

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-POCA-2021/00443

In the *ex parte* application of:

**THE PROSECUTOR-GENERAL**

**APPLICANT**

**Neutral Citation:** *The Prosecutor-General* (HC-MD-CIV-MOT-POCA-2021/00443) [2024] NAHCMD 87 (7 March 2024)

**Coram:** MASUKU J

**Heard:** 1 November 2023

**Delivered:** 7 March 2024

**Flynote:** Legislation – Prevention of Organised Crime Act 29 of 2004 ('the Act') – Forfeiture of property order in terms of s 59 – Issues to be taken into consideration by the court in deciding whether or not to grant a forfeiture of property order – Whether the fact that an application for forfeiture of property order relieves the court of carefully scrutinising the application.

**Summary:** The Prosecutor-General brought an application for forfeiture of property order in terms of s 59 of the Act. The case commenced with Lycia Limited contacting Mr Kangonga and enquiring about the sale of diamonds. A representative of Lycia came to Namibia and procured some diamonds and

paid for them the sum of N\$860 855, 70 to the account of an entity called Cabino CC and N\$4 094 457, 56 to the account of Mr Kangonga. The diamonds were kept in a safe in Lycia's representative's hotel room as the necessary processes for the shipment of the diamonds were underway. During that time, a police officer came to the representative's hotel room and informed him that the diamonds needed to be taken to the Ministry of Mines and Energy for some procedures to be effected. That was the last the diamonds were seen. The money paid as consideration for the diamonds, was thereafter paid to various individuals. A preservation of property order was obtained and served on the interested parties, including Lycia and Mr Kangonga. They did not comply with the provisions of the Act. They later made separate applications for condonation for non-compliance with the provisions of s 52 of the Act, as persons with an interest in the properties and who intended to oppose the forfeiture application. Their respective applications were dismissed. As such, the application for forfeiture of property order, was uncontested as any possible opposition fell by the wayside.

*Held:* That in making the forfeiture order, the court is required to consider whether on a balance of probabilities, the property concerned was an instrumentality or intended instrumentality of an offence referred to in Schedule 1; the proceeds of unlawful activities or is an unexplained asset.

*Held that:* The fact that the application is unopposed does not relieve the court from making a proper enquiry into whether a case has been made out by the PG on a balance of probabilities. In this regard, the court should ensure that the evidence relied on by the PG is credible, admissible and not in any way tainted or unreliable.

*Held further that:* In the instant case, the crimes that were on a balance of probabilities committed were theft, fraud and dealing in unpolished diamonds in violation of the Diamond Act 13 of 1999, thus qualifying the court to grant the forfeiture of property application.

*Held:* That the persons whose bank accounts were credited with the money from the sale of diamonds, knew or ought to have known that the money was proceeds of unlawful activity within the meaning of the Act.

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## ORDER

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1. The properties which are presently subject to a preservation of property order granted by this Honourable Court under the above case number, namely:
  - 1.1. The positive balance in the positive balance in First National Bank account number 62245970802 held in the name of Heikki K. Kangonga;
  - 1.2. The positive balance in First National Bank account number 62269544386 held in the name of Cabino Financial Services CC;
  - 1.3. The positive balance in First National Bank account number 62274169327 held in the name of Toini Shilunga;
  - 1.4. A sum of N\$58 000.00 held in First National Bank internal office account number 62275725631 linked to FNB account number 62023483415 held in the name of Leevi Nanyeni;
  - 1.5. The positive balance in First National Bank account number 62261180055 held in the name of Petrus Dawid;
  - 1.6. The positive balance in Bank Windhoek account number CHK 8023444377 held in the name of Natangwe Kalambi;
  - 1.7. The positive balance in Nampost Limited account number 911824805588 held in the name of Erastus G. Heita; and
  - 1.8. The positive balance in First National Bank account number 62275675167 held in the name of Erastus G. Heita, hereinafter referred to as 'the properties', be forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 ('POCA').

2. The properties are to remain under the control and supervision of Detective Inspector Johan Nico Green ('D. Insp Green') a member of the Anti-Money Laundering and Combating of Financing and Terrorism: Asset Recovery Sub-Division within the Namibian Police Force ("Nampol"), stationed at Ausspanplatz, Windhoek, and in D. Insp Green's absence any other authorised member of Nampol.
3. D. Insp Green, or in his absence, any other authorised member of Nampol, is directed to pay the properties and the interest thereto, into the Asset Recovery Account:

Ministry of Justice –POCA

Standard Bank account number 589245309

Branch Code: 08237200

4. Any person whose interest in the properties concerned is affected by the forfeiture order, may within 15 days after he or she has become aware of the order apply to the High Court for a variation or rescission of the order.
5. The Registrar of this Honourable Court must publish notice of the forfeiture order in the Government Gazette as soon as practicable after it is made.
6. Prayers 1 and 3 will not take effect before 30 days after the notice of this order was published in the Government Gazette has expired or before an application in terms of section 65 of POCA or an appeal has been disposed of.
7. The matter is removed from the roll and regarded as finalised.

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## JUDGMENT

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MASUKU J:

Introduction

[1] This is an application in terms of the provisions of 59 of the Prevention of Organised Crime Act, 29 of 2004, ("the Act"). The applicant, the Prosecutor-General (PG) applies for the forfeiture of the positive balance in First National Bank account numbers held in the names of Heikki Kaushiwetu Kangonga, Cabino Financial Services CC, Toini Shilunga, Petrus Dawid, a sum of N\$58 000 held in the internal FNB account linked to an FNB account in the name of Leevi Nanyeni, FNB account held in the name of Erastus G Heita, positive balance in Bank Windhoek account held in the name of Natangwe Daniel Kalambi and the positive balance in Nampost Limited held in the name of Erastus G Heita.

[2] It is important to mention that the application is factually unopposed. This is so because attempts by some of the parties with an interest in the preserved property, who intended to oppose the forfeiture application, to intervene and participate at this juncture of the proceedings, was dismissed by this court in judgments that were delivered in open court. Reference will be made to these judgments as this judgment unfolds.

#### The law applicable

[3] The law applicable to applications for forfeiture of property orders, is to be found in s 59, as read with s 61 of the Act. Section 59, in my considered view, stipulates the procedural requirements for the bringing of a forfeiture application. Section 61, on the other hand, provides for the considerations the court must take into account, in making the preservation order. The latter provision reads as follows:

'61. (1) The High Court must subject to section 63, make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned –

- (a) is an instrumentality or intended instrumentality of an offence referred to in Schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is an unexplained asset.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under the order.

(3) The absence of any person whose interest in property may be affected by the forfeiture order does not prevent the High Court from making the order.

(4) Any person who has entered a notice in terms of section 52(3) and whose interest in the property concerned is affected by a forfeiture order made in his or her absence under subsection (3), may within 20 days after he or she has acquired knowledge of that order, apply for variation of the order.

(5) On good cause shown in an application referred to in subsection (4), the High Court may vary or rescind the order made under subsection (1) or make some other appropriate order.

(6) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute those proceedings, in respect of an offence with which the property concerned is in some way associated.

(7) The registrar of the High Court must publish a notice of the forfeiture order in the *Gazette* as soon as practicable after it is made.

(8) A forfeiture order under subsection (1) does not take effect –

(a) before the period allowed for an application under section 65 or an appeal under section 66 has expired; or

(b) before an application or appeal referred to in paragraph (a) has been disposed of.’

[4] A Full Bench of this court stated the purpose of the Act in the light of a challenge that it constitutes an infringement to property rights in the following terms in *Shalli v Attorney-General*<sup>1</sup>:

‘I accordingly conclude that chapter 6 does not violate the right to property under art 16 of the Constitution because art 17 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in *Lameck* that even if ch 6 were to infringe upon art 16, then it would, in my view, be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrong doing and that a remedy of this kind is justified to induce members of the

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<sup>1</sup> *Shalli v Attorney-General and Another* 2013 (3) NR 613 (HC) PARA 45.

public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose.’

[5] As indicated earlier, the purpose of this judgment, is to consider and decide whether this is an appropriate matter in which the court should grant a forfeiture order. In order to arrive at that conclusion, the court will consider the papers filed of record by the PG and the submissions made on her behalf and decide whether the threshold set out by the legislature, in s 61, has been met by the PG. The fact that the interested parties have not filed any papers in opposition to this particular application, counts for very little as the court must primarily have proper regard to the provisions of s 61. This is what I intend to do below.

### Background

[6] On 11 November 2021, the PG approached this court on an urgent and *ex parte* basis, in terms of s 51(1) of the Act. The PG essentially sought an order for the preservation of the property mentioned in para 1 above. The application was predicated on the affidavits of the PG and Ms Emilia Naituwe Nambadi. A reading of the founding affidavit of the PG paints a picture on the canvass that is described briefly below.

[7] The PG deposed that the police had received information that three statutory interventions were due to expire in a matter of days in certain listed positive balances. These interventions had been made at the behest of the Financial Intelligence Centre (FIC). Had these interventions lapsed, the banks concerned would have been at liberty to allow the account holders to withdraw the effects.

[8] The PG deposed further that she had approached the court in terms of s 51 of the Act, to preserve the property in question with immediate effect and to further grant a rule *nisi* calling upon interested persons against whom the order is made, to show cause on a date to be mentioned in the order, why the said order should not be made final.

[9] The PG further deposed that evidence had been obtained through investigations conducted by the police in terms of which there were reasonable grounds to suspect that the parties mentioned in para 1, acted in common purpose to defraud a foreign company known as Lycia Limited, situated in Unit 6 International Business Charflegts Road, Canvay Island SS8 OSG, United Kingdom. ('Lycia'). In this regard, it was deposed that Messrs Heita and Hamupolo and/or their entities, had informed the Lycia and its representative, that they were selling some diamonds, which was a ploy to obtain money from Lycia.

[10] It was further deposed that on 13 October 2021, a Mr Bruno Manual Silva De Jesus laid a complaint with the police, alleging that he was deputed by Lycia, to come to Namibia, to liaise, inspect, negotiate and act on Lycia's behalf. Contact had been established with Mr Heita, who was informed that Lycia was interested in purchasing some diamonds.

[11] To cut the long story short, contact was established and Mr De Jesus came to Namibia on 5 October 2021 and established contact with Mr Kangonga. He was booked in at the Heinitzburg hotel. Eventually, Messrs Hamupolo, De Jesus and Kangonga attended at the latter's office where Mr Hamupolo, who had been introduced as a diamond seller, produced three plastic bags with diamonds which had already been pre-sorted. They were said to be 177ct.

[12] A safe was then purchased and in which to place the diamonds in safety. Hamupolo would keep the keys to the safe until such time that payment would have been made for the diamonds. These diamonds were inspected by Mr Kangonga, and kept in the safe deposit, the keys of which were kept by Mr De Jesus and Mr Hamupolo. Mr de Jesus took the diamonds in the safe and deposited them in his hotel room and kept the key to the safe.

[13] Eventually, Mr Heita told De Jesus that he could obtain all the necessary documents, together with all the other necessities, such as the



settlement of taxes, certificate of origin, the Kimberley Process Certification within a period of 4 days from the Ministry of Mines and Energy. To do so, he needed payment of USD 57 190 for the paperwork needed for the 177ct and 425ct diamonds. He further required USD950 for taxes and the KPC as per the ct so that people at the Ministry, would inspect the parcels and issue the necessary documents promptly. Mr De Jesus issued payment of the two amounts to the account of Cabino CC. Clearance of the funds would take a few days. Another 1000ct diamond was also made part of the bargain.

[14] After some days, a box was bought to keep the 1000ct of diamonds. Mr De Jesus would keep one set of keys to the safety box and Mr Heita would keep the other set. On 18 October 2021, whilst in his hotel room, Mr De Jesus was informed by a manager at the hotel that police were looking for him and wanted to speak to him. Indeed, a police officer in official uniform presented himself to Mr De Jesus and produced his appointment certificate. The officer informed him that he was working for the Ministry of Mines and had come to collect the parcels for the protection of the buyer and the transaction as well.

[15] The officer informed Mr De Jesus that the diamonds must be taken to the Ministry for evaluation as well as proper inspection before Mr De Jesus takes the diamonds to a company that will ship the diamonds to the final destination. The officer was driving an official police vehicle and told Mr De Jesus not to worry. He was also carrying a letter from Mr Heita, the seller. Mr De Jesus gave the officer the boxes with the 177ct and 425 ct. The officer received the boxes and assured De Jesus that all was in order and that if he had any questions, Mr Heita would explain everything to him. That was the last he saw the diamonds, having paid the amounts mentioned earlier. He did not have proof of the payment he had effected for the diamonds.

[16] It was later confirmed that the following payments had been made from the account of Lycia, namely, of USD243 399,10 on 6 October 2021. This was transferred to a Bank Windhoek account, namely 8020945809, in the name of Joat Trading; USD40 375 on 8 October and transferred to Cabino's account; USD17 815 to Cabino's account on the same date; USD 255 000 for the

425ct to Mr Heita; N\$74 500 was transferred to Mr Heita's account and this was for the activity Mr Heita would engage to source the diamonds; USD268 000 was transferred to Mr Kangonga's FNB account.

[17] The police also arrested Mr Kangonga on 27 October 2021 and charged him with fraud, theft under false pretences and money laundering in contravention of s 4 of the Act. The police further discovered that the funds in the amount of N\$3 377 810 paid by Lycia were deposited into an account where Mr Hamupolo was a signatory ie Joat CC's Bank Windhoek account. An amount of N\$7 187 723,90 was thus transferred from Lycia's account.

[18] Mr Kangonga's account, which previously had an amount of N\$356,48 received a windfall of N\$4 119 457,56 during the time of the transactions with Lycia. Some deposits were made from this account, namely 28 September 2021 – N\$74 500; 8 October – N\$93 757, 56; 15 October 2021 – N\$3 926 200 and some other lesser transfers.

[19] Cabino CC's account was opened on 18 November 2010 with Mr Heita as the sole signatory thereto. On 20 September 2021, this account had a positive balance of N\$50 239, 07. Cabino received a deposit of N\$860 855,70 from Lycia. N\$25 000 was transferred to Mr Heita's FNB account and from which an amount of N\$631 000 was withdrawn in a cash transaction. This left a residue of N\$1 208,90. On 11 October 2021, a deposit of N\$597 550 with Lycia' reference was made; on 13 October 2021, N\$236 305, 70 from Lycia, was deposited and on 13 October 2021, a deposit with Lycia's reference for the amount of N\$263 305, 70 was made. An amount of N\$794 496, 35 was withdrawn. Significant withdrawals included an amount of N\$25 000 ie N\$10 000 and N\$15 000 to Mr Heita's FNB account on 21 and 25 October 2021. N\$691 000 teller cash withdrawals were made on 14 October 2021, respectively and an amount of N\$331 000 on 20 October 2021, to mention the large withdrawals. There were some other lesser transactions that need not be mentioned for the purpose of this judgment.

[20] The PG stated that there were reasonable grounds to believe that the properties sought to be preserved were proceeds of unlawful activities, namely fraud and alternatively, theft by false pretences and money laundering, in contravention of ss 4(a)(i), and 6(a), (b), (c) of the Act. The PG pointed out further that there was no record of any dealings by the Ministry of Mines with any of the persons mentioned above and furthermore, none of the said persons was possessed of a licence to deal in diamonds, which is a legal requirement.

[21] It was further stated that Mr Kangonga, via his company Namibia Gemologists and Mr Heita via Cabino CC, pretended to sell diamonds to Lycia Limited under the pretences that Mr Heita and Mr Hamupolo or their entities were entitled and authorised to deal in diamonds in terms of the laws of Namibia. The PG alleged that the crimes mentioned above, had been committed.

[22] The court, satisfied with the depositions of the PG, granted the preservation order as prayed and ordered that it be served on the interested parties. The PG produced documents evidencing publication and service of the preservation order on the said parties but that they had failed to file the necessary papers in terms of s 53(2) of the Act, ie a notice to oppose the making of a forfeiture application or for the exclusion of their interests in the properties from operation of the forfeiture order.

[23] It is necessary to point out that both Mr Kangonga and Lycia attempted to file applications in a bid to oppose the making of the forfeiture order but their respective applications were, for reasons pronounced by the court in two different judgments, dismissed. The application by Mr Kangonga for condonation for the late filing of his notice in terms of s 52(3) of the Act, was dismissed by a ruling delivered by the court, as presently constituted, on 10 March 2023. The court further held that he had failed to comply with the provisions of s 52(4) of the Act.<sup>2</sup>

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<sup>2</sup> *Kangonga v Prosecutor-General* (HC-MD-CIV-MOT-POCA-2021/00443) [2023] NAHCMD 108 (10 March 2023).

[24] Lycia also approached this court for condonation of its failure to comply with the provisions of s 60(1) of the Act. This application was dismissed by Maasdorp AJ in a judgment styled *Lycia Limited v Prosecutor-General*.<sup>3</sup> The court found that the Lycia had failed to demonstrate that it was impossible for it to comply with the provisions of s 52(3) and (4) of the Act. The court further found that the Lycia had failed to show that it had good cause in the ordinary sense, not to comply with the provisions of the Act. It was for those reasons that the application was dismissed.

[25] The effect of the dismissal of the applications for condonation by both Mr Kangonga and Lycia, resulted in the PG approaching the court for an order for forfeiture of property, virtually unopposed. I mention that I am not aware of any intention or manifestation thereof by Mr Kangonga or Lycia, to apply for leave to appeal against either judgment delivered. The period for doing so lapsed a long time ago. To the extent that it may be argued that the orders issued by this court in either matter, were final in effect, I am not aware of the any appeal or in any event, any application for stay of the forfeiture proceedings pending the appeal.

[26] That being said, it does not necessarily mean that because the application for forfeiture is unopposed, the court must perforce grant it. The court has to be satisfied that the requirements of the relevant statutory provisions for forfeiture of property, have been complied with to the letter by the PG. It is to that exercise that the court now turns.

#### The forfeiture application

[27] The founding affidavit in support of the forfeiture application was deposed to by the PG herself. In it, she lays down the background that led to the preservation order. That has been captured above. In her said affidavit,

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<sup>3</sup> *Lycia Limited v Prosecutor-General* (HC0-MD-CIV-MOT-POCA-2021/00443) NAHCMD 423 (19 July 2023).

the PG makes clear that the order for forfeiture relates to the following property –

- (a) the positive balance in FNB account number 62245970802 held in the name of Mr Kangonga;
- (b) the positive balance in FNB account number 62269544383 held in the name of Cabino Financial Services CC;
- (c) the positive balance in FNB account number 62274169327 held in the name of Ms Toini Shilunga;
- (d) a sum of N\$58 000 held in FNB internal office account number 62275725631, linked to FNB account number 62023483415 held in the name of Mr Leevi Nanyeni;
- (e) the positive balance in FNB account number 62261180055 held in the name of Mr Petrus Dawid;
- (f) the positive balance on Bank Windhoek account number CHK 8023444377 held in the name of Mr Natangwe Kalambi;
- (g) the positive balance in the Nampost Limited account number 911824805588 held in the name of Mr Erastus G Heita; and
- (h) the positive balance in FNB account number 62275675167.

[28] It must be mentioned, in this regard, that because the applications for condonation filed by Mr Kangonga and Lycia were dismissed, the versions of the said parties to the current application, are not before court. The court has largely to go by the allegations of the PG on oath to the extent that they are credible and admissible and devoid of any element that would suggest their exclusion on legal grounds.

[29] It is the PG's assertion on oath, that a careful analysis of the facts surrounding the matter, as described earlier, on reasonable grounds, depicts the perpetration of the crimes of theft by false pretences and illegal possession of or sale of or dealing in diamonds in contravention of the provisions of the ss 30, 31, 32 and 33 of the Diamond Act 13 of 1999, as amended, and money laundering as provided for in s 4(a)(i) and 6 of the Act.

[30] The PG, in her affidavit, sets out the following material facts in relation to scheme leading to the present proceedings. She cites three individuals who appear to be at the centre of the entire enterprise. These are Messrs Kangonga, Heita and Hamupolo. In this connection, Lycia, through Mr De Jesus, sought to purchase diamonds. To this end, they surfed on the internet for a gemologist to inspect and evaluate the diamonds. They came through the name of Mr Kangonga, who advertised himself as such, through his company called Namibia Gemologist CC. It was touted that the company 'specifically deals in rough diamond evaluation/ and 'help (*sic*) identify product(s) and determine the quality in terms of essay reports.'

[31] Mr Kangonga advertised himself as a chief gemologist at the company and who possesses experience as a diamond polisher. Lycia, on the strength of the advertisement, engaged the services of Mr Heita, to purchase the diamonds and to also engage the services of Mr Kangonga to evaluate the diamonds. The duo, Mr Kangonga and Heita informed Mr De Jesus that they were legitimate diamond dealers.

[32] Mr Kangonga furnished Lycia with a tax invoice for an amount of USD268 000 on the letterheads of Namibia Gemologist CC, which reflected that the said amount was payable for 'Rough Diamond Lot4c.' Thereafter, Mr Patel made payment on Lycia's behalf for 177ct and 425ct of diamonds into Cabino's account with FNB. This amount was described as being for taxes and Kimberley Process Certification (KPC).

[33] An amount of N\$4 094 467,56 was deposited into Mr Kangonga's FNB account. It consisted of N\$74 500, N\$93 757,56 and N\$263 305,70. The parties then agreed that the diamonds be kept in safe boxes, whose keys were kept by Mr Heita and Mr Hamupolo. These safe boxes were kept by Mr De Jesus in his hotel room.

[34] Thereafter, an 'unexpected' event, on the part of Lycia, occurred. I place the word unexpected in inverted commas for the reason that the event was unexpected by Lycia but it would seem not by those Lycia was dealing

with. A person who identified himself as a police officer, came to Mr De Jesus and collected the diamonds under the ruse that they were supposed to be presented to the Ministry of Mines and Energy, for inspection as per usual procedure. This was after Mr Kangonga had assured Mr De Jesus that there was nothing untoward with the collection of the diamonds and presenting them to the Ministry and that this was the normal procedure followed.

[35] It is common cause, however, that the Ministry never received the diamonds as touted to Mr De Jesus. Furthermore, Lycia did not eventually receive the delivery of any diamonds, despite having made payment therefor and depositing funds into Mr Kangonga's FNB account and Cabino's FNB account as stated above. It also became common cause that the Ministry does not have any record of dealings with Mr Kangonga, Mr Heita, Cabino or Namibia Gemologist CC. It further transpired that Mr Kangonga, is not a licensed diamond dealer in the terms of the relevant law of Namibia.

[36] What did, however, transpire, was that Mr Kangonga did at some stage, apply for a diamond dealer's licence via Namibia Gemologist CC. Pertinently, this was only 17 December 2021, which was after the preservation order was granted by this court on 11 November 2021.

[37] It must be recalled that s 61 of the Act, in terms of which this application is must be decided, states that this court 'must', subject to s 63, make a forfeiture of property order if the property concerned is, on a balance of probabilities (a) an instrumentality of an offence or intended instrumentality of an offence referred to in s 1 of the Act, or is (b) proceeds of unlawful activities or (c) is an unexplained asset.

[38] It is the PG's submission that on a proper analysis and consideration of the facts in this matter, as captured in para 27 to 33, the property in question in this matter, is, on a balance of probability, either an instrumentality of an offence as spelt out in s 1 or is proceeds of unlawful activities.

[39] I am of the considered view that when proper regard is had to the facts stated in paras 27 to 33 above, the conclusion that the property in question is on the balance of probabilities the proceeds of unlawful activities or instrumentality of an offence, irresistible. In this regard, I choose to deal with the allegation that the property in question constitutes the proceeds of unlawful activities on a balance of probabilities.

[40] First, it is clear that the whole scenario, as stated above, appears to show that Messrs Kangonga, Heita and Hamupolo, in a concerted effort, set out on an enterprise to lure unsuspecting individuals into believing that they were involved in legitimate business of selling diamonds in Namibia. Mr Kangonga, was, in this connection, held out to have been a certified and qualified gemologist.

[41] Lycia, through its representatives, fell for the bait. In this regard, they parted with a substantial amount in the excess of N\$7 million, believing that they were purchasing diamonds. It would appear that Mr De Jesus, Lycia's representative, was shown the diamonds and they were kept in his custody, until a scheme of deception was perpetrated on him, after the money had been paid to the schemers, to the effect that the diamonds were to be taken to the Ministry of Mines as a procedural requirement. This 'standard requirement' was confirmed by Mr Hamupolo and that is how Mr De Jesus in good faith, it would seem, parted with the diamonds, having previously parted with the money paid therefor.

[42] I am of the considered opinion that on a balance of probabilities, the crime of theft, alternatively fraud, was perpetrated on Lycia, through its representative, Mr De Jesus. The diamonds in Mr De Jesus' possession were spirited away from him under the pretext that they were being taken to the Ministry for some procedural requirements, when that was not the case. The Ministry, it is common cause, never received or had any record or trail of these diamonds. The fact of the matter is that Lycia parted both with the money for the diamonds and also with the diamonds themselves, either



through theft and/or fraud. I find this to be the case on a balance of probabilities.

[43] Secondly, it appears to me, again on a preponderance of probabilities, that the transaction recounted above, was committed in violation of the provisions of the Diamond Act. Section 30(1)(c) and (d) of the said Act, when read with s 30(2) thereof, provide the following:

‘(1) Save as is otherwise provided in this Act, no person shall have any unpolished diamond in his or her possession unless such person is –

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(c) a licensee;

(d) in respect of that diamond the holder of a permit referred to in section 27(a), (b), (c) (d), (e) or (f); or

(e) in possession of that diamond while acting in the course and scope of or in the execution of a lawful agreement to which any person referred to in paragraph (a), (b), (c) or (d) is a party, proof of which shall be on such first mentioned person.’

[44] Section 31(1)(c), (d) and (e) of the Diamond Act, provides the following:

‘Save as is otherwise provided in this Act. No person shall sell or otherwise dispose of any unpolished diamond unless such person is –

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(c) a dealer;

(d) the holder of a permit referred to in section 27(b); or (e) an authorised representative of any person referred to in paragraph (a), (b), (c) or (d) and acting within his or her scope of his or her duties as such an authorised representative.

(2) The provisions of subsection (1) shall not be construed so as to authorise such producer, licence holder dealer, permit holder or authorised representative to sell any unpolished diamond which has come into his or her possession in an unlawful manner.

[45] Furthermore, s 32(1) of the same Act states the following:

(1) Save as is otherwise provided in this Act, no person shall receive or purchase any unpolished diamond unless such person is –

- (a) a licensee;
- (b) the holder of a permit referred to in section 27(c); or
- (c) an authorised representative of any person referred to in paragraph (a) or (b) and acting within the scope of his or her duties as such an authorised representative.'

[46] Section 33 of the same Act, on the other hand, provides that:

Save as is otherwise provided in this Act, any person – (a) referred to in section 31(1) who sells or otherwise disposes of any unpolished diamond to any person other than a person referred to in section 32(1); (b) referred to in section 32(1) who receives or purchases any unpolished diamond from any person other than a person referred to in section 31(1), shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding twenty years or to both such fine and imprisonment.'

[47] Last, but by no means least, s 52 of the same Act makes the following provision:

'(1) Save as is otherwise provided in this Act, no person shall receive or purchase any unpolished diamond unless such person is (a) a licensee; (b) the holder of a permit referred to in section 27(c); or an authorised representative of any person referred to in paragraph (a) or (b) and acting within the scope of his or her duties as such an authorised representative.'

[48] It is not necessary that I comment on each of the provisions quoted immediately above. What becomes abundantly clear, from reading the above provisions though, is that sale or dealing in unpolished diamonds is a highly regulated activity in terms of the law. It is not every Tom, Dick and Harry that is allowed by law to deal in or with or sell diamonds, and unpolished ones in respect of this case. From the synopsis of the facts as uncovered by

investigations, with no countervailing evidence to the contrary, it would seem to me, on a preponderance of probabilities, that various provisions of the Diamond Act were possibly contravened in this case.

[49] In this connection, Mr Kangonga does not appear to be a person entitled in terms of the law, at the time, to deal with or in unpolished diamonds. The same goes for Mr Heita and Mr De Jesus, as far as the evidence is on the record suggest. None of these individuals appears to have had the requisite permit nor did they fall into the categories of individuals to whom some colour of right was extended by law, to deal with or in diamonds.

[50] In the premises, it seems to me that there was, on the balance of probabilities, a contravention of some or other of the provisions of the Diamond Act in the respects referred to above. In particular, it does not appear that any of the individuals who dealt with the unpolished diamonds involved in this matter, had any licence or permit to deal with same, as mandatorily required by law.

[51] On the basis of this conclusion, it would appear that over and above the conclusion that there might have been theft or fraud perpetrated on Lycia in this matter, as held earlier, there appears to have been serious and multiple contraventions of the Diamond Act. This points inexorably to the possibility of the payments made by Lycia to Mr Kangonga *et al*, to have been proceeds of illegal sale or dealing in unpolished diamonds in contravention of s 30, 31, 32 and 33 of the Diamond Act and thus falling within the definition of proceeds of unlawful activities as defined in s 1 of the Act.

#### Money laundering

[52] I now turn to deal with the issue of money laundering, as submitted by the PG. Section 4(a)(i) of the Act reads as follows:

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

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 . . . and that agreement, transaction or act has or is likely to have the effect of concealing or disguising the true 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 commits the offence of money laundering.'

[53] Section 6 of the Act, on the other hand, provides the following:

'Any person who acquires; uses; has possession of . . . property and knows or ought to reasonably have known that it forms part of the proceeds of unlawful activities commits the offence of money laundering.'

[54] It becomes necessary, in this regard, with the above provisions in mind, to consider the movement and dealings with the amounts of money paid by Lycia in respect of the diamonds. Again, this information is not challenged. In point of fact, with electronic transactions being employed, the trail of the money and sometimes its use, is not difficult to detect. Footprints, as it were, of the money, become engraved in the tapestry of electronic information maintained by the banks and other entities. These are recorded and filed in evidence by the PG in her application. I shall, however, not make specific reference to the source of each transaction in the course of the judgment.

[55] In this connection, the money paid into Cabino's FNB account, from the information availed, was N\$860 866,70. Cabino, prior to this transfer, had a balance in that account of N\$50 239,07. Having had this windfall from Lycia, Mr Heita transferred N\$25 000 to his FNB account and also withdrew an amount of N\$631 000 in cash, leaving the balance of N\$1 208,90 in the account.

[56] Prior to the deposit mentioned above, Mr Heita's FNB account had a positive balance of N\$995 on 20 October 2021. As stated above, N\$25 000 was deposited into the account. An amount of N\$16 580 was withdrawn,

leaving a balance of N\$9 415. His Nampost account only had one transaction since its inception, namely, receipt of an amount of N\$61 000. This deposit appears to have coincided with the withdrawal of the amount of N\$631 000 from the FNB account.

[57] The activities on these accounts, appear to paint a picture on the canvass that suggests the conclusion, on a balance of probabilities, that Mr Heita's accounts and Cabino's account, had relatively low balances until the payment of the amount by Lycia, thus creating a link between the hive of activity after the deposit and the transfer of the money into Cabino's account. It appears to me, having regard to the timing and movement of money in these related accounts that Mr Heita knew or ought reasonably to have known that the amount of N\$860 855,70 deposited in Cabino's FNB account, was proceeds of unlawful activities.

[58] It is also plain that the movement of the funds received fraudulently from Lycia, ie deposits and withdrawals, as indicated above, had the ominous effect of concealing or disguising the true origin of the money received from Lycia. This, it seems to me, was in violation of the provisions s 4(a)(i), quoted above. Furthermore, it also seems on the balance, to have contravened the provisions of s 6 of the Act, also quoted above.

[59] I now turn to the activities on the movement of money in the accounts of Mr Kangonga. Before receiving the amount of N\$4 119 457,56 from Lycia, Mr Kangonga's FNB account had the paltry amount of N\$ 356,48. After the windfall, as it were, from Lycia, stated above, the following transactions were made on the said account: a transfer of N\$58 000 was made to a Mr Nanyeni's FNF account; a transfer of N\$100 000 was made to a Ms Shilunga's FNB account; N\$46 000 was transferred to a Mr Nepolo's FNB account and a cash withdrawal of N\$63 730 was made from the said account. This left a balance of N\$2 307 342,93 on the said account.

[60] Having regard to the above factual matrix, it appears to me that the probabilities favour the conclusion that the transfers and withdrawals from Mr

Kangonga's account were done with the object of concealing or disguising the true origin, source and disposition of the money received from Lycia. I am of the considered opinion on a preponderance of probabilities that this was done in violation of s 4(a)(ii) of the Act.

[61] In like measure, it appears to me on a balance of probabilities, that the amount of N\$58 000 deposited into Mr Nanyeni's FNB account was acquired by him and he had the money in his possession when he knew or ought reasonably to have known that it was proceeds of unlawful activities in terms of the s 6 of the Act. A similar conclusion appears meet, in my considered view, in regard to the FNB account of Ms Shilunga, which had a positive balance of N\$35, 31 before the windfall. After receipt of the money in her account, she transferred N\$20 000 to a Mr Kalambi's Bank Windhoek account and N\$50 000 to a Mr Dawid's FNB account.

[62] It is worth pointing out that before the transfer of N\$50 000 by Ms Shilunga, Mr Dawid's account had a paltry sum of N\$60,72. He withdrew an amount of N\$1 070, leaving a balance of N\$48 869, 28. Ms Shilunga, for her part, after making a transfer of N\$20 000 and N\$50 000 to Messrs Kalambi and Dawid, further withdrew an amount of N\$1 070, leaving a balance of N\$48 869, 28.

[63] With regard to Mr Nepolo, his FNB account, before the windfall, had a measly positive balance of N\$96,24. Upon receipt of the N\$46 000, Mr Nepolo transferred a sum of N\$21 220 to Ms Tresia Nakathingo's bank account. On 3 November 2021, Mr Nepolo's account had a positive balance of N\$11 679,24.

[64] From the above rendition of banking activities in the accounts mentioned, considering the measly amounts before the windfall, the conclusion that the account holders knew or ought reasonably to have known that the money paid into their respective accounts, was proceeds of unlawful activities, is irresistible on a balance of probabilities and I so find. The trio of Ms Shilunga, and Messrs Kalambi and Dawid, knew or ought to have

reasonably known that the money deposited into their respective accounts, was part of money that formed proceeds of unlawful activities.

[65] The manner in which the windfall from Lycia was dealt with by all those who received it directly or indirectly, and the manner in which it was secondarily dealt with, gives rise to an irresistible inference that they knew that the source of the money was unlawful and they, for the most part, parted with it, in some cases as if with both hands, simultaneously. There is accordingly a link between the properties mentioned in this case and the unlawful activity, as recounted above.

[66] The words that fell from the lips of the Supreme Court in *New Africa Dimension*<sup>4</sup> resonate powerfully as this judgment draws to a close. They bear repeating. The court said:

‘It has become evident in recent times that the criminal justice system does not live up to the adage that crime does not pay. Criminals are, for a variety of reasons, able to keep and enjoy the spoils of their loot. This anomaly provided a powerful incentive for crime to thrive. The Namibian Legislature, in line with a similar trend worldwide, has taken steps to address the problem through POCA. The approach adopted in POCA is to hit the criminal where it hurts most; his or her pocket so as to remove the incentive for crime.’

[67] This, it seems to me, is an appropriate case in which to give effect to legislative solicitudes, fully endorsed by the Supreme Court, namely, that of hitting those who look to crime as being their paymaster, hard and to force them pause and to think twice before entangling themselves in such criminal enterprises, whether in primary or secondary association therewith. I am of the considered view that the PG has amply demonstrated, by admissible evidence, which cannot be regarded as flimsy or inherently unreliable, that this is a proper case in which to grant the forfeiture of property order.

## Conclusion

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<sup>4</sup> *New Africa Dimensions CC v Prosecutor-General* 2018 (2) NR 340 (SC), p 345 para 13.

[68] I am, on the balance of probabilities satisfied that the amount that was sourced from Lycia Limited and subsequently transferred to various individuals and entities mentioned above, was proceeds of crime. I am accordingly satisfied on the balance of probabilities, that the crimes of theft and fraud appear to have been perpetrated in this matter. Furthermore, it appears that there were contraventions of the Diamond Act.

[69] There is therefor, also reason to believe, for reasons advanced above, that the individuals who were beneficiaries of the windfall, knew or ought to have reasonably known that the money deposited into their accounts, was proceeds of unlawful activities and that they knowingly or should have reasonably known that the said amount was proceeds of unlawful activities.

#### Order

[70] Having regard to the foregoing, I accordingly issue the following order and hopefully bring an end to this saga, namely:

1. The properties which are presently subject to a preservation of property order granted by this Honourable Court under the above case number, namely:
  - 1.1. The positive balance in the positive balance in First National Bank account number 62245970802 held in the name of Heikki K. Kangonga;
  - 1.2. The positive balance in First National Bank account number 62269544386 held in the name of Cabino Financial Services CC;
  - 1.3. The positive balance in First National Bank account number 62274169327 held in the name of Toini Shilunga;
  - 1.4. A sum of N\$58 000.00 held in First National Bank internal office account number 62275725631 linked to FNB account number 62023483415 held in the name of Leevi Nanyeni;
  - 1.5. The positive balance in First National Bank account number 62261180055 held in the name of Petrus Dawid;



- 1.6. The positive balance in Bank Windhoek account number CHK 8023444377 held in the name of Natangwe Kalambi;
  - 1.7. The positive balance in Nampost Limited account number 911824805588 held in the name of Erastus G. Heita; and
  - 1.8. The positive balance in First National Bank account number 62275675167 held in the name of Erastus G. Heita, hereinafter referred to as 'the properties', be forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 ('POCA').
2. The properties are to remain under the control and supervision of Detective Inspector Johan Nico Green ('D. Insp Green') a member of the Anti-Money Laundering and Combating of Financing and Terrorism: Asset Recovery Sub-Division within the Namibian Police Force ("Nampol"), stationed at Ausspanplatz, Windhoek, and in D. Insp Green's absence any other authorised member of Nampol.
  3. D. Insp Green, or in his absence, any other authorised member of Nampol, is directed to pay the properties and the interest thereto, into the Asset Recovery Account:

Ministry of Justice –POCA

Standard Bank account number 589245309

Branch Code: 08237200

4. Any person whose interest in the properties concerned is affected by the forfeiture order, may within 15 days after he or she has become aware of the order apply to the High Court for a variation or rescission of the order.
5. The Registrar of this Honourable Court must publish notice of the forfeiture order in the Government Gazette as soon as practicable after it is made.
6. Prayers 1 and 3 will not take effect before 30 days after the notice of this order was published in the Government Gazette has expired or

before an application in terms of section 65 of POCA or an appeal has been disposed of.

7. The matter is removed from the roll and regarded as finalised.

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T S MASUKU  
Judge

## PPEARANCES

APPLICANT: C Piccanin  
Of the Office of the Prosecutor-General  
(Windhoek)