REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2021/00312

In the matter between:

VINCENT & TIFFANY CONSTRUCTION CC	**APPLICANT**

And

DEPUTY GOVERNOR OF THE BANK OF NAMIBIA (MR. E. UANGUTA)	**1st RESPONDENT**
THE BANK OF NAMIBIA	**2nd RESPONDENT**
MINISTER OF FINANCE OF THE REPUBLIC OF NAMIBIA	**3rd RESPONDENT**
STANDARD BANK NAMIBIA	**4th RESPONDENT**
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	**5th RESPONDENT**

Neutral citation: *Vincent & Tiffany Construction CC v Deputy Governor of the Bank of Namibia* (HC-MD-CIV-MOT-GEN-2021/00312) [2022] NAHCMD 655 (2 December 2022)

Coram: PRINSLOO J

Heard: **6 June 2022**

Delivered: **2 December 2022**

Flynote: Application – Regulation 22A and 22B inserted in the Exchange Control Regulations of 1961 by RSA Government Notices GN 157/1987 and GN 881/1988 applicability in Namibia – Regulations as invalid and null and void – Validity of Notice and Order of Forfeiture executed by the First Respondent in respect of the applicant's funds – Dispensation that flowed from AG 7 of 1977 (which the applicant relies upon) had no effect on the Currency and Exchange Act – Currency and Exchange Act and Regulations were never transferred and, therefore, not administered by the Administrator-General – Regulations are not inconsistent and ultra vires with the Namibian Constitution – First respondent had no authority, power, capacity or jurisdiction to make the decision that any result flowing from that decision would be invalid and be bound to be set aside.

Summary: On 15 August 2016, a CFC account (also known as a "customer foreign currency" account) was opened in the applicant's name at the fourth respondent. CFC accounts are held onshore and represent local assets denominated in foreign currency. On 21 January 2016, Mr Vincent Wang deposited cash in the amount of USD115 000 to the applicant's CFC account, which was declared as export proceeds. On the same day, he requested an outward payment to China in the same amount to Nantong Lianju Textile Co in China to buy goods.

This transaction was reported to the second respondent by the fourth respondent resulting in the second respondent placing a regulatory hold on the applicant's CFC account in terms of reg 22A(1)(*b*) of the Exchange Control Regulations of 1961 in March 2016. Based on the report made by the fourth respondent, the second respondent was of the view that there were grounds to believe that there was a contravention of reg 2(1) of the Exchange Control Regulation of 1961.

As a result of an alleged incident between Mr Wang and Mr Bryan Eiseb, the Director of Exchange Control and Legal Service of the second respondent, details of which I will not discuss, criminal proceedings were instituted against Mr Wang and whereof Mr Wang was later acquitted on all charges brought against him. Upon Mr Wang's acquittal, Mr Namandje, the applicant's legal practitioner of record, requested the release of the funds previously restrained and blocked by the second respondent to be released to the applicant.

the applicant's legal practitioners under the hand of Mr Bryan Eiseb, was informed that the applicant's funds would remain blocked in terms of reg 22A(1)(*b)* of the Exchange Control Regulations, 1961 and that the second respondent will in due course give consideration to the forfeiture of the funds. Another letter was directed to the second defendant questioning the basis for the intended forfeiture of the applicant's funds. Mr Eiseb directed further correspondence to Mr Namandje and attached a notice and order of forfeiture to it, issued under the hand of the first respondent, Mr Uanguta, the Deputy Governor of the second respondent which in summary stated that the second respondent decided to forfeit to the State all money (USD115 000) held in the fourth respondent's CFC account number 60xxxxx held in the name of the applicant. The applicant's funds were blocked in terms of reg 22A(1)(*b*) of the Exchange Control Regulations of 1961 and the notice of forfeiture was issued in terms of reg 22B of the said regulations as amended made under s 9 of the Currency and Exchange Act 9 of 1933 read with the Bank of Namibia Act, 1 of 2020. The cash funds of USD115 000 were ultimately forfeited to the State. This decision on behalf of the second respondent, resulted in the applicant launching the current application before the court.

Held that: the dispensation that flowed from AG 7 of 1977 (which the applicant relies upon) had no effect on the Currency and Exchange Act. I agree further with the view that only those statutes of which the relevant powers were transferred in terms of executive power transfer proclamations made subsequent (and pursuant) to AG 7 of 1977, were affected by its provisions as the Exchange Control Regulations do not fall in that category. The Currency and Exchange Act and Regulations were never transferred and, therefore, not administered by the Administrator-General.

Held that: the Currency and Exchange Act and the relevant Regulation are not foreign legislation as it has been part of our legislation for the longest time. I agree with the contention that for law to be applicable and in force in Namibia, it must be published in the Government Gazette, however, publication in the SA Gazette at the time alone was deemed sufficient for legislation to effectively apply to South West Africa. The issues raised in this regard with reference to the answering affidavit deposed to on behalf of the second respondent must thus fall by the wayside.

Held that: I am not convinced that the Regulations are inconsistent and ultra vires with the Namibian Constitution. Neither am I convinced that impugned regulations accord “uncircumscribed and wide discretionary powers”.

Held further that: I am not convinced that the first and second respondents made out a case that Mr Uanguta, the first respondent, had the authority, the power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021. It then follows that as the first respondent had no authority, power, capacity or jurisdiction to make the decision that any result flowing from that decision would be invalid and be bound to be set aside.

The prayers as set out in paragraphs (a) and (b) of the Notice of Motion dated 9 August 2021, is dismissed. The prayers as set out in paragraphs (c) and (d) of the Notice of Motion dated 9 August 2021 are upheld.

ORDER

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1. Paragraphs (a) and (b) of the Notice of Motion dated 9 August 2021 is dismissed with costs. Such costs to include the costs of one instructing and two instructed counsel in respect of the first and second respondents and the costs of two legal practitioners in respect of the third and fifth respondents.

2. Paragraphs (c) and (d) of the Notice of Motion dated 9 August 2021 are upheld in the following terms:
   2.1 The Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the Applicant's funds in the amount of USD115 000 is invalid and hereby set aside.
   2.2 It is declared that the first respondent has no power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021, and his decision, Notice and Order is hereby set aside.

3. The second respondent will be liable for the cost of the applicant in respect of paragraphs (c) and (d).
4. The matter is removed from the roll and regarded as finalized.

JUDGMENT

PRINSLOO J:

The parties

[1] The applicant is Vincent & Tiffany Construction CC, a close corporation registered in terms of the laws of the Republic of Namibia with its main place of business in Windhoek.

[2] The first respondent is the Deputy Governor of the Bank of Namibia, Mr Epson Uanguta, and appointed as such in terms of s 19(1) read with s 87 of the Bank of Namibia Act 1 of 2020. The first respondent is cited in his official capacity as the entity that executed the Notice and Forfeiture Order referred to herein below.

[3] The second respondent is the Bank of Namibia, registered in terms of the Bank of Namibia Act 15 of 1997 (repealed by Act 1 of 2020), with its main place of business at 71 Robert Mugabe Avenue, Windhoek.

[4] The third respondent is the Minister of Finance of the Republic of Namibia cited in his official capacity as the political head of the Ministry of Finance appointed in terms of Article 32(3)(*i*)(*dd*) of the Namibian Constitution.

[5] The fourth respondent is Standard Bank Namibia, a banking institution registered and established in terms of the Banking Institutions Act 2 of 1998, with its main place of business at 1 Chasie Street, Windhoek. This respondent did not

oppose the relief sought by the applicant and where I refer to the respondents in general it is therefore with the exclusion of the fourth respondent.

[6] The fifth respondent is the Attorney-General of the Republic of Namibia, appointed in terms of Articles 80 and 32(3)(*i*)(*cc*) of the Namibian constitution and cited only for any interest it may have in the orders sought by the applicant in this matter. No relief is sought against the fifth respondent.

Relief sought by the Applicant

[7] The relief sought by the applicant herein is as follows:

'a) Declaring that Regulation 22A and 22B inserted in the Exchange Control Regulations of 1961 by RSA Government Notices GN 157/1987 and GN 881/1988 are not applicable to and in force in Namibia.

b) In the event of the Court finding that Regulation 22A and Regulation 22B of the Exchange Control Regulations of 1961 are indeed applicable to and in force in Namibia, declaring the aforestated Regulations as invalid and null and void, and setting them aside.

c) Declaring the Notice and Order of Forfeiture executed by the First Respondent on 5 July 2021 in respect of the Applicant's funds in the amount of USD 115,000, attached to the Applicant's Founding Affidavit as Annexure "FA-KW6", as invalid and setting it aside.

d) Declaring that the First Respondent has no power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021, and setting aside his decision, Notice and Order.

e) Costs of suit against any of the Respondents opposing the application.

f) Further and/or alternative relief.'

Brief background

[8] The applicant is a close corporation with business interests and deals throughout Namibia and, amongst others, conducted business in Oshikango in the Northern part of Namibia. Realizing that it would have difficulty to conduct business in Oshikango without a foreign currency account, the applicant approached the fourth respondent, as an agent of the second respondent, to open such an account.

[9] On 15 August 2016, a CFC account was opened in the applicant's name at the fourth respondent. CFC accounts are held onshore and represent local assets denominated in foreign currency. CFC accounts are conducted by residents in the administration of an authorised dealer, in terms of the provisions of the second respondent's Authorised Dealer Exchange Control Manual or in terms of a specific authority granted.

[10] On 21 January 2016, Mr Vincent Wang deposited cash in the amount of USD 115 000 to the applicant's CFC account, which was declared as export proceeds. On the same day, he requested an outward payment to China in the same amount to Nantong Lianju Textile Co in China to buy goods.

[11] This transaction was reported to the second respondent by the fourth respondent resulting in the second respondent placing a regulatory hold on the applicant's CFC account in terms of reg 22A(1)(*b*) of the Exchange Control Regulations of 1961 in March 2016. Based on the report made by the fourth respondent, the second respondent was of the view that there were grounds to believe that there was a contravention of reg 2(1) of the Exchange Control Regulation of 1961. As a result of an alleged incident between Mr Wang and Mr Bryan Eiseb, the Director of Exchange Control and Legal Service of the second respondent, details of which I will not discuss, criminal proceedings were instituted against Mr Wang.

[12] This resulted in the arraignment of the sole member of the applicant, Mr Wang, and two other gentlemen before the Magistrate's Court, Windhoek, on several charges under case number ACC-HQO/16/001924. One of the charges preferred against Mr Wang was a charge of contravention of reg 2(1) of the Exchange Control

Regulations promulgated by Government Notice 1112 of 1 December 1961 as amended, with the allegation that the applicant 'bought' and/or 'sold' foreign currency while not being authorized to do so.

[13] From the Namcis court record emanating from the Magistrate's Court, it is not clear if the charge of contravening reg (2)(1) of the Exchange Control Regulations was ever put to Mr Wang as the charges that Mr Wang was acquitted on by and large relate to contraventions of the Anti-Corruption Act 8 of 2003.

[14] However, Mr Wang and a second accused, Mr Caizeng Zhuang, were acquitted on 5 March 2021 of all charges brought against them. Upon Mr Wang's acquittal, Mr Namandje, the applicant's legal practitioner of record, requested the release of the funds previously restrained and blocked by the second respondent to be released to the applicant.

[15] On 13 April 2021, the second respondent directed correspondence to the applicant's legal practitioners under the hand of Mr Bryan Eiseb, informing him that the applicant's funds would remain blocked in terms of reg 22 A (1)(*b)* of the Exchange Control Regulations, 1961 and that the second respondent will in due course give consideration to the forfeiture of the funds. The applicant was granted the opportunity to make a written representation on why the funds should not be forfeited to the State as envisaged by the Regulations.

[16] Mr Namandje directed a letter to the second defendant on 10 May 2021 questioning the basis for the intended forfeiture of the applicant's funds. On 5 July 2021, Mr Eiseb directed further correspondence to Mr Namandje under the heading 'Notice and Order of Forfeiture: Vincent & Tiffany Construction CC' and attached to it a notice and order of forfeiture issued under the hand of the first respondent, Mr Uanguta, the Deputy Governor of the second respondent.

[17] The Notice and Order of Forfeiture stated as follows:

> 'Be pleased to take note that:

1. The Bank of Namibia hereby gives notices of a decision to forfeit to the State all money (USD115,000) held in the Standard Bank Namibia Limited CFC Account number 60xxxxx held in the name of Vincent & Tiffany Construction Close Corporation.
2. Standard Bank Namibia Limited will be instructed to transfer the aforementioned money into the National Revenue Fund.
3. The aforementioned money is forfeited on the date of publication of this notice.
4. This notice also constitutes a written order, as contemplated in terms of Regulation 22B of the Regulations whereof the aforementioned money is hereby forfeited.'

[18] The applicant's funds were blocked in terms of reg 22A(1)(*b*) of the Exchange Control Regulations of 1961 and the notice of forfeiture was issued in terms of reg 22B of the said regulations as amended made under s 9 of the Currency and Exchange Act 9 of 1933 read with the Bank of Namibia Act 1 of 2020. The cash funds of USD115 000 were ultimately forfeited to the State.

[19] This decision on behalf of the second respondent, resulted in the applicant launching the current application before the court.

Opposition by the respondents

[20] The opposition to the application by the respondents can be summarized as follows:

In respect of the relief sought:

a) The applicant - in respect of all the relief that is sought in its notice of motion - has not (in its founding affidavit) made out a case for the relief that it seeks;

b) The applicant has not made a case for a declarator to the effect that reg 22A and 22B are not in force in the Republic of Namibia, as according to the respondents' reg 22A and 22B are applicable in the Republic of Namibia.

c) The applicant has not made out a case for a declaration of invalidity with respect to the Notice and Order of Forfeiture executed on 05 July 2021;

d) The applicant has not made out a case that the first and the second respondents do not have the capacity/competence/jurisdiction to issue the aforesaid notice.

[21] If the court is inclined to grant prayer 2 of the applicant's notice of motion, then in that event, instead of a declaration of invalidity, the court should allow the appropriate agency to correct any defect therein.

[22] In addition to the aforementioned the third and fifth respondents oppose the application on the following basis:

e) that s 9 of the Currency and Exchanges Act 1933 has been correctly applied as the Act was made applicable to Namibia, the then South West Africa, from 23 June 1950 by s 26 of the Finance Act 36 of 1950.

f) in the alternative, if the court finds that, given that the amendments which brought about s 9(2) do not expressly mention their application to Namibia, it cannot accept that s 9(2) as introduced into the Act in 1987 and 1988 applies to Namibia, that the absence or presence of s 9(2) neither determine the validity of reg 22A and 22B nor fatal to the validity of reg 22A and 22B.

g) that reg 22A and 22B remain valid whether or not s 9(2) is present or absent from s 9 as the section already provides in s 9(1) for Regulations to be made "in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges" and which provision is on its own sufficient legal basis for the existence and application of reg 22A and 22B in Namibia.

h) that the delegation by the third respondent to the first and second respondent was lawfully made in terms of s 54(1) of the Bank of Namibia Act 2020 which stipulates that the second respondent is an agent of the Government of the Republic of Namibia in exercising and performing the powers and functions relating to any exchange control and further by virtue of reg 22E which delegation conferred onto the first and second respondents the power, jurisdiction and competence to apply and make decisions in terms of reg 22A and 22B.

i) that the first respondent's delegated power to make forfeiture orders does not amount to uncircumscribed and wide discretionary powers. The decision-making

powers to make forfeiture orders delegated to the first respondent by the third respondent are subject to Administrative Justice requirements as set out in Article 18 of the Namibian Constitution and thus do not amount to unfettered powers as asserted by the applicant.

Issues to be adjudicated

[23] The issues between the parties can be set out as follows:

a) Whether reg 22A and 22B inserted in the Exchange Control Regulations of 1961 by the RSA Government Notices GN 157/1987 and GN 881/1988 are applicable to and in force in Namibia.
b) In the event that the court finds that reg 22A and 22B inserted in the Exchange Control Regulations of 1961 are indeed applicable to and in force in Namibia, whether the aforesaid Regulations are invalid and null and void.
c) Whether the Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the applicant's funds are invalid and to be set aside.
d) Whether the first respondent has the power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021.

Arguments advanced on behalf of the parties

[24] I do not intend to recite the entire arguments made by the parties as all the parties filed extensive heads followed with crisp arguments, which the court appreciates.

[25] I must however note that at the commencement of the arguments by the parties, despite the concessions made during case management proceedings the respondents appear to have changed their approach to the matter at hand as it was submitted on behalf of the first and second respondents that the concessions were incorrectly made on wrong legal principles. It relates specifically to para 1 of the issues between the parties as set out above. I will deal with this issue later during this judgment.

[26] A further issue that fell away at the time of arguing the matter was the issue of the non-joinder of the President of Namibia as a party to these proceedings. At the commencement of his argument, Mr Tötemeyer indicated that the first and second respondents would not persist with this point raised in their papers.

On behalf of the applicants

[27] Mr Namandje on behalf of the applicant argued that the President of Namibia has, after 21 March 1990, neither constitutional nor executive power to make a South African ready-made law (not in force in Namibia immediately prior to the date of independence) part of Namibia law simply by reference.

[28] Mr Namandje argued that although Namibia, the then South West Africa, remained under the control of South Africa until independence on 21 March 1990, the powers of the South African President to make laws by Proclamation in Namibia and that of its Parliament to make law, by choice, applicable to Namibia, were reduced, alternatively extinguished by virtue of General Proclamation AG 7/1977, AG 10/1978 as amended by AG 20/1982, read with SWA Legislative and Executive Proclamation RS 5101 of 1985 (RSA Government Gazette 9790).

[29] Mr Namandje further argued that by 1987 when the concerned Regulations (reg 22A to 22E) were made law in South Africa, the South African President did not have the power and authority to make an amendment to the South West Africa Exchange Control Regulations of 1961.

[30] Mr Namandje further argues that the applicant makes three direct submissions why the allegations made by the first and third respondents that the Regulations became applicable to Namibia by mere reference when they were simply referred to (not published) in the heading of GN 126/2011 attached as BON”1” on the first respondents’ affidavit and MOF”1” on the third respondent’s affidavit are wrong and the submissions are as follows:

a) First, Government Notice 126/2011 was meant to specifically amend regulations 10 and 11. Those amendments were published in the Government Gazette.
b) Second, the President of Namibia has no power to incorporate foreign laws simply by reference to the citation of such foreign law.
c) Third, in fact, even assuming that the President had the power to make a foreign law applicable to and in force in Namibia, for such a piece of law to be valid, it must meet certain requirements on the basis of the doctrine of legality, which are:
    i. Firstly, the President must in law have such power to make such a piece of law.
    ii. Secondly, the President cannot make law which is inconsistent with the Constitution of Namibia, as far as the law-making process is concerned.
    iii. Thirdly, and most importantly, for a law to be applicable and in force in Namibia it must be published in the Government Gazette.

On behalf of the first and second respondents

[31] Mr Tötemeyer referred the court to the requirements to be met for declaratory relief and goes on to state that the discipline in motion proceedings in litigation of this nature, the Supreme Court held that an applicant is required to specify in which respects impugned provisions are alleged to offend against the principles and/or provisions of Namibian Constitution relied on. Mr Tötemeyer argues that the founding papers cannot merely defer the basis for making these assertions to legal argument. Such an approach lacks the particularity required for pleading in constitutional litigation and hampers the administration of justice. Mr Tötemeyer argues that the applicant's founding affidavit fails the needed requirements as stated herein.

[32] Mr Tötemeyer argues further that reg 22A and 22B are important, if not critical, as it ensures proper compliance with the Exchange Control Regulations. These Regulations cater for rapidly changing circumstances and provide for those instances where prompt steps need to be taken by the Bank of Namibia. Mr Tötemeyer pointed out that financial transactions through banking accounts can occur at a moment's notice and as a result, the provisions in reg 22A read with reg 22B are reasonable and justified in the circumstances.

On behalf of the third and fifth respondents

[33] Mr Ncube argued that the President did not "wrongly assume" that the Regulations he was including in the definition of "Regulations" by means of GN 126/2011 were already part of the laws in force in Namibia but was merely clarifying for the purpose of certainty what constitutes "Regulations" in terms of the Customs Act which included all Regulations which were indeed already promulgated and applicable to Namibia prior to 1990.

[34] Mr Ncube submits that contrary to the applicant's assertions, s 9 of the Currency and Exchange Act has not been erroneously applied. The Act was made applicable to Namibia, then South West Africa, from 23 June 1950 by s 26 of the Finance Act 36 of 1950. Section 9(6) of the Currency and Exchange Act (enacted by way of an amendment Act, being Act 36 of 1950 of the South African Parliament) made s 9 of the Currency Act applicable to South West Africa. The amendments which brought about s 9(2) were made in 1987 and 1988, prior to Namibia's independence in 1990.

Discussion

The case management conference report

[35] In order to determine the questions before this court it is necessary to briefly revisit the transfer of statutes from South Africa to South West Africa and the ultimate applicability thereof in our independent Namibia. This is necessary as the first and second respondents invoked reg 22A and 22B to seize and forfeit the USD115 000 in question.

[36] In the case management conference report, the parties initially agreed as follows:

'(b) Reasonable way in which issues may be limited and admissions and concessions be recorded that may lead to the narrowing of the issues to be adjudicated
The parties are agreed that Regulations 22A to D were not in force and applicable to South West Africa/Namibia immediately prior to the date of independence.
This Court shall be required to determine whether or not the President of the Republic of Namibia could have lawfully made the concerned Regulations applicable in Namibia and make them law in force in Namibia through Government Notice 126/2011 (GG 4767), attached as BON3 to the first and the second respondents' opposing affidavit.'

[37] The first and second respondents took an about turn in this regard as Mr Tötemeyer submitted at the commencement of the hearing that this concession by the respondents (specifically the first and second respondents) is wrong in law and as a result, the respondents cannot be held bound to a concession that is patently wrong. Mr Ncube, in argument, also indicated that the third respondent withdraws his concession which creates the impression that the impugned regulations were not in force at the time of independence and accordingly invites the court to adopt the same stance taken in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*[1].

[38] Mr Namandje took issue with the respondents' failure to approach the court to apply for an amendment of the case management report but was nonetheless ready to argue the matter regardless of the respondents' change in stance.

[39] The applicable legal principles regarding issues of agreement between the parties in a pre-trial conference in order to limit issues were recently restated in *Mwaala v Nghikomenwa*[2]. Although the *Mwaala* matter relates to a pre-trial conference the same principle applies to the agreement between parties in a case management conference in terms of rule 71 of the Rules of Court.

[40] In the *Mwaala* case Mainga JA states as follows:

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[1] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC)] para 16.
[2] *Mwaala v Nghikomenwa* SA 100/2022 delivered 14 November 2022.

'[27] On the agreements between the parties I do no better than to refer with approval the sentiments of Damaseb AJA (as he then was), in *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331, when he said:

'[20] For his part, the defendant relies on the agreement reached between the parties' legal practitioners to limit the issues to be decided by the trial court and recorded at the commencement of the hearing by Mainga J and argues that the plaintiff was not entitled *a quo* (and is not entitled on appeal), to raise the issue of the ineffectiveness of the repudiation as that was not an issue before the trial court in view of the agreement limiting the issues.

[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) ([1998] 1 All SA 239) at 614B-D:

"To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding.'" [Footnotes omitted.]

In *F & I advisors (Edms) Bpk en 'n Ander v Eerste Nasional Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) ([1998] 4 All SA 480) at 524F-H this principle was reiterated. The judgment is in Afrikaans and the headnote to the judgment will suffice (at 519D):

". . . a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the appellants should be released from their agreement.'"[3]

[28] The parties were bound by the issues they had agreed upon as contained in the pre-trial order. There is no good cause shown or special circumstances arising why the court *a quo* heard the special plea contrary to the parties' agreement and court order.'

[3] *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) para 20-21.

[41] I am of the view that the correct procedure to follow by the relevant respondents would have been to bring an application to vary the case management conference order. However, I agree with respondents counsel that if the concession made by the respondents are incorrect as a matter of law it cannot be binding on the respondents or on the court as there cannot be an estoppel against law.

[42] Therefore, having heard the submissions made by Mr Tötemeyer and Mr Namandje and having satisfied myself with Mr Namandje's preparedness to comprehensively argue the matter, I decided to hear the respondents on the issue of reg 22A and 22B despite of them resiling from the legal concession that they made during the case management conference.

[43] As a result, I do not intend to make any further rulings in this regard.

Transfer of the South African statutes to South West Africa

[44] In its Notes on the Annotated Statutes (the Notes) the Legal Assistance Center of Namibia tracked and recorded the transition or transfer of the South African statutes to South West Africa and then thereafter to our independent Namibia.

[45] From these Notes it is clear that from 1977 to 1980, the administration of some South African statutes were transferred from the respective South African government departments to the Administrator-General of South West Africa. This was done by means of a series of proclamations called 'transfer proclamations'. Most of these transfer proclamations applied to all South African statutes administered by a specific South African Minister or government department.

[46] Most of the individual Transfer Proclamations refer to the 'General Proclamation', which is the Executive Power Transfer Proclamation, AG 7/1977, as amended. This General Proclamation sets forth the mechanics of the transfer of powers.

[47] According to the Notes, s 3(1) of the General Proclamation AG 7/1977[4] was the core of the administrative transfer and if the administration of a statute was transferred to South West Africa by the General Proclamation, s 3(5) of the General Proclamation[5] (as inserted by AG 10/1978 as amended by AG 20/1982) had the effect of 'freezing' the statute as it stood at the date of transfer.

[48] The effect was that the blanket provision predating the transfer, such as the frequently-used formula 'this Act, and any amendment thereof, shall also apply in the territory of South West Africa' no longer operated to make South African amendments to the Act automatically applicable to South West Africa. Amendments to the statute in South Africa after the date of the relevant transfer proclamation were applicable to South West Africa only if the amending Act, or some other law passed subsequent to the date of transfer, expressly made amendments to South West Africa. The same rule applied to repeals. If a statute, which has been transferred to South West Africa had been repealed in South Africa, the repeal was not applicable to South West Africa, unless the repealing act expressly stated that it also applied to South West Africa.

[49] The same principle applied to rules and regulations issued under a statute which had been transferred to South West Africa. In this regard s 3(4) of the General

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[4] **Application of laws**

3(1) Subject to the provisions of subsection (2), any reference in any law referred to in section 2 –
(a) to the Minister or to the Minister of Finance or State President or Parliament (including the Senate or the House of Assembly) or Government of the Republic, shall be construed as a reference to the Administrator-General;
(b) to the State, shall be construed as including a reference to the Administrator-General;
(c) to the Republic, shall be construed as a reference to the territory;
(d) to the Government Gazette of the Republic, shall be construed as a reference to the Official Gazette.

[5] Section 3(5) as amended states:
No Act of the Parliament of the Republic –
(a) which repeals or amends any law –
(i) passed by Parliament and which applies in the Republic as well as in the territory; and
(ii) of which any or all the provisions are administered by or under the authority of the Administrator-General or the Council of Ministers in terms of a transfer proclamation or any other law; and
(b) which is passed after the commencement of such transfer proclamation or other law shall, notwithstanding any provision of a law referred to in paragraph (a) or any other law passed after the commencement referred to in paragraph (b) that the law referred to in paragraph (a) or any amendment thereof applies in the territory, apply in the territory, unless it is expressly declared therein or in any other law that it shall apply in the territory

Proclamation[6] applies.

The interpretation of Article 140(1) of the Namibian Constitution

[50] Article 140(1) of the Namibian Constitution provides that:

'(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.'

[51] In *Government of the Republic of Namibia v Cultura 2000*[7], Mahomed CJ discussed art 140(1) and said the following at 335E:

'Article 140(1) deals with laws which were in force immediately before date of independence and which had therefore been enacted by or under the authority of the previous South African Administration exercising power within Namibia. Such laws are open to challenge on the grounds that they are unconstitutional in terms of the new Constitution. Until such a challenge is successfully made or until they are repealed by an Act of Parliament, they remain in force.'

[52] The case of *Carlos M Perez Redondo v The State*[8] Ackerman AJA stated that:

'The application of Article 140(1) to the territory of Namibia (excluding Walvis Bay) does not appear to present difficulties. Pre-Independence Laws in force in this part of Namibia which conflict with the Constitution can either be repealed or amended or declared unconstitutional by a competent Court. *Pre*-Independence laws which do not conflict with the

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[6] Section 3(4) of the General Proclamation AG7/1977 states:
Any proclamation, regulation or rule which is issued or made after the commencement of any transfer proclamation by, or on the authority or with the approval of, the State President or the Minister under a law which at such commencement applies both in the territory and in the Republic, and which is published in the Government Gazette of the Republic, shall, notwithstanding the provisions of subsection (1), apply in the territory if such proclamation, regulation or rule or the notice by which it is so published, contains a statement that it was or is issued or made with the consent of the Administrator-General, and applies also in the territory: Provided that for the purposes of the application of such proclamation, regulation or rule in the territory, the provisions of subsection (1) [the section which interpreted terminology in the relevant laws so as to effect the transfer] shall apply.

[7] In *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC); 1994 (1) SA 407 (Nms)

[8] *Carlos M Perez Redondo v The State* 1992 NR 133 (SC).

Constitution can be amended by the Namibian Legislature as it thinks fit (subject, of course, to the Constitution).'

Section 9 of the Currency and Exchange Act 9 of 1933

[53] It is common cause that only s 9 of the Currency and Exchange Act was made applicable to South West Africa by the addition of s 9(6) by s 26 of the Finance Act 36 of 1950, which reads 'the provisions of this section shall also apply to the Territory of South-West Africa'. The amendment effected by Act 36 of 1950 came into effect on 23 June 1950.

[54] It does not appear that the administration of this Act was transferred to South West Africa. It is therefore necessary to consider legislation dating back as far as 1925.

[55] The starting point for the current enquiry will be the South West Africa Constitution Act 42 of 1925. The said Act created a Legislative Assembly amongst other things, with the aim that the Assembly would have the power to make laws, to be entitled ordinances in the territory of South Africa. However, the Legislative Assembly was precluded from making ordinances in respect of certain classes of matters. Section 26 of the Act enumerated the classes of matters permanently reserved from legislation by the Assembly and s 26(*k*) specifically refers to 'currency and banking and the control of banking institution'.

[56] This exclusion was repeated in s 22(1)(*k*) of the South West Africa Constitution Act 60 of 1968 again under the heading 'matters ordinarily reserved from legislation by Assembly'.

[57] Following shortly on the South West Africa Constitution Act of 1968 was the South West Africa Affairs Act 25 of 1969. Section 14 of Act 25 of 1969 amended s 22(1) of the 1968 Act but the amendment encompassed in s 14 makes no mention of currency and banking and the control of banking institutions. From my reading of the aforesaid amendment is clear that s 22(1)(*k*) of the principle Act, 60 of 1968, was

neither repealed nor substituted. The 1969 Act only added paragraphs ranging from s 22(1)(*l*) to s 22(1)(*jj*), and as a result, s 22(1)(*k*) remained in force.

[58] Section 23 of Act 25 of 1969 further provided that 'All laws of the territory in force at the time of the commencement of this Act, shall subject to the provisions of this Act, continue to be in force until repealed or amended by competent authority'.

[59] The next question is then whether the Executive Power Transfer (General Provisions) Proclamation, AG 7 of 1977 is applicable to s 9 of the Act and the accompanying Exchange Control Regulation of 1961, specifically with reference to the amendment to the regulations inserting reg 22A to 22E.

[60] Mr Namandje argued that the powers of the South African President to make laws by Proclamation in Namibia and that of its Parliament to make law, by choice, applicable to Namibia, were reduced, alternatively extinguished by virtue of General Proclamation AG 7/1977, AG 10/1978 as amended by AG 20/1982, read with SWA Legislative and Executive Proclamation RS 5101 of 1985 (RSA Government Gazette 9790).

[61] Both Mr Tötemeyer and Mr Ncube argued that it goes without saying that General Proclamation AG 7/1977 brought about significant changes in the administration of legislation applicable to South West Africa. It however depended for its application on the transfer of the relevant executive powers by means of transfer proclamations of only those statutes of which the relevant powers were transferred following and pursuant to AG 7/1977. Thus it had the effect of essentially "freezing" only the statutes which were the subject of such transfer proclamations at the date of such transfer so that any amendments that were enacted thereafter would not apply thereto unless expressly so provided.

[62] Counsel submitted that no transfer proclamation of which the Currency and Exchange Act was the subject of transfer effectively insulated the said Act from the effects of AG 7/1977. The result is thus keeping the Currency and Exchange Act as it applied to South West Africa and thereby making it eligible for the subsequent amendments which took place prior to 1990, including those brought about by GN

957/1987 and GN 881/1988 creating reg 22A to 22E and the amendment to s 9(2) of the Currency Act.

[63] In light of my earlier discussion, I agree with Mr Tötemeyer and Mr Ncube that the dispensation that flowed from AG 7 of 1977 (which the applicant relies upon) had no effect on the Currency and Exchange Act. I agree further with the view that only those statutes of which the relevant powers were transferred in terms of executive power transfer proclamations made subsequent (and pursuant) to AG 7 of 1977, were affected by its provisions as the Exchange Control Regulations do not fall in that category. The Currency and Exchange Act and Regulations were never transferred and, therefore, not administered by the Administrator-General. A fact that is patently clear from the South West Africa Constitution Act 42 of 1925, the South West Africa Constitution Act 60 of 1968 and the South West Africa Affairs Act 25 of 1969 referred to above.

[64] The amendments to the Act and the Regulations, in my view, were applicable to South West Africa prior to independence and are equally still applicable in Namibia.

[65] The submissions made on behalf of the applicant that the President had no power to incorporate foreign laws simply by reference to the citation of such foreign law is therefore in my opinion, not factually correct. The Currency and Exchange Act and the relevant Regulation is not foreign legislation as it has been part of our legislation for the longest time. I agree with the contention that for law to be applicable and in force in Namibia, it must be published in the Government Gazette, however, publication in the SA Gazette at the time alone was deemed sufficient for legislation to effectively apply to South West Africa. The issues raised in this regard with reference to the answering affidavit deposed to on behalf of the second respondent must thus fall by the wayside.

The validity of Regulations 22A and 22B

[66] The applicant further took the point that the Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the applicant's funds are invalid and should be set aside.

[67] Mr Namandje argued that assuming that the court finds that the Regulations were part of Namibian law, then they are further invalid because such Regulations can only be applied subject to certain requirements provided for under the more elaborate provisions of the South African Currency and Exchanges Act 9 of 1933. Further to that, Mr Namandje argued that the first respondent, Mr Uanguta, had no power to make an order of forfeiture in terms of the Regulations, on the basis that he is neither part of the legislature nor the executive nor is he specified in the Exchange Control Regulations as contemplated under s 9(5)(*a*) of the Currency and Exchanges Act 9 of 1933 which reads 'Any regulations made under this section may provide for the empowering of such persons as may be specified therein to make orders and rules for any of the purposes for which the Governor-General is by this section authorized to make regulations'[9].

[68] Mr Namandje also argued that the Regulations are inconsistent with and ultra vires the Namibian Constitution in that the subject, in particular the blockage of accounts and making of a forfeiture order, are matters that can only be prescribed by law (an Act of Parliament). It is not something that the Executive or administrative officials could legislate, promulgate and/or act on. The applicant's challenge however does not stop there. Mr Namandje further maintained that the Regulations are unlawful and unconstitutional as it is only Parliament through legislation that can make such far-reaching decisions. Further, that given the invasive nature of the powers under reg 22A and 22B, the Regulations are invalid on the basis that they impermissibly limit and take away the fundamental property right of the applicant to own and deal with its property, in a manner that is incompatible with the scheme and structure of fundamental rights under Chapter 3 of the Namibian Constitution.

[9] Although the Act refers to the Governor-General who was the head of state at the time the principal Act, the Currency and Banking Act, 1920 (Act 31 of 1920 were promulgated (as amended by the Currency and Banking Act Amendment Act, 1923 (Act 22 of 1923), and the Currency and Banking (Further Amendment) Act, 1930 (Act 26 of 1930)). Today the Act must be read as referring to the President. The President can delegate the power to regulate to the Minister of Finance.

[69] In *South African Reserve Bank and Another v Shuttleworth and Another*[10] the South African Constitutional Court grappled with a similar argument and Moseneke DCJ, writing for the majority, stated as follows in this regard:

'[65] The second main plank of the dissent is about delegation of legislative power. It is that Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body. The regulation-making power granted to the President in section 9(1) of the Act effectively assigns plenary legislative power to the President. That is constitutionally impermissible.

[66] I do not agree that the legislative scheme here assigns plenary legislative power to the President. Even though the Act predates our constitutional modernism by more than 60 years it does not fall into that pitfall. Section 9(1), in its very words, provides that the President "may make *regulations* in regard to any matter . . . relating to . . . currency, banking or exchanges". There can hardly be argument that Parliament is entitled to delegate subordinate legislation, and does so routinely, in the form of regulation-making to the Executive. The President made regulations and in regulation 10(1)(c) prohibited the exportation of capital except "in accordance with such conditions as the [Minister] . . . may impose".

[67] The President has not delegated legislative power. His power is to regulate by imposing conditions for export of capital. To that end, the Minister set, amongst other conditions, an exit charge. The trail from the legislation to the regulations and to implementation is there.

[68] But even if Parliament's delegation of regulatory authority to the President here is conspicuously abundant, I consider that its exceptional nature is warranted in the field in which it occurs. This case requires us to consider the constitutional validity of a statute vesting authority on the President to regulate specifically the export of currency. We are not concerned with the competence of an exercise of that power in relation to banking or exchanges. The authority at issue here was exercised by the promulgation of regulation 10(1)(c) which prohibited, except subject to the Minister's conditions, the export of capital from the Republic.

[69] Capital exports have the capacity to drain an economy of its lifeblood, and so to impact catastrophically on the country's economic welfare. The debate about how best to regulate capital movement, whether by exchange controls, or their absence, is not before us. For

[10] *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC), para 65-66, 68 and 70.

present purposes, capital exports are of such singular concern to the country's wellbeing that the Constitution vests special powers in the Reserve Bank. It stipulates that the "Reserve Bank is the central bank of the Republic" whose primary object is to "protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic". The Constitution requires the Reserve Bank, in pursuit of this primary object, to perform its functions independently and without fear, favour and prejudice, though there must be regular consultation between the bank and the Executive.

[70] That the Constitution affords an express mandate for protecting the value of the currency demonstrates the exceptional significance of the issue. Currency moves with lightning speed. Money has long ceased to be a hand-held commodity or physical article of trade for exchange purposes. The internet and electronic communications enable it to be moved from and between locations and jurisdictions almost instantly. Hence the need for special regulation. Hence also the need for special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide, but its unusual width meets the unusual circumstance of the subject matter.'

[70] The court in the case of *South African Reserve Bank* proceeds to state the following on the allegation of the Regulations granting the Minister broad discretionary powers:

'[79] The thrust of the attack is that the section and regulation give the Minister broad discretionary powers of the same kind that this Court criticised in *Dawood.* That decision warned against broad discretionary powers that may prejudice those who may be entitled to seek relief from an adverse decision arising from an open ended discretion. We must however recognise that this Court's treatment in *Dawood* of broad discretionary powers conferred by legislation was measured and nuanced. It did not hold all wide legislative discretion to be inconsistent with the constitutional norm and invalid. Let the judgment speak for itself:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. *At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance*. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of discretionary power

are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made." (Emphasis added and footnote omitted.)

[80] The High Court dismissed the contention and held, correctly in my view, that South Africa's "exchange control system requires a flexible, speedy and expert approach to ensure that proper financial governance prevails". That Court stated that the exchange control system may require a specific set of rules to be in place in specific circumstances. These circumstances can change at any time, requiring an adaptation of the rules in place. It stated that it would be impossible to lay down rules or set out factors in advance, and held that regulation 10(1)(c) was valid. It found support in the dissertation of Dr Anthon de Swardt, which stressed the need for agility and speed in decision-making in order to respond to domestic and global currency trends and markets.

[81] It would be difficult to find fault with the reasoning of the High Court. This is particularly so in light of the history and the purpose of the Act, and its exceptional design in protecting the national currency. It would be trying to strike a balance between providing guidelines while still ensuring that flexibility and speedy governance are maintained. The complexity of the exchange control system should not be understated. I am not persuaded that the broad discretion under section 9(1) and regulation 10(1)(c) offends *Dawood* or the Constitution.'

[71] I can do no better than to concur with the observations of the court in the *South African Reserve Bank* matter. I am not convinced that the Regulations are inconsistent and ultra vires with the Namibian Constitution. Neither am I convinced that impugned Regulations accord 'uncircumscribed and wide discretionary powers'.

Was the Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the applicant's funds valid?

[72] Mr Namandje raised the issue in respect of the authority of the first respondent to issue the Notice and Order of Forfeiture on 5 July 2021. Mr Namandje argued that Regulation 22E that deals with the delegation of power is ultra vires s 9(5)(*a*) Act because in s 9(5)(*a*), power is delegated to the Governor-General who was the head of state at the time, i.e. the President in our modern day whereas reg 22E (1) provides that 'the Minister of Finance may delegate to any person any power

or function conferred upon the Treasury by any provision of these Regulations or assign to any such person a duty imposed thereunder to the Treasury.'

[73] The main question raised is where the first respondent's authority as Deputy Governor emanates from in order to make the order to forfeit the property of the applicant.

[74] The second respondent pleads that in terms of the third respondent's delegation, the first and second respondents are competent to have issued the Notice and Order of forfeiture. It is further pleaded that the notice was issued on the strength of a resolution taken on 28 May 2021.

[75] If one has regard to the resolution in question it is clear what it referred to relates to an extract of a virtual board meeting held on 28 May 2021, during which an unknown person made a report to the board. The Board made the following resolution:

'Resolution 9:

The Board took note of the update and supported the activities by the Exchange Control and Legal Services to bring this matter to a conclusion. The Board further approved that the amount of US$115 000.00 should be forfeited to the State Account.'

[76] From this extract, which I must add stands alone and out of context with the relevant minutes, one cannot determine that the Board made a definite decision that the funds are forfeited. The choice of words is that the funds <u>should</u> be forfeited. A notice is then issued, not by the Board but under the hand of the Deputy Governor, Mr Uanguta. There is no indication that the Board authorised Mr Uanguta to act in any way whatsoever.

[77] Nowhere is it placed on record what the basis for his authority is because the authority as set out in s 23 of the Bank of Namibia Act is of no assistance. What is clear is that nowhere in the relevant legislation is the Deputy Governor listed as a decision maker.

[78] It is common cause that in terms of s 54 of the Bank of Namibia Act, the Bank is an agent for the administration of exchange control. This section provides that:

'(1) The Bank acts as agent for the Government in exercising and performing the powers and functions relating to any exchange control that the Minister may assign or delegate to the Bank under the Currency and Exchanges Act.'

[79] This, however, still does not resolve the issue of the authority of Mr Uanguta. The authority of Mr Uanguta to issue the notice and cause the forfeiture of the applicant's funds was tackled head-on by the applicant, yet the first and second respondents do not address this issue. Mr Eiseb glosses over the authority issue in his answering affidavit, and it is not addressed in the argument on behalf of the first and second respondents apart from now saying the decision to forfeit the funds in terms of reg 22B was a decision of the Board. Thereby suggesting that the first respondent acted on the instructions of the Board. There is however not a case made out in the papers.

[80] In any event, if one has regard to reg 22E the delegation of power from the Minister of Finance to the Treasury and the Treasury in the context of the Regulations is defined as follows: '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'. I fail to see the second respondent fit into this definition, much less the first respondent.

[81] I am not convinced that the first and second respondents made out a case that Mr Uanguta, the first respondent, had the authority, the power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021. It then follows that as the first respondent had no authority, power, capacity or jurisdiction to make the decision that any result flowing from that decision would be invalid and be bound to be set aside.

Costs

[82] The final issue that I need to address is the issue of costs. As the applicant is partially successful in its application and will therefore only be entitled to a portion of its costs. That part of the application within which the applicant was successful relates exclusively to the first and second respondents. The first respondent was cited in his official capacity, and the question arises whether the costs should be granted on a joint and several basis against these respondents.

[83] In *Hoveka No and Others v The Master and Another*[11] Hannah J held as follows:

> 'In *Coetzeestroom Estate and G M Co v Registrar of Deeds* 1902 TS 216 Innes CJ said at 223:
> 'With respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or his attitude, though mistaken, was bona fide would in my opinion be inequitable.'
> The learned Chief Justice continued at 224:
> 'This general rule we shall follow for the future; but the Court will reserve to itself the right to order costs against the Registrar if his action has been mala fide or grossly irregular ....'"

[84] Although the first respondent's actions were in my view irregular I am not prepared to hold that it was grossly irregular and therefore the first respondent should not be held liable for costs. I am of the view that only the second respondent should be held liable for the applicant's costs in respect of paras (c) and (d) of the Notice of Motion.

[85] The respondents successfully opposed the application of the applicant in respect of the paras (a) and (b) of the Notice of Motion, were correct in their opposition in my view. These litigants are therefore entitled to their costs.

Conclusion

[11] *Hoveka No and Others v The Master and Another* 2006 (1) NR 147 (HC) at 155 B-C.

[86] My order is as follows:

1. Paragraphs (a) and (b) of the Notice of Motion dated 9 August 2021 is dismissed with costs. Such costs to include the costs of one instructing and two instructed counsel in respect of the first and second respondents and the costs of two legal practitioners in respect of the third and fifth respondents.

2. Paragraphs (c) and (d) of the Notice of Motion dated 9 August 2021 are upheld in the following terms:
   2.1 The Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the Applicant's funds in the amount of USD115 000 is invalid and hereby set aside.
   2.2 It is declared that the first respondent has no power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021, and his decision, Notice and Order is hereby set aside.

3. The second respondent will be liable for the cost of the applicant in respect of paragraphs (c) and (d).

4. The matter is removed from the roll and regarded as finalized.

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JS PRINSLOO

Judge

APPEARRANCES

APPLICANT:	S Namandje (with him N Alexander) Of Sisa Namandje & Co. Inc., Windhoek
FIRST and SECOND RESPONDENT:	R Tötemeyer SC (with him D Obbes) Instructed by LorentzAngula Inc., Windhoek
THIRD and FIFTH RESPONDENT:	J Ncube (with him C van der Smit) Of the Office of the Government Attorney, Windhoek