the present application.

[9] It is common cause that the applicant herself, even though she is the applicant, did not conduct the investigations. The investigations were conducted by members of Namibia Police Force (Nampol): Commercial Crime Investigation Unit. The main affidavit upon which the applicant relies is the affidavit deposed to by Warrant Officer Green in respect of the preservation property application. He did not depose to a further affidavit in respect of the present application for the forfeiture of property order.

[10] From the affidavit by Warrant Officer Green, it appears that the investigation into Mr Paulo's activities was triggered after Mr Paulo made a deposit of a large amount of money at Standard Bank and indicated on the deposit receipt that the source of the funds was 'business'. Standard Bank then alerted Nampol of a possible offence of money laundering. Nampol through Warrant Officer Green launched the investigation about Mr Paulo and the CC's activities.

[11] Warrant Officer Green obtained an affidavit from a certain Ms Cloete, a Teller at Standard Bank, who attended to Mr Paulo on 17 November 2015. According to her, Mr Paulo made a cash deposit of N\$1 800 000 into the CC's account held at

Standard Bank. Mr Paulo was requested to explain the source of the funds which he indicated on the deposit receipt as 'business'. He further presented a receipt of foreign currency transaction from Bank Windhoek, indicating an amount of USD120 000 which he exchanged the previous, day equal to the sum of N\$1 738 800 at Bank Windhoek from US Dollars to Namibian Dollars.

[12] According to Warrant Officer Green, he visited the address furnished by Mr Paulo to Standard Bank as the CC's registered address, being 41 Hornbill, Long Island Street in Rocky Crest. The persons renting the premises however informed him that they did not know Mr Paulo. Upon further investigations, he established that Mr Paulo had submitted an application for a work permit to the Ministry of Home Affairs on 22 September 2015. That application had, however not been processed when he conducted his investigation. He noted that the application documents stated that the CC had four employees in its employment. Upon enquiry at the office of Social Security Commission the records indicated that three people were employed by the CC. The documents further indicated that two of the employees were receiving a monthly salary of N\$6 000 and whereas the third employee was receiving a salary of N\$2 500 per month. The document further showed that the three employees were removed as employees on 15 December 2015. The reason advanced for such removal was that the CC was still not operational.

[13] Warrant Officer Green deposed further that his investigations established that the CC held two accounts at Standard Bank: a call account and an ordinary business transactional account. It also held an account at Bank Windhoek. Mr Paulo himself held an account at Bank Windhoek. Warrant Officer Green further stated that he analysed the CC's respective accounts as well as Mr Paulo's account. He concluded that there were reasonable grounds to believe that the CC and Mr Paulo were unlawfully trading in foreign currency.

[14] Finally, Warrant Officer Green stated that he interviewed Mr Paulo who explained to him the nature of his business including providing him with a copy of the letter which Mr Paulo had written to Bank Windhoek on 20 October 2015 in which he explained the CC's business scope and operations.

[15] Warrant Officer Green did not file a further affidavit in the present forfeiture application. Warrant Officer Nambadi instead deposed to an affidavit. She claims that she investigated this case together with Warrant Officer Green during December 2015, which investigation led to the application for the preservation of property order being made. She deposed further that she investigated the allegations made by Mr Paulo in his opposing affidavit with regard to the agreement entered into between Bank of Namibia and the Central Bank of Angola which permitted their respective citizens to exchange their respective currency in Namibia.

[16] As regards the exchange of Kwanzas to Namibian Dollars made by Mr Paulo at Oshikango between June 2015 and August 2015, Warrant Officer Nambadi states that according to the 'Immigration Movement Register' when Mr Paulo crossed the border of Angola into Namibia he would have carried N\$3 765 182 which would have been over the maximum of USD10 000 allowed in terms of the Angolan Government Exchange Control Regulations. She further alleges that Mr Paulo was required by s 14 of the Customs and Excise Act, 20 of 1998 to declare the Kwanzas currency when he entered into Namibia.

[17] Based on the allegations set out above, the applicant submits that the facts alleged in the affidavits filed, proved on a balance of probabilities that the respondents were involved in the illegal trading in foreign currency in contravention of regulation 2(1), read with regulation 22 of the Exchange Control Regulations of 1961; that the respondents committed fraud by making misrepresentations to Standard Bank and the Ministry of Home Affairs, by submitting false information; that Mr Paulo contravened the provisions of s 30 of the Immigration Control Act, 7 of 1993; and that the respondents committed the offence of money laundering as described in ss 4 and 6 of POCA.

The respondents' case

[18] Mr Paulo deposed to the opposing affidavit on behalf of the respondents. He started by pointing out that his conduct and activities which gave rise to the present matter were triggered by the conclusion of the agreement between Bank of Namibia and the Central Bank of Angola in terms whereof the citizens of the two countries could exchange their respective currencies at Oshikango. Based on that agreement

he approached Bank Windhoek which assisted the CC to exchange Angolan Kwanzas into Namibian Dollars. In support of that, he attached the CC's bank statements for the period June 2015 to October 2015, detailing the money transactions made.

[19] As to the applicant's allegation that the respondents illegally traded in foreign currency, he explained that he addressed a letter on 10 October 2015 on behalf of the CC to Bank Windhoek informing them about the scope of the CC's business. He further informed Bank Windhoek that the CC has clients at Oshikango who needed US Dollars to buy goods there as most of the shops at Oshikango only accept US Dollars. As a result, its clients would give the CC Namibian Dollars and the CC would in exchange give the client US Dollars equivalent of Namibian Dollars. The reason for the clients engaging the services of the CC is because they did not wish to travel to Windhoek to buy US Dollars from the authorised dealers. As a consideration for such services rendered the CC received payment. He deposed further that he was informed by Bank Windhoek that the CC's envisaged activities would be perfectly in order. He points out that Bank Windhoek has thus since been assisting the CC in accordance with the provisions of reg 3(1). Mr Paulo asserts that the CC only acted as an agent for Angolan clients and denies that he traded in foreign currency.

[20] As regards the deposit of N\$1 800 000 deposited in the CC's account held at Standard Bank on 18 November 2015 and which triggered the police investigation, Mr Paulo states that that amount came from the CC's customers at Oshikango, who had given it to the CC for purposes of the CC obtaining foreign currency for them.

[21] According to Mr Paulo, the agreement between the two Banks was not a public document and he was not in possession of that document.

Issue for determination

[22] The question for determination is whether the Prosecutor-General has proved on a balance of probabilities, that the properties are the proceeds of unlawful activities and she is thus entitled to an order declaring the properties forfeited to the State.

Applicable legal provisions and principles

[23] As has been noted earlier in this judgment, the applicant's case is that the properties are proceeds of unlawful activities, in that the respondents contravened: regulation 2(1) of the Exchange Control Regulations, 1961; committed fraud; contravened s 30 of the Immigration Control Act, 1993 and committed an offence of money laundering as contemplated in ss 4 and 6 of POCA.

[24] Section 1 of POCA defines proceeds of unlawful activities as -

'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.'

[25] The section further defines 'unlawful activity' as -

'Any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia'. (Underlining supplied for emphasis)

[26] It would seem to me that for the property to constitute proceeds of unlawful activities, the applicant would have to establish on a balance of probability, firstly, that the respondents had committed an offence or contravened any law in Namibia, regardless of whether or not the conduct occurred in Namibia, as long as the conduct is an offence in Namibia or is a contravention of any law in Namibia. It is only if that first leg of the requirement is established that the second leg would be considered.

[27] The second leg is to determine whether the property is the proceeds of unlawful activities that is, whether the respondents directly or indirectly 'derived, received or retained' the property in connection with or as a result of the offence or contravention of any such law established in the first leg of the requirement.

[28] It follows therefore, that the applicant would only be successful if she proves both requirements on a balance of probabilities. If the applicant makes out a case that the property is the proceeds of unlawful activities, then the court has no discretion, but to grant the forfeiture order.²

[29] It is now well-established that in view of the fact that the POCA makes it obligatory for the Prosecutor-General to apply for a forfeiture order by way of an affidavit, any factual dispute has to be resolved in accordance with the applicable principles in relation to dispute of facts in motion proceedings as laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Pty Ltd*³. The Plascon-Evans rule, as it has become known, can be summarized as follows – a court may grant final relief only if the facts as stated by the respondent, together with the facts admitted in the applicant's affidavit justify the grant of the final relief. This principle is subject to two exceptions. These are firstly, a bare denial such that it does not raise a real or genuine or bona fide dispute of fact and secondly, where a denial is so clearly untenable that the court would be justified in rejecting it on the papers. In any instance where any one of the two exceptions arise, the court would be justified in finding that no dispute of fact has arisen from the facts asserted by the respondent and accept the version of the applicant.⁴

Analysis and discussion

[30] In order to provide a structured approach to the resolution of the dispute between the parties in the present matter, I proceed using the headings of the alleged offences which the applicant alleges the respondents committed, as sign posts as I navigate through the judgment. I will first briefly state what the applicant alleges then mention the respondents' response towards the applicants allegations. I will thereafter mention the parties' counsels' respective submissions. Finally, I will make the court's determination.

² *New Africa Dimensions CC v Prosecutor General* (SA 22/2016) [2018] NASC (8 March 2018) para [15].

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 633 (A).

⁴ *Prosecutor-General v Kamunguma* (SA 62/2017) [2019] NASC (12 June 2019) at para [39]. See also, *New Africa Dimensions CC v Prosecutor-General* (SA 22/2016) [2018] NASC at paras [17] – [19].

Illegal trading in foreign currency in contravention of regulation 2(1) of the Control Exchange regulations

[31] In their founding affidavits in the application for the preservation of property order, both the applicant and Warrant Officer Green made almost identical allegations and arrived at identical conclusions. They state *inter alia* that Mr Paulo is not an authorised dealer; that Mr Paulo in his letter to Bank Windhoek indicated that the CC would outsource US Dollars to their clients; and that there were reasonable grounds to believe that the CC would receive compensation for such outsourcing services. They concluded that Mr Paulo and the CC were involved in unlawful buying, borrowing and selling of foreign currency.

[32] As has been noted when dealing with the parties' respective cases, Mr Paulo on behalf of the parties explained in his affidavit about how he first approached Bank Windhoek in writing, explaining what business the CC wanted to conduct and that he was thereafter informed by Bank Windhoek that the business the CC wanted to engage in namely, to exchange Namibian Dollars into US Dollars on behalf of his clients was in order. Mr Paulo's version is corroborated, in this regard by what is stated by Mr Scholtz Arthur Peter, a Senior Teller at Bank Windhoek, who deposed to the fact that he attended to Mr Paulo most of the time when the latter conducted foreign currency transactions at that bank. Mr Peter further confirmed that Mr Paulo told him that he needed foreign currency to pay his clients. Mr Peter further stated that 'We have transferred the money from his personal account to business account and then we exchanged it to foreign currency.'

[33] Ms Angula for the applicant submits in her written submissions that the court has 'to determine whether the conduct of the respondents falls foul of regulation 2(1) of the Exchange Control Regulations.'

[34] Regulation 1 of The Exchange Control Regulations, 1961 provide as follows:

'Regulation 2(1) – Except with permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to any person not being an authorised dealer.'

[35] Mr Namandje for the respondents on the other hand submits in his written submissions that the CC properly applied to Bank Windhoek, as an authorized dealer so authorised by the Bank of Namibia to deal in foreign currency and that the CC conducted its foreign currency transactions with Bank Windhoek. Counsel therefore submits that the CC was entitled to buy foreign currency from Bank Windhoek in terms of Regulation 2(3) of the Exchange Control Regulations. Counsel thus argued that the properties are not proceeds of any unlawful activities.

[36] Regulation 2(3) reads as follows:

‘Every person other than an authorised dealer desiring to buy or borrow or sell or lend foreign currency or gold shall make an application to an authorised dealer and shall furnish such information and submit such documents as the authorised dealer may require for the purpose of ensuring compliance with any conditions determined under sub-regulation (2) of this regulation.’

[37] It is common cause that Bank Windhoek is an authorized dealer within the meaning of the Regulations and that the CC applied to Bank Windhoek to buy foreign currency and was provided with such foreign currency. It appears on the papers that the applicant appears to have misunderstood the respondents’ case in so far as she appears to assert that the CC claims to be an authorised dealer. That is not correct. What the respondents said, in respect of the CC, is that it acted as an agent for its clients to acquire foreign currency from Bank Windhoek for a consideration in respect of such services rendered. Mr Paulo deposed as follows: ‘The CC and I therefore at all relevant times simply acted as agent of Angolan clients who would give money and it would in terms of the law be given US Dollars to hand over to its clients, the CC then got paid for services rendered.’

[38] It is necessary in this regard to the provisions of Regulation 2(4) of the Exchange Control Regulation which provide that -

‘(4) No person other than an authorised dealer shall: (a) use or apply any foreign currency or gold acquired from an authorised dealer for or to any purpose other than that stated in his application to be the purpose for which it was required; or 3(b) do any act

calculated to lead to the use or application of such foreign currency or gold for or to any purpose other than that so stated.

[39] Mr Paulo's evidence is that, he informed Bank Windhoek of the purpose for which the CC intended to utilize the foreign currency. That much has been confirmed by Mr Peter of Bank Windhoek namely that the CC intended to assist its clients at Oshikango border post, to exchange the Namibian Dollars into US Dollars.

[40] According to the learned author Wills⁵ anyone who desires advice on exchange or currency matters governed by the Exchange Control Regulations should approach an authorised dealer. That is exactly what Mr Paul did. Under those circumstances, it is fair to assume that Mr Paulo as a foreigner would not have known the provisions of the Exchange Control Regulations of Namibia. Bank Windhoek, as an authorised dealer, was of the view that the purpose for acquiring foreign currency by the CC was not contrary to the provisions of the Regulations. Had Bank Windhoek been of the view that the purpose for which the CC intended to utilise the foreign currency would be in contravention of the Regulations, it would have advised the CC accordingly and declined to transact with the CC. In this connection it is important to point out that it is not the applicant's case that the CC utilized the foreign currency for the purpose other than that stated in its application submitted to Bank Windhoek when it applied to buy foreign currency.

[41] Put differently, there is no evidence by the applicant, through Bank Windhoek, as a witness for the applicant and as an authorized dealer that at any point during its dealings with Mr Paulo, it had informed Mr Paulo that the CC's business of obtaining US Dollars from Bank Windhoek which it would subsequently pass-on to its clients and receive Namibian Dollars in return was unlawful. Neither, is there evidence that Bank Windhoek refused to sell to the CC the US Dollars for the purpose it had stated in its application.

[42] For all these reasons, I am of the considered view that it cannot be said that the respondents version is 'clearly untenable' 'or is so improbable' that it may be rejected on papers. I am therefore satisfied that the applicant has failed to prove on a balance of probabilities that the respondents contravened the Exchange Control

⁵ *Banking in South African Law*, (1981) Juta, p 239.

Regulation as alleged. I move to consider whether the applicant has proved the next offence alleged.

Contravening s 30 of the Immigration Control Act, 7 of 1993

[43] As in respect of the alleged offence of illegal trading in foreign currency, likewise with this alleged offence of contravention of the Immigration Control Act, the applicant and Warrant Officer Green made identical allegations in the application for the preservation order, which the applicant requested should be read as incorporated in this application. The applicant and Warrant Officer Green alleged in the preservation application that there were reasonable grounds to believe that Mr Paulo was conducting a business without a work permit. This was evidenced by the fact that he received money in his account with reference 'salary'. They further alleged that Mr Paulo was not allowed to work in Namibia without a valid work permit.

[44] In the present application both the applicant and Warrant Officer Nambadi merely submit that Mr Paulo contravened s 30 of the Immigration Control Act in that he was working without a work permit. On that basis the applicant submits that the proceeds of the business Mr Paulo conducted or the proceeds of work done by him are proceeds of unlawful activities and should for that reason be forfeited to the State.

[45] On his part, Mr Paulo denies having contravened s 30 of the Immigration Control Act and asserts that the CC, as a Namibian registered entity, did not require a visa to conduct business in Namibia and that he at all times was in possession of a valid business visa and could as a result conduct business in Namibia.

[46] There is no dispute that the CC as a Namibian registered entity does not require permission to conduct business in Namibia. As regards the allegation that Mr Paulo received a salary based on the description of two deposits made in Mr Paulo's bank account, I consider the allegation denied by Mr Paulo in his general denial and by his pleading over that he was in possession of a valid business visa. In my view, the allegation relating to the reference of 'salary' of two deposits made in his account is vague and inconclusive and falls short of proving the alleged offence on a balance

of probabilities. At best it raises a suspicion that Mr Paulo might have received a salary. The reference to 'salary' is capable of many interpretations. If the deposits were a real 'salary' it is improbable, in my view, that Mr Paulo would have paid himself only twice over a number of months.

[47] One would, under those circumstances, have expected such deposits to consistently appear every month. But that is not the case. On the applicant's own case 'Several transactions were made between the different accounts of Rhapsody and Mr Paulo's personal account. In my view, under those circumstances it is rather too selective to pick out two transactions with reference 'salary' as proof that Mr Paulo paid himself a salary for only two months. I found it highly improbable that if he knew that he was illegally employed by the CC he would himself have made such incriminating entries in the bank accounts.

[48] As to the allegation that Mr Paulo contravened s 30 of the Immigration Control Act, the section provides that -

'(1) If any person to whom has been issued any permit under this Act, as the case may be, is prohibited by reason of any purpose for which such permit was issued under this Act or any condition stated in such permit from –

- (a) entering into or being in the employment of any other person;
- (b) entering into or being in the employment of any other person, except a person specified in such permit;
- (c) entering into or being in the employment of any other person in any capacity except a capacity specified in such permit or for a period longer than the period so specified;
- (d) conducting a business or carrying on a profession or occupation;
- (e) ...;
- (f)

no person shall -

- (i) in the case of a prohibition referred to in paragraph (a), employ or continue to employ such person;
- (ii) in the case of a prohibition referred to in paragraph (b), employ or continue to employ such person, unless he or she is the person specified in the permit;
- (iii) in the case of a prohibition referred to in paragraph (c), employ or continue to employ such person in any capacity except the capacity specified in the permit or for a period longer than the period so specified;
- (iv) in the case of a prohibition referred to in paragraph (d), enter into an agreement with such person for the conduct of a business or the carrying on of a profession or occupation or conduct a business or carry on a profession or occupation in cooperation with such person;’

[49] On proper a reading of s 30(1) it would seem to me that, the contravention is committed in respect of a permit that had already been issued under the Act and not because a permit had not been issued. Therefore, for the applicant to succeed with an allegation that the provisions s 30(1) have been contravened, she firstly has to prove that (a) Mr Paulo was issued with a permit under the Act, (b) that the permit so issued was for a certain ‘purpose’ or that certain conditions were attached to that permit and (c) that Mr Paulo engaged in conduct that contravened the ‘purpose’ for which that permit was issued or that he contravened any of the conditions attached to that permit.

[50] In the present matter, the applicant merely asserts that Mr Paulo did not have a work permit. That, in my judgment, is not enough. Mr Paulo must have been issued with a permit upon his entry in Namibia, say a visitors’ or tourist visa. That visitor’s permit or tourist visa would contain conditions for instance that he is not allowed to take up any employment in Namibia. It is the contravention of that purpose (visitor or tourist visa) or condition (not to work) which constitutes an offence.

[51] There is no evidence by the applicant as to the type of permit or visa which Mr Paulo held for the duration of his stay in Namibia, be it a visitor’s permit or a tourist

visa. Perhaps realising this short-coming in the applicant's case, counsel for the applicant attempts to cure this defect through her heads of argument, where she submitted that: 'The 1st respondent entered Namibia on a visitors' permit'. The submission is not based on any evidence on record. This attempt by the counsel to sneak in evidence in her heads of argument is disingenuous, unbecoming of an officer of the court and cannot be tolerated. I will accordingly not have any regard to it.

[52] It is noteworthy to observe that there is no allegation that Mr Paulo was an illegal immigrant in Namibia during the relevant time under consideration. This, in my view, implies that he must have been in the country on some permit issued under the Immigration Control Act. I cannot conceive that Mr Paulo would have approached the Ministry of Home Affairs, to apply for a work permit while knowing that he was in Namibia without any valid permit. He must have been in Namibia lawfully. That could be the only reason why Home Affairs did not take issue with his presence in Namibia, when he submitted his application for a work permit. In my view, the applicant could have easily ascertained this information from Home Affairs but failed to do so and resorted to make bald allegations unsupported by any admissible evidence.

[53] As mentioned before, Mr Paulo, in response to the allegation that he did not have a work permit at the relevant time, asserted that he had a business visa at all times. The applicant in reply alleges that Mr Paulo should have produced such business visa. In this connection one should not forget that the applicant bears the burden to prove all the allegations on a balance of probabilities. The applicant has to satisfy this court that the provisions s 30 were indeed contravened. In a nutshell therefore, the applicant was required to produce admissible evidence which proves on a balance of probabilities that, Mr Paulo was an illegal immigrant as he did not hold any visa or permit to be in Namibia at the relevant time and therefore did not have the authority to work or conduct business in Namibia. Alternatively she should have proven that, Mr Paulo held a permit or a visa for a certain purpose or with certain conditions, which purpose or conditions he contravened. She failed to do so.

[54] Taking all the factors and considerations into account, I have arrived at the conclusion that the applicant has failed to prove on a balance of probabilities that the

respondents contravened the provisions of s 30 of the Immigration Control Act. I move to consider the alleged offence of fraud.

Did the respondents commit an offence of fraud?

[55] Like with other offences alleged, both the applicant and Warrant Officer Green made identical allegations in their affidavits in the preservation application. They alleged that Mr Paulo made misrepresentations to Bank Windhoek and the Ministry of Home Affairs by – (a) providing an address at which he was not residing or conducting business and by not submitting any change of address documentation to Ministry of Industrialization and Trade and SME Development; and (b) by completing and submitting forms for registering employees with the Social Security Commission who were neither working for him nor for the CC. The applicant and Warrant Officer Green alleged that by doing so Mr Paulo created the impression to Ministry of Home Affairs, Immigration, Safety and Security that the CC is a legitimate business. Furthermore, it is alleged that Mr Paulo used his different accounts to make deposits and transfer funds without disclosing the true source and origin of the funds.

[56] According to Warrant Officer Green, Mr Paulo applied for a work permit to the Ministry of Home Affairs, Immigration, Safety and Security on 22 September 2015. Therein, he indicated Long Island Street, Hornbill Court 41, as his residential address. However, on 30 October 2015, Mr Paulo provided Standard Bank with another address, being 3rd Floor, Maerua Mall. According to Warrant Officer Green this conduct amounts to misrepresentation.

[57] It is Warrant Officer Green's evidence that, when he visited the address in Rocky Crest, the tenant there informed him that he had never heard of nor did he know who Mr Paulo was. The tenant also had no knowledge of the CC. He went on to say that when he visited the address at Maerua Mall given to Standard Bank, he found no one at the address and that a lady 'next door' informed him that Mr Paulo was out of the country.

[58] According to Warrant Officer Green, Mr Paulo in support of his application for a work permit, submitted employees' registration documents from the Social Security Commission, which indicated that the CC had four employees who were paid

salaries. Affidavits by two of the alleged employees were also attached and in which they denied that they worked for the CC.

[59] Mr Paulo in his affidavits merely made a bare denial of having committed fraud. He further points out that, in any event there is no connection between the alleged fraud and the property.

[60] Fraud 'consists in unlawfully making, with the intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'⁶.

[61] Having considered both parties' respective versions, it is apparent to me that insofar as the allegation of fraud is concerned, Mr Paulo's denial is not real or made in good faith and this court is accordingly convinced about the inherent credibility of the applicant's version. The court is satisfied that the applicant has proven on a balance of probabilities that Mr Paulo committed fraud by submitting documents to the Ministry Home Affairs purporting to prove that the CC had people in its employment whereas that was not the fact. By doing so Mr Paulo acted to the potential prejudice of Home Affairs and thus committed the offence of fraud. I will revert later to deal with the effect of this finding on the application as a whole.

[62] I proceed to consider the allegation that Mr Paulo intentionally made misrepresentations to Standard Bank with the intention to defraud the Standard Bank by submitting documents in respect of the address of the CC which was not the registered address or where the CC was not conducting business.

[63] As regards the registered address of the CC at Rocky Crest, the fact that a tenant at the premises did not know about its existence does by no means serve as proof that it was not the registered address of the CC. What is important is that the address indeed exists. One should not confuse the principal place of business of a CC or a company with a registered address. A registered address is a statutory requirement where for instance official documents relating to the CC are to be served or delivered. The principal place of business on the other hand is the business address where the CC conducts business.

⁶ C R Snyman, Criminal Law 4th ed, page 520.

[64] In my view, the fact that the physical address exists at Rocky Crest, as stated in the CC's document is proof of the truth rather than falsity. The allegation of misrepresentation in this regard is misconceived and appears to be based on the wrong understanding of the purpose of a registered address of a CC. In this connection it is to be noted that there is no evidence about the nature of the premises at Rocky Crest. Was it a single building or a complex or a mixed development? If for instance, it is complex with a number of units, how was it feasible for such a tenant to know all the tenants residing in the complex. The situation would even be more complicated if the premises is a mixed development made up of residential and business units. The evidence of no-knowledge by a tenant at the premises is weak to sustain a serious allegation of misrepresentation.

[65] As to the existence or otherwise of the registered address at Maerua Mall, on Warrant Officer Green's own version, when he attended at the physical address or the registered address of the CC at Maerua Mall, a neighbour of the CC informed him that Mr Paulo was out of the country. On these undisputed facts, in my judgment, it cannot be said that Mr Paulo had furnished a false address to Standard Bank. The fact that he was out of the country at the time Warrant Officer Green visited the address at Maerua Mall cannot be said to be indicative of any misrepresentation of the address. The fact of the matter is that the address existed and was as it was traceable. In my view, the fact that the neighbour knew that Mr Paulo was out of the country, clearly demonstrated that the CC indeed has an office at that address. In my view, the mere fact that the records at the Registrar of Companies were not updated when the address was changed from Rocky Crest to Maerua Mall does not amount to misrepresentation.

[66] For the foregoing reasons, the applicant has failed to prove on a balance of probabilities that an offence of fraud was committed in respect of the CC's documents submitted to Standard Bank. I turn to deal with the effect of the finding of fraud in respect of the documents submitted to Home Affairs.

[67] The question to be determined is whether, the properties are the proceeds of the fraud committed on the Ministry of Home Affairs. The answer to this question is in the negative. The properties are proceeds of the CC's business which was carried

out by Mr Paulo, before and after the application for the work permit. The properties were not acquired as a result of the fraud on the Ministry of Home Affairs.

[68] In the *National Director of Prosecutions v Seevnarayan*⁷, the Supreme Court of Appeal of South Africa, was faced with a situation where Mr Seevnarayan invested a large sum of money with Sanlam, a life insurance company operating in South Africa as well as in Namibia, under false names. The purpose was to conceal the moneys and their proceeds so as to avoid paying income tax. The investment as is customary, accrued interest. The National Director of Public Prosecutor (NDPP) sought forfeiture of the investment and interest as *inter alia* proceeds of unlawful activities. The court *a quo* dismissed the application holding that the NDPP had failed to show that either the money the capital or the interest earned were proceeds of unlawful activities.

[69] On appeal, the court rejected the NDPP contention that the entire capital was retained in connection with or as a result of unlawful activities. The court reasoned that it could not be said that the capital invested changed its character so as to taint it with the fraud committed by Seevnarayan by investing it under false names. As regards the interest, the court held that the interest was not 'derived, received or retained' as a result of Seevnarayan's unlawful conduct in making false representations to Sanlam and to the Receiver of Revenue. The interest was the direct result of his investment, and not his false statements. In other words, had Mr Seevnarayan invested the same amount with Sanlam in his own name, the interest would still have accrued on the investment so made.

[70] In the present there is no causal connection between the offence of fraud committed by Mr Paulo and the properties. The properties were not 'derived, received or retained' as a result of Mr Paulo unlawful conduct in making false presentations to the Ministry of Home Affairs. It follows thus, that the properties cannot be declared forfeited to the State as it is not the proceeds of unlawful activities.

[71] It bears pointing out that the allegation of fraud in the applicant's affidavits was only made in relation to the alleged false addresses of the CC submitted to

⁷ *National Director of Prosecutions v Seevnarayan* (111/03) [2004] ZASCA 38, para 73.

Standard Bank and the in respect of the submission of the information from Social Security Commission to the Ministry Home Affairs in support of the application for work permit. The applicant now attempts in her heads of argument to extend the allegation of fraud to the deposit of N\$1 800 000 deposited in the CC's account held at Standard Bank as an offence of fraud. That was not the applicant's case as pleaded in her founding affidavit and for that reason, this submission insofar as it relates to fraud is disregarded in considering this alleged offence. I turn to consider the alleged offence of money laundering.

Money Laundering ss 4 and 6 of POCA

[72] In the application for the preservation of property order both the applicant and Warrant Officer Green also made identical allegations that Mr Paulo used Bank Windhoek's document in order to hide the source of the funds as well as to launder the proceeds of his unlawful activities in contravention of ss 4 and 6 of POCA. They alleged further that Mr Paulo and the CC contravened s 6 of POCA by having in their possession the proceeds of unlawful activities, knowing it to be the proceeds of their illegal business and fraud.

[73] In the present application for forfeiture order under the heading 'New facts discovered since the preservation of property order was obtained' the applicant, in response to Mr Paulo's explanation about the origin of the funds, that he brought in the money from Angola, alleges that in that event Mr Paulo failed to declare the money at the border in contravention of the Angolan Exchange Regulations. Furthermore, that he deposited such money into his bank account thereby disguising the true source of the funds. The applicant alleges in the alternative, that Mr Paulo deposited the money whilst knowing that it was the proceeds of unlawful activities.

[74] The applicant further alleges that, when Mr Paulo deposited N\$1 800 000 at Standard Bank, he indicated the source of those funds to be a previous transaction with Bank Windhoek thereby disguising the origin of the funds.

[75] Mr Paulo's explanation is that the money he brought in from Angola, was his savings after he had left his employment in Angola. He asserts that he brought in the money from Angola on the basis of the agreement between the Bank of Namibia and

the Central Bank of Angola which allowed the citizens of the two countries to exchange their respective currencies. In respect of the amount of N\$1 800 00 deposited by him on 18 November 2015 at Standard Bank, he says that, that money was from the CC's customers at Oshikango border post which was to be exchanged into US Dollars.

[76] Section 4 of POCA which regulates money laundering provides that -

'Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and -

- (a) enters into any agreement or 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
- (b) 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 -
 - (i) 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
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere -
 - (aa) to avoid prosecution; or
 - (bb) 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.'

[77] Section 6 of POCA provides that -

'Any person who -

- (a) acquires;

- (b) uses;
 - (c) has possession of; or
 - (d) brings into, or takes out of, Namibia,
- 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.’

[78] Ms Angula submitted on behalf of the applicant that in view of the fact that the respondents have four bank accounts and the money is transferred amongst these accounts, the purpose was to create the perception that the funds were from these accounts in order to disguise the real source of the funds being established. In reality, the transactions amongst the different accounts have the effect of concealing or disguising the nature or origin, source or location of the funds.

[79] Mr Namandje for the respondents argued on the other hand that it was fatal to the applicant’s case that she did not dispute the existence of the agreement entered into between the Bank of Namibia and the Central Bank of Angola on the basis of which Mr Paulo alleges he exchanged Kwanzas into Namibian Dollars.

[80] I agree with Mr Namandje’s submission on this point. The applicant was in a perfect position to cause the said agreement to be produced through Mr Bryan Eiseb, the Deputy Director: Exchange Control at the Bank of Namibia, who deposed to an affidavit stating that Mr Paulo was not licensed as an authorised dealer. No reasons have been furnished why he could not in the same affidavit dispute or confirm the allegation by Mr Paulo (that he exchanged the Kwanza into Namibian Dollars) without divulging confidentiality of that agreement. On Mr Paulo’s version, that was the origin of part of the funds in the bank accounts. As regards the balance of the funds in the accounts Mr Paulo’s explanation is that it originated from the CC’s customers at Oshikango.

[81] Regarding the applicant’s allegation that the money that Mr Paulo brought into Namibia was in excess and thus in contravention of exchange regulation which allows an Angolan national only to take out of that country a maximum of USD10 000, the allegation is liable to be rejected for a number of reasons. Firstly, on Mr Paulo’s version, he ‘exported’ Kwanzas and not US Dollars. Secondly, there is no evidence how the agreement between the Bank of Namibia and the Angolan Central

Bank impacted on the Angolan alleged Exchange Regulation. Thirdly, the evidence is inadmissible as the witness purported to testify about a foreign law without being qualified as an expert of Angolan laws.⁸

[82] Having regard to Mr Paulo's explanation as to how he brought the money in question into Namibia, I am unable to say that such explanation is 'fanciful or untenable' or is 'so improbable and unrealistic'. I am accordingly of the view that the applicant has failed to prove on a balance of probabilities that the respondents have committed the offence of money laundering within the meaning of ss 4 and 6 of POCA.

[83] In respect of the properties in the respondents' possession I have already found that such properties are not proceeds of unlawful activities as a result of the offences trading in foreign currency, fraud or the contravention of s 30 of the Immigration Control Act, alleged by the applicant.

Conclusion

[84] Taking all the factors, considerations and submissions into account, I have arrived at the conclusion that the applicant has failed to prove on a balance of probabilities that the respondents have committed the offences alleged and that the properties are the proceeds of unlawful activities. Further, that while the applicant has proven fraud on the Ministry of Home Affairs, Immigration, Safety and Security, she failed to prove on a balance of probabilities that there is a nexus – causal connection between the offence of fraud and the properties.

[85] In the result I make the following order:

1. The application to declare the respondents' property held under a preservation order issued by this court on 24 December 2015 is dismissed.
2. The *curator bonis* Warrant Officer Green or in his absence Warrant Officer Nambadi under whose control the property was placed by the

⁸ *Hoffmann & Zefferett: The South African Law of Evidence*, 4th ed, p 109.

preservation of property order, is directed to release the said property under his control into the hands of the respondents.

3. The applicant is to pay the respondents' costs.
4. The matter is removed from the roll and is regarded as finalized.

H ANGULA
Deputy Judge-President

APPEARANCES:

APPLICANT:

L ANGULA

Of Office of the Prosecutor-General, Windhoek

RESPONDENTS:

S NAMANDJE

Of Sisa Namandje & Co. Inc., Windhoek