

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 18/36715

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 26 July 2023 WI du

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

and

RAVICHANDREN DHURGASAMY

RESPONDENT

In re: the sum of 630 000 US Dollars in cash seized at O.R. Tambo International Airport on 11 September 2018 and held under criminal docket ORTIA CAS 117/09/2018

JUDGMENT

DU PLESSIS AJ

[1] Introduction

[1] This is an application for a forfeiture order in terms of s 53, alternatively s 50 read with s 48 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"), declaring forfeit to the state certain property (cash) seized at OR Tambo

International Airport on 11 September 2018. The Respondent denies that the Applicant is entitled to the order sought and entered an appearance in terms of s 39 of POCA to oppose the forfeiture of the property.

- [2] The Applicant is the National Director of Public Prosecutions appointed in terms of s 10 of the National Prosecuting Authority Act read with s 179(1)(a) of the Constitution of the Republic of South Africa, 1996. The Respondent is Ravichandren Dhurgasamy, a businessman who claims to be the owner of the property.
- [3] The property in question is the sum of US\$630 700, seized at OR Tambo International Airport (ORTIA) on 11 September 2018 and held under criminal docket ORTIA CAS 117/09/2018. The property is subject to a preservation of property order granted by this court on 8 October 2018, in terms of s 38 of POCA. This court is not concerned with the preservation order but with the forfeiture order.
- [4] This application is thus brought in terms of s 48 of POCA, seeking an order declaring the property forfeit to the state on the grounds that the property is the proceeds of unlawful activities and/or an instrumentality of an offence or offences referred to in Schedule 1 of POCA.
- [5] S 50(1) of POCA empowers ("shall") the High Court to grant a forfeiture order if the court finds on a balance of probabilities that the property is an instrumentality of an offence referred to in Schedule 1 or the proceeds of unlawful activities or both. S 50(5) of POCA requires the Registrar of this court to publish a notice of the forfeiture order in the Government Gazette.
- [6] The Applicant submits that the property constitutes the proceeds of unlawful activities, namely the violation of various exchange control provisions and/or regulations and/or is an instrumentality of one or more of Schedule 1 offences, particularly offences relating to various exchange control provisions and/or regulations. The Respondent states that as the lawful owner of the property lawfully obtained, he has an interest in the property. If a forfeiture order is granted,

it shall violate his constitutional rights, particularly s 25(1) of the Constitution regarding arbitrary deprivation of property.

[2] The facts

[7] The facts that gave rise to this case are set out in the founding affidavit. They are:

- i. On 11 September 2018, at approximately 12h00 at ORTIA, an Officer employed by the Border Control Unit of the Customs and Excise Department of SARS received information from an informer that a passenger intended to depart from ORTIA to Hong Kong, suspected to be involved in cash smuggling. The informer gave the officer the name Fayrooz Saleh ("Saleh") and the passport number of Saleh.
- ii. Officials from the Customs and Excise Department of the South African Revenue Services (SARS and members of the South African Police had Saleh disembarked from the plane. When asked if she had anything to declare, she said no. When asked if she had any currency on her, she said yes. She opened her backpack, and in the bag, wrapped in elastic bands and covered with brown paper wrapped with sello-tape, was the property.
- iii. The officer then informed her that she contravened the Customs Act¹ by not declaring the property and by possessing illicit goods. Saleh re-entered the country and was asked to accompany the SARS officials to the interviewing rooms with her luggage.
- iv. In the Customs office, the SARS official opened the backpack in the presence of the Commander and Inspector and removed the property. The property was counted and amounted to US\$ 630 700. They filled in a detention form, and Saleh signed the notices acknowledging SARS officials' seizure of the property. The property was then kept in the custody of SARS in a high-value safe for safekeeping. No other incriminating evidence was found on Saleh.

¹ 91 of 1964.

- v. She was asked about the ownership of the property and how she travelled to ORTIA, and where she had to deliver the property in Hong Kong. She said she travelled with public transport from her parental home in Ennerdale to Bedfordview. There she met a female Gambian whom she only knows as Jafa. Jafa gave her the packaged currency. At times Jafa would take her to ORTIA, or she would use an Uber to get to ORTIA to catch a flight to Hong Kong. In Hong Kong she delivers the packaged currency to an Indian Nationality male person. She then takes the first flight back to South Africa. She earns R5 000 per trip.
- vi. When arrested, she did not have proof of purchase of the property and did not make a statement as to when, how and from where the property was derived. She made a statement to her legal representative. She did not furnish a statement to clarify whether the relevant South African Customs and Exchange Control requirements were met.
- vii. The Applicant states that Saleh knew taking goods out of the Republic without declaring it was an offence. This is evident from how the property was wrapped and hidden and her intentional failure to declare the property. Conveying the property in this way, as opposed to, for instance, depositing the money in a bank account and transferring it electronically to Hong Kong, which is also safer, coupled with how the property was hidden, suggests that the property was not derived from a legitimate source or used for legitimate purposes.
- viii. A case was opened against Saleh under ORTIA CAS 117/09/2018. The charges included charges of contravention of s 15(1)(b) read with ss 1, 87(1) and 95 of the Customs Act, and a violation of s 6(a), (b) and (c) read with ss 1, 8 and 76 of POCA.
- ix. This all indicates, the Applicant avers, that the property constitutes the proceeds of unlawful activities, violating various exchange control provisions and/or regulations.

- x. In addition, Saleh contravened the following legislation:
- a. S 15(1)(b) of the Customs Act² by not declaring the property;
 - b. Regulation 3(1) of the Exchange Control Regulations by not producing a SARB certificate authorising the taking out or sending of property;
 - c. Regulation 3(3) of the Exchange Control Regulations for not declaring the property;
 - d. S 80(1)(b) of the Customs Act³ by not providing proof of purchase of foreign currency;
 - e. S 11(1) and (2) read with s 1 and 91 of the Banks Act⁴ 94 of 1990 – unlawful conducting the business of a bank through the "Hawala" system;
 - f. S 4 of POCA, money laundering;
 - g. S 5 of POCA, assisting another to benefit from the proceeds of unlawful activities;
 - h. S 6 of POCA, unlawful acquisition, possession or use of property by a person who knows or ought to reasonably have known that it is or forms part of the proceeds of unlawful activities.

[8] She gave no explanation why the property was transported as cash and why she had the property. There was no explanation as to the source of the property. Saleh also has a long history of frequent international travel, typical of a bulk cash courier. Looking at the flight route, the destination and how the property was

² 91 of 1964.

³ 91 of 1964.

⁴ 94 of 1990.

wrapped and covered, the Applicants state that it is reasonable to conclude that the property was smuggled on behalf of a "Hawala" syndicate.⁵

[9] Before discussing the Applicant's contention that this is a typical money laundering scheme, it is necessary to understand the Respondent's bases for entering an opposition to this case.

[3] Respondent's notice to oppose

[10] The Respondent became aware of the preservation order when Mr Tsunke, the legal representative of Saleh, informed him on 30 January 2019. The Respondent then filed his notice of intention to oppose a forfeiture order in terms of s 39(3) of the POCA on 2 February 2019. An affidavit in terms of s 39(5) of the POCA was filed simultaneously.

[11] In his s 39(5) affidavit, he claims to be giving notice of his intention to oppose the making of a forfeiture order. The Respondent states that the property is *not* the proceeds of unlawful activities or an instrumentality of unlawful activities and claims to be the owner of the property. He does so on the following grounds:

- i. He trades with various electronics from Guangzhou in China as a business person.
- ii. He underwent hip surgery and could not travel, when his friend Jamal informed him that he can assist him with purchasing goods for his business.
- iii. He placed an order for goods with his supplier, Mr Yan, and was awaiting delivery. Jamal promised assistance with purchasing the goods, and the Respondent informed him that he already converted his money into dollars as his supplier requires payment in USD upon delivery of the goods in South Africa.
- iv. Jamal informed him that he would open a Corporate Foreign Currency Account to deposit his USD into the account and then directly pay his

⁵ It is explained in the founding affidavit that the Hawala system is a parallel remittance system operating parallel to the traditional banking or financial channels.

suppliers as soon as they receive the invoices. He trusted Jamal and gave him the order list.

- v. Jamal informed him on 14 September 2018 that there was a problem, as he asked his friend Saleh to purchase the goods on the order list. He stated that he handed her the money but that she was arrested. Jamal said he thought they would get a better discount if the goods were paid in cash. The Respondent was in shock, as he did not know Jamal had given the money to Saleh.

[12] He then explained how he got the money:

- i. He borrowed money from a family friend Rathilal to pay for the goods.
- ii. As security for the loan amount, he used his property.
- iii. Rathilal got the money from a Liberty Life investment and casino winnings. He attaches various bank statements of Rathilal as proof.
- iv. He exchanged the money with Naidoo for USD to pay for the goods.

[13] For this reason, the Respondent avers, the property should be excluded from the forfeiture order.

[4] The supporting affidavit

[14] The Applicant disagrees. The Applicant states that from these facts, it is clear that the property constitutes the proceeds of unlawful activities, namely the violation of various exchange control provisions and/or regulations. It relies on the supporting affidavit of Ms Schimper, the NDPP's financial investigator. She did a thorough investigation and made the following observations:

- i. A WinDeed search showed that the Respondent did not own any immovable property.

- ii. There is no business address indicated in the affidavit. A WinDeed search showed that the Respondent is not a current member or director of any companies.
- iii. There are three vehicles registered in his name on eNatis, namely:
 - a. A Mercedes-Benz, reported as stolen;
 - b. A Nissan Bakkie, reported as stolen;
 - c. A VW Gold, reported as "illegal import".
- iv. Therefore, it is clear that the Respondent has no immovable or movable property registered to his name. He has no assets to the value of R 8 000 000.
- v. On the SARS System there was no business activity on the Respondent or custom activity.
- vi. A reconciliation of Rathilal's statements regarding the winnings from various casinos showed nett winnings of R1 017 700.
- vii. A search on Naidoo, now deceased, shows no trace of him being a registered money exchanger. He had a tow truck business. A deeds search indicates that he has various properties registered to his name of over R6 000 000 in value. His tow truck business would unlikely have enabled him to buy such properties. His tax returns only showed an income derived from taxis. There is no information on his Money Exchange business. It is not clear where the USD 635 000 originated from.
- viii. According to Naidoo, he received R9 000 000 from the Respondent. According to the Respondent, he received R8 000 000 from Rathilal. The source of the R1 000 000 is unknown.

- ix. There were no exemptions regarding the South African Reserve Bank Exchange Control Regulations concerning the relevant foreign currency to be taken from South Africa.
- x. She could not find the existence of Yan as someone who had been in South Africa.
- xi. She could not find a person named Jamal, per the opposing affidavit's details.
- xii. Rathilal has no employment details and is not registered as a member or director of any business entity. It is doubtful that Rathilal had the money to lend the Respondent.

[15] From this, Schimper makes the following conclusion:

- i. The Respondent contravened the provisions of Exchange Control Regulation 2(1) by acquiring foreign currency from a non-authorised dealer.
- ii. Naidoo contravened the provisions of Exchange Control Regulation 2(1) in selling or lending, or exchanging rands to foreign currency on behalf of the Respondent, a non-authorised dealer, without Treasury's permission.
- iii. The Respondent contravened the provisions of Exchange Control Regulation 3(1)(b) by delivering foreign currency to Jamal to take out of the country without Treasury's permission. Jamal contravened same, by giving the money to Saleh. They are not exempt from the Exchange Control Regulations.
- iv. Rathilal is not a registered money-lender. The Liberty Life investment and the casino winnings do not account for the R8 000 000.
- v. All this instead shows that the Respondent, Yan, Jamal, Saleh, Rathilal and Naidoo are members of a bulk cash smuggling syndicate and/or part of the bulk cash smuggling syndicate that smuggles cash outside South Africa.

[16] It is typical that in transnational organised crime, the Schimper argues, that cash is generated through transnational organised crime activities, money laundering and what is referred to as "bulk cash smuggling" – that is, the concealment and the transport of large sums of cash across international borders without detection by law enforcement agencies. The clandestine manner of distributing the cash to various parts of the world to fellow syndicate members is typical of such syndicates.

[17] Once the cash is detected and seized, the people involved often cannot provide evidence that the cash was derived from a legitimate source and was not used for an unlawful purpose. Various legislation is aimed at facilitating the detection of money laundering activities, where criminals often try to avoid the banking system and sometimes rely on bulk cash smuggling to send proceeds of crime across the borders without detection. The Hong Kong route is a route particularly associated with these unlawful activities.

[5] Contraventions

[18] The Applicant avers that this indicates that the property is an instrumentality of one or more of the offences above, as the property plays a substantial and functional role in successfully committing the offences. These offences are contemplated in items 26 (any offence relating to exchange control), 32 (any offence referred to in chapter 3 or 4 of POCA relating to money laundering and gang-related offences) and 33 (any offence the punishment of which may be a period of imprisonment exceeding one year without the option of a fine) of Schedule 1 of POCA.

[19] The Applicant states that Saleh contravened the Customs and Excise Act⁶ and various Exchange Control Regulations by not declaring the property when exiting the country.

[20] They also argue that it is an instrumentality of offences as provided in Schedule 1 of POCA, namely:

⁶ 94 of 1990.

- i. The operation of the Hawala scheme (ss 11(1) and (2) and ss 1 and 91 of the Banks Act⁷) in that the Hawala system is cash-based operated, being used to pay members of the syndicate. The money is likely used in making payments. It is directly functional to and connected to the commission of bank-related offences in an alternative remittance system (the hawala system). Cash facilitates the commission of such crimes and does not leave a paper trail to go undetected.
- ii. Money laundering in terms of ss 4, 5 and/or 6 of the POCA, in that Saleh in all likelihood, knew that the property was proceeds of unlawful activities in that it was a substantial amount and a high risk in conveying the money in that manner. The facts are consistent with the typical modus operandi of suspects engaged in the operation of a Hawala scheme, and/or drug-related offences and/or black market exchange system. At the time of arrest, there was no explanation of where the money came from, and it was not declared at customs. In all likelihood, she assisted other members of the syndicate to the benefit, which links to a 5 of the POCA. Likewise, in probability, she acquired, used or possessed property forming part of the proceeds of unlawful activities of members of the syndicate, which is an offence in terms of s 6 of the POCA.
- iii. The non-declaration-related offences under s 15, 80 and 84 of the Customs Act as the property was involved in the commissions of the offence. It was the subject of and reason for the non-declaration – it thus has a close functional connection to the commission of the offence. It is impossible to commit these offences without the particular goods in question.
- iv. Contravening Exchange Control Regulations by taking or sending goods out of the country without the required permission under regulation 3, failure to comply with regulation 3(3) and/or exchanging money in contravention of regulation 2(1) of the Exchange Control Regulations, in that it was similarly involved in the commission of the offence.

⁷ 94 of 1990.

[21] With this factual background in mind, discussing the *in limine* points is necessary before addressing the substantive questions.

[6] Technical locus standi

[22] S 39(5) requires that the Respondent must state in his affidavit the full particulars and identity of the person entering the appearance and the nature and extent of their interest in the property concerned. The Applicant avers that the Respondent did not disclose the nature and extent of any interest in the property. The Respondent states that he has a "vested interest" in being the lawful owner of the property. Still, he fails to show the nature and extent of his business or company's interest and the basis of the defence upon which he intends to rely on in opposing the forfeiture order or applying for the exclusion of his interest from the operation of the forfeiture order as required by the Act. These are peremptory requirements.

[23] The Applicant thus states that since there was non-compliance with s 39(3), there was no appearance in terms of s 39(3) and therefore the Respondent has no *locus standi* under s 49(4) to appear in these proceedings.

[24] The Applicant further contends that since the Respondent does not have the necessary *locus standi* to oppose granting a forfeiture order, they are entitled to an order by default in terms of s 53(1) of POCA.

[25] While the affidavit lacks various details, it seems clear that the Respondent avers that he owns the money. This indicates a vested interest. He provides information, albeit scantily backed up, that he obtained the money from a loan and, after converting it to US dollars, gave it to Jamal, purportedly to deposit it in a bank account to facilitate the purchase of goods in China. It seems he wants to state, "I am an innocent owner". Although not a defence as such – since forfeiture in terms of chapter 6 is based on a legal fiction of the property being guilty of an offence – if he can convince the court that he obtained the property interest legally and for consideration, it can be excluded from the operation of the order. Based on the affidavit filed, this seems to be what he attempts to do. I, however, find that he has the necessary *locus standi* in terms of POCA.

[7] Locus standi

[26] Should the court not agree with the Applicant on the "technical *locus standi*" argument, the Applicant avers that the Respondent does not have the needed *locus standi* to oppose the forfeiture application. This is because the Respondent states that the property does not fall under POCA as he is a business person who conducts business activities as set out above. This, the Applicant avers, means that a person acting on behalf of a business or company in legal proceedings must be duly authorised. Furthermore, it is the business and not the person who holds the interest.

[27] As alluded to in the previous paragraph, the Respondent states in his affidavit that he is a businessman. There is very little evidence of the nature of the business, whether he operates the business through a closed corporation or a company or trades in his own name. From the supporting affidavit by Schimper we know that he is not a member or a director of any legal entity. If indeed he has a business, this means he is trading in his own name.

[28] Either way, there is not enough information in the opposing affidavit before the court to determine whether the Respondent had to bring the application in the name of his company (and then with all the required permissions) or his own name. Although not clear, I again find that the Respondent has the necessary *locus standi*.

[29] Having dealt with the points in limine, it is now necessary to determine whether the Applicant is entitled to the forfeiture order sought and whether the Respondent has shown, on a balance of probabilities, that he acquired the property legally and for consideration. To do so, it is necessary to set out the law applicable to the facts.

[8] The legal framework

[30] The regulatory framework starts with South Africa's international obligations that require measures to be in place to combat money laundering activities, including bulk cash smuggling. Internationally, government obligations stem from the United

Nations Convention Against Transnational Organised Crime, the Financial Action Task Force Special Recommendations IX, and the United Nations Convention against Corruption. Within this framework, various pieces of legislation pertaining to exchange control and banking must be analysed, and POCA must be interpreted.

[31] For instance, s 15(1)(b) of the Customs and Excise Act⁸ provides that

"Any person entering or leaving the Republic shall, in such a manner as the Commissioner may determine, unreservedly declare (b) before leaving, all goods which he or she proposes taking with him or her beyond the borders of the Republic, including goods which are

(i) carried on behalf of another person;

(iii) prohibited, restricted or controlled under any law; or

(iv)

and shall furnish an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer, and shall pay the duty assessed by such officer, if any, to the Controller.

[32] Custom and Excise Rule 15(1)(b)(ii) requires that a traveller that leaves the Republic need not declare goods that are personal effects but are required to declare any goods that are required be declared on the forms before leaving the Republic. From the forms, the traveller must indicate currency exceeding limits. Although the limits are not indicated, it refers to foreign currency in cash that residents may bring into and carry out of the country. A maximum of R25 000 in cash is allowed to be brought into our out of the country.

[33] S 80(1) of the Act states that should a person be found with the goods, they will be guilty of an offence liable on conviction to a fine no more than R20 000 or the value of the goods, whichever is greater, or to imprisonment for a period not exceeding five years, or both. In terms of s 81, contravention of s 15 may be liable on conviction of a fine or imprisonment for no more than two years, and the goods contained shall be liable for forfeiture.

[34] In terms of the Exchange Control Regulations of 1961,⁹ various provisions are applicable. Regulation 3(1) prohibits transporting money out of the Republic any

⁸ 91 of 1964.

bank notes unless the Treasury grants permission. Regulation 3(3) requires people leaving the Republic, when requested by an officer, to declare whether they have bank notes or foreign currency and produce these bank notes or foreign currency. Regulation 3(4) allows such an officer to seize such property if found, and Regulation 3(5) states that this property shall be forfeited for the benefit of the National Revenue Fund. Regulation 22 states the punishment for people who, amongst other things, make an incorrect statement, namely a fine or imprisonment for not more than five years.

[35] The Prevention of Organised Crime Act¹⁰ was implemented with various objectives in mind, one of which was to enable the recovery of money earned through illegal activities and to allow for the civil forfeiture of assets used in the commission of a crime ('instrumentality of an offence') and/or assets acquired through illegal means (referred to as 'proceeds of crime'). The preamble to POCA underscores the principle that no individual should benefit from the gains of criminal acts or illicit activities. Therefore, POCA was deemed necessary to establish a legal mechanism for civil remedies, enabling the preservation, seizure, and forfeiture of property acquired through illegal activities or linked to the commission or suspicion of a crime. When issuing a forfeiture order, the court considers this objective carefully.

[36] S 38(1) allows for the NDPP to proceed *ex parte* for a preservation order. S 39(1) requires that the NDPP give notice of any preservation order obtained by any person who may have an interest in the matter and publish it in the Government Gazette. This is what the Applicant did.

[37] It then requires in s 39(3) that any person who claims an interest in the property join the proceedings as a respondent by entering an appearance in terms of s 39 of POCA. S 39(5) of POCA requires a person who has an interest in the property to state under oath his full particulars, the nature and the extent of his interest in

⁹ Promulgated in terms of S 9 of the Currency and Exchanges Act 9 of 1933, in GN R111 of 1 December 1961.

¹⁰ 121 of 1998.

the property, and the defence to which he intends to rely in opposing a forfeiture order or in applying for the exclusion of his interest.

[38] S 48(4) of the POCA provides that only persons who entered an appearance under s 39(3) may appear in a forfeiture application to oppose granting a forfeiture order. These individuals are then allowed to take action in response to the forfeiture application. They can choose to oppose the issuance of a forfeiture order altogether. Alternatively, they may apply for an order that modifies the effects of the order regarding the specific property in question. Furthermore, they have the right to request their interests in the property be excluded from the scope of the forfeiture order. The grounds on which this can be done are set out in s 52 of POCA.

[39] S 52(2) provides that a court may exclude certain interest in property if it finds, on a balance of probabilities, that the person had acquired the interest legally and for consideration and where the person did not know or had no reasonable grounds to suspect that the property in which the interest is held, is the proceeds of unlawful activities.

[40] When considering this application, certain definitions are important. Section 1 of POCA defines "proceeds of unlawful activities" as follows:

"any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic 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".

[41] Property is defined as

"money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof".

[42] Unlawful activity is defined as

"any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere".

[43] POCA differentiates between two types of forfeiture: criminal forfeiture and civil forfeiture. When it comes to civil forfeiture, the proceedings are of a civil nature and do not rely on a prior criminal conviction. This distinction becomes apparent when comparing chapter 5 of POCA, which deals with confiscation orders following a criminal conviction, with chapter 6 of POCA, which addresses forfeiture orders under civil forfeiture circumstances. In chapter 5, confiscation orders are applicable when there has been a conviction for a criminal offence. In contrast, in chapter 6, forfeiture orders are applied without requiring a prior criminal conviction, operating under the principles of civil law.¹¹

[44] Chapter 6 has a two-step procedure. It begins with the National Director of Public Prosecutions (NDPP) making an ex parte application for a preservation of property order according to section 38 of POCA. This application occurs when there are reasonable grounds to suspect that the property in question falls into one of the following categories: (a) an instrument used in an offence listed in Schedule 1, (b) the proceeds of illegal activities, or (c) property linked to terrorist and related activities. The two categories relevant to this case are the instrumentality of an offence and the proceeds of illegal activities.

[45] In terms of the definitions clause of POCA, "instrumentality of an offence" means

"any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere" ;

[46] and "proceeds of unlawful activities" means

"any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic 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" ;

[47] Chapter 6 has been the subject of constitutional scrutiny. In *Prophet v National Director of Public Prosecutions*:¹²

¹¹ *Mohamed NO v National Director of Public Prosecutions* 2002 (4) SA 843 (CC)

¹² [2006] ZACC 17.

"The application does raise important constitutional issues. Asset forfeiture orders as envisaged under ch 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties, particularly residential properties. Courts are therefore enjoined by s 39(2) of the Constitution "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" to interpret legislation such as the POCA in a manner that "promote(s) the spirit, purport and objects of the Bill of Rights", to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of s 25 the Constitution." (Footnotes omitted.)

- [48] Once a court finds that the property falls under either of these categories, it "shall" order the forfeiture. In *National Director of Public Prosecutions v Botha N.O.*¹³ Victor AJ clarified that due to the proportionality test, the "shall" in section 50(1) should rather be understood to mean "may, if proportionate". This is to ensure that the effect of such an order does not infringe on section 25(1) of the Constitution.¹⁴ The proportionality test is not set out in POCA but was developed by the courts. It is thus necessary to look at what this test entails.
- [49] Because Chapter 6 is based on the legal fiction that it is the *property* that has violated the law, once the threshold of property as an instrumentality of the offence is established, a proportionality test must be performed by weighing the severity of the interference with individual property rights against the extent to which the property was used for the commission of the offence, with due regard for the nature of the offence.¹⁵
- [50] As explained before: The purpose of doing the proportionality analysis is to ensure that granting a forfeiture order does not amount to an arbitrary deprivation of property contra s 25(1) of the Constitution. This is especially so since the purpose of forfeiture is not to regulate property, as in other instances of deprivation of property, but to vest ownership of the property in the state for the public benefit of crime fighting. In other words, civil forfeiture allows the state to impede the financial mobility of crime syndicates in that their property (especially money) derived from criminal activities is forfeited to the state.

¹³ [2020] ZACC 6.

¹⁴ *National Director of Public Prosecutions v Botha N.O.* [2020] ZACC 6 par 46.

¹⁵ *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC).

[51] As stated by Van Heerden AJ in *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)*¹⁶

"the broader societal purposes served by civil forfeiture under Chapter 6 of POCA have been held to include: removing incentives for crime; deterring persons from using or allowing their properties to be used in crime; eliminating or incapacitating some of the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned."

[52] This important function, the fighting of crime, then justifies the limitation of property rights, as set out in *National Director of Public Prosecutions v Samuel*:¹⁷

"[38] This enquiry has found its way into the application of POCA, specifically in relation to forfeiture orders to give recognition to s 25 of the Constitution. It is not a statutory requirement but an equitable requirement developed to curb the excesses in civil forfeiture. The proportionality analysis has been adopted to balance the requirement of combatting crime against the constitutionally entrenched right to property. The proportionality analysis is a constitutional imperative as POCA does not in itself refer to proportionality.

[39] The purpose of the enquiry is to determine whether the granting of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25 of the Constitution. POCA and its preamble goes far wider than combatting organised crime and courts must, especially where dealing with cases of individual wrongdoing, be alive to the possibility of disproportionate and constitutionally unacceptable forfeiture orders being granted. The only safeguard against the arbitrary deprivation of property given the wide ambit of POCA is to be found in the principle of proportionality.

[40] Such enquiry weighs the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offences, bearing in mind the nature of the offence. It 'cannot be measured with fine legal callipers' but one must always bear in mind that 'forfeiture orders will almost always visit real hardship upon those against whom they are made: this is among the very purposes for which they were devised'.

[53] In *National Director of Public Prosecutions v Botha N.O.*¹⁸ the Constitutional Court was faced with the question of whether the proportionality test is also applicable in assessing a forfeiture order under s 50(1)(b) of POCA concerning proceeds of a crime. The majority of the court found that if the property is found to be "proceeds of a crime", s 25(1) of the Constitution is not invoked as unlawful proceeds are not property. Thus, if found that the property is proceeds of unlawful activities, these proceeds must be forfeited to the state unless the exclusion in s 52 applies.¹⁹

¹⁶ [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC).

¹⁷ [2023] ZAKZDHC 38.

¹⁸ [2020] ZACC 6 par 46.

¹⁹ Para 116.

[54] Therefore, if the property is an instrumentality to the crime, the court shall, subject to the proportionality analysis, declare the property forfeited to the state. If the property is the proceeds of a crime, then the court shall order the forfeiture. In both instances, in terms of s 52, the court can exclude the property from the order upon application of a person with an interest in the property.

[55] What follows is a discussion of the process insofar as it has a bearing on the facts of this case.

[56] It is thus for this court to decide the following:

- i. Whether the property is an instrumentality to the offence;
- ii. Whether the property is proceeds of the crime;
- iii. And if so, whether, on a balance of probabilities, the Respondent acquired the interest legally and for consideration, and did not know or had no reasonable grounds to suspect that the property is the proceeds of unlawful activities.

[9] Discussion on the merits

(i) Proceeds

[57] At the time of her arrest, Saleh did not have proof of purchase of the property, did not make a statement as to where she got the property and did not furnish a statement as to whether the relevant Custom and Exchange Control requirements were met. From the fact that the money was wrapped and concealed, it is clear that Saleh knew this was an offence and wanted to hide the property from being detected. A criminal case was opened against Saleh, and she was found guilty.

[58] However, this is not the only incident on which the Applicant's case rests. They argue that it must be understood in the broader context of transnational organised crime, money laundering and bulk cash smuggling. This is where Schimper's supporting affidavit helps explain these syndicates' *modus operandi* as was alluded to above.

- [59] The facts support such *modus operandi*. When Saleh was found in possession of a large sum of cash concealed in a backpack, that was inherently suspicious. She was carrying this substantial amount of cash, even if it is a high risk, and should legally and safely be done via conventional banking systems. She did not declare the property in her backpack and could not show evidence where the dollars had been acquired. She was travelling on a well-known smuggling route – the Johannesburg and Hong Kong route linked to illegal drug, abalone and counterfeit goods activities, leading to the conclusion that this was, in all probability, part of such a syndicate.
- [60] Did the Respondent prove, on a balance of probabilities, that despite the Applicant's explanation, he was not involved in the bulk cash smuggling operation? I think not.
- [61] I should start by stating that the Respondent did not engage in the supplementary affidavit of Schimper at all, leaving her findings largely uncontested. The Respondent's explanation that the property is a loan from Rathilal, and thus a legitimate source, does not hold up scrutiny. Apart from failing to prove his alleged business's existence and nature, he does not even state the business's name in the opposing affidavit. Whether there is a business is therefore questionable.
- [62] Furthermore, if the property is a loan secured on behalf of the business for paying for goods, then he does not have a personal interest in the property. His opposing affidavit is full of contradictions as far as this is concerned. First he states that he is the owner, and then he says that the business obtained a loan. This lack of clarity fits into the *modus operandi* to evade detection.
- [63] Rathilal's explanation also does not add up. There is no proof or details about the surrender of the Liberty Life investment, nor is there an explanation of where the funds come from. This is also true for the money used to gamble in the casinos. That the funds came from the Liberty Life investment and gambling is therefore improbable.

- [64] When it comes to the loan agreement and the security for the loan, the version becomes more improbable. There is no evidence about the conditions of the loan agreements, nor *what* property was the security for the loan. No property is registered in the Respondent's name to the value of R8 000 000. It is implausible that an agreement such as that would not be recorded.
- [65] The bank statements of Rathilal do not instil confidence that the money was generated by gambling either. There is no clear indication in the statements when the sums of money making up R8 000 000 were withdrawn. It is left for the court to scrutinise and make sense of the many entries on the statement, with many winnings and losses recorded.
- [66] Naidoo, who exchanged the money, was not a legitimate forex trader.
- [67] All this indicates that the property was the proceeds of various crimes. At the very least of Customs and Exchange Regulation transgressions by Saleh, but on a balance of probabilities, proceeds of money laundering.

(i) Instrumentality

- [68] To determine whether the property was instrumentality, looking at money laundering methods is necessary. Here the submissions by Yam, Jamal, Rathilal and Naidoo becomes essential and should be understood as ways to circumvent domestic legislation that try to curb money laundering by proffering creative explanation of what is essentially laundering money.
- [69] Money laundering schemes, as Schimper explains, diminish assets by concealing them in other people's names. The informal business sector is often intertwined with the system and an attempt to increase liabilities. Cash is often used in part of a legitimate business, through which large sums of cash can be laundered. The creation of loans and the need to repay large sums of cash for these loans often feature. Businesses enable the flow of large sums of cash without immediate detection.

[70] The businesses of Yan, Jamal, Rathilal and Naidoo match this. There was a large loan from Rathilal to pay for business goods, which, if the affidavit is to be believed as it stands, is a legitimate business of trading in electronics and clothes from China. The money then changed hands from him to Naidoo, who converted it to US dollars to pay Yan through Jamal. The option to pay cash instead of through bank transfers was done deliberately, with large amounts of cash being moved from one person to the next. However, there is little documentary evidence of the purported legitimate basis on which this happened, which means that the Respondent did not prove his case on a balance of probabilities and supports the Applicant's inference that this is a money laundering scheme.

[71] Should it be that the Respondent's business is informal in the sense that he trades in his personal name selling goods, this further supports the money laundering narrative in that it misfits with the wealth of the Respondent.

[72] For all these reasons, this court attached little weight to the documents annexed to the opposing affidavit and the explanations proffered by the Respondent. This means that on a balance of probabilities, the property played a central, functional role in committing the offences and is thus an instrumentality of the offences.

[73] Since I have found that it is the proceeds of a crime, in terms of s 50 I *shall* declare the property forfeited without resorting to the proportionality test. In light of that, I deem it unnecessary to do the proportionality analysis under the "instrumentality" leg, except to say that the direct involvement of the property and the nature of the crime will justify a forfeiture order in line with the purpose of POCA.

(ii) Exclusion

[74] For reasons set out above, the Respondent failed to convince the court that he acquired the interest legally and did not know that the property was the proceeds of unlawful activities.

[10] Order

[75] I, therefore, make the following order:

1. In terms of section 50 read with section 48 of the Prevention of Organised Crime Act 121 of 1998, the sum of 630 700 US dollars cash seized at OR Tambo International Airport on 11 September 2018 and held under criminal docket ORTIA CAS 117/09/2018, subject to a preservation of property order granted by this court under the above case number on 08 October 2018, is declared forfeit to the state.
2. The need to appoint a *curator bonis* is dispensed with.
3. The South African Revenue Service and/or its duly authorised representative must pay over the property into the Criminal Assets Recovery Account established under section 63 of the Prevention of Organised Crime Act 121 of 1998, account number 80303056 held at the SARB, Vermeulen Street, Pretoria.
4. The Applicant must furnish proof of payment by fax (012) 843 3732 or email at stjsethe@npa.gov.za.
5. Any person whose interest in the property concerned that is affected by the forfeiture order may set the matter down for variation or rescission by the court within 20 days after he or she has acquired knowledge of such order.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr TS Sethe
Instructed by:	State Attorney
Counsel the for Respondent:	LW Dixon (attorney)
Instructed by:	Dixon Attorneys
Date of the hearing:	17 July 2023
Date of judgment:	26 July 2023