

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 64289/21

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION

Applicant

In re:

R12 537.97 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom

R218 422.05 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R350 633.69 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R134494.85 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R56 321.45 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R33 720.53 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R108 992.66 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R161 367.67 and interest in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R4 000.94 and interest in Capitec Bank with account number [...] held in the names of Aubrey Rorisang Setlhare.

R132 039.23 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R67 346.01 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R22 754.00 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R577 018.61 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R12 993.34 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R8 760.16 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R13 260.22 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R372 882.18 and interest held in Capitec Bank with account number [...] held in the names of Mandla Floyd Mnzana.

R499 955.03 and interest in Capitec Bank with account number [...] held in the names of Mandla Stephanns Mabotja.

R44 966.37 and interest in Capitec Bank with account number [...] held in the name of Bongani Alert Chabalala.

R874 046.93 and interest in African Bank with account number [...] held in the names of Minette Elizabeth Blom.

R927 866.06 and interest in African Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R440 890.63 and interest in First National Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R261 700.42 and interest in First National Bank with account number [...] held in the names of Dirk Christoffel Grobler.

In re:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION Applicant

and

MXOLISI NDLOVU Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 19 February 2024.*

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] Before this Court are two opposed applications emanating from an *ex parte* application that was launched by the National Director of Public Prosecutions (“the NDPP”), in terms of section 38(1) of the Prevention of Organised Crime Act (“POCA”),¹ (“the Preservation Application”), in which application the NDPP sought a preservation of property order against certain funds (cash) held in various bank accounts registered with different banking institutions. The purpose of the order was to place a hold on the bank accounts to prevent the account holder(s) from accessing the funds and thus stop the dissipation of the funds.

[2] The preservation of property order was granted in respect of the bank accounts listed below:

R12 537.97 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R218 422.05 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R350 633.69 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R134 494.85 and interest accrued in Capitec Bank with account number [...] held in the names of Minette Elizabeth Blom.

R56 321.45 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R33 720.53 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R108 992.66 and interest accrued in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R161 367.67 and interest in Capitec Bank with account number [...] held in the names of Dirk Christoffel Grobler.

¹ Act No. 121 of 1998.

R4 000.94 and interest in Capitec Bank with account number [...] held in the names of Aubrey Rorisang Setlhare.

R132 039.23 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R67 346.01 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R22 754.00 and interest in Capitec Bank with account number [...] held in the names of Jessica Roestoff.

R577 018.61 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R12 993.34 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R8 760.16 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R13 260.22 and interest in Capitec Bank with account number [...] held in the names of Mxolisi Ndlovu.

R372 882.18 and interest held in Capitec Bank with account number [...] held in the names of Mandla Floyd Mnzana.

R499 955.03 and interest in Capitec Bank with account number [...] held in the names of Mandla Stephanns Mabotja.

R44 966.37 and interest in Capitec Bank with account number [...] held in the name of Bongani Alert Chabalala

R874 046.93 and interest in African Bank with account number [...] held in the names of Minette Elizabeth Blom.

R927 866.06 and interest in African Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R440 890.63 and interest in First National Bank with account number [...] held in the names of Dirk Christoffel Grobler.

R261 700.42 and interest in First National Bank with account number [...] held in the names of Dirk Christoffel Grobler.

[3] The two applications are launched, respectively, in accordance with sections 48² and 52³ of POCA. The application in terms of section 48 of POCA (which is the Forfeiture Application) is instituted by the NDPP pursuant to the preservation of property order, against the bank holders of the various bank accounts into which the preserved funds are held (“the interested parties”). Out of all the interested parties, it is only Mxolisi Ndlovu, who is opposing the Forfeiture Application, and in so doing, he is concerned only with his interest. Consequently, in addition to opposing the Forfeiture Application, he has, in terms of section 52 of POCA, approached Court for an order, in terms of section 50 of POCA,⁴ to exclude his interest from the operation of the forfeiture order, if granted.

[4] In terms of section 38(2) of POCA, the High Court must make a preservation of property order if there are reasonable grounds to believe that the specified property is the proceeds of unlawful activities or an instrumentality of an offence referred to in Schedule 1 of POCA or both. Chapter 6 of POCA establishes a two-stage asset forfeiture mechanism. The preservation of property order is the first stage of such mechanism, with the second stage involving an application for a forfeiture order in terms of section 48 of POCA. Thus, the preservation of property

² Section 48(1) – If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order. And when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

³ Section 52(1) – The High Court may, on application – (a) under section 48(3) and when it makes a forfeiture order, make an order excluding certain interest in property which is subject to the order, from the operation thereof.

⁴ Section 50(1) – The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned - (a) is an instrumentality of an offence referred to in Schedule 1; (b) is the proceeds of unlawful activities; or (c) is property associated with terrorists and related activities.

order is granted pending the outcome of an application for a forfeiture order in terms of section 48 of POCA, hence the application launched by the NDPP.

[5] In this instance, the Court granted the preservation of property order having satisfied itself that there were reasonable grounds to believe that the cash amounts specified in the respective bank accounts are proceeds of unlawful activities, whilst the bank accounts, into which the funds are held, served as the instrumentality of an offence referred to in Schedule 1 of item 12 of POCA, namely, fraud and money laundering.

[6] It is under these circumstances that the two applications were launched. Before the two applications are dealt with, the factual matrix that led to the institution of the Preservation Application are, first, set out.

FACTUAL BACKGROUND

[7] The relevant facts upon which the NDPP relies as evidence that the cash preserved in the various bank accounts are the proceeds of unlawful activities and that the bank accounts are an instrumentality of an offence referred to in Schedule 1, fraud and money laundering, are based on three investigations carried out by the National Consumer Council (“the NCC”), the Financial Intelligence Centre (“FIC”) and the South African Police Service (“SAPS”). All the reports emanating from the investigations are uncontested. The NDPP relied on these factual circumstances in the Preservation Application and continues to rely on them even in the Forfeiture Application.

Investigation by the National Consumer Council

[8] The three investigations were initiated by a complaint received by the NCC against a company known as TKL On-line Revenue (“TKL”). The essence of the complaint which was made by one Mr Fareez Lewis (“Mr Lewis”), is that Mr Lewis was introduced to an online platform called TKL Online Revenue. He was told that TKL assists Takealot, Alibaba and Amazon in promoting and selling products. The role of a consumer, like Mr Lewis, in joining the scheme, was to process sales on behalf of Takealot, Alibaba and Amazon, and by so doing, the consumer would earn a daily commission rate depending on their initial investment. Mr Lewis invested an

amount of R20 354.45 and completed all the tasks allocated to him, but was never paid his commission or the initial money he invested.

[9] Before the complaint was launched, the NCC had noticed a newspaper article with the Headlines "*Ponzi scheme investigated as some victims lost as much as R200 000*", published on IOL Online. The article alleged that "*a company calling itself TKL-Online Revenue is under investigation by the police and the fraud department of local banks in Cape Town after hundreds of people were scammed out of thousands of rands*". On the strength of the complaint by Mr Lewis and the newspaper article, the NCC formed a reasonable suspicion that TKL was committing contraventions of the Consumer Protection Act ("the CPA"),⁵ and initiated a complaint. Mr Mbalenhle Nkomo ("Mr Nkomo") was, in terms of section 88(1) of the CPA, appointed as inspector for the NCC and directed to investigate the complaint.

[10] On further investigation and an interview with Mr Lewis, Mr Nkomo learnt that TKL is an online entity that, allegedly, processes orders made by buyers on on-line stores such as Takealot. A person joins TKL by paying a joining fee starting from R300 to R400 000 and gets allocated a VIP level of between level 1 up to level 9. A person will receive daily orders (called tasks) that they must process and will be paid a commission based on the tasks completed. Depending on which level a person was on and the bigger the deposit amount was, the more the daily commission would be.

[11] On Hellopeter, Mr Nkomo found numerous complaints against TKL. The majority of the complaints were about consumers having been scammed out of their money – they were not paid their commission despite having paid their fees and completed their tasks. He noted that the complainants alleged that they have lodged complaints with SAPS, and of the affidavits lodged with SAPS he received seven. From many of the affidavits received from SAPS, Mr Nkomo noticed that the complainants did not pay money into any bank account held in a name of a company. All deposits were made into personal bank accounts of either Dirk Christoffel Jacobus Grobler, Jessica Roestoff, Minette Elizabeth Blom, Aubrey Rorisang Setlhare, Mxolisi Ndlovu, Stephanns Mabotja, Bongani Alert Chabalala and/or Mandla Floyd Mnanzana.

⁵ Act 68 of 2008.

[12] A search on the Companies Intellectual Property Commission (CIPC) further revealed that TKL was not registered and therefore operating illegally. Evidence, also, indicated that TKL was masquerading as a working partner of Takealot, whereas in the process unsuspecting members of the public invested huge amounts of money with the company with an expectation of getting returns. On Facebook, Mr Nkomo found a page called "TKL-ONLINE REVENUE PLATFORM". In the page the following was stated: "i) First you need to register for TKL-Online Revenue platform account for free, ii) Requirements: Your Name and Cell Phone Number; iii) After successful registration, you will get R300 (Disappears after 16 days) experience gold, free 16 days' mission. iv) Make you familiar with the process of making money, and you can earn commissions immediately. v) If you are interested Click on the link below <https://tkl-onlinerevenue.com/...user/register/56061.html>; vi) Withdrawal rules are generally paid on working days from Monday to Friday, not on weekends and holidays". On the strength of the evidence gathered against TKL, Mr Nkomo believed that there were reasonable grounds that TKL was operating a Ponzi scheme.

[13] By his investigation, Mr Nkomo found that Dirk Christoffel Jacobus Grobler, Jessica Roestoff, Minette Elizabeth Blom, Aubrey Rorisang Setlhare, Mxolisi Ndlovu, Stephanns Mabotja, Bongani Alert Chabalala and Mandla Floyd Mnanzana, operated an alternative work scheme, using the Alter Ego TKL ON-LINE REVENUE. By falsely representing that TKL is contracted or affiliated or associated or in partnership with Amazon, Alibaba, and JD.com, internationally renowned platforms such as Flipkart, Allegro, Mercadolibre etc, Dirk Christoffel Jacobus Grobler, Jessica Roestoff, Minette Elizabeth Blom, Aubrey Rorisang Setlhare, Mxolisi Ndlovu, Stephanns Mabotja, Bongani Alert Chabalala and Mandla Floyd Mnanzana, were found to have contravened section 37(1) of the CPA which provides that "*A person must not make a false representation with respect to the availability, or extent of availability, actual or potential or profitability, risk or other material aspect of an Alternative Work Scheme.*" He, as a result, recommended, in terms of sections 97(1) (a)(ii) and 99(c)(i) of the CPA, that his report be referred to: the Financial Intelligence Centre to conduct, on behalf of the NCC, financial analysis of the listed banking accounts; the SAPS to institute criminal investigations; and the National Prosecuting Authority ("the NPA") to preserve any funds held in the various accounts listed.

Investigation by the Financial Intelligence Centre

[14] On 21 December 2021, FIC received an urgent request from the Asset Forfeiture Unit, Pretoria (AFU), indicating that a collaboration of law enforcement agencies was engaged with an investigation pertaining to the affairs of the owners/directors including associates of an alleged Ponzi scheme identified as TKL-Online Revenue. The information received by FIC was that multiple complaints were made by investors via internet open-source platforms, social media platforms. Members of the public were allegedly introduced to the scheme by referral where after an introductory fee of R300 was to be paid. Thereafter, investors had to invest in this scheme, complete a certain allocation of tasks and in turn generate additional income. Various Capitec Bank account numbers were provided to investors to deposit funds into. Once investors wanted to withdraw their funds, they were unable to access the funds. It, also, emerged that the scheme was operating nationally across various Provinces. The subjects concerned were sought for offences ranging from fraud and possible money laundering activities. Eight complainants had already opened dockets with SAPS with regard to cases of fraud.

[15] The request to FIC was accompanied by statements from SAPS in respect of the following complainants:

Gelvandale CAS: 228/11/2021 (A1 complainant registered as Kim Kivedo),

Amanzimtoti CAS:251/11/2021 (A1 complainant as Pieter Jacobus Steenkamp),

Amanzimtoti CAS: 257/11/2021 (A1 complainant registered as Thamandren Naidoo),

Amanzimtoti CAS: 269/11/2021 (A1 complainant registered as Debora Ann Edwards),

Amanzimtoti CAS: 272/11/2021 (A1 complainant registered as Tracey Lee Diedericks),

Amanzimtoti CAS:283/11/2021 (A1 complainant registered as Jason Errol Van Eeden),

Isipingo CAS: 230/11/2021 (A1 complainant registered as Dhanasagrie Ramaungam), and

Bothasig CAS: 06/12/2021 (A1 complainant registered as Vishanthi Benny),

[16] Upon receiving the information under oath about the alleged fraud, FIC, in terms of section 34 of the FIC Act, made enquiries to the accountable financial institutions and was provided with the transactional information which confirmed the transactions and the balances on the accounts credited and linked to the subjects in question. FIC found that the funds in the respective bank accounts linked to the subjects in question, were dissipated via transfers between their own additional linked bank accounts and between the subjects. At the time the FIC report was being drafted, the analysis of the matter was ongoing, and additional information was to be provided as soon as it became available.

[17] As a result of the information provided to FIC and enquiries in relation to the transactions in the bank accounts in question, FIC, in terms of section 34 of the FIC Act, directed Capitec Bank, First National Bank and African Bank to place a hold on the funds in the bank accounts associated with the subjects in question. The Directives were issued on the basis that transactions or proposed transactions associated with the accounts may be linked to the proceeds of unlawful activities and/or offences related to money laundering or may constitute transactions referred to in section 29(1)(b) of the FIC Act. The section 34 of the FIC Act intervention directives were to expire at midnight 04 January 2022. The NDPP approached Court for the preservation of property order before the expiry of that date.

[18] The accountable banks are said to have identified similar *modus operandi* involving other bank accounts associated with their respective clients specified in the directives by FIC, wherein unsuspected victims were allegedly defrauded large amounts of money, and decided to put a hold on those accounts, as well. There is, however, no evidence from the banks in support and/or confirmation of this allegation, forming part of these proceedings. The total amounts that were under

intervention directives as at the date of authorisation held by the accountable institutions, are as follows:

On 2021-12-21, an amount of R4 000.94 was secured in Capitec Bank account number [...] held in the name of (“ino”) Aubrey Rorisang Setlhare.

On 2021-12-21, an amount of R44 966.37 was secured in Capitec Bank account number [...] held ino Bongani Alert Chabalala.

On 2021-12-21, an amount of R161 367.67 was secured in Capitec Bank account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R108 992.68 was secured in Capitec Bank account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R33 720.63 was secured in Capitec Bank account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R56 321.45 was secured in Capitec Bank account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R22 754.00 was secured in Capitec Bank account number [...] held ino Jessica Roestoff.

On 2021-12-21, an amount of R67 346.01 was secured in Capitec Bank account number [...] held ino Jessica Roestoff.

On 2021-12-21, an amount of R132 039.23 was secured in Capitec Bank account number [...]. held ino Jessica Roestoff.

On 2021-12-21, an amount of R372 882.18 was secured in Capitec Bank account number [...] held ino Mandla Floyd Mnzana.

On 2021-12-21, an amount of R134 494,85 was secured in Capitec Bank account number [...] held ino of Minette Elizabeth Blom.

On 2021-12-21, an amount of R350 633.69 was secured in Capitec Bank account number [...] held ino Minette Elizabeth Blom.

On 2021-12-21, an amount of R218 422.05 was secured in Capitec Bank account number [...] held ino Minette Elizabeth Blom.

On 2021-12-21, an amount of R12 537.97 was secured in Capitec Bank account number [...] held ino Minette Elizabeth Blom.

On 2021-12-21, an amount of R13 260.22 was secured in Capitec Bank account number [...] held ino Mxolisi Ndlovu.

On 2021-12-21, an amount of R8 760.16 was secured in Capitec Bank account number [...] held ino Mxolisi Ndlovu.

On 2021-12-21, an amount of R12 993.34 was secured in Capitec Bank account number [...] held ino Mxolisi Ndlovu.

On 2021-12-21, an amount of R577 018.61 was secured in Capitec Bank account number [...] held ino Mxolisi Ndlovu.

On 2021-12-21, an amount of R499 955,03 was secured in Capitec Bank account number [...] held ino Stephanns Mabotja.

On 2021-12-21, an amount of R440 890.63 was secured in FNB Current account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R261 700.42 was secured in FNB Savings account number [...] held ino Dirk Christoffel Jacobus Grobler.

On 2021-12-21, an amount of R927 856.06 was secured in African Bank Transactional Account [...] held ino Dirk Christoffel Jacobus Grobler

On 2021-12-21, an amount of R874 048.93 was secured in African Bank Transactional Account [...] held ino Minette Elizabeth Blom.

Basic Asset Check

[19] FIC further conducted a basic asset check on the accounts linked to the individuals who it is alleged benefitted from the alleged illegal scheme, and the following are observations noted during the course of the check:

Re: Minette Elizabeth Blom

[20] From the analysis that was done, in respect of the statements received from SAPS, Minette Elizabeth Blom was linked to the following accounts:

20.1	Amanzimtoti CAS: 251/11/2021 opened by Pieter Jacobus Steenkamp –	
	Capitec Bank Account [...]	R809.41
	Capitec Bank Account [...]	R806.86
	Capitec Bank Account [...]	R450.04
	Capitec Bank Account [...]	R4 200.00
20.2	Amanzimtoti CAS: 283/11/2021 opened by Jason Errol Van Eeden –	
	Capitec Bank Account [...]	R15 0018.49
20.3	Amanzimtoti CAS: 257/11/2021 opened by Thamandren Naidoo –	
	Capitec Bank Account [...]	R20 006.09
	Capitec Bank Account [...]	R10 001.58
	Capitec Bank Account [...]	R 307.40
	Capitec Bank Account [...]	R10 500.77
20.4	Statement by Kim Kivedo	
	Capitec Bank Account [...]	R 305.06
	Capitec Bank Account [...]	R20 004.35
	Capitec Bank Account [...]	R 307.43
20.5	Statement by Dhavasagrie Ramaungam	
	Capitec Bank Account [...]	R 5 005.55

Capitec Bank Account [...] R11 201.26

Re: Dirk Christoffel Jacobus Grobler

[21] A certain address found on the Consumer report was linked to the address given on a Capitec Bank account held by Dirk Christoffel Jacobus Grobler. From the analysis that was done, in respect of the statements received from SAPS, he is linked to the following accounts:

21.1 Amanzimtoti CAS: 257/11/2021 opened by Thamandren Naidoo –

Capitec Bank Account [...] R 5 007.66

21.2 Statement of Vishanthi Benny

Capitec Bank Account [...] R 2 008.13

Capitec Bank Account [...] R 300.00

21.3 Statement of Dhavasagrie Ramaungam

FNB Account [...] R 809.00

FNB Account [...] R 2 003.08

FNB Account [...] R 1 005.51

FNB Account [...] R 2 002.75

FNB Account [...] R 306.02

FNB Account [...] R 308.41

Re: Aubrey Rorisang Setlhare

[22] The Consumer Report attached in respect of this interested party refers to Aubrey Rorisang Sethibe. It is not explained in the papers why the names are different. The statements received from SAPS, however, link Aubrey Rorisang Setlhare to the following bank accounts:

22.1 Statement of Kim Kivedo

Capitec Bank Account [...] R 307.33

22.2	Statement by Dhavasagrie Ramaungam	
	Capitec Bank Account [...]	R 307.33

Re: Jessica Roestoff

[23] From the analysis that was done, in respect of the statements received from SAPS, Jessica Roestoff is linked to the following accounts:

23.1	Statement made by Vishanthi Benny	
	Capitec Bank Account [...]	R 301.17
	Capitec Bank Account [...]	R 308.58
	Capitec Bank Account [...]	R 701.67

[24] A basic asset check was not done in respect of the other interested parties, namely, Stephanns Mabotja, Mxolisi Ndlovu, Bongani Alert Chabalala and Mandla Floyd Mnanzana, and as appears from the statements received from SAPS, none of the complainants link them to any of the funds associated with the bank accounts in question. Of note is that the complaints registered with SAPS do not implicate them in any way.

Financial Analysis

[25] Furthermore, FIC conducted a financial analysis to determine whether the money in the concerned bank accounts constitutes proceeds of crime. The bank account statements and opening documentation of the accounts were requested and obtained from respective banks after the hold was made by the various banks on suspicion of illegal activities. The analysis was, thus, based on bank statements at FIC's disposal, but further financial investigations were still being conducted at the time. From these statements it was found that the accounts received random figures of money which were found to be inconsistent with the profiles of the subjects. It was, also found that the amounts deposited were given similar references which could be linked to certain codes used by the entire scheme.

[26] Having made the analysis of the evidence provided, it was concluded that the positive balances in these accounts represent the proceeds of unlawful activities. In

addition, it was concluded that all the bank accounts and any legitimate balance therein had become both instrumentalities and proceeds of the offences of fraud and money laundering; and the bank accounts were all instruments to commit fraud and money laundering. It was said that the bank accounts made it easier to move the money around or to disguise the money or the origin thereof. The bank accounts were used as instrumentalities of money laundering in contravention of the provisions of chapter 3 of POCA, namely that it: received the proceeds of crime; laundered the money and was used to disguise the true origin of the tainted money.

Investigation by South African Police Services

[27] Eight (8) cases or dockets were registered with SAPS and all of them are implicating TKL and some of the interested parties. For instance,

- 27.1 Tracey Lee Diedericks' ("Ms Diedericks") complaint was reported under Amanzimtoti CAS: 272/11/2021 wherein she alleges that she paid an amount of R36 818.31 towards the company TKL-Online and never received her remuneration. The bank account into which the money was deposited is not mentioned.
- 27.2 Jason Errol Van Eeden ("Mr Van Eeden") whose case is investigated under Amanzimtoti CAS: 283/11/2021 alleges to have made payments towards the company, TKL. Mr Van Eeden deposited different amounts in the sum of R150 018.49 into the Capitec Bank account of Minette Elizabeth Blom.
- 27.3 Debora Ann Edwards ("Ms Edwards") whose matter is investigated under Amanzimtoti CAS: 269/11/2021 states that she paid an amount of R9 802.42 into Capitec Bank accounts linked to TKL-Online. No specified banks accounts are mentioned. Ms Edwards indicates that she never received her money and later realised that she was scammed.
- 27.4 Thamandren Naidoo's ("Mr Naidoo") matter is investigated under Amanzimtoti CAS; 267/11/2021 wherein Mr Naidoo alleges that he paid an amount of R46 119.32 into the bank account in favour of the company TKL-Online Revenue held with Capitec Bank. He indicated

that he tried to do some withdrawals after completing his tasks and it was at that stage that he realised that he was unable to. Mr Naidoo contacted other investors and they were also experiencing a similar problem. The amount was deposited in different accounts held by Dirk Christoffel Jacobus Grobler and Minette Elizabeth Blom.

- 27.5 Kim Kivedo (“Ms Kim”) whose complaint is also under investigation, alleges that she paid an amount of R21 524.55 into the bank account in favour of company TKL-Online Revenue held with Capitec Bank. She alleges that the company TKL-Online Revenue made a guarantee that their money shall be made available upon request. Ms Kim further alleges that after completing her tasks, no money was credited into her account. The amounts were deposited in the bank accounts of Minette Elizabeth Blom and Aubrey Rorisang Sethare.
- 27.6 Pieter Jacobus Steenkamp (“Mr Steenkamp”) whose matter is investigated under Amanzimtoti CAS: 251/11/2021, alleges that he paid an amount of R9 159.90 into the bank account in favour of the company known as TKL-Online Revenue. Mr Steenkamp alleges that the payments were made with the agreement that he can withdraw the money at any time from the profiles he created. Mr Steenkamp further alleges that he attempted to withdraw his money and could not. It was at that stage that he realised that he was scammed. The said amounts were deposited in the account of Minette Elizabeth Blom.
- 27.7 Vishanthi Benny (“Mr Benny”) whose matter is being investigated, complained that he made several deposits of money amounting to R9 081.40 in favour of the company known as TKL-Online Revenue into an account held with Capitec Bank. Mr Benny further alleges that he later noticed that the internet site of the company was blocked and he could not access his money. The amount was deposited in different accounts held by Dirk Christoffel Jacobus Grobler, Stephanns Mabotja and Jessica Roestoff.
- 27.8 Dhavasagrie Ramaungam’s (“Mr Ramaungam”) matter is also under investigation. Mr Ramaungam alleges that he made several deposits of

money amounting to R30 314.68 into the bank account in favour of TKL-Online Revenue. Mr Ramaungam indicates that he deposited using different bank account numbers. The amount was deposited in various accounts including those of Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom and Aubrey Rorisang Setlhare.

[28] Based on the statements provided to SAPS by the complainants, it is clear that although TLK is implicated, none of the alleged deposits were paid directly into TLK's banking account(s). The complainants deposited money into the banking accounts of Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom, Jessica Roestoff, Stephanns Mabotja and Aubrey Rorisang Setlhare. None of the statements show that any one of the complainants deposited money into the banking accounts of Mxolisi Ndlovu, Bongani Alert Chabalala and Mandla Floyd Mnzana.

DISCUSSION

The Forfeiture Application

[29] The Forfeiture Application, ordinarily, turns on whether the evidence adduced by the NDPP in support of its case, established that the preserved funds represents the proceeds of unlawful activities and whether the bank accounts into which the concerned funds are held, constitute the instrumentality of an offence. This is so because, in terms of section 50 of POCA, as interpreted by the Court in *National Director of Public Prosecutions v Parker*, the *onus* is on the NDPP to prove on a balance of probabilities that it is entitled to a forfeiture order.⁶

[30] As a point of departure, the NDPP must prove that the preserved funds represent the proceeds of unlawful activities. Put differently, are the funds proceeds of the offence of fraud and/or money laundering.

[31] Section 1 of POCA defines 'proceeds of unlawful activities' as '*any property or any services, 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.*'

⁶ National Director of Public Prosecutions v Parker [2006] 1 All SA 317 (SCA) para 18.

[32] The Supreme Court of Appeal, in *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*,⁷ held that the definition requires that the property in respect of which a forfeiture order is sought must have been 'derived, received or retained' 'in connection with or as a result of' unlawful activities. The proceeds must in some way be the consequences of unlawful activity.

[33] The balance of proof between the Preservation Application and the Forfeiture Application is different. Section 38(2) of POCA authorises the Court to grant a preservation of property order if it has been reasonably satisfied that the property concerned is proceeds of unlawful activities. A different standard of proof is applied when it comes to the forfeiture application. Section 50 of POCA places the burden on the applicant to prove on a balance of probabilities that the property concerned is proceeds of unlawful activities. This being a forfeiture application, the NDPP must prove on a balance of probabilities that the funds so preserved are the proceeds of unlawful activities.

[34] In trying to prove that, the NDPP relies on the evidence proffered by the three agencies that investigated the claims. In terms of that evidence, not all the preserved funds are proceeds of unlawful activities. For instance, the investigation done by the NCC does not indicate how the bank holders of the preserved funds were involved in the unlawful activities that are attributed to TKL which was said to be operating a Ponzi scheme. The complaint of Mr Lewis, who initiated the whole process, implicates only Minette Elizabeth Blom and Dirk Christoffel Jacobus Grobler, and does not refer to the other interested parties. , Jessica Roestoff,; Aubrey Rorisang Setlhare, Mxolisi Ndlovu, Stephanns Mabotja, Bongani Alert Chabalala and Mandla Floyd Mnzana, are implicated by the say so of Mr Nkomo in alleging that by his investigation he found that they operated an alternative work scheme using the Alter Ego TKL On Line Revenue or that they falsely represented that TKL is contracted or affiliated to the internationally renowned platforms like Alibaba, Amazon and the others, the investigation does not show in what manner are the said individuals alleged to have operated the alternative work scheme, or represented that TKL is contracted or affiliated to the said renowned international platforms.

⁷ *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* [2004] ZASCA 36 2004(2) SACR 208 (SCA) para 64.

[35] Secondly, through its enquiries made to the accountable financial institutions, FIC states that the transactional information it received from those institutions confirmed the transactions and the balances on the accounts credited and linked to the subjects (meaning the bank holders in question). This, however, is said without any proof of how the information received linked each of the bank holders in question and/or the preserved funds, to the transactions and balances. By means of this information from the financial institutions, FIC, also found that the funds in the respective bank accounts were dissipated by transfers between the respective bank holders own linked bank accounts and between themselves. There is no evidence on record that establishes how these transfers were made and which of the bank holders transferred and/or received funds from which bank account(s) or from which other bank holder(s). The evidence procured does not explain what proceeds came into the respective bank holders account which were proceeds of unlawful activities, where those proceeds emanated, how it furthered any crime or how the individuals benefited from such unlawful activities, if any. The financial institutions that provided the information did not provide confirmatory affidavits. To make matters worse, at the time of drafting FIC's report, the analysis of the matter was still ongoing and additional information was to be provided as it became available. This means that FIC's report was incomplete.

[36] Furthermore, FIC conducted a basic asset check on the accounts linked to the individuals who it was alleged benefited from the alleged scheme. The basic asset check was done in conjunction with the statements of the complainants who opened cases with SAPS. From the said check, only four of the suspected bank holders were implicated, namely Minette Elizabeth Blom, Dirk Christoffel Jacobus Grobler, Aubrey Rorisang Setlhare and Jessica Roestoff. It does not appear as if the check was done in respect of the other bank holders which means that none of the complainants who reported their cases to SAPS linked them to any of the funds associated with the concerned bank accounts.

[37] On conducting the financial analysis for suspected illegal activities, the banks concerned provided FIC with bank account statements and opening documentation of the accounts in question. It was found that the said accounts received random figures of money which were inconsistent with the profiles of the subjects, and that the amounts deposited were given similar references which could be linked to certain

codes used by the entire scheme. There is nothing on record that proves these allegations.

[38] As regards the SAPS investigation, on the basis of the statements provided to SAPS by the eight complainants, it is apparent that not all the interested parties are implicated, in that funds were deposited in their respective bank accounts. The only bank accounts into which the complainants deposited funds are those of Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom, Jessica Roestoff, Stephanns Mabotja and Aubrey Rorisang Setlhare. No funds were deposited in the bank accounts held by Mxolisi Ndlovu, Bongani Alert Chabalala and Mandla Floyd Mnanzana.

[39] Probabilities are that Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom, Jessica Roestoff, Stephanns Mabotja and Aubrey Rorisang Setlhare were involved with the scheme operated by TKL. More so, Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom, Jessica Roestoff and Aubrey Rorisang Setlhare, are implicated in the basic asset check conducted by FIC and there are some of the complainants who allege that they deposited funds in their respective bank accounts. The bank account numbers to which the complainants deposited their funds, matches those held by them. However, not all the funds preserved are implicated in these complaints. For example, the funds preserved in the First National Bank accounts of Dirk Christoffel Jacobus Grobler and the African Bank accounts of Dirk Christoffel Jacobus Grobler and Minette Elizabeth Blom, are not implicated. It is only the funds held in their respective Capitec Bank accounts, that are at issue.

[40] It is trite that the granting of the preservation of property order *ex parte* does not deprive persons who have a legal interest in the preserved property of the opportunity to have their opposition heard and from safeguarding their interests during the operation of the order. In order to provide such opportunity, a prayer for reconsideration of the preservation order granted is included in the notice of motion and in the subsequent order granted. This prayer ensures that interested parties may be heard later on despite the initial *ex parte* granting of the order. There are also certain provisions of POCA that safeguards the interests of those who claim to have a legitimate interest in the property preserved.⁸ The said sections provide such persons with sufficient opportunity to participate in the subsequent forfeiture

⁸ Amongst others, sections 39, 48(2) to (4), 52 and 54 of POCA.

proceedings and to oppose the granting of a forfeiture order, or to seek an order excluding their legitimate interests in the property from forfeiture. Further to the specific provisions of POCA, the Court also has a wide discretion in regulating its own process and to ensure that any interested party who wishes to contest the granting of the preservation order, can do so.

[41] This being the case, an applicant is, in terms of section 39(1) of POCA, obliged, as soon as practicable after the granting of the preservation of property order, to give notice of the order to any person known to have an interest in the property so preserved. In addition, such an applicant is called upon to cause publication of the order in the *Government Gazette*, as a further means to draw the attention of any person who receives or reads it, to the granted order and what he/she should do to safeguard any interest they may have in the property. The Preservation Application having been duly granted in this instance, the resultant preservation of property order was, in terms of section 39(1) of POCA, to be served upon any person known by the NDPP to have an interest in the preserved funds.

[42] Section 39(2) of POCA requires a notice of the preservation of property order to be served on all persons known to the National Director to have an interest in the property, by service in the manner in which a summons whereby civil proceedings in the High Court are commenced. The NDPP's deponent states in the founding papers that to the best of his knowledge, the persons who might have interest in the cash are Dirk Christoffel Jacobus Grobler, Minette Elizabeth Blom, Mandla Floyd Mnanzana, Stephanns Mabotja, Mxolisi Ndlovu, Bongani Albert Chabalala, and Jessica Roestoff, who must, in terms of section 39(1) of POCA, be served notice of the order once it is granted. Such service, as *per* section 39(3) of POCA ought to be served on all the persons known to have interest in the cash by the Sheriff.

[43] In terms of section 53 of POCA, the High Court may make any order by default which it could have made under sections 50(1) and (2) of POCA, if the High Court is satisfied that no person has appeared on the date upon which an application under section 48(1) is to be heard; and on the grounds of sufficient proof or otherwise that all persons who entered appearances in terms of section 39(3) have knowledge of notices given under section 48(2).

[44] At the hearing of the forfeiture application, except for Mxolisi Ndlovu, none of the other interested parties appeared in Court or were represented. It was, thus, upon the NDPP to prove that they have knowledge of the notice of the order. The NDPP's Counsel could not provide proof that notice of the order was effected and/or served on all persons known to the National Director to have an interest in the cash preserved. Counsel handed in the Sheriff's return of service in respect of only, Minette Elizabeth Blom, Mandla Floyd Mnzana, Stephans Mabotja, and Bongani Albert Chabalala. Counsel undertook to upload the Sheriff's returns of service in respect of Aubrey Setlhare, Dirk Christoffel Jacobus Grobler and Jessica Roestoff on Caselines in due course. At the time of drafting this judgment, the three remaining proofs of service had been uploaded on Caselines as undertaken. However, the respective returns of service in respect of Dirk Christoffel Jacobus Grobler and Jessica Roestoff, indicate that the orders have not been served on the two persons because they were not known at the addresses provided. As regards Aubrey Rorisang Setlhare, the proof of service provided is in the form of a letter with which the Sheriff informs the NDPP that the process was attended to but the return of service was not rendered due to the NDPP's failure to settle its account with the Sheriff. What the letter states is that the process was attended to, it does not state whether or not the process was indeed served on Aubrey Rorisang Setlhare. The letter is, thus, not satisfactory proof of service.

[45] Under such circumstances, the forfeiture order sought against the preserved funds held in the banks accounts of the three individuals, namely, Aubrey Rorisang Setlhare, Dirk Christoffel Jacobus Grobler and Jessica Roestoff, cannot be granted pending proof of satisfactory service of the preservation order on them, and the forfeiture application in this regard, should be postponed.

[46] It is clear that, in respect of, Alert Chabalala and Mandla Floyd Mnzana, the NDPP has on a balance of probabilities failed to establish their connection to the scheme undertaken by TKL and that the funds preserved in their respective Capitec Bank accounts are proceeds of unlawful activities. Even though Bongani Alert Chabalala and Mandla Floyd Mnzana did not oppose the application, the NDPP had the *onus* to prove that their respective funds are proceeds of unlawful activities, the NDPP failed to do so. The forfeiture order sought against the preserved funds held in their respective Capitec Bank accounts ought to be dismissed. There is, also,

no evidence which implicates the funds preserved and held in the First National Bank accounts of Dirk Christoffel Jacobus Grobler and the funds preserved and held in the respective African Bank accounts of Dirk Christoffel Jacobus Grobler and Minette Elizabeth Blom.

[47] In regard to the preserved funds held in the bank accounts of Mxolisi Ndlovu, as it will be properly explained hereunder, the NDPP seeks to tie such funds to TKL's unlawful activities by a complaint made against Mxolisi Ndlovu by one Pulane Prudence Mampuru ("Ms Mampuru") and a transaction in one of his Capitec Bank accounts conducted with one E Pretorius.

MXOLISI NDLOVU's CASE

[48] As mentioned earlier in the judgment, Mxolisi Ndlovu is opposing the Forfeiture Application instituted by the NDPP and has applied for the exclusion of the preserved funds held in his Capitec Bank accounts, from the operation of the forfeiture order the NDPP has applied for.

[49] According to the evidence tendered, Mxolisi Ndlovu is the account holder of the preserved funds which are kept in the following Capitec Bank accounts, namely:

- 49.1 R 577 018.61 in account [...] as described in paragraph 1.13 of the preservation of property order.
- 49.2 R 12 993.34 in account [...] as described in paragraph 1.14 of the preservation of property order.
- 49.3 R 8 760.16 in account [...] as described in paragraph 1.15 of the preservation of property order.
- 49.4 R 13 260.22 in account [...] as described in paragraph 1.16 of the preservation of property order.

[50] Mxolisi Ndlovu alleges in his papers filed of record that he obtained these funds by virtue of his *bona fide* employment with BDO South Africa Auditors ("BDO Auditors") and through Bitcoin transactions. His main source of income is his salary which he receives on a monthly basis through his aforesaid employment with BDO

Auditors. To make extra money, he engages in cryptocurrency in the form of Bitcoin trading, where he buys and sells Bitcoin.

[51] As he explains, Bitcoin is a digital currency which is bought online without a central bank on the peer-to-peer bitcoin network. He uses the Localbitcoins.com platform to buy and sell Bitcoin online. He would normally keep the acquired Bitcoin on his profile that is on the Localbitcoins.com platform and will later on advertise it once the selling value is much higher. He would then receive offers to buy the Bitcoin from interested buyers through the very same platform. Any potential buyer is provided with bank details in which to deposit the purchase price for any amenable offer, and in that way, the transaction will be made. All communications and transactions are done virtually on the platform and users do not physically meet.

[52] As earlier indicated the NDPP did not tender evidence in the Preservation Application that proves that the funds preserved in the Capitec Bank accounts held in the name of Mxolisi Ndlovu are proceeds of unlawful activities. The NDPP, however, in its replying affidavit to the Forfeiture Application accuses Mxolisi Ndlovu of running unlawful activities and benefitting from the proceeds of those activities, and having defrauded individuals like Ms Mampuru. The NDPP, further, alleges that Mxolisi Ndlovu transacted with a certain E Pretorius who is a subject of investigation in respect of Ponzi schemes. The NDPP relies on these allegations in an attempt to connect Mxolisi Ndlovu or the funds preserved in the Capitec Bank accounts held in the name of Mxolisi Ndlovu, to the unlawful activities (Ponzi schemes) alleged to have been committed by TKL.

Is the Preserved Property Proceeds of Unlawful Activities?

Re: Pulane Prudence Mampuru (“Ms Mampuru”)

[53] Ms Mampuru’s evidence is that Mxolisi Ndlovu is a person who is involved in multiple WhatsApp Stokvels and TKL Online. She was approached by Warrant Officer Letsatsi who made enquiries about her involvement in the WhatsApp stokvel and Mxolisi Ndlovu. She informed Warrant Officer Letsatsi that on 26 February 2021 she deposited an amount of R400, as an investment into Mxolisi Ndlovu’s Capitec Bank Account with account number 1305251081. She received no return from the

investment she made nor did she receive her invested R400 back. After her search on Facebook she discovered that Mxolisi Ndlovu operated different stokvels with different names. Mxolisi Ndlovu promoted and recruited people to join these stokvels.

[54] Mxolisi Ndlovu denies all these allegations by Ms Mampuru and emphatically states that Ms Mampuru is unknown to him. He has never approached her on the day indicated in her affidavit. On that day Mxolisi Ndlovu contends that he reported on duty at his workplace. He denies ever meeting Warrant Officer Letsatsi and/or Ms Mampuru.

Point in Limine

[55] In his heads of argument and in oral argument in Court, Mxolisi Ndlovu's counsel raised an *in limine* point mounted on the ground that Ms Mampuru's complaint was a new complaint which came up only in the replying affidavit to the Forfeiture Application. Relying on the judgment in *MAN Financial Services (SA) (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others*,⁹ whereat that Court quoted with approval the long standing rule in our law that does not allow parties to adduce new evidence in their replying papers, but to make out a proper case in the founding papers to which they are bound, counsel contends that Ms Mampuru's complaint should be rejected as new evidence that did not form part of the NDPP's founding papers.

[56] It is a general rule of our law, which is well established, that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit. An applicant is bound to the case made out in the founding papers and stands or falls by it. The Court in *MAN Financial Services (SA) (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others*, when dealing with this rule expressed itself as follows:

⁹ (36672/2020) [2021] ZAGPJHC 655 (24 August 2021).

“It is of course trite that not only must an applicant in motion proceedings make out a proper case in the founding papers and that an applicant is bound to the case made out therein and may not make out a new case in the replying affidavit.”¹⁰

[57] The rationale for the rule has been held to be legal certainty. This principle was clarified in the Constitutional Court judgment in *South African Transport and Allied Workers Union and another v Garvas and Others*,¹¹ where that Court expressed itself thus –

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a . . . challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[58] The rule against allowing new matter or new grounds in reply was held, in *Bayat and Others v Hansa and Another*,¹² to be capable of being departed from only in exceptional circumstances. The principle nonetheless remains that a case must be made out in the founding papers. New issue(s) in a replying affidavit will generally be allowed in circumstances where the applicant could not have known of such issues at the time of deposing to the founding affidavit. In other words, the Court will not permit or will strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit.¹³ In considering whether to allow new material introduced for the first time in the replying affidavit, the Court has a judicial discretion to exercise. The indulgence of allowing new material in the replying affidavit will generally be allowed when warranted by special circumstances.¹⁴

[59] It is common cause that the complaint of Ms Mampuru was raised for the first time in the NDPP's replying affidavit to the Forfeiture Application. There is no explanation in the papers why Ms Mampuru's evidence was not made out in the founding papers – either in the founding affidavit in respect of the Preservation

¹⁰ Para 6.

¹¹ (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012) para 114.

¹² 1955 (3) SA 547 (N) at 553D.

¹³ See *Dawood v Mahomed* 1979 (2) SA 361 (D).

¹⁴ See *Bayat and Others v Hansa and Another* 1955(3) SA 547 (N) at 553D.

Application or the Forfeiture Application. The explanation was proffered by the NDPP's counsel from the bar that when preservation applications are launched, they are launched with the sole purpose of trying to ensure that whatever it is that is being preserved does not actually get dissipated. And after the freezing thereof, further investigations are conducted to ensure that whoever is tied to the application, maybe his or her rights may be excluded in the final forfeiture application. Therefore, upon further investigations, it became clear through the evidence of Ms Mampuru that Mxolisi Ndlovu was actually involved in multiple stokvels on WhatsApp groups. The contention is that it is Ms Mampuru who tied Mxolisi Ndlovu to the bigger scheme of operations, by TKL.

[60] The NDPP does not, in its papers, give an indication of how the investigations that led to the complaint of Ms Mampuru, were conducted. Nor does the NDPP provide evidence of when it became aware that Ms Mampuru might be of assistance in the matter. What is apparent from the papers on record, is that Ms Mampuru was approached by Warrant Officer Letsatsi on 29 March 2022. This is after the preservation of property order had already been granted, but before the Forfeiture Application was launched. The Forfeiture Application, as *per* the date stamp of the Registrar of the High Court, was issued on 31 August 2022. It means that at the time of launching the Forfeiture Application, the statement of Ms Mampuru, which implicated Mxolisi Ndlovu, was already available but was not used. Without any reasonable explanation of why the statement was not used in the first place, there are no grounds upon which it can be accepted into evidence.

Does the statement of Ms Mampuru link Mxolisi Ndlovu to unlawful activities?

[61] Even if the ruling made in regard to the *in limine* point is wrong, the finding will still be that in using the complaint of Ms Mampuru, the NDPP has not, on a preponderance of probabilities, been able to link Mxolisi Ndlovu to unlawful activities. Nor does the statement establish that the preserved funds held in the name of Mxolisi Ndlovu are proceeds of unlawful activities.

[62] Ms Mampuru's evidence is that she searched her Capitec App on the phone and realised that she added a person by the name of Mxolisi Ndlovu, as a beneficiary. She does not know this person. Upon further investigation she noticed

that she invested R400 on a stokvel. She does not remember the name of that stokvel, because she used to be involved in WhatsApp stokvels as she is a network hustler. In order to fortify Ms Mampuru's allegations, the NDPP should have attached prove of the flow of this money from Ms Mampuru's account to that of Mxolisi Ndlovu. For example, a screenshot of Ms Mampuru's Capitec App could have gone a long way to do that. Moreover, the NDPP was in possession of the banking details of and had access to the Capitec Bank accounts of both Ms Mampuru and Mxolisi Ndlovu. The bank statements ought to have reflected the flow of the R400 from Ms Mampuru's bank account to that of Mxolisi Ndlovu, if any such transaction did take place. There is, as such, no evidence that Mxolisi Ndlovu is the beneficiary to whom the R400 was paid. There is, as well, no evidence of the flow of the alleged illicit funds to Mxolisi Ndlovu's Capitec Bank account. To make matters worse, the NDPP has preserved an amount of R600 000 of Mxolisi Ndlovu's funds strewn over four bank accounts, without specifically indicating why all that amount was preserved. The allegation is that Ms Mampuru was defrauded of an amount of only R400 which allegedly went into Mxolisi Ndlovu's Capitec Bank account number [...]. At the very least only an amount of R400 in bank account number [...] ought to have been preserved. By preserving all the funds in the four bank accounts is indicative of the fact that the NDPP was unable to prove that such a transaction took place. This is such a simple transaction, which should have been easily proven, but, proof thereof is not apparent on the papers before Court.

[63] In order to establish that a property in question is the proceeds of unlawful activities, the Court in *The National Director of Public Prosecutions v R O Cook*,¹⁵ held that –

"The definition in essence requires that the property in question be 'derived received or retained' in connection with or as a result of unlawful activities."

[64] The evidence tendered by the NDPP does not prove that the funds preserved in the four Capitec Bank accounts held in the name of Mxolisi Ndlovu, are derived or received or retained in connection with or as a result of unlawful activities. The connection, if any, is not established. Consequently, the R400 does not conclusively

¹⁵ (260/03) [2004] ZASCA 36 (13 May 2004) para 64.

link Mxolisi Ndlovu to any unlawful activities nor are the funds preserved in the respective Capitec Bank accounts held in his name linked to any unlawful activities. In fact, Ms Mampuru's statement does not even, link Mxolisi Ndlovu to TKL Online because she says in her statement that she does not remember the name of the stokvel, because as a network hustler she used to be involved in various WhatsApp stokvels. Her investigations through the Facebook platform does not take the case any further, the picture of Mxolisi Ndlovu who was found on the Facebook pages is that of a white man and is not the Mxolisi Ndlovu whose funds have been preserved by the NDPP.

Re: the transaction with E Pretorius

[65] It is further alleged that Mxolisi Ndlovu transacted with a certain E Pretorius who is a subject of investigation in respect of a Ponzi scheme. E Pretorius, according to the NDPP, is a person who dabbles in Ponzi schemes and a preservation order was obtained against his bank accounts. The NDPP concluded, therefore, that both E Pretorius and Mxolisi Ndlovu form part of a syndicate benefiting from Ponzi schemes and that the Bitcoin transactions are used to disguise the true origin of the cash derived from the schemes.

[66] Mxolisi Ndlovu accedes to the fact that there was an exchange of money between himself and E Pretorius. He explains this exchange of money being for a transaction in which he sold Bitcoin to the said E Pretorius. This, according to him, was a legitimate transaction because it is allowed by the South African National Government. The argument by Mxolisi Ndlovu's counsel that in accordance with decided cases of our Courts, for Mxolisi Ndlovu to prove that the funds in question are not proceeds of unlawful activities, he is only required to show, on a balance of probabilities, where the funds in question came from and whether or not such funds are not connected to illegal activity, is correct. Mxolisi Ndlovu has, as such, been able, through his evidence, to show the flow of the money that formed the basis of the transaction with E Pretorius by the production of bank statements. Except to allege that E Pretorius is involved in Ponzi schemes and that a preservation of property order was obtained against his bank accounts, the NDPP was not able to show that the transaction between Mxolisi Ndlovu and E Pretorius is illegal, which would render the money used in that transaction to be proceeds of unlawful activities

and that both E Pretorius and Mxolisi Ndlovu form part of a syndicate benefitting from the Ponzi schemes.

Should the Property be Excluded from the Operation of the Forfeiture Order?

[67] Section 52 of POCA, to which reference is made in section 50 thereof, permits a court to exclude from the operation of a forfeiture order certain interests in the property concerned if it is shown by the applicant for such exclusion that the interest was legally acquired and that the applicant 'neither knew nor had reasonable grounds to suspect' that the property in which the interest is held, is the proceeds of unlawful activities.

[68] In an attempt to get the funds preserved in his Capitec Bank accounts excluded from the operation of the forfeiture order sought by the NDPP, Mxolisi Ndlovu provides the following explanation to show that such funds were legally acquired:

- 68.1 According to his evidence, the Capitec Bank account number [...], is his main bank account. It is the bank account through which he receives his salary.
- 68.2 Capitec Bank account number [...] is a savings account which he opened in 2018 to save for his children's school fees. He transfers funds to this account from time to time from his other bank accounts including his main account in which he receives his salary. This, he says, is not his everyday account and as at 25 November 2021 the balance in that account was R12 993.34.
- 68.3 Capitec Bank account number [...] is his savings account which is integrated with his main account. He opened this account in 2018 for his residential deposit. He has been transferring funds to this account from time to time by directly depositing to this account and transferring from other bank accounts including his main account. It is, also, not his everyday account, and as at 25 November 2021 the balance on that account was R8 760,16.

68.4 Capitec Bank account number 1535301528 is, also, his savings account which is integrated with his main account. He opened this account in 2012 and designed it for paying off his debts. He transfers funds to this account from time to time by directly depositing to this account and transferring from other bank accounts including his main account. This is not his everyday account, as well, and as at 25 November 2021 the balance on that account was R13 260,22.

[69] He submits that the three accounts are pocket accounts to the main account. All funds in these accounts were directly transferred by him to each respective account, legally and with proper authorisation from himself as the owner of the accounts. He, further, submits that he does not have access to the financial records of his employer, and would, therefore, not know the source of the funds used to pay his salary. He knows that the company's clients are billed from time to time after auditing duties are completed, but he cannot give evidence as to whether those are the funds used to pay his salary or not. Nor does he have knowledge or reasonable grounds to suspect that his employer uses money that is the proceeds of unlawful activities, to pay his salary.

[70] As regards the Bitcoin transactions his explanation is that he does the transactions through his Capitec Bank account number [...]. As at 14 November 2021 he had a balance of his lifetime savings of R471 655, which he has been saving to purchase property. These savings were from his salary, bonuses and from proceeds of Bitcoin trades. Portion of these funds were his salary of the previous month, however the greater part of it was from his savings over the years. On 19 November 2021, his Bitcoin which he keeps on the Localbitcoins.com platform, appreciated value to an amount of R955 000, and he decided to trade on Localbitcoins.com. The trader by the name of E Pretorius as referred to in the bank statement he produced, purchased Bitcoin worth R500 000 which was paid into his Capitec Bank account mentioned above. The balance as of 19 November 2021, therefore, increased to R974 029. On the same day, he repurchased Bitcoin in the amount of R500 000 through Localbitcoin.com leaving a balance of R474 029. On 22 November 2021 he sold another Bitcoin in the amount of R199 999 to one E Pretorius and the balance in this account was increased to R674 028. He then

transferred R100 000 to his cousin Mr Bhenkizitha Nkomo to his Capitec Bank account number [...], and the balance was decreased to R574 028.

[71] He, also, explained that he does not meet his Bitcoin customers nor has he any form of relationship with them. He has been engaging in Bitcoin since 2017 and has never, in all that time, asked any of his customers the source of the funds they use to purchase his Bitcoin. He, thus, cannot possibly know whether the funds that his customers give in exchange for Bitcoin are proceeds of unlawful activities as he only engages with them through the online platform of Localbitcoins.com. He, as a result, does not know nor has he any reasonable grounds to suspect that the funds received for the Bitcoin transactions are proceeds of unlawful activities.

[72] The explanation Mxolisi Ndlovu tenders, is plausible and is not in essence refuted by the NDPP in its papers. Consequently, Mxolisi Ndlovu's funds preserved by the NDPP in his Capitec Bank accounts as referred to in the preservation of property order dated 3 January 2022, ought to be excluded from the operation of the forfeiture order sought by the NDPP.

CONCLUSION

[73] It is evident that the NDPP failed, on a balance of probabilities, to prove that the preserved funds held in the Capitec Bank accounts of Mxolisi Ndlovu, Bongani Alert Chabalala and Mandla Floyd Mnzana, as well as those held in the First National Bank accounts of Dirk Christoffel Jacobus Grobler and African Bank accounts of Dirk Christoffel Jacobus Grobler and Minette Elizabeth Blom, are proceeds of unlawful activities. The evidence does not mention the role the said bank holders played in furthering any crime or using the proceeds of crime or being in receipt of such proceeds. It is, thus, evident that the preservation order against their respective funds, was sought and/or granted in error. There is no evidence which ties them, respectively, to the illegal activities alleged to have been committed by TKL. No evidence is presented that shows that they are directors or controllers of any company let alone that of TKL. Consequently, the relief sought against the funds preserved in the Capitec Bank accounts held in the names of Mxolisi Ndlovu, Bongani Alert Chabalala and Mandla Floyd Mnzana, as well as those held in the First National Bank accounts of Dirk Christoffel Jacobus Grobler and the respective

African Bank accounts of Dirk Christoffel Jacobus Grobler and Minette Elizabeth Blom, should be dismissed.

[74] The NDPP has been successful in proving, on a balance of probabilities, that the funds preserved in the Capitec Bank accounts held in the name of Minette Elizabeth Blom and Stephanns Mabotja, are proceeds of unlawful activities. Therefore, the relief sought by the NDPP in the Forfeiture Application should be granted against the funds preserved in the Capitec Bank accounts held in the names of Minette Elizabeth Blom and Stephanns Mabotja, only.

[75] Due to none service of the preservation order, the relief sought against the funds preserved in the Capitec Bank accounts held in the name of Dirk Christoffel Jacobus Grobler, Jessica Roestoff and Aubrey Rorisang Setlhare ought to be postponed *sine die*. The Applicant is to be granted leave to approach court on these papers for relief in the event there is proper service upon them.

COSTS

[76] As earlier stated Mxolisi Ndlovu is the only interested party who opposed the Forfeiture Application and further applied for the exclusion of his preserved property from the operation of the forfeiture order. As the successful party in the applications against the NDPP he is entitled to be awarded costs. Mxolisi Ndlovu, applied to be granted costs on a party and party scale. However, in oral argument, his counsel made submission for a punitive cost order urging the Court to send a strong message to the NDPP (Director Public Prosecutions) for in future to lay out a proper case and effectively do their investigations properly before approaching Court for relief.

[77] This matter is not one where punitive costs are warranted. It is indeed so that the NDPP is supposed to approach Court for relief of this nature where there are reasonable grounds to believe that an offence was actually committed. The aim of POCA, as set out in the Preamble of that Act, is mainly, to introduce measures to combat organised crime, money laundering and criminal gang activities. The Act is designed, more so, to grant law enforcement extra power to seize the proceeds of organised crime, such as money laundering. A punitive costs order, in matters like these, might deter the NDPP in future applications to approach Court for relief. A punitive costs order ought not to be granted under the circumstances.

ORDER

[78] Consequently, the following order is made

Order 1

- 1.1 The property described in paragraphs 1.13, 1.14, 1.15, 1.16, 1.17, 1.19, 1.20, 1.21, 1.22 and 1.23 of the preservation order dated 03 January 2022 is excluded from the National Director of Public Prosecution's application in terms of section 48 of the Prevention of Organized Crime Act 120 of 1998.
- 1.2 The National Director of Public Prosecutions is directed to release the property described in paragraphs 1.13, 1.14, 1.15 and 1.16 of the preservation order dated 03 January 2022 to Mxolisi Ndlovu.
- 1.3 The National Director of Public Prosecutions is directed to release the property described in paragraph 1.19 of the preservation order dated 03 January 2022 to Bongani Alert Chabalala.
- 1.4 The National Director of Public Prosecutions is directed to release the property described in paragraph 1.17 of the preservation order dated 03 January 2022 to Mandla Floyd Mnzana.
- 1.5 The National Director of Public Prosecutions is directed to release the property described in paragraph 1.20 of the preservation order dated 03 January 2022 to Minette Elizabeth Blom.
- 1.6 The National Director of Public Prosecutions is directed to release the property described in paragraph 1.21, 1.22 and 1.23 of the preservation order dated 03 January 2022 to Dirk Christoffel Jacobus Grobler.
- 1.7 The National Director of Public Prosecutions is directed to pay the costs incurred by Mxolisi Ndlovu in opposing the Forfeiture Application and for the application in terms of section 52 of the Prevention of Organized Crime Act 120 of 1998.

Order 2

- 2.1 The property (including the positive balances and interest accrued therein) described in paragraphs 1.1, 1.2, 1.3, 1.4, and 1.18, of the preservation order dated 03 January 2022 is declared forfeited to the State in terms of section 53 of the Prevention of Organised Crime Act, 121 of 1998.
- 2.2 In terms of section 56(2) of the Prevention of Organised Crime Act, 121 of 1998, ownership of the property shall vest in the State as from the effective date of this order.
- 2.3 The appointment of a *curator bonis* is dispensed with.
- 2.4 The property shall remain in the custody of the multiple bank accounts in which it is held, and the positive amount and interest accrued in the accounts, must then be transferred or deposited into the Criminal Assets Recovery Account established in terms of section 63 of the Prevention of Organised Crime Act, 121 of 1998 (account number [...]) held at the South African Reserve Bank, Vermeulen Street, Pretoria.
- 2.5 Any person whose interest in the property concerned is affected by the forfeiture order may within 20 days after he or she acquired such knowledge of the order, set the matter down for variation or rescission by the Court.

Order 3

- 3.1 The relief sought against the property described in paragraphs 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, and 1.12, is postponed *sine die*.
- 3.2 The Applicant is granted leave to approach the Court on the same papers to seek relief in respect of this property should it opt to do so in future.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 17 October 2023

Date of judgment: 19 February 2024

APPEARANCES:

For the Applicants: Adv DL Phalane instructed by State Attorney

For the Third Respondent: Adv J Vilakazi instructed by Ntsele Attorneys