



REPORTABLE

CASE NO.: SA 21/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL

Appellant

and

ALEXES PAULO

First Respondent

RHAPSODY CLOSE CORPORATION

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 13 March 2023

Delivered: 03 May 2023

Summary: On 17 November 2015, the first respondent who is an Angolan national deposited N\$ 1 800 000 into the second respondent's premium call account with Standard Bank. The deposit slip reflected the source of the money as 'business'. He further presented a receipt of foreign currency, transacted at Bank Windhoek the previous day in the amount of USD 120 000 which then was equivalent of N\$ 1 738

800. It is this deposit which attracted suspicion and ultimately an investigation into the activities of the respondents. The results of the investigations prompted the appellant (applicant *a quo*) to approach the court for a preservation of property order on an urgent basis.

The appellant obtained a preservation of property order in terms of s 51 (1) of the Prevention of Organised Crime Act 29 of 2004 (POCA) in respect of the positive balances in the respondents' four bank accounts held at Bank Windhoek Namibia and Standard Bank Namibia. Subsequent thereto, the appellant unsuccessfully applied for a forfeiture order in terms of s 61 (subject to s 63) of POCA.

In the opposed forfeiture application, the appellant asserted that the properties are proceeds of unlawful activities. That is that, they are proceeds of (a) illegal trading in foreign currency in contravention of reg 2(1) read with reg 22 of the Exchange Control Regulations of 1961; (b) fraud; (c) contravention of s 30 of the Immigration Control Act 7 of 1993 and (d) money laundering in terms of ss 4 and 6 of POCA. Further, that the properties are instrumentalities of Schedule 1 offences to POCA.

The court *a quo* found that the appellant had failed to prove on a balance of probabilities that the respondents had committed the offences alleged and that the properties were proceeds of unlawful activities. As regards the allegation of fraud, that court found that the first respondent committed fraud against the Ministry of Home Affairs, Immigration, Safety and Security, but failed to prove on a balance of probabilities a connection between such fraud and the properties. The court *a quo* as a result dismissed the forfeiture application.

The appellant appealed against the whole judgment of that court but for the findings on fraud.

Held that, there is evidence aliunde and it is undisputed for that matter, that the first respondent purchased USD from Bank Windhoek, an authorized dealer and therefore this case is distinguishable from *S v Katsikaris* 1980 (3) SA 880 (A) and *Henry v Branfield* 1996 (1) SA 244 (D) as foreign currencies were not purchased from authorized dealers in those cases.

Held that, there is no evidence that the respondents and their clients concluded agreements of sale in terms whereof they sold foreign currencies to their clients. There is further no evidence that the respondents sold USD to their clients. The uncontradicted evidence is that the respondents simply assisted their clients to obtain USD from the banks in terms of reg 3(1) of the Exchange Control Regulations of 1961.

Held that, the appellant did not prove on a balance of probabilities that the respondents contravened the Exchange Control Regulations of 1961.

Held that, there was no evidence that the first respondent was an illegal immigrant in Namibia. Further, the appellant failed to prove on a balance of probabilities that the properties are proceeds of the first respondent's failure to hold a work permit or that they are proceeds of the first respondent's violation of conditions attendant on any permit or visa issued to him by the Ministry of Home Affairs, Immigration, Safety and Security.

Held that, the appellant failed to prove on a balance of probabilities that the amount deposited into the second respondent's premium call account was not from the respondents' clients.

Held that, the appellant failed to prove on a balance of probabilities that the agreement between Bank of Namibia and the Central Bank of Angola as alleged by the first respondent and which allowed the two nations to exchange their respective currencies did not exist or if it did, that its terms prohibited the conduct of the respondents.

Held that, asset forfeiture is a serious matter and a court cannot forfeit an asset on the evidence as presented by the appellant.

Held that, the appeal is dismissed with costs.

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APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and HOFF JA concurring):

Introduction

[1] This is an appeal against the whole judgment and order of the High Court (Main Division) dismissing a forfeiture application sought in terms of s 61(1) (subject to s 63) of the Prevention of Organised Crime Act 29 of 2004 (POCA).

[2] The brief background to this case is that, on 24 December 2015, the appellant had filed an application and successfully obtained an order in the High Court for a preservation of property order ('preservation order') under s 51(1) of POCA. The application was in relation to the positive balances:

- 2.1. In the Standard Bank Namibia, business banking account number 60001553274 held in the name of Rhapsody Investment CC (“the Standard Bank Business account”);
- 2.2. In the Standard Bank Namibia Premium call account number 60001400222 held in the name of Rhapsody Investments CC (“the Standard Bank Premium account”);
- 2.3. In the Bank Windhoek Namibia Cheque account number 8003095691 held in the name of Alexes Paulo (“Mr Paulo’s Bank Windhoek account”); and
- 2.4. In the Bank Windhoek account number 8004741004 held in the name of Rhapsody Investments CC (“Rhapsody’s Bank Windhoek account”), collectively referred to as ‘the properties’.

[3] At the heart of the appellant’s case are the allegations that there are reasonable grounds to believe that the properties in para 2 above are the proceeds of unlawful activities, namely:

- (a) Illegal trading in foreign currency in contravention of regulation 2(1) read with regulation 22 of the Exchange Control Regulations of 1961¹ (‘the Exchange Control Regulations’).
- (b) Fraud in that the first respondent made misrepresentations to Standard Bank and the Ministry of Home Affairs when he provided false information, namely, providing a false residential and business address

¹ Exchange Control Regulations, GN R1112 of 1 Dec 1961 (and amended up to GN 126), GG 4767, 1 August 2011.

where he was not residing or conducting business therefrom, registering employees with the Social Security Commission allegedly in the employment of the respondents when such employees never worked for the respondents.

- (c) Contravention of s 30 of the Immigration Control Act 7 of 1993 (the Immigration Act).
- (d) Money laundering in terms of ss 4 and 6 of POCA.

[4] The alleged offences above were triggered when the first respondent, an Angolan citizen, deposited a large sum of money in the amount of N\$1 800 000 into the premium call account of the second respondent held at Standard Bank on 17 November 2015. The deposit slip reflected the source of the money as 'business'. He further presented a receipt of foreign currency, transacted at Bank Windhoek the previous day, in the amount of USD 120 000 which then was equivalent to N\$ 1 738 800. Standard Bank reported that transaction to the relevant authorities which resulted in an investigation by the Namibian Police (NAMPOL).

[5] On 29 April 2016, the appellant applied for the properties to be forfeited to the State in terms of s 59 of POCA. The appellant, contended that on a balance of probabilities the properties are the proceeds of unlawful activities.

[6] The appellant further submitted that the properties are instrumentalities of Schedule 1 offences to POCA namely:

- (a) The contravention of the Exchange Control Regulations as per item 22 of Schedule 1.
- (b) Money laundering offences as per item 27 of Schedule 1.
- (c) Offences as set out in the Customs and Excise Act 20 of 1998 ('the Customs Act') as per item 28 of Schedule 1.

[7] These allegations were not persisted with in this court and nothing would be said about them.

[8] The respondents opposed the forfeiture order and on 17 March 2021 the court *a quo* dismissed the application.

Judgment of the High Court

[9] The court *a quo* on the allegations that the respondents contravened the Exchange Control Regulations held that the first respondent had applied to Bank Windhoek, an authorised dealer, to buy foreign currency from it for its clients at Oshikango, but the bank at no point informed the first respondent that such conduct would be unlawful or violate the Exchange Control Regulations. At paras 40-42 the court went on to say:

[40] According to the learned author Wills [Banking in South African Law, (1981) Juta, p 239] anyone who desires advice on exchange or currency matters governed by the Exchange Control Regulations should approach an authorised dealer. That is exactly what Mr Paulo did. Under those circumstances, it is fair to assume that Mr Paulo as a foreigner would not have known the provisions of the Exchange Control Regulations of Namibia. Bank Windhoek, as an authorised dealer, was of the view that the purpose for acquiring foreign currency by the CC was not contrary to the provisions of the Regulations. Had Bank Windhoek been of the view that the purpose for which the CC intended to utilize the foreign currency would be in contravention of the Regulations, it would have advised the CC accordingly and declined to transact with the CC. In this connection it is important to point out that it is not the applicant's case that the CC utilized the foreign currency for the purpose other than that stated in its application submitted to Bank Windhoek when it applied to buy foreign currency.

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

[42] For all these reasons, I am of the considered view that it cannot be said that the respondents version is 'clearly untenable' 'or is so improbable' that it may be rejected on papers'

[10] Pertaining the allegation of the contravention of the Immigration Control Act, the court opined that there was no dispute that the second respondent as a Namibian registered entity does not require permission to conduct business in Namibia. On the allegation that first respondent received a salary, founded on two deposits made to

the first respondent's bank account, the court found that that falls short of proving the commission of the offence as one would have expected that he paid himself a salary on a monthly basis. The court went on to say:-

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

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

[51] There is no evidence by the applicant as to the type of permit or visa which Mr Paulo held for the duration of his stay in Namibia, be it a visitor's permit or a tourist visa. Perhaps realizing this short-coming in the applicant's case, counsel for the applicant attempts to cure this defect through her heads of argument, where she submitted that: "The 1st respondent entered Namibia on a visitors' permit". The submission is not based on any evidence on record'.

[11] The court further found that first respondent was not an illegal immigrant in Namibia, he was lawfully in Namibia, and he had a business visa.

[12] On the allegation of fraud when the first respondent submitted documents to the Ministry of Home Affairs purporting to prove that the second respondent had people in its employment whereas that was not the fact, the court found that first respondent committed fraud to the potential prejudice of Home Affairs. On the documents submitted to Standard Bank on the residential and business addresses the court found no misrepresentation was done more so that the business address at Maerua Mall was found to be in existence.

[13] On the allegation of money laundering the court *a quo* found that the properties were received from the second respondent's clients and what the first respondent brought into Namibia from Angola from his savings. On the point that first respondent brought into Namibia money in excess of what the Angolan Exchange Control Laws permit, the court found that the deponent was not an expert on the Angolan Exchange Control Laws and further that the appellant was in a better position to produce the agreement alleged by first respondent to have been entered into between the Bank of Namibia and the Central Bank of Angola which allowed the citizens of the two countries to exchange national currencies in their respective countries. Without that agreement, it is unknown what impact it had on the Angolan Exchange Control Laws.

[14] In conclusion, the court *a quo* held that the appellant had failed to prove on a balance of probabilities that the respondents have committed the offences alleged and that the properties are the proceeds of unlawful activities. On the proven fraud on the Ministry of Home Affairs, the court held that the appellant failed to prove the

causal connection between the offence of fraud and the properties. Consequently, the court dismissed the application.

[15] The appellant appeals against that order and the entire judgment.

The submissions

[16] In this court the submissions from both parties were overwhelmingly on the allegation whether the first respondent illegally traded in foreign currency or not in contravention of reg 2(1) read with reg 22 of the Exchange Control Regulations.

[17] On behalf of the appellant, it was contended as a principle thrust of the appellant's case that the first respondent is not an authorised dealer as per reg 1 of the Exchange Control Regulations and therefore his conduct contravened regulation 2(1) read with regulation 22 which constituted a criminal offence.

[18] Ms Boonzaier relied on three South African authorities² which emphasize the purpose of exchange control and on the strength of the case of *Henry v Branfield*³ counsel in the written argument also submitted that the conduct of the respondents is tainted with illegality. The appellant's argument is allegedly sustained by the provisions of the Exchange Control Regulations the relevant provisions I enumerate *infra*. It is argued that the respondents were not appointed as agents of Bank Windhoek, that the confirmatory affidavit from Bank Windhoek says that there was no agency agreement and that the relationship between the Bank and second

² *Van der Merwe & another v Taylor NO & others* 2008 (1) SA 1(CC), para 63, *S v Katsikaris* 1980 (3) SA 880(A) at 586-590 and *Henry v Branfield* 1996 (1) SA 244 (D) at 249-250.

³ *Ibid*, note 1.

respondent is strictly client-banker relationship and thus the respondents are not authorised dealers in terms of the regulations.

[19] Counsel references to the respondent's opposing affidavit in the forfeiture application, particularly the first respondent's assertion that, second respondent is in the business of assisting its clients, by receiving Namibia Dollars from them to obtain USD for them so that they could purchase goods in USD at Oshikango as the majority of suppliers at Oshikango only accept USD; and that the N\$1 800 000 deposited at Standard Bank was received from its clients and submits that the business activities of the second respondent are exactly the same as a sales agreement of foreign currency as the agreement constitutes the buying and selling of foreign currency, more so that second respondent was paid for the services so rendered. It was further contended that if respondents were truly acting as agents on behalf of their clients, the clients' names would have appeared on the second respondent's Bank Windhoek statements and the money deposited at Standard Bank should have been deposited at Bank Windhoek.

[20] The submissions on behalf of the respondents were crisp. Mr Namandje argued that the appellant bore the onus to prove that the properties preserved are proceeds of unlawful activities. It was further argued that the preserved properties which the appellant sought to be forfeited are funds which were generated through a legitimate business that the respondents conducted as per the document that detailed the objectives of the second respondent and that first respondent was assisted by

Bank Windhoek, an agent of Bank of Namibia, in as far as foreign currency exchange was concerned in compliance with reg 2(3) of the Exchange Control Regulations. Further, respondents argued that the purpose of purchasing foreign currency was disclosed to Bank Windhoek (in a letter addressed to the branch manager on 20 October 2015) which is not disputed and that at all times respondents used the foreign exchange for the disclosed purpose in compliance with reg 2(4) of the Exchange Control Regulations.

[21] Finally we were urged to adopt the rationale expounded in *National Director of Public Prosecutions v Airport Clinic Johannesburg International (Pty) Ltd & another*⁴, Adams AJ holding that the property did not constitute proceeds of unlawful activities as the foreign currency in that matter was acquired lawfully and therefore there was no connection between the foreign currency and the respondent's contravention of reg 6(1). It was submitted that the evidence proffered by the appellant was, on a balance of probability insufficient to prove a contravention of the regulations.

[22] It was further contended on behalf of the respondents that the authorities relied on by the appellant on the point of the contravention of the regulations are distinguishable from the facts of this case, in that here, the respondents at all times were acting with the assistance of an authorised dealer (Bank Windhoek) within the scope of the declared purpose in compliance with regs 2(3) and 2(4) of the Regulations.

⁴ *National Director of Public Prosecutions v Airport Clinic Johannesburg International (Pty) Ltd & another* 2016 (2) SACR 576 (GJ) para 18.

The Legal Framework

[23] The relevant provisions of the Exchange Control Regulations provide as follows:

'RESTRICTION ON PURCHASE, SALE AND LOAN OF FOREIGN CURRENCY AND GOLD

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

(2) (a) An authorised dealer shall not buy, borrow or receive or sell, lend or deliver any foreign currency or gold except for such purposes or on such conditions as the Treasury may determine.

(b) The Treasury may, in its discretion, by order prohibit all authorised dealers or any one or more of them:-

(i) from selling, lending or delivering to, or buying, borrowing or receiving from, any specified person, fund or foreign currency or gold; or

(ii) from so selling, lending, delivering, buying, borrowing or receiving any foreign currency or gold for any specified purpose or except for such purposes or on such conditions as the Treasury may determine.

(3) Every person other than an authorised dealer desiring to buy or borrow or sell or lend foreign currency or gold shall make application to an authorised dealer and shall furnish such information and submit such documents as the authorised dealer

may require for the purpose of ensuring compliance with any conditions determined under sub-regulation (2) of this regulation.

(4) No person other than an authorised dealer shall:-

(a) use or apply any foreign currency or gold acquired from an authorised dealer for or to any purpose other than that stated in his application to be the purpose for which it was required; or

(b) do any act calculated to lead to the use or application of such foreign currency or gold for or to any purpose other than that so stated'.

[24] Regulation 1 of the Exchange Control Regulations provides that, in these regulations, unless the context otherwise indicates-

“authorised dealer” means, in respect of any transaction in respect of gold, a person authorised by the Treasury to deal in gold, and in respect of any transaction in respect of foreign exchange, a person authorised by the Treasury to deal in foreign exchange;

“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'.

[25] Regulation 22 of the Exchange Control Regulations is a penal provision.

[26] According to sec 1 of POCA:

“proceeds of unlawful activities” means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in

Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity;

“unlawful activity” means any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia’.

The question for determination

[27] Whether on a balance of probabilities the appellant proved that the respondents committed the offences alleged and by extension that the properties are the proceeds of unlawful activities.

Discussion

[28] On 20 October 2015, the first respondent penned a letter to the branch manager, Bank Windhoek, Capricorn Branch, for the attention of Mr F Viljoen. The subject matter of the letter is: ‘Request for Favourable Discounted Bank Charges on Business Account – CHK 8004741004’. In the paragraph headed ‘Scope’ he said the following:

‘SCOPE

The scope of activity is to support the Oil and Gas Sectors, we propose to offer services of PROCUREMENT, AND LOGISTICS in the purchase, Import and Export, Storage and delivery of all types of products, equipment and tools used in production line within the Oil & Gas and Mining Industry, by providing a door to door service.

Rhapsody Investment has open a business Account with BANK WINDHOEK to secure and handle the transactions within NAMIBIA, we will source out USD with high frequency from BANK WINDHOEK to facilitate and assist our clients to purchase their goods at Oshikango Border as most of the shops are authorized to sell their goods in USD and in turn we get paid back for the services provided. (the underlining is mine).

Note: Making the USD readily available to our clients just provides us with a competitive advantage in the supply chain business. Thus, we kindly seek your consideration in providing us with a **cost-effective cash handling fee rate** as well as **lower commission rate** in order to reduce the operating costs that is currently affecting our business negatively. Our ultimate goal is to maximize our profits that will ultimately make the business survive in the global market and our target is to have the current cash handling fee as well as commission rate paid for the acquisition of the US Dollar reduced at least with 50% to remain competitive in order to retain our existing customers and create new ones that consequently will promote the win-win situation between the BANK and RHAPSODY INVESTMENTS as a client'. (the underlining is mine).

[29] In their opposition to the forfeiture application, first respondent in his affidavit, states that:

'In relation to the specific amount preserved that was deposited at Standard Bank such amount was received from the CC's clients as usual assisting them to obtain foreign currency to purchase their goods at Oshikango. It is not derived from any unlawful activities at all. I have explained the CC's activities to the Bank transparently and the Bank have assured me that there was nothing wrong.'

[30] In a document that purports to be a Resume of the first respondent, he states that:

'Dealing with foreign currencies was absolutely not RHAPSODY'S core business but was used as a strategy to provide us with a competitive advantage to create new customers and retain or secure the existing ones by offering a full service that could assist the major clients (Angolans) to acquire easily the USD or N\$ to facilitate their transactions locally then, organize their shipments where the company gets paid for services provided.

The letter to Bank Windhoek clearly described my motivation to seek for guidance from a credible financial institution to avoid any possible unlawful activity that compromise the business in the future; "I was granted low commission rate and low cash handling fee as the bank did not see any irregularity in the execution of my business".'

[31] To the respondents' case the appellant in her affidavit relies on reg 2(1) of the regulations above that they are not authorised dealers in foreign exchange and that on enquiry by Namibia Police (Nampol) at Bank of Namibia (BON) one Mr Bryan Eiseb a Deputy Director in the Exchange Control Division confirmed that first respondent was not licensed as an authorised dealer and one Mr Issy Tjihoreko at Ministry of Finance confirmed that second respondent was not licensed as an authorised dealer. Appellant contends that Bank Windhoek had no powers to appoint first respondent as an authorised dealer and that such powers were vested in the Minister of Finance.

[32] Further that in fact Bank Windhoek confirmed that it did not appoint the respondents as its agents, but that they only had a normal client-banker relationship.

[33] The appellant further states that there is a discrepancy in first respondent's explanation of the source of the N\$1 800 000 deposited in the Standard Bank premium call account for he does not explain why he told Standard Bank that the source of the N\$1 800 000 was the transaction in USD he did at Bank Windhoek the previous day. Appellant continues to disclose further discrepancies in respondents' case, namely: (a) failure to disclose the businesses in Oshikango trading in USD, (b) the Euros that first respondent purchased and how it was related to the clients in Oshikango, (c) failure to disclose the exact amount of money brought from Angola, (d) the exchange of money in Namibia, while first respondent was not in Namibia, (e) denial by Bank Windhoek that the respondents were agents, (f) absence of accounting records indicating who purchased the Namibian Dollars from the respondents, (g) failure to pay VAT on the N\$1 095 687,90, money appellant alleges is profit respondents generated from their illegal exchange of money, which if legitimate, second respondent was obliged to pay VAT in terms of the Value Added Tax Act (VAT Act)⁵, for which second respondent is registered. Appellant states that there is no indication that second respondent was operating any business in Angola, and that if the money was brought from Angola, it was not declared and that the assertions by first respondent that second respondent was running a legitimate business is an attempt to deceive this court. Appellant further states that first respondent provides two versions for the source of the money, namely, initially that it is his own investments and then from relatives in Angola and second respondent's

⁵ Value – Added Tax Act 10 of 2000.

clients and submits that, given the contradictions, it favours the probability that the money in the accounts are proceeds of unlawful activities.

[34] From the features of the parties' cases, it becomes clear that there are assertions by the respondents which the appellant cannot contradict with admissible evidence. Of note is the sources of the monies held in the accounts at Bank Windhoek and Standard Bank, whether the second respondent runs business in Angola, and that it has clients at Oshikango that trade in USD. On that score, appellant's case is sheathed in either bare denials or conclusions that are not supported by credible evidence. Unfortunately for the appellant, being the party seeking to forfeit the properties of the respondents, she had have to demonstrate on a balance of probabilities that the properties so sought are proceeds of unlawful activities.

[35] As I have already indicated, appellant's principal argument is that respondents are not authorised dealers in foreign exchange and therefore given their own versions they contravened reg 2(1) of the Exchange Control Regulations. The simple answer to that argument is that respondents bought the foreign currencies from an authorised dealer and within the regulations. Appellant still argued to say, notwithstanding, Bank Windhoek had no authority to appoint the respondents as its agents as that authority is vested in the Minister of Finance and that respondents should have sought treasury approval. Appellant relies on reg 2(1) of the Regulations and *Katsikaris*.

[36] The dicta from *Katsikaris*⁶ which the appellant relies on bears repeating and reads as follows:

'1. What reg 2(1) forbids is that a person should, without the necessary permission etc, "buy" or "sell" any foreign currency. That pre-supposes the entering into of an agreement to buy or sell foreign currency. The provision hits at the entering into of such an agreement with someone who is not an authorised dealer without Treasury permission. Its purpose is to enable the Treasury to exercise proper control, directly or through authorised dealers, over all such transactions in order to protect the Republic's reserves of foreign currency. Consequently, as soon as such an agreement is entered into without its permission, and with someone other than an authorised dealer, reg 2 (1) is contravened, irrespective of where or when the foreign currency, as the *merx* of the agreement, is to be received or delivered in pursuance thereof. Thus, for example, if A without the necessary permission agrees to buy \$10 000 from B, not being an authorised dealer, in terms of which agreement that foreign currency is to be received by or delivered to A somewhere abroad when he goes there, then reg 2 (1) is, without more, contravened. That in terms of the agreement some article (like a key to the safe where \$10 000 is being kept abroad) or some document (like a letter or cheque) evidencing A's right to receive that foreign currency is simultaneously given by B to A in order to facilitate his getting the \$10 000 when abroad, must not be allowed to obscure the true nature of the agreement.'

[37] Appellant on the dicta above puts emphasis on the words, '. . . and with someone other than an authorised dealer . . .'. Appellant analyses the versions of the respondents particularly on their agency for their clients at Oshikango and concludes that 'from the respondents' version, the business activities described are exactly the same as sales agreements of foreign currency' and that the respondents' agreement with their clients constitutes the buying and selling of foreign currency.

⁶ Footnote 1 above at 589H-590A-C.

[38] It is as a result of that conclusion that appellant places reliance in the matter of *Henry v Branfield* above. In that matter plaintiff and defendant concluded an oral contract the terms of which were that plaintiff would deliver to the agent of the defendant an amount of 380 000 Zimbabwe Dollars and after an expiry of a six months period defendant would pay the plaintiff in South African Rands the amount equal to 90% of the face value of the said amount of Zimbabwe Dollars. The plaintiff delivered as agreed but the defendant failed to honour his part of the agreement. Plaintiff sued defendant and among other things the issue arose whether that agreement fell foul of the South African Exchange Control Regulations (SA Regulations).

[39] The court in that matter relied on the provisions of reg 2(1) of the SA Regulations and found that the agreement amounted to a sale of Zimbabwean currency by the plaintiff and a purchase thereof by the defendant. It was said all the elements of sale were present. The court stated that 'It follows therefore that the agreement is tainted with illegality, inasmuch as the provisions of reg 2(1) of the said Exchange Control Regulations would be contravened' and held that the contract was illegal and unenforceable.

[40] In my opinion the raising of the matters of *Katsikaris* and *Henry v Branfield* in argument does not assist the appellant. They are distinguishable on the facts. In both cases the foreign currencies were not purchased from an authorised dealer nor was

permission sought from Treasury. *Katsikaris* bought from a middlemen and it is not clear from *Henry v Brandfield* where and how the Zimbabwe Dollars were obtained, a clear contravention of reg 2(1) of the Regulations.

[41] In *casu* there is evidence aliunde, undisputed for that matter, that first respondent purchased the USD from Bank Windhoek an authorised dealer. It was made very clear in the *Katsikaris* matter what reg 2(1) prohibits – entering into an agreement with someone who is not an authorised dealer without Treasury permission.

[42] The appellant proceeded to argue that what falls foul of reg 2(1) of the Exchange Control Regulations is the agreement respondents entered into with their clients to provide them with the USD. There is no evidence of the respondents and their clients concluding a contract with the terms that the respondents would obtain USD and sell same to their clients. Worse still, there is no evidence that the respondents sold the USD they bought from Bank Windhoek to their clients. The uncontradicted evidence on this point is that of the first respondent, when he in his affidavit states that he just assisted their clients to obtain USD from banks in terms of reg 3(1) of the regulations above. That regulation provides for every person who desires to buy or borrow or sell or lend foreign currency to apply to an authorised dealer and shall furnish such information and submit such documents as the authorised dealer may require for purpose of ensuring compliance with any conditions determined under reg 3(2). First respondent states that, that is what he did.

[43] First respondent further states that he and the second respondent at all relevant times simply acted as agents of Angolan clients who would give the second respondent money and he would lawfully obtain USD to handover to its clients and the second respondent would be paid for services so rendered. He further states that he did not sell foreign currency to Angolan clients and that Bank Windhoek was entitled to sell to the second respondent's clients through the second respondent the agent of its clients in terms of reg 3. He further states that he provided Bank Windhoek all the information and documents required and was assured that all was above board.

[44] The first respondent is corroborated by Mr Scholtz a head teller at Bank Windhoek who attested to an affidavit *inter alia* saying, first respondent informed Bank Windhoek that he purchased goods in foreign currency and paid his clients in foreign currency as well. He continued to say:

'5. . . . meaning he pay his clients also in foreign currency. I do not know as to what/who are this clients that he is referring.

6. That is why we asked him to provide us with the letter that is clarifying as to what type of business that he is doing. A foreign (sic) is not allowed to deposit a local currency unless provide a proof as to where did he exchange the money'.

[45] Mr Scholtz continued to say, 'first respondent could deposit and withdraw Namibia Dollars and exchange it to foreign currency based on the letter he provided to the bank'.

[46] When regard is had to the following words in first respondent's letter to Bank Windhoek – '. . . we will source out USD with high frequency from Bank Windhoek to facilitate and assist our clients to purchase their goods at Oshikango Border as most of the shops are authorised to sell their goods in USD and in turn we get paid back for the services provided . . . Note: Making the USD readily available to our clients just provides us with a competitive advantage in the supply chain business' and also when regard is had to the amount of USD 120 000 sold to the respondents, the only reasonable construction of the words together with the large sum sold, is that Bank Windhoek sold such a large sum of foreign currency with the unknown clients in its consideration. The respondents are not saying they acquired the USD for themselves but made it clear for whom the foreign currency was intended.

[47] In my opinion that purges appellant's argument that respondents entered into an agreement with their clients to sell them USD and the court *a quo* was correct to hold the respondents' version probably true. Bank Windhoek's version that it only had a normal client-banker relationship with respondents is inconsistent with the statement above and the sum of money it sold in foreign currency. In the banking environment, foreign currency is sold for a valid reason, like travelling or a student at an institution at a foreign destination. In the first respondent's letter to Bank

Windhoek, the only reason he gave for purchasing the USD was to make the currency available to their clients and the bank issued it for that reason only and nothing else. Therefore, the allegations of a contravention of the Exchange Control Regulations are bound to fail. The discrepancies in the respondents' case appellant relies on to buttress her case are not credible evidence to sustain her claim.

[48] What is left are the remainder of the offences to which I now turn. It is contended that first respondent contravened s 30 of the Immigration Act when he conducted the affairs of the second respondent without a work permit. It is submitted that the respondents derived, received and retained the proceeds of unlawful activities as a direct result of contravening s 30 of the Immigration Act.

[49] The submission is a big leap to a conclusion that is not supported by any shred of evidence. There is no evidence that first respondent was illegally in Namibia. He must have been allowed entry into Namibia on some other form of authorization. He says he had a business visa. In my opinion, it is that allegation appellant should have ascertained and the conditions attached thereto. Appellant's answer to that allegation is that he failed to produce it. That is not good enough. It is the appellant who had the burden to prove the statutory infraction. It is possible that the business visa allowed him to do the transactions he did on behalf of the second respondent. Section 30 provides for a holder of any permit under the Act – I would imagine any permit validated by Ministry of Home Affairs Immigration, Safety & Security. It was easily

determinable whether first respondent had a business visa but appellant failed to do so.

[50] In any case, I don't think appellant could rely on a failure to have a work permit to seek forfeiture of the properties in question. The returns/benefits must either be connected with or be as a result of any unlawful activity. Even if we were to accept that the failure to possess a work permit has a connection to the properties sought to be forfeited – there is a hurdle whether the properties are proceeds of unlawful activity. Therefore this argument should also fail. Section 30 of the Immigration Act, presupposes that there is a permit that was issued to which may be attached conditions. The appellant's reliance on s 30 is misplaced.

[51] Appellant did not raise the offence of fraud in this court and nothing further should be said about it.

[52] I now turn to the money laundering offences. Appellant raises the source of respondents' money under this heading again and the explanation first respondent had offered, the failure to have declared the money at the border when he did so with three other items, the N\$1 800 000 deposited at Standard Bank on 17 November 2015. It is contended that on 16 November 2015 first respondent purchased USD at Bank Windhoek and the following day he deposited the N\$1 800 000 at Standard Bank and that he would have had less than a day to travel to Oshikango and gather the N\$1 800 000 from the unidentified clients and travel back to Windhoek. The

simple answer is that he could have had the money on him already when he transacted at Bank Windhoek on 16 November 2015 or it could have been delivered to him from Oshikango or it is also possible that he could have driven or flown back to the north – Oshikango.

[53] Mr Cloete of Standard Bank attested to an affidavit saying that he asked the first respondent as to the source of N\$1 800 000 and he produced the receipt of the USD 120 000, a transaction he performed the previous day at Bank Windhoek. It must be remembered that Mr Scholtz stated that a foreigner is not allowed to deposit a local currency unless there is proof of the exchange. First respondent could have produced the USD 120 000 receipt for the reason. Does that conduct mean the N\$1 800 000 was a proceed of illegal activity? In my opinion not. Let us accept that he lied, but it is not the only inference that since he lied the money was from illegal activities. His version is that it came from their clients. He was probably weary of writing another letter similar to the one he wrote to Bank Windhoek.

[54] Appellant proceeds to argue that once the N\$1 800 000 was deposited in the second respondent's call account, on the same date N\$1 600 000 was transferred to the business account and N\$10 000 the next day. The second respondent's Bank Windhoek account also received different amounts on 5, 15 and 19 October 2015 and that respondents offer no explanation for the transfers. Appellant contends that the transfers were done to avoid the question of the real source of funds having to be disclosed to the banks and that the transactions between the four accounts had the

effect of concealing or disguising the nature or the origin, source or location of the funds and thus evident that the properties are the proceeds of contravening s 4 of POCA.

[55] It is unfortunate that appellant wants to rely on inferences which are not the only ones to be drawn from the circumstances in a serious matter as asset forfeiture. The transfers could have been for any other reason other than concealing the source of the funds. Mr Scholtz of Bank Windhoek, appellant's witness attempted to explain how first respondent operated on his personal and business account. He went on to say, that on the business account first respondent could deposit and withdraw Namibian dollars and exchange the withdrawals to foreign currency. Mr Scholtz further said at the time he wrote that letter to Bank Windhoek he was negotiating for lower rates on his business account. So the transfers from the one account of second respondent to the other held at Standard Bank could have been done for the same reason.

[56] In any case, once we have found that respondents' funds originated from their clients at Oshikango the arguments on money laundering offences fall away. It must be remembered that first respondent contends that he took advantage of the agreement between the Bank of Namibia and the Central Bank of Angola which provided for the citizens of the two nations to exchange their respective currencies. Except for that statement, we do not know whether the agreement exists, and if it does what are its terms. We do not know why the appellant who is in the powerful

position of authority could not have made the agreement available. My brother presiding (Damaseb DCJ) twice asked whether the trade at Oshikango in foreign currency is allowed unfettered and Ms Boonzaier responded that she could not confirm that it was unlawful. It appears that first respondent could bring into Namibia as much Kwanzas and exchange them without any consequences. Failure to declare such amount of money must be a chargeable offence but first respondent must on the calculations of the appellant, have brought into Namibia over N\$38 000 000 undeclared but was never charged. Bank Windhoek continued (except for explanatory letter it sought from him) to assist him without any murmur. Standard Bank raised an alarm at the deposit of N\$1 800 000 but it seems thereafter it was business as usual. In the absence of evidence to the contrary, we should accept that the agreement exists and allows first respondent to do what he does.

[57] Asset forfeiture is a serious matter and a court cannot forfeit an asset on the evidence the appellant presented. The appellant should have done better to close the apparent lacunas in her case that I have referred to in the body of this judgment.

[58] Consequently this argument should also fail.

[59] The costs should follow the cause.

[60] In the result, I make the following order:

1. The appeal is dismissed.
2. Appellant to pay costs consequent upon the employment of two legal practitioners.

MAINGA JA

DAMASEB DCJ

HOFF JA

APPEARANCES:

Appellant:

M Boonzaier (with her A Keulder)
Instructed by Government Attorney

Respondents:

S Namandje (with him S Kadhila-
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