



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: 9863/2016**

In the matter between:

**THE NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS**

**APPLICANT**

and

**SAVITHREE SAMUEL  
CALEB ENOCH SAMUEL  
TITUS ENOCH SAMUEL  
JOASH ENOCH SAMUEL  
DHURUVASEN GOVENDER  
SALLY POOBALAN GOVENDER**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT  
SIXTH RESPONDENT**

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**ORDER**

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The following orders are issued:

1. The respondents are granted condonation for the late filing of their heads of argument and practice note.
2. An order is granted in terms of section 50 of the Prevention of Organised Crime Act 121 of 1998 (the Act), declaring forfeited to the State, the property listed in Annexure B (the property) to the notice of motion, save for the exclusion of items 5, 6 and 12. The property is currently in the custody of the *curator bonis*.

3. Phinda Shembe of Shembe Attorneys, who was appointed as *curator bonis* in terms of the preservation order, is authorised to continue to act as such.
4. In terms of section 56(2) of the Act, the property shall vest in the *curator bonis* on behalf of the State on the date on which this order takes effect.
5. In terms of section 57 of the Act, the *curator bonis* is authorised, as of the date on which this order takes effect, to perform all the powers and functions specified in the Act, including the following:
  - (a) to take possession of the property on behalf of the State;
  - (b) to deduct his fees and expenditure;
  - (c) to deposit the balance of the proceeds of the sale of the property into the bank account of Tiger Brands and Treats, a division of Tiger Consumer Brands Ltd, Nedbank, account number 1454082313, branch code 145405, being the victim in the matter; and
  - (d) to perform any ancillary acts which, in the opinion of the *curator bonis*, are reasonably necessary to effect such fulfilment.
6. In terms of section 50(6) of the Act, this forfeiture order shall not take effect before the period allowed for an application under section 54 of the Act or an appeal under section 55 of the Act has expired or before such application or appeal is disposed of.
7. In terms of section 50(5) of the Act, the registrar of this court, or the State Attorney (KZN) on the request of the registrar, is to publish a notice of this forfeiture order in the form set out in annexure C to the notice of motion in the *Government Gazette* as soon as practicable after this order is granted.
8. The first to fourth respondents are directed to pay the costs occasioned by their opposition to the forfeiture application.
9. The application by the first and third to sixth respondents for the exclusion of their interests in the property in Annexure B is dismissed.

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## JUDGMENT

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**HENRIQUES J**

## Introduction

[1] This is an application for a forfeiture order in terms of section 48 of the Prevention of Organised Crime Act 121 of 1998 (POCA) forfeiting property itemised in Annexure B to the notice of motion, hereinafter referred to as ‘the property’. This court may, in terms of sections 48 and 50(1) of POCA, grant an order forfeiting the property to the State, if it finds on a balance of probabilities that the property constitutes the proceeds of unlawful activity. The applicant submits that the property is the proceeds of unlawful activities, in this instance, fraud.

[2] On 3 October 2016, the applicant obtained a preservation of property order in terms of section 38(1) of POCA. The property preserved is listed in Annexure B to the order.<sup>1</sup> Pursuant to the obtaining of the preservation order, the following persons entered an appearance in terms of s39(3) and gave notice of their intention to oppose the forfeiture application: this was the first respondent, Savithree Samuel (Savithree); the second respondent, Caleb Enoch Samuel (Caleb); the third respondent, Titus Enoch Samuel (Titus); the fourth respondent, Joash Enoch Samuel (Joash); and the fifth and sixth respondents, Dhruvasan Govender and Sally Poobalan Govender. The fifth and sixth respondents are married to each other and the second, third and fourth respondents are the sons of the first respondent.

[3] The applicant, and the first to fourth respondents elected to have the matter decided on the papers. The fifth and sixth respondents elected to have a hearing in open court.

[4] In summary, the first respondent applies for the exclusion of her interest in six policies held with Sanlam and Discovery<sup>2</sup> as she avers that some of these policies were not paid for entirely with the proceeds of unlawful activity. Some policies had been taken out prior to the date on which she had received funds from the alleged ‘illegitimate’ source and had been paid with legitimate funds earned by her from monies received from ‘investors’. The first respondent submits that the funds in her main personal bank account contained legitimate deposits from investors totalling the

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<sup>1</sup> Preservation order dated 3 October 2016, Volume 1, pages 4–19.

<sup>2</sup> These are items 7-12 of Annexure B.

sum of R16 128 812. These investments were managed from her personal bank account.

[5] The second, third, and fourth respondents apply for the exclusion of their interests in the immovable property listed in Annexure B and allege that they are innocent owners and were unaware that a portion of the money used to purchase the immovable property was from the proceeds of unlawful activity. In addition, they submit that the forfeiture of the immovable property would be disproportionate and prejudicial as the majority of funds utilised to purchase the immovable properties were legitimately earned.<sup>3</sup>

[6] The fifth and sixth respondents have applied for the exclusion of their interests in the immovable property<sup>4</sup> as innocent owners and have indicated that they have not committed any crime warranting a forfeiture of the immovable property. This was a gift given to them by the late Gonaseelan Govender (Gonaseelan), the fifth respondent's brother, and they were not aware that the immovable property was purchased with the proceeds of unlawful activities.

[7] In relation to their opposition, section 52 of POCA provides that when a high court makes a forfeiture order in terms of section 50(1), it may exclude certain interests if the respondents can show that they acquired the property legally and did not know nor had reasonable grounds to believe that the property was the proceeds of unlawful activity. The defence raised by the respondents in opposition is often referred to as the 'innocent owner defence'.

### **The application for recusal**

[8] Before dealing with the issues for determination, it is necessary to deal with a preliminary matter which arose when the opposed motion was allocated for hearing. Given the Covid-19 pandemic and the protocols in place at the time, correspondence was addressed to the respective parties concerning the conduct of the proceedings. A response was forthcoming only from the applicant and the first to fourth respondents.

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<sup>3</sup> In respect of the second respondent, the property is item 3 in Annexure B. In respect of the fourth respondent, these are items 1 and 2 of Annexure B.

<sup>4</sup> Item 4 of Annexure B.

The fifth and sixth respondents did not respond to the initial enquiry. It was then agreed that the matter be decided on the papers without the hearing of oral argument, with the submission of written heads of arguments and practice notes as well as written submissions.

[9] It subsequently transpired from email correspondence exchanged between the temporary secretary assigned to me and the fifth and sixth respondents that a response had been sent through, albeit to an incorrect email address. The fifth and sixth respondents raised objections to the matter being decided on the papers. In addition, I had also addressed correspondence to the parties in relation to whether or not they had any objections to me presiding in the matter.

[10] The applicant and the first to fourth respondents raised no objection to me presiding in the matter and complied with the directive and submitted their written heads of argument as well as their written submissions. The parties were unable to comply with the directive in relation to the submission of a joint statement of issues as the heads of argument were filed late. They elected not to attend the court hearing.

[11] As a consequence of the response received from the fifth and sixth respondents, a court hearing was arranged at which the fifth and sixth respondents appeared in person and made oral submissions in relation to their objection to me presiding and in relation to the merits of the matter should I refuse the application for my recusal.

[12] In considering the oral submissions relating to my recusal I had regard to Article 13 of the Judicial Code of Conduct, the *locus classicus* in respect of recusal applications being the decisions of *President of the Republic of South Africa and others v South African Rugby Football Union and others*<sup>5</sup> and the Constitutional Court in *South African Commercial Catering and Allied Workers Union & Others v Irvin and Johnson Limited (Seafoods Division Fish Processing)*<sup>6</sup> as refined in *S v Shackell*.<sup>7</sup>

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<sup>5</sup> *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) ('SARFU').

<sup>6</sup> *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) para 15.

<sup>7</sup> *S v Shackell* [2001] ZASCA 72; 2001 (4) SA 1 (SCA); [2001] 4 All SA 279 (A) ('Shackell').

[13] The fifth and sixth respondents recorded in writing the basis upon which they sought my recusal and this is a matter of record. This was conveyed in correspondence and included the following:

- (a) My previous interactions with officials from the Asset Forfeiture Unit;
- (b) How I would address the acts of corruption committed by senior officials from the Asset Forfeiture Unit which the fifth and sixth respondents had exposed;
- (c) They would not be given a fair hearing in court given the fact that they cannot afford legal representation;
- (d) They have serious doubts concerning my impartiality, and my biased views about respondents in Asset Forfeiture Matters; and
- (e) They are opposed to me deciding the matter and require clarity regarding what happened to the original judge assigned to deal with the matter. They queried the decision to change judges and considered the change of judges a well-planned strategy designed to make them fail.

[14] The record of the proceedings will indicate that during the course of hearing the fifth and sixth respondents' submissions in relation to my recusal, it became evident that as lay persons, they misunderstood the court proceedings and court processes. In fact, I explained to the fifth and sixth respondents how matters are assigned in this division and how the matter was allocated. This seemed to allay the fifth and sixth respondents' fears concerning the allocation of the matter to me.

[15] I also explained I had ceased dealing with asset forfeiture matters in the Northern Cape in 2011. I have had no interaction with that office since then, and my involvement with matters involving the Asset Forfeiture Unit since my elevation to the Bench, has only been in dealing with matters as they appeared on the motion court roll. After hearing my answers to their concerns, the fifth and sixth respondents raised no objections to my continued involvement in the matter. In fact, Mr Govender was of the view that he would place his trust in the legal system, as well as the judiciary and appreciated that judges took an oath of office to be impartial and unbiased.

[16] In the result, this line of opposition was not pursued any further and they withdrew their request for my recusal. I then heard submissions on the merits of their opposition.

### **Issues requiring determination**

[17] The following issues require determination:

- (a) Whether the property in Annexure B constitutes the proceeds of unlawful activities and is liable to forfeiture in terms of section 48 read with section 50 of POCA.
- (b) Whether the first, and third to sixth respondents have any interest in the respective properties which are liable for exclusion in terms of section 52 of POCA.
- (c) In the event of the court finding that the immovable property is liable to forfeiture, whether the proposed forfeiture is proportional, i.e. the proportionality assessment.

[18] In respect of the issues which require determination, the applicant bears the onus to prove on a balance of probabilities that the property constitutes the proceeds of unlawful activity, and the proportionality of such forfeiture. The respondents bear the onus to prove on a balance of probabilities their respective innocent owner defences and for the exclusion of their interests in the property. The second respondent no longer seeks to have his interest in all the property excluded from the forfeiture order and appears to have abandoned his opposition, specifically in relation to the immovable property in Annexure B which is registered in his name.

### **The context for the preservation and forfeiture applications**

[19] Between July 2009 to October 2014, an entity known as Jocatus Transport CC (Jocatus) issued 60 invoices to Tiger Brands Limited (Tiger Brands) for logistic services, purportedly rendered pursuant to an enterprise development agreement. Tiger Brands made payment to Jocatus on receipt of such invoices in the amount of R121 679 095.70. Subsequently, the enterprise development agreement between Jocatus and Tiger Brands was found to contain a forged signature on behalf of Tiger Brands and it was ascertained that Jocatus had not rendered any services to Tiger Brands, and consequently Tiger Brands had suffered a financial loss as a result of such fraudulent payments to Jocatus (the Jocatus fraud).

[20] A former financial manager at Tiger Brands, the late Gonaseelan Govender was found to be instrumental in the fraud and was subsequently dismissed from his employment at Tiger Brands. The first respondent Savithree was the sole member of Jocatus. Once payment had been made by Tiger Brands into Jocatus' bank account,

such funds were disbursed into other bank accounts. A number of persons received funds in their bank accounts which funds were either retained in such bank accounts, or dispersed to other bank accounts, or used to acquire those properties listed in Annexure B. The first, and third to sixth respondents have interests in and are the owners of the respective immovable properties sought to be forfeited as a consequence of being purchased from such funds.

[21] The affidavit of Ms Meera Ramdeen (Ms Ramdeen) contains an analysis of how the funds received by Jocatus were disbursed to other entities, persons and their bank accounts, including the first to fourth respondents. In the instance of the fifth and sixth respondents, immovable property was purchased in their names..

### **The applicable legislation**

[22] POCA was enacted to provide inter alia for the recovery of the proceeds of unlawful activity and for the civil forfeiture of property that has been used to commit an offence (referred to as an 'instrumentality of an offence') and/or property that is the proceeds of unlawful activity (often referred to as 'proceeds of crime'). In the preamble to POCA, it is emphasised that no person ought to benefit from the fruits of an offence or from the fruits of unlawful activities and that POCA is necessary to provide for a civil remedy for the preservation, seizure and forfeiture of property derived from unlawful activities or which is concerned in the commission or suspected commission of an offence. It is with this purpose in mind that a court considers a forfeiture order.

[23] Section 1 of POCA defines 'proceeds of unlawful activities' as follows:  
'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'.

[24] 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'.

[25] 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.’

[26] POCA draws a distinction between criminal forfeiture and civil forfeiture. In respect of civil forfeiture, these proceedings are civil in nature and are not dependent on there being a prior conviction for a criminal offence. This is evident if one draws a contrast between chapter 5 of POCA which provides for confiscation orders on conviction for a criminal offence and chapter 6 of POCA which provides for forfeiture orders in terms of civil forfeiture.

[27] As was held in *National Director of Public Prosecutions v Mohamed NO*: ‘Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted . . . Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.’<sup>8</sup>

[28] The civil recovery of property is governed by the provisions of chapter 6 of POCA and as the proceedings are civil in nature, consequently the rules of evidence which apply to civil proceedings apply to proceedings instituted under this chapter.<sup>9</sup>

[29] The chapter envisages a two-step procedure. The process commences with the National Director of Public Prosecutions (NDPP) applying, on an *ex parte* basis, for a preservation of property order in terms of section 38 of POCA, in circumstances where there are reasonable grounds to believe that the property concerned ‘is an instrumentality of an offence referred to in Schedule 1’,<sup>10</sup> or are ‘the proceeds of unlawful activities’,<sup>11</sup> or ‘is property associated with terrorist and related activities’.<sup>12</sup>

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<sup>8</sup> *National Director of Public Prosecutions and another v Mohamed NO and others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) para 17.

<sup>9</sup> Section 37 of POCA.

<sup>10</sup> Section 38(2)(a).

<sup>11</sup> Section 38(2)(b).

<sup>12</sup> Section 38(2)(c).

[30] Once an order is made, section 39(1) requires that

‘the National Director shall, as soon as practicable after the making of the order—

- (a) give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and
- (b) publish a notice of the order in the *Gazette*.’

In terms of section 39(3) of POCA,

‘[a]ny person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.’

[31] Such appearance must contain

- ‘(a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his or her interest in the property concerned; and
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.’<sup>13</sup>

[32] A forfeiture application in terms of section 48 of POCA must be instituted within 90 days after the date upon which notice of the preservation order is published in a *Government Gazette*.<sup>14</sup> Once a preservation order has been granted, a *curator bonis* takes control of and administers the property subject to the directions of the high court.

[33] Sections 48 to 57 of POCA govern the procedure relating to applications for forfeiture orders. Section 48 provides that the NDPP may apply to a high court for the forfeiture of all property subject to a preservation of property order. Notice of such application must be provided to all persons who entered an appearance in terms of section 39(3). Such persons may oppose the making of a forfeiture order, or alternatively apply for an order varying the operation of the order in respect of the property or excluding his or her interests in the property from the operation of the forfeiture order and may adduce evidence at the hearing of such application.

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<sup>13</sup> Section 39(5).

<sup>14</sup> Section 40.

[34] In terms of section 50, subject to section 52 of POCA, a high court shall if it finds on a balance of probabilities that the property concerned ‘is an instrumentality of an offence referred to in Schedule 1’, or ‘is the proceeds of unlawful activities’ or ‘is property associated with terrorist and related activities’ make a forfeiture order. It is also authorised to make any ancillary orders it deems appropriate for the operation of such forfeiture order.

[35] Section 52 of POCA deals with the exclusion of interests in property and provides that

‘The High Court may, on application—

(a) under section 48(3); or

(b) by a person referred to in section 49(1),

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.’

It may make such an order

‘. . . if it finds on a balance of probabilities that the applicant for the order—

(c) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

(d) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.’<sup>15</sup>

### **The interpretation of the applicable legislation**

[36] It is evident from POCA that the orders envisaged in chapter 6 are intrusive and carry with them dire consequences for the owners or possessors of properties, in particular residential properties. When interpreting the provisions of such legislation, and having regard to the facts of a particular matter, our courts are enjoined to interpret the legislation in a manner that ensures its provisions are in line with the spirit, purport and object of the Bill of Rights, and that such forfeiture orders are constitutionally permissible, specifically in light of the provisions of section 25(1) of the Constitution and to prevent the arbitrary deprivation of property.

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<sup>15</sup> Section 52(2).

[37] As was held by Nkabinde J in *Prophet v National Director of Public Prosecutions*:

'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.'<sup>16</sup> (Footnotes omitted.)

### **Proportionality**

[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

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<sup>16</sup> *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC) para 46.

commission of the offences, bearing in mind the nature of the offence. It 'cannot be measured with fine legal callipers'<sup>17</sup> 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'.<sup>18</sup>

[41] As remarked by Nkabinde J in *Prophet v National Director of Public Prosecutions*,

'Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law'. This kind of forfeiture [envisaged in chapter 6 of POCA] is . . . remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry - weighing 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 offence, bearing in mind the nature of the offence.'<sup>19</sup>

[42] When considering a forfeiture order,

'the purpose and object of ch 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution, which requires that "no law may permit arbitrary deprivation of property".'<sup>20</sup>

[43] When deciding what is meant by arbitrary deprivation of property, the Constitutional Court in *First National Bank of South Africa Ltd trading as Wesbank v Commissioner, South African Revenue Service and another; First National Bank of South Africa Ltd trading as Wesbank v Minister of Finance*<sup>21</sup> held that 'arbitrary' in section 25(1) of the Constitution means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Constitutional Court held that

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<sup>17</sup> *National Director of Public Prosecutions v Cole and others* 2005 (2) SACR 553 (W) para 15.

<sup>18</sup> *Ibid* para 15.

<sup>19</sup> *Prophet* para 58.

<sup>20</sup> *Prophet* para 61.

<sup>21</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 100 ('*Wesbank*').

‘for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.’<sup>22</sup>

[44] The Constitutional Court acknowledged that the standard for establishing arbitrariness is different to the standard of proportionality. The following factors were considered relevant by the court in cases where property is involved:

- (a) The relationship between the purpose of the deprivation and the person whose property is affected;
- (b) The relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation;
- (c) A more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables;
- (d) The reasons should be more compelling as more incidents of ownership are affected;
- (e) Depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer towards proportionality as the effects increase; and
- (f) The enquiry takes full account of the relevant circumstances of each case.<sup>23</sup>

[45] The purpose of a proportionality enquiry is to determine whether the grant of a forfeiture order would be tantamount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution. The proportionality analysis weighs up the effect on the owner concerned of a forfeiture order against the purpose the forfeiture order aims to serve.

### **The current application**

[46] In the present matter, the NDPP obtained a preservation order in terms of section 38 of POCA on the basis that the property concerned was the proceeds of unlawful activities alternatively instrumentalities of an offence. Such order was granted

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<sup>22</sup> *Wesbank* para 98.

<sup>23</sup> *Wesbank* para 100.

by Kruger J on 3 October 2016.<sup>24</sup> In anticipation of the forfeiture application, the procedural requirements envisaged in section 48 of POCA were complied with in that the NDPP effected service on all the respondents and affected persons<sup>25</sup> and effected publication of the preservation order in the *Government Gazette* on 24 February 2017.<sup>26</sup> I may add that the section 48 application was instituted within 90 days of the date of publication and consequently, there has been compliance with the procedural requirements envisaged in section 48 of POCA.

[47] Pursuant to the preservation order, the *curator bonis* took control of the property and filed various reports which are a matter of record. To discharge the onus, the applicant relies on the factual matrix when it obtained the preservation order and the affidavits and annexures filed in relation to the forfeiture application. The facts relied on when obtaining the preservation order, is summarised and dealt with in the affidavit of Ms Ramdeen, a senior financial investigator employed by the National Prosecuting Authority in its Asset Forfeiture Unit.

**The factual allegations relied on by the applicant in the preservation application**

[48] Ms Ramdeen indicates that during August 2015, she was approached by a Colonel Botha from the Commercial Crime Unit of the South African Police Service who advised her that she was investigating a case of fraud, under Wentworth Cas 137/08/2015, perpetrated against Tiger Brands by Jocatus. The fraud related to 60 invoices issued by Jocatus for alleged logistics services rendered by Jocatus to Tiger Brands in the total value of R121 679 095.70.

[49] Tiger Brands had discovered irregularities in certain of its accounts and had conducted preliminary internal investigations. These irregularities were highlighted in statements provided to Ms Ramdeen during her investigations.

[50] Tiger Brands appointed Mr Gareth Seymour (Mr Seymour), an accountant, to investigate various irregularities in its material usage variants account and costs of

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<sup>24</sup> Annexure KMS1, Volume 16, pages 1533–1544.

<sup>25</sup> Affidavit of Kenneth Mark Samuels para 11, Volume 16, pages 1502–1505 and annexures KMS3-MS19, pages 1550–1570.

<sup>26</sup> Annexure KMS2, Volume 16, pages 1545–1549.

sales account. His investigations revealed that in the 2011 and 2012 fiscal years, there were transactions with Jocatus amounting to R24 161 018.98 and R11 178 461.75. The description for these transactions on the system was 'distribution allowance' which ought not to have been recorded in the material usage variants account. When Mr Seymour traced the originator of the entries on the system, he discovered that they were processed on behalf of an entity known as Jocatus and the list of transactions relating to Jocatus totalled R121 679 095.70. These payments were charged to different financial accounts being the balance sheet provision account, national distribution warehouse, materials cost of sales and customer discounts allowance.

[51] A contract was discovered in the office cabinet of Gonaseelan, the financial manager at the time of the Snacks, Treats and Beverages Division of Tiger Brands in Jacobs. This contract had allegedly been entered into between Tiger Brands and Jocatus and was purportedly signed by a former logistics manager on behalf of Tiger Brands, being one Mr Benjamin Mamoerane. Mr Mamoerane, when questioned about the agreement, denied having signed it and denied any knowledge of an entity known as Jocatus.

[52] Investigations in relation to purchase orders revealed that one Ms Sugeshree Mewalall (Ms Mewalall), a receptionist at Tiger Brands, generated purchase orders in favour of Jocatus which she confirmed were done on the instruction of Gonaseelan. Ms Mewalall stated that Gonaseelan personally handed her the Jocatus invoices for processing and Gonaseelan then approved the purchase orders. This involved her confirming that the services were rendered or delivered satisfactorily.

[53] Interviews with officials from the logistics department at Tiger Brands who were responsible for receiving goods or services rendered against purchase orders, confirmed that they were not aware of any services rendered by Jocatus. The invoices were never seen by the officials from the logistics department and they were not aware of services that were allegedly rendered by Jocatus, nor were they aware of the tonnage, number of loads, and rate of pay per load that was charged for the services.

[54] Investigations by Mr Phaphle Phalane (Mr Phalane), the Supply Chain Executive for the Snacks, Treats and Beverages Division of Tiger Brands, revealed it



suffered a significant loss in May 2013 in the Mallows and Jellies Manufacturing Unit, Jacobs. It was discovered that on 20 April 2013, the work in progress at the plant had been overstated by means of fictitious entries to the value R9 109 735.49. A further overstatement was discovered to the value of R8 043 588.08. KPMG was instructed to conduct an investigation, the outcome of which led to the dismissal of one Ms Jocelyn Govender who admitted that she had deliberately inflated the figures.

[55] During the course of Mr Seymour's investigations, he together with Mr Phalane questioned Gonaseelan on 31 July 2015 about some of the invoices which included Jocatus' invoices. Gonaseelan alleged that the invoices had been transferred to Isando Shared Services. Further investigations discovered that payments to Jocatus were made during July 2009 to September 2014. These payments were charged to different financial accounts and it was subsequently discovered that these were fraudulent.

[56] Mr Seymour and Ms Elizabeth Norval (Ms Norval), a financial executive in the Snacks, Treats and Beverages Division of Tiger Brands, accessed the Tiger Brands supplier payment enquiry accounting system, which revealed that between July 2009 and October 2014, payments were made into Jocatus' FNB bank account 55140041836 to a total value of R121 679 095.70. In addition, Jocatus was not a known vendor of the business nor were any persons nor did it appear that anyone was aware of any services which they rendered. The fact that transport costs were charged to the material issues account raised questions around the validity of the vendor.

[57] In addition, payments to Jocatus which were charged to different financial accounts also raised questions, as purchase orders which were described as either a 'distribution allowance' or 'provision of logistic services', were irregular as according to Ms Norval, a distribution allowance is only payable to customers or a third-party contracting company to distribute products on behalf of Tiger Brands, and such allowance is not paid to logistics services providers.

[58] Henry John Schimper Enslin, employed by Tiger Brands as a financial executive for Tiger Brands' shared services centre, confirmed that new vendors are

opened on the JDE system upon proper completion and authorisation of an application for a new vendor or changes to a vendor form.

[59] Mr Anesh Owthar, the creditors manager, opens accounts for new vendors, which application form must be accompanied by a letter on the proposed vendor's letterhead indicating amongst others the vendor's postal and street addresses, contact details, registration number, account contact details and VAT registration number. Such form must be signed by three signatories. Mr Owthar then loads the vendor information onto the JDE system and once verified by the treasury manager having regard to the supporting documents, the treasury manager approves the creation of the vendor on the system.

[60] Purchase orders are then raised by someone who has been granted access to do so and is then approved by a person other than the person who raised it. Departments which received goods delivered or services rendered, are required to certify the satisfactory receipt of those goods or services on the JDE system by processing the goods received against the relevant purchase order. After balancing the creditors reconciliation, the creditors supervisor creates a batch payment on the JDE and once the payment batch has been authorised by authorised signatories in the Snacks, Treats and Beverages Division, payment is approved and thereafter payment is transmitted.

[61] An investigation of the Jocatus application, revealed that Mr Owthar loaded the Jocatus application, and reviewed the payment batches and creditors reconciliation which Ms Mewalall had generated, with Jocatus' purchase orders and thereby initiated the transactions to pay. Ms Mewalall also confirmed the goods were receipted and costed the transport expense to the relevant general ledger account based on the code provided by Gonaseelan. The treasury manager approved the opening of Jocatus as a vendor on the JDE system and released payments to Jocatus. Gonaseelan coded Jocatus on the face of the invoice in order for Ms Mewalall to raise purchase order numbers. Gonaseelan approved the purchase orders generated by Ms Mewalall and Gonaseelan then released payments to Jocatus.

[62] Ms Mewalall confirmed that Gonaseelan approached her in 2009 to capture invoices for Jocatus onto the JDE system to generate order numbers. Once she had captured the invoices, she took them to Gonaseelan for approval. Once Gonaseelan had approved them, he would personally return the invoices to her to receipt them on the JDE system for submission to the creditors department for payment. She confirmed that Gonaseelan would personally hand her the Jocatus invoices and the cost centre details to which the invoices were to be charged against. Ms Mewalall confirmed that, having regard to the copies of the Jocatus purchase orders and invoices she processed from 2009 and 2014, she processed the invoices on the direct instructions of Gonaseelan, being her senior.<sup>27</sup>

[63] Mr Mamoerane confirmed that the enterprise development agreement dated 23 September 2009, purportedly concluded between Tiger Brands and Jocatus, was never signed by himself. He indicated that the signature thereon was forged and denied ever seeing the agreement prior to seeing it in 2015. He confirmed what whilst employed at Tiger Brands he did not deal with nor had he heard of Jocatus and denied that whilst employed there Jocatus had provided logistics services to Tiger Brands' Snacks, Treats and Beverages Division. He also confirmed that he had never seen the invoices shown to him in respect of payments made to Jocatus for July 2009 to November 2010 nor had he authorised such payments.<sup>28</sup>

[64] Ms Gcina Mdladla (Ms Mdladla), the logistics clerk for Tiger Brands Snacks, Treats and Beverages Division since July 2012, confirmed that her main duties involved processing and receipting of supplier invoices, verifying road manifests for cross-border deliveries and submitting expenses to the logistics controller for outstanding payments. She confirmed that a part of her duties would involve a service provider forwarding her a copy of the invoices together with supporting documentation including tonnage, number of loads, and rate of pay per load and she would check and verify the rates per load and ensure that the supplier details corresponded with what had been agreed to.

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<sup>27</sup> Annexure MR5, Volume 4, pages 344–345.

<sup>28</sup> Annexure MR6, Volume 4, pages 346–355.

[65] Once she had verified the information, she would create a purchase order and forward the documents to the logistics controller for verification who would double check the documentation and forward it to the logistics manager for approval. Once approved, Ms Mdladla would receive the order number for payment and she would then forward the original invoices to the creditors department for payment. Ms Mdladla confirmed, when shown the invoices of Jocatus which were processed during the period from 2009 to 2014, that she did not recall having ever seen such order numbers or invoices.<sup>29</sup>

[66] Ms Mdladla's version was corroborated by Ms Kriya Munien, the logistics controller, who confirmed that she had never heard of Jocatus nor had it provided logistic services to Tiger Brands. Had it done so, she would have been aware of it. She also confirmed that she had never seen the order numbers or invoices processed for Jocatus during 2009 to 2014.<sup>30</sup>

[67] Mr Paul Evans-Crabtree, a principal database administrator employed by Business Connections to provide information technology services to Tiger Brands, confirmed that he was asked to access the JDE system of Tiger Brands to identify the persons who had generated the Jocatus purchase orders, approved the orders, certified or receipted the services rendered by Jocatus and approved the payment of Jocatus' invoices. He compiled a spreadsheet after accessing the JDE system which indicated that 54 purchase orders in respect of Jocatus were receipted by Ms Mewalall as services rendered/satisfactorily delivered by Jocatus.<sup>31</sup>

[68] Mr Charles Phiri, the National Logistics Manager for beverages employed at Tiger Brands since January 2010, confirmed that transport service providers are appointed via a tender and contract process in terms of Tiger Brands' operational systems. Since September 2009, the main service provider for beverages distributions at Tiger Brands was Imperial. Smaller transporters who provided delivery services for beverages were Logico Transport, Global Holding Transport, Doda Transport, Biotrace Transport, Mazwani Transport, Wallace Transport and Overnight Logistics.

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<sup>29</sup> Annexure MR7, Volume 4, pages 356–358.

<sup>30</sup> Annexure MR8, Volume 4, pages 359–361.

<sup>31</sup> Annexure MR9, Volume 4, pages 362–368.

Mr Phiri confirmed that he had neither heard of nor utilised Jocatus as a logistics service provider.<sup>32</sup>

[69] Mr Mohamed Aslam Ebrahim Seedat, the chief procurement officer at Tiger Brands responsibilities include the appointment of logistics service providers and awarding contracts on a national basis. He confirmed that from time to time as part of its empowerment initiatives, Tiger Brands would enter into enterprise development contracts with certain service providers with a view to developing and empowering them in the various departments to which such services were rendered. He was shown a copy of the enterprise development agreement allegedly concluded between Jocatus and Tiger Brands and confirmed that he had neither heard of Jocatus nor had Jocatus rendered logistics services to Tiger Brands. In addition, he confirmed that the main logistics service provider at that time was Imperial and having regard to the invoices submitted by Jocatus, it was not physically possible for Jocatus to have moved the volumes it claimed payment for in the invoices submitted.<sup>33</sup>

[70] Mr Ernest Theodore Grundlingh, the risk manager for Tiger Brands' Snacks, Treats and Beverages Division, perused the enterprise development agreement that was allegedly concluded between Tiger Brands and Jocatus. He proceeded to the physical address provided in the agreement for Jocatus and did not find any trucks belonging to Jocatus on the premises.<sup>34</sup>

### ***Ms Ramdeen's further investigations***

[71] Ms Ramdeen's enquiries with the CIPC (Companies and Intellectual Property Commission) regarding Jocatus revealed the following. The entity was first incorporated on 28 September 1995, with its sole member being Savithree Samuel, the first respondent. Gonaseelan was listed as its accounting officer. On 24 March 2014, Gonaseelan resigned and one Viv Moodley was appointed. On 25 March 2014, Jocatus changed its name to Zion Freight CC with its registered business address at 21 Aurora Drive, Umhlanga. On 17 September 2014, Zion Freight effected a name

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<sup>32</sup> Annexure MR10, Volume 4, pages 369–370.

<sup>33</sup> Annexure MR11, Volume 4, pages 371–400.

<sup>34</sup> Annexure MR12, Volume 5, pages 412–417.

change to Tiger Asset Management and on 11 June 2016 effected a further name change to Zion Asset Management.

[72] Ms Ramdeen further discovered that Jocatus had an FNB business cheque account with account number 55140041836, first opened under the name Jocatus Transport CC on 25 October 1995 with the two signatories being Savithree and her husband Mr Enoch Moses Samuel.<sup>35</sup> She did an analysis of Jocatus' bank statements relating to Jocatus' operational expenses. She found that it did not have expenses consistent with or relating to a transport business as there were no normal operational transport business expenses like fuel, truck maintenance, trailer maintenance, liability insurance, VAT payments to SARS, staff salaries, office costs and on the road costs like tyres and truck parts.

[73] In addition, an analysis of Jocatus' bank account statements to determine if it owned any assets relating to transportation or logistics, revealed that it did not own any trucks or trailers and owned two vehicles being a Toyota Hilux 2.4D DLXLWB and a Jaguar X-type 2.0 LV6 sedan. Of the 60 Jocatus invoices generated, 18 of them bore a description 'provision of logistics services' yet the bank statements had no indication of expenses relating to logistical services.

[74] Ms Ramdeen accessed copies of bank statements of Jocatus' FNB account from 1 June 2009 to January 2015<sup>36</sup> and analysed such statements, which revealed deposits totalling the sum of R125 305 937.12. Of this amount, payments made by Tiger Brands to Jocatus totalled R121 679 095.70. On a regular basis after Tiger Brands had made payments into Jocatus' bank account, Jocatus would immediately transfer the money to other bank accounts belonging to inter alia the first respondent, other individuals and certain other entities. Jocatus further made direct payments to Ms Maligavathe Naidoo (Ms Naidoo), Ms Lingasphrie Pillay (Ms Pillay) and Discovery Invest.

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<sup>35</sup> Annexure MR14, Volume 5, pages 439–446.

<sup>36</sup> Annexure MR17, Volume 5, pages 449–500.

[75] Savithree's personal FNB account initially received R4 908 600 from Jocatus. Her second bank account with account number 62196714333 also initially received R6 9 09 000. Ms Naidoo's FNB account 62254856332 received R70 581 369.90 and her second account 62254855392 received R6 220 000. Ms Pillay's FNB account 62433322667 received R28 610 843 and Discovery Invest received the sum of R2,5 million. The total of these payments made by Jocatus was R119 729 812.90.

[76] Payments made by Tiger Brands to Jocatus are reflected in a schedule marked annexure MR18. When Tiger Brands made payments to Jocatus, Jocatus would thereafter make payments into the following bank accounts: Savithree's personal FNB account; Savithree's second FNB account 62196714333; Ms Naidoo's two bank accounts with FNB (62254856332 and 62254855392); Ms Pillay's FNB account 62433322667; Mr Caleb Samuel's (Caleb) two FNB accounts 62471044679 and 62487822051; Gonaseelan's FNB bank account 62379659918, his Standard Bank account 251058212, his Standard Bank Money Market account 058451625-001, and his Standard Bank Fixed Deposit account 058451625-002; and two Investec accounts held by one Mr Vernon Naidoo, the first being an Investec Private Bank account 10010451108 and an Investec Prime Saver Bank account 1100505436500.

[77] Ms Ramdeen then analysed Savithree's first personal FNB account 62013370325. This is an FNB Premier Cheque account. The initial credit balance before payments were received from Jocatus' bank account was R1 045.83. Forty payments totalling R4 908 600 were paid from Jocatus' bank account into this account. This is reflected in annexure MR19.<sup>37</sup> An analysis of this account reveals that it received payments totalling R37 856 251.37 which were initially the proceeds of fraud that were received into Jocatus' bank account.

[78] The account, according to Ms Ramdeen, is inconsistent with the operation of a personal bank account as the deposits are too high and mainly in round figures. Payments from this account were made to Maritz Boshoff and Du Preez Attorneys, Sanlam and Gonaseelan.

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<sup>37</sup> Annexure MR19, Volume 6, page 592.

*Payments to Maritz Boshoff and Du Preez Attorneys*

[79] An analysis by Ms Ramdeen of this account reflected 17 payments to Maritz Boshoff and Du Preez Attorneys in the total sum of R965 000, which payments were described on Savithree's bank statement as 'MARTIZ BOSHOF AND DU CALEB ENOCH SAMUEL'. This is reflected in annexure MR21.<sup>38</sup>

[80] Ms Ramdeen's enquiries with Maritz Boshoff and Du Preez Attorneys confirmed, by way of an affidavit from Mr Carl Johannes Boshoff (annexure MR22),<sup>39</sup> that these payments were for the transfer of three properties in a scheme known as Cupido Gardens and that Savithree paid for the purchase of three sectional title properties being units 35, 232 and 30.

[81] In respect of unit 35 Cupido Gardens, nine payments in the total amount of R475 000 were paid by Savithree to Maritz Boshoff and Du Preez Attorneys. This property was subsequently registered in the name of Mr Joash Enoch Samuel (Joash). Unit 232 Cupido Gardens, a garage, was sold for a purchase price of R55 000 paid for as follows. Savithree made two payments to Maritz Boshoff, in the sum of R15 000, a payment of R18 200 was made from an unidentified source and a further R21 800 was paid by Blue Dot Properties. These properties are registered in the name of Joash. In respect of unit 30, six payments totalling R475 000 were made by Savithree using her personal FNB account and the property was subsequently registered in the name of Mr Titus Enoch Samuel (Titus).

[82] According to Ms Ramdeen, the monies used to purchase these properties are the proceeds of the Jocatus fraud. Payments for these properties were made from Savithree's personal FNB account during the period from 21 February 2012 to 5 April 2014. Savithree's FNB account received the following amount from Jocatus:

- (a) Payments totalling R4 341 300 during the period from February 2012 until 5 April 2014;
- (b) Payments totalling R1 000 850 for the period from 21 February 2012 until 4 February 2013; and

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<sup>38</sup> Annexure MR21, Volume 7, page 614.

<sup>39</sup> Annexure MR22, Volume 7, pages 615–642.



(c) Payments totalling R10 362 300 from Savithree's second FNB account 62196714333 during the period from 21 February 2012 until 6 June 2013.

*The Sanlam policies*

[83] From an analysis of Savithree's personal FNB account, Ms Ramdeen discovered several payments to Sanlam. She was advised by Ms Cindy Cloete of Sanlam as to the nature of these payments and Ms Cloete confirmed that Savithree has three active policies, being a Matrix Top Cover policy (18902291X6), Stratus Endowment policy (44000077X6) and a second Stratus Endowment policy (44007869X9).

[84] In respect of the Matrix Top Cover policy, Ms Ramdeen's enquiries revealed that the policy was taken out on 1 April 2004 and was for life cover. From 4 August 2009, Savithree's personal FNB account had begun receiving the proceeds of the Jocatus fraud. Consequently, the payments for this policy constitute the proceeds of crime. In respect of the first Stratus Endowment policy, this policy was taken out on 17 January 2014 and the current premiums which are paid are R12 100 per month. From 4 August 2009, Savithree's FNB account began receiving the proceeds of the Jocatus fraud and consequently these are the proceeds of crime. Ms Ramdeen's investigation also uncovered that Savithree has no other lawful source of income except payments received from the Jocatus fraud.

[85] In respect of the second Stratus Endowment policy, this policy also commenced on 30 January 2014 and the monthly premiums which are currently paid up, are R6 050 per month. Similarly, the policy is the proceeds of crime.

[86] From 4 August 2009 to 27 October 2011, Savithree made 23 payments to Gonaseelan Govender totalling R6 938 561.28 from the account. Annexure MR30<sup>40</sup> reflects the payments from Savithree's account 62013370325 into Gonaseelan Govender's Standard Bank Prestige Plus account.

*Savithree's second FNB Money on Call account 62196714333*

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<sup>40</sup> Annexure MR30, Volume 11, page 1017.

[87] Ms Ramdeen accessed bank statements for this account from 31 March 2009 to 30 June 2013. A sample of 10 bank statements reveal that 20 payments totalling R6 909 000 were made from Jocatus' bank account into the second FNB bank account. This is reflected in annexure MR32.<sup>41</sup> It is self-evident from the schedule that the payments made into this account were within days after Jocatus had received payments from Tiger Brands.

[88] On receiving proceeds from Jocatus, Savithree would also transfer monies back to Jocatus. This is reflected in annexure MR33<sup>42</sup> which shows that for the period from 11 September 2009 to 6 April 2011, Savithree made 12 payments totalling R130 900 back to Jocatus. Within a short space of time, R16 263 150 was transferred to Savithree's personal FNB account which included proceeds from Ms Naidoo's FNB account 62254855392. Savithree's second FNB account also received payments from Jocatus and Ms Naidoo, and she transferred these funds to her FNB personal account.<sup>43</sup>

#### *Ms Naidoo's FNB account 62254856332*

[89] Ms Ramdeen accessed Ms Naidoo's FNB account for the period from 3 February 2010 to 14 November 2013. Jocatus made 39 payments totalling R70 581 369.90 into Ms Naidoo's first FNB account. These 39 payments are set out in annexure MR35.<sup>44</sup> Ms Ramdeen's analysis of Ms Naidoo's first FNB account showed that on receiving payments from Tiger Brands, Jocatus would transfer money into Ms Naidoo's first FNB account and shortly thereafter Ms Naidoo would transfer these proceeds to her FNB Gold cheque account 62254855392. Three payments totalling R6 220 000 were made by Jocatus into Ms Naidoo's second FNB account. After receiving the proceeds from Jocatus, Ms Naidoo then transferred R5 850 000 into her FNB account.

#### *Ms Naidoo's second FNB account*

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<sup>41</sup> Annexure MR32, Volume 11, page 1034.

<sup>42</sup> Annexure MR33, Volume 11, page 1035.

<sup>43</sup> Volume 11, page 1036.

<sup>44</sup> Annexure MR35, Volume 11, page 1055.

[90] For the period from 3 February 2010 to 14 November 2013, Ms Naidoo's second FNB account received a total of 192 payments totalling R86 709 514.63. A schedule of these payments is annexed as annexure MR37.<sup>45</sup> These deposits were thereafter paid by Ms Naidoo into her second FNB account.

[91] From Ms Naidoo's second FNB account, she then transferred the proceeds to Gonaseelan, Savithree and a firm of attorneys, Ponnen Pienaar and Associates. Ms Ramdeen's investigations reveal the following:

- (a) Ms Naidoo made 66 payments totalling R52 238 157.45 to Gonaseelan's Standard Bank account 251058212, evidenced by annexure MR38;<sup>46</sup> and
- (b) On 23 October 2010, Ms Naidoo paid R1 421 632 from her second FNB account into Gonaseelan's FNB account 62379659918, as evidenced by annexure MR39.<sup>47</sup>

[92] It is thus evident that the payments made by Ms Naidoo into Gonaseelan's respective banks accounts were the proceeds of unlawful activities in the hands of Gonaseelan. These proceeds were initially in the hands of Jocatus and were channelled to Ms Naidoo's first FNB account and then to her second FNB account and thereafter transferred to Gonaseelan's bank account. Ms Naidoo in moving the proceeds through many bank accounts, attempted to disguise the proceeds. This was to make the proceeds entering into Gonaseelan's accounts appear as legitimate income. Had she however done so straight from Jocatus' bank account into Gonaseelan's bank account, it would have created a link between her, Jocatus, Gonaseelan and Tiger Brands.

[93] Ms Naidoo also made 35 payments, as evidenced by annexure MR40,<sup>48</sup> into Savithree's second FNB account totalling R6 412 000.

[94] An analysis of Ms Naidoo's second FNB account reflected a payment made on 22 September 2013 of R2 050 000 to Ponnen Pienaar and Associates. The attorneys

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<sup>45</sup> Annexure MR37, Volume 11, pages 1076–1079.

<sup>46</sup> Annexure MR38, Volume 11, pages 1080–1081.

<sup>47</sup> Annexure MR39, Volume 11, pages 1082–1088.

<sup>48</sup> Annexure MR40, Volume 11, page 1089.

confirmed receiving a payment of that amount for the transfer of a property described as Erf 1984, Umhlanga Rocks which was purchased for the fifth and sixth respondents, Gonaseelan's brother and his wife.

[95] On 6 August 2013, Jocatus paid R1 900 000 into Ms Naidoo's second FNB account and on the same day, Ms Naidoo transferred R1 750 000 to her first FNB account. On 20 August 2013, Ms Naidoo transferred R220 000 from her second FNB account to her first FNB account. The total proceeds transferred were R2 120 000. On 2 September 2013, Ms Naidoo transferred R2 050 000 back to her second FNB account and on the same day, paid Ponnen Pienaar and Associates. The balance was paid by means of a deposit of R150 000 on 1 August 2013.

[96] Consequently, the applicant alleges the property owned by the fifth and sixth respondents was purchased with the proceeds of crime and it axiomatically follows that it is the proceeds of unlawful activity in the hands of the fifth and sixth respondents.<sup>49</sup>

[97] Ms Ramdeen, from her analysis of Savithree's and Ms Naidoo's various bank accounts, indicates efforts by Savithree to distance the source of monies in her bank account from that of Jocatus' bank account. In order to do so, both Ms Naidoo's FNB accounts were utilised for this purpose. Ms Naidoo's bank accounts were utilised to receive the proceeds from Jocatus' bank account and thereafter to pay these monies to Savithree and Gonaseelan. This is evident from the fact that the transactions are frequent and the amounts transferred are in round figures. This is clearly not consistent with the operation of personal bank accounts.

[98] An analysis of Ms Naidoo's various bank accounts reflects payments to the following persons in the following amounts. In respect of Gonaseelan's Standard Bank account 251058212 an amount of R52 238 157.45; Gonaseelan's FNB account 62379659918 an amount of R14 221 632; Savithree's FNB account 62196714333 an amount of R6 412 000; and payment to Ponnen Pienaar and Associates of

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<sup>49</sup> Annexure MR41, Volume 11, page 1090–1093.

R2 050 000. These transfers to the various bank accounts from Ms Naidoo totalled R62 121 789.45.

[99] Ms Pillay's Platinum FNB Cheque account 62433322667, for the period from 25 September 2013 to 25 July 2015, received 17 payments totalling R28 610 843 from Jocatus. A schedule of these payments is annexed as annexure MR45.<sup>50</sup> Shortly after Ms Pillay's FNB account received these monies from Jocatus, she disbursed the majority of these funds to Sanlam and Gonaseelan. Sanlam was paid R22 500 000 and Gonaseelan R2 208 956.66. This total equates to R24 708 956.66.

[100] Ms Ramdeen established that Ms Pillay made six payments totalling R22,5 million into a Sanlam Glacier Investment account soon after she had received these monies from Jocatus. These were lump sum payments and from her investigations, she had established that Ms Pillay made these payments on behalf of Savithree for her son, Caleb. Ms Cloete's affidavit confirms the six payments and Ms Ramdeen's affidavit deals with the flow of funds from Jocatus to Ms Pillay to Sanlam:<sup>51</sup>

(a) On 3 February 2014, Tiger Brands paid Jocatus R2 475 627 and on 6 February 2014, Jocatus paid Ms Pillay R2 201 364. On 14 February 2014, an amount of R5 million was invested with Sanlam;

(b) On 1 April 2014, Tiger Brands paid Jocatus R2 380 523 and on 2 April 2014 Jocatus paid Ms Pillay R2 650 000. On 2 April 2014, R6 million was invested with Sanlam;

(c) On 3 May 2014, Tiger Brands paid Jocatus R 2 475 725 and on 5 May 2014 Jocatus paid Ms Pillay R2 400 000. On 5 May 2014, an amount of R3 million was invested with Sanlam;

(d) On 2 June 2014, Tiger Brands paid Jocatus R2 346 211 and on 4 June 2014 Jocatus paid Ms Pillay R2 224 000. On 4 June 2014, R3 million was paid to Sanlam; and

(e) On 1 October 2014, Tiger Brands paid Jocatus R3 346 725 and on 6 October 2014, Jocatus paid Ms Pillay R3 million. On 6 October 2014, an investment with Sanlam of R2,5 million was made. On 10 October 2014, Jocatus paid Ms Pillay

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<sup>50</sup> Annexure MR45, Volume 12, page 1119.

<sup>51</sup> Volume 1, page 97-98.

R53 000 and on 28 October 2014 made another payment to her of R70 000. On 28 October 2014, R3 million was paid to Sanlam.

[101] It is for these reasons that Ms Ramdeen concluded that the payments which were made from Jocatus to Ms Pillay to Sanlam constitute the proceeds of unlawful activities in the hands of Caleb.

[102] Ms Cloete confirms that a payment of R5 million was made on 14 February 2014 from Ms Pillay's FNB account 62433322667 into a Glacier Investment account 4257606, held in the name of Savithree. On 12 March 2014, Savithree gave Sanlam instructions to transfer these funds from her Glacier Investment account 4257606 into an account which was to be held by Caleb in an amount of R4 978 606.13 under Glacier Investment Plan 4294450, which was opened on 13 March 2014.

#### *Caleb*

[103] Caleb's Glacier Investment account 4294450 reflects five further deposits, confirmed by Ms Cloete, which occurred as follows:

- (a) On 16 April 2014, R6 million was deposited into this account. According to Ms Cloete, money for this payment was received from an FNB bank account ending in 2667. Ms Ramdeen discovered that this R6 million was paid from Ms Pillay's FNB account on 2 April 2014 to an account described on Ms Pillay's bank statement as 'ATM Pmt to Sanlam M64456941896X2';
- (b) On 6 May 2014, R3 million was deposited into the investment account which was received from an FNB account ending in 2667. Similarly, Ms Ramdeen confirms that this deposit came from Ms Pillay's FNB account on 5 May 2014;
- (c) Ms Ramdeen confirmed that the further payment of R3 million on 5 June 2014, emanated from Ms Pillay's FNB account on 4 June 2014;
- (d) In October 2014, R2 million was also paid into the investment account. Ms Ramdeen confirms the deposit emanated from Ms Pillay's account on 6 October 2014; and
- (e) Ms Ramdeen confirmed that the R3 million deposited on 30 October 2014, emanated from Ms Pillay's FNB account on 28 October 2014.

[104] Ms Cloete's affidavit further confirms that Caleb made nine withdrawals from this investment. On 3 July 2014, Caleb withdrew R1,5 million from this investment account and deposited the money into his FNB account 62471044679. Subsequently, on 8 July 2014, Caleb paid the same amount into Savithree's Discovery Endowment Plan 8550060814. The nine withdrawals made by Caleb and deposited into his respective FNB bank accounts 62471044679 and 62487822051, occurred on the following dates and in the following amounts, namely,

- (a) 3 July 2014: R1,5 million;
- (b) 9 December 2014: R2 million;
- (c) 20 January 2015: R700 000;
- (d) 16 March 2015: R1,5 million;
- (e) 7 April 2015: R500 000;
- (f) 9 April 2015: R1 million;
- (g) 17 April 2015: R1 million;
- (h) 13 May 2015: R1 150 000; and
- (i) 28 August 2015: R5 200 000.

[105] These payments totalled R14 550 000. Similarly, Ms Ramdeen concludes that this represents the proceeds of the fraud channelled from Jocatus to Ms Pillay, and from Ms Pillay to Sanlam, and eventually moved from Sanlam into Caleb's two FNB accounts. It is for these reasons that the applicant submits that the money in the investment account is the proceeds of the fraud and is liable to forfeiture.

[106] Ms Ramdeen analysed Caleb's FNB account 62487822051 for the period from 6 August 2014 to 31 December 2015. An analysis of this account confirmed that R13 050 000 entered into this account from the nine withdrawals made for the Glacier Investment. Over this period of time, Caleb effected payments to different persons using his FNB account as follows: Joash: R3 351 600; Jocatus: R3 690 000; Discovery Invest: R1,7 million; Discovery Invest: R300 000; Savithree: R100 000; Glucodes Pharmaceutical (an entity which has Savithree as a 100% member): R450 000 and R100 000 respectively; and Mr Enoch M Samuel, Caleb's father: R5 000. In addition,

Caleb effected payment into his FNB account 62471044679 of the sum of R5 350 000.<sup>52</sup>

[107] Ms Ramdeen's analysis of Caleb's second FNB account 62471044679 for the period from 30 May 2014 to 30 November 2015<sup>53</sup> reflects the following payments: a deposit of R1 million on 8 August 2014 to Discovery Invest, and payments totalling R7 500 to his brother Joash. Consequently, Ms Ramdeen concluded that these amounts are the proceeds of the Jocatus fraud.

#### *Gonaseelan*

[108] On 2 October 2013, Ms Pillay received R2 462 800 from Jocatus. On 3 October 2013, Ms Pillay transferred R2 338 000 to Gonaseelan's account 62434596419. On 1 November 2013, Ms Pillay received R2 050 100 which was suspected to be from Gonaseelan's account. On the same day, Ms Pillay made two payments of R2 050 098 and R50 396.66 to Gonaseelan. Ms Ramdeen subsequently confirmed that these two payments effectively reached Gonaseelan's Standard Bank Private Plus current account 251058212.

[109] Ms Pillay received R2 207 762 from Jocatus on 6 November 2013 and on the following day, 7 November 2013, Ms Pillay paid R107 762 to Gonaseelan. These funds were traced to Gonaseelan's Standard Bank Private Plus current account 251058212.

[110] Consequently, Ms Ramdeen alleges the funds in Gonaseelan's Standard Bank Private Plus current account are the proceeds of crime.

#### *Discovery Invest*

[111] Ms Ramdeen approached Discovery Invest regarding the deposits and investments made by Jocatus or Savithree and was provided with an affidavit from Ms Diane Jarvis (Ms Jarvis)<sup>54</sup> and was able to obtain the following information. On 1 July 2014, Tiger Brands paid Jocatus R2 316 528.28. On 6 July 2014, Savithree paid

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<sup>52</sup> The extract of bank statements is annexed as MR46, Volume 12, pages 1120–1126.

<sup>53</sup> Annexure MR47, Volume 12, pages 1140–1149.

<sup>54</sup> Annexure MR48, Volume 12, pages 1160–1200.



Jocatus R200 000 from her FNB personal account. On 8 July 2014 an amount of R2,5 million was paid from Jocatus' bank account to Discovery Invest.

[112] In respect of the Discovery Endowment Plan investment 8550060814, Ms Jarvis confirmed that on 10 July 2014, Savithree invested in this endowment plan with Discovery. A lumpsum contribution of R4 million was made into this investment as follows: R2,5 million paid from Jocatus, and R1,5 million paid from Caleb's FNB account 62471044679. Payment of both these amounts were made to Discovery Invest on 8 July 2014. Annexure MR49 reflects the payment by Caleb to Discovery Invest for this investment.<sup>55</sup>

[113] The R2,5 million paid to Discovery Invest originally emanated from Jocatus as demonstrated by the following: On 1 July 2014, Tiger Brands paid Jocatus R2 316 528.28. On 6 July 2014, Savithree paid R200 000 to Jocatus. On 8 July 2014, R2,5 million was paid by Jocatus to Discovery Invest. The R1,5 million paid by Caleb to Discovery Invest represented the proceeds he received on 3 July 2014 from his withdrawal of funds from his Sanlam Investment. The initial proceeds in the hands of Jocatus were paid over to Ms Pillay who in turn paid these proceeds into the Glacier Investment. R1,5 million was withdrawn from the Glacier Investment account and paid into Caleb's FNB account 62471044679 and thereafter Caleb paid the proceeds to Discovery Invest on behalf of Savithree.

[114] In respect of the Endowment Investment Plan 8550070959, Ms Jarvis confirmed that on 19 March 2015, Savithree invested in this policy. She paid a lumpsum contribution of R1,7 million and this payment to Discovery Invest was facilitated on 18 March 2015 from Calebs' FNB account 62487822051. This is evidenced by annexure MR51.<sup>56</sup>

[115] R1,5 million of the R1,7 million paid by Caleb to Discovery Invest represents the proceeds that were paid through the withdrawal from his Glacier Investment policy

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<sup>55</sup> Annexure MR49, Volume 13, pages 1255–1256.

<sup>56</sup> Annexure MR51, Volume 13, page 1265.

on 16 March 2015. A further R200 000 was paid on 18 March 2015 from Caleb's FNB account 62510028831.

[116] By 30 October 2015, Ms Pillay had channelled a total of R22,5 million of the proceeds received from Jocatus into Caleb's Sanlam Policy. On 10 March 2015, Caleb withdrew R1,5 million and paid this into his FNB account ending with 051. On 18 March 2015, Caleb again paid R1,7 million from this account into Savithree's Discovery Endowment Policy ending with 958.

[117] Ms Jarvis also confirmed that on 1 October 2010, Savithree invested in Discovery Endowment Plan 8550019612. The monthly premium due was R1 000 with an annual escalation of 10 percent and the premium was paid from Savithree's first FNB account. Ms Ramdeen analysed Savithree's bank statements for this account and confirmed that payments were regularly made from this bank account to the investment policy. At the time of this investment, Savithree had already started receiving payments from Jocatus into this bank account.

[118] It is for these reasons that the applicant submits that the payments from these accounts were the proceeds of crime but were attempted to be disguised as legitimate investments hidden in the various investments made with Discovery.

#### *Payments to Gonaseelan*

[119] For the period from 1 June 2009 to 20 December 2013, Savithree, Ms Naidoo, Ms Pillay and Caleb paid a total amount of R64 106 507.39 to Gonaseelan. Of this amount, R60 684 875.39 was paid into Gonaseelan's Standard Bank Prestige Current account 251058212, and the remainder of R3 421 632 was paid into his FNB account 62379659918. These monies are the proceeds that were paid by Tiger Brands into Jocatus' bank account, which were then moved from Jocatus to various bank accounts belonging to Savithree, Ms Naidoo and Ms Pillay, before it ultimately reached Gonaseelan.

[120] Ms Ramdeen analysed the monies received by Gonaseelan and her investigations revealed the following: Savithree paid R6 238 461.28 into Gonaseelan's Standard Bank account 251058212, and Ms Naidoo paid R52 238 157.45 into his

Standard Bank account, and R1 421 632 into his FNB account. Ms Pillay paid R2 208 256.66 into Gonaseelan's Standard Bank account and Caleb paid R2 million into his FNB account. Gonaseelan, on receiving these amounts, would move them from his Standard Bank and FNB accounts into a Standard Bank Money Market account 058451625-001 and a Standard Bank Fixed Deposit account 058451625-002.

[121] Ms Ramdeen analysed these two bank accounts,<sup>57</sup> and discovered the following transfer of funds: For the period from 12 January 2010 to 30 September 2015, Gonaseelan transferred monies from his Standard Bank account 251058212 to this Money Market account. The transactions would often be described as 'IB TRANSFER TO RITA'. This is the name used by Savithree. Although the description reflected 'IB TRANSFER TO RITA' the monies were actually transferred to Gonaseelan's Money Market account and not to Savithree.

[122] Even though he attempted to conceal the source and destination of these monies, it still shows a thread of transfers from Savithree and Jocatus. 55 payments were made from his Standard Bank account 251058212 to his Money Market account totalling R57 983 950.08. This is evidenced by annexure MR56. These monies would be moved from the Money Market account back to the Standard Bank account. He made 210 payments totalling R51 275 200 from the Money Market account back to his Standard Bank account as is evidenced by annexure MR56. The most significant of payments identified by Ms Ramdeen was a payment made on 20 July 2012 where Gonaseelan transferred R15 million to a Standard Bank Fixed Deposit account 058451625-002.

*Gonaseelan's Standard Bank Fixed Deposit account 058451625-002*

[123] Ms Ramdeen analysed the bank statements for this account for the period from 20 July 2012 to 21 July 2014. The account was closed on 20 July 2014. A deposit of R15 million was made on 20 July 2012 from Gonaseelan's Money Market account. The money remained in the account for approximately two years and thereafter on 21 July 2014, R15 million was transferred back to Gonaseelan's Money Market account and the account was closed. The interest of R1 682 301.47 was paid into

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<sup>57</sup> Annexure MR54, Volume 13, pages 1278–1300; annexure MR55, Volume 14, pages 1378–1397; and annexure MR56, Volume 14, pages 1398–1400.

Gonaseelan's Standard Bank Prestige account 251058212. The amount of interest paid is annexed as annexure MR58.<sup>58</sup> Subsequently, on 26 September 2014, the money was moved from Gonaseelan's Money Market account to his Standard Bank Prestige account 251058212. After receiving the proceeds from Savithree, Ms Naidoo and Ms Pillay, Gonaseelan then made payments from this account to the following persons: Mr Vernon Naidoo, Garlicke and Bousfield Attorneys, G&K Trust, Strauss Daly Attorneys, L&L Construction and Kanavalie Govender.

*Mr Vernon Naidoo*

[124] Ms Ramdeen found two bank accounts in Mr Vernon Naidoo's name at Investec. Private Bank account 10010451108 and Investec Prime Saver bank account 50008880759. On 26 September 2015, after Gonaseelan had transferred R15 million into his Standard Bank account, he then transferred the money to the Investec bank account of Mr Vernon Naidoo. On Gonaseelan's bank statement the transfer is referred to as 'Interbank Transfer V Naidoo'. Investec Bank provided Ms Ramdeen with the relevant bank statements of Mr Vernon Naidoo for the period from 10 August 2014 to 10 March 2016. Her analysis of Mr Vernon Naidoo's Investec Private Bank account 10010451108 confirmed receipt of the payment of R15 million by Gonaseelan on 26 September 2014.

[125] After the R15 million had been received into Mr Vernon Naidoo's account, the monies were disbursed in the following manner:

- (a) Mr Vernon Naidoo paid R1,8 million to what was described as 'Transfer G Govender funds' on 20 October 2014;
- (b) Seven payments totalling R1 050 000 to Gonaseelan's Standard Bank account 251058212, as is evidenced from annexure MR60;<sup>59</sup> and
- (c) On 4 March 2015, Mr Vernon Naidoo transferred R11,5 million to his Prime Saver account 1100505436500.

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<sup>58</sup> Annexure MR58, Volume 15, page 1404.

<sup>59</sup> Annexure MR60, Volume 15, page 1459.

[126] The Prime Saver Bank account of Mr Vernon Naidoo was analysed for the period from 1 March 2015 to 30 June 2016.<sup>60</sup> On 4 March 2015, the transfer of R11,5 million is reflected in Mr Vernon Naidoo's Prime Saver Investec Bank account.

[127] The above investigations by Ms Ramdeen formed the basis of the evidence in the preservation application and resulted in the preservation order, and continues to form the basis on which the applicant relies in seeking the forfeiture order. It has specifically requested that the affidavits and annexures in the preservation application be incorporated into the forfeiture application. To some extent the applicant also relies on the reports of the curator bonis in relation to the property.

### **Opposition to forfeiture application**

[128] Shortly after the respective notices of opposition were filed certain of the respondents filed affidavits in terms of s 39(3) of POCA.

### **The section 39(3) affidavits**

[129] In her section 39(3) affidavit, Savithree seeks to have her interest in the various endowment plans with Discovery, and the Sanlam Stratus and Matrix policies which are in her name excluded from the operation of the forfeiture order on the basis that not all the money invested in these plans emanated from the fraud perpetrated on Tiger Brands and the alleged proceeds of unlawful activities of Gonaseelan.

[130] She submits that money, legitimately earned, was invested in these policies. She is unable to quantify the precise amounts of the legitimate earnings invested in the policies, but indicated that she would do so before the hearing of the forfeiture application. By the time of the filing of written submissions, she had not done so.

[131] Caleb seeks the exclusion of his interest in the monies held in his FNB account 62471044679, on the basis that this is his current account from which he conducts all his personal banking and the monies are legitimately due to him arising from his salary and other lawful income.

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<sup>60</sup> Annexure MR61, Volume 15, pages 1460–1475.

[132] Titus claims ownership of section 30 of Cupido Gardens and seeks in the alternative the exclusion of his interest in the operation of the forfeiture order on the following grounds:

- (a) the majority of the funds used to purchase the immovable property were lawfully earned and generated by him and consequently he is an innocent owner;
- (b) in the alternative, if the applicant establishes that any portion of the purchase price in respect of the immovable property constitutes the proceeds of unlawful activity, he was unaware of this as he received financial assistance from his mother, Savithree, on the understanding that the funds were hers and were legitimate funds;
- (c) the property is fixed immovable property and is an indivisible asset and consequently in circumstances where he has paid a major portion of the purchase price for the immovable property from legitimate funds, it will be disproportionate and/or inequitable for the court to order him to forfeit it, alternatively for the court to order the sale of the immovable property; and
- (d) indicates that the six payments towards the purchase price were paid from Savithree's FNB account 62013370325. This represented the return on his investment in his mother's investment business.

[133] Joash, as the registered owner of sections 35 and 232 of Cupido Gardens, opposes the granting of a forfeiture order, alternatively seeks an order excluding his interest from the operation of any forfeiture order on the following grounds:

- (a) the majority of the funds used to purchase the properties were lawfully earned and generated by himself and he is consequently an innocent owner;
- (b) if the applicant establishes that any portion of monies utilised to acquire the immovable properties are the proceeds of unlawful activities, that he was unaware of this and received financial assistance from his mother, Savithree, on the understanding that the monies were hers and were legitimate income; and
- (c) the properties are fixed immovable properties and are indivisible and consequently in circumstances where he paid a major portion of the purchase price to acquire these immovable properties from legitimate income, it would be disproportionate and inequitable to order him to forfeit same or for the state to order their sale.

**The factual matrix in respect of the forfeiture application**

[134] As already mentioned the applicant relies on the application papers submitted in the preservation papers in support of its forfeiture application and has requested that the papers in the preservation application be specifically incorporated.

**The opposition advanced by the respondents to the forfeiture order and the applications for the exclusion of their interests***Savithree*

[135] In her answering affidavit in opposition to the forfeiture application, Savithree acknowledges that the basis of the applicant's case for forfeiture is fraud committed by Gonaseelan against his employer, Tiger Brands, in the sum of R121 679 095.70. She notes that there is no allegation that she perpetrated the fraud on Tiger Brands, and consequently the applicant's case is based on her receiving and possessing the proceeds of the unlawful activities by Gonaseelan. Because the application is not an application against her in her personal capacity and is an application *in rem*, she indicates that she does not intend to address each and every allegation made, and instead focusses on that property which she seeks to have excluded from the operation of any forfeiture order.

[136] The items which she seeks to have excluded from the operation of any forfeiture order are items 5 to 12 in annexure B which are bank accounts and policies in her name.

[137] The first bank account she deals with is that of her FNB Premier Cheque account 62013370325, which she indicates is her personal bank account. The account is currently overdrawn in the amount of R65 151.79 and she disputes Ms Ramdeen's evidence that the account has a positive balance. Savithree seeks to have it excluded because there is no value in the bank account as it is overdrawn, and there is thus nothing to be forfeited and she wants to continue to utilise this bank account as it is her personal account. She considers herself liable for the overdraft. In addition, she maintains that the majority of the money deposited into this personal account were not the proceeds of the Jocatus fraud.

[138] She acknowledges that Ms Ramdeen<sup>61</sup> indicates that a total amount of R4 908 600 and R37 856 251.37 was deposited into this account from Jocatus' bank account. She submits that Ms Ramdeen does not proffer any evidence to show that the monies were the proceeds of the Jocatus fraud.

[139] She submits that an analysis of the deposits in this personal bank account show that substantial deposits were made by individual investors which were unrelated to the fraud. It is for these reasons that she submits that these deposits by the investors are not the proceeds of the Jocatus fraud. In support of this contention, she annexes as annexure SS2, which is an extract from the bank account which reflects deposits made for the period from 22 January 2010 to 24 December 2014 by various depositors. The total of these deposits made is R16 128 812.

[140] According to Savithree, these depositors were investors who were part of a group who collectively invested in a variety of commodities and resources, which investments she managed for them utilising her personal account. In addition, there are deposits from Titus and Joash which were deposits made with her for investment purposes. All the persons who deposited such monies into her personal bank account expected returns on their investments.

[141] Joash's and Titus' returns on their investments were constituted by payments, in lieu of returns, for the purchase of the property situated at 30 Cupido Gardens in respect of Titus, and for the purchase of the property situated at 35 Cupido Gardens in respect of Joash. These were legitimate payments made in lieu of their return on the investments and were utilised to purchase the properties. These were legitimate monies and were not the proceeds of unlawful activities.

[142] In respect of 232 Cupido Gardens, she paid R15 000 from her personal account on behalf of Joash and these were legitimate monies due to him based on his investment. The amount of R21 800, which is a payment by Blue Dot Properties towards the purchase of unit 232 Cupido Gardens, was rental collected due to Joash

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<sup>61</sup> Volume 1, paras 24.1 and 24.2, page 78.



who let out of his property; Blue Dot Properties being the managing agent which collected the rental. Consequently, these were not the proceeds of unlawful activities.

*FNB Money Market Call account 62196714333*

[143] This account is in Savithree's name and has a zero balance. Because the account has no value, and there are no monies to forfeit, she requests that the account be released to her as she wishes to continue operating same.

*Discovery Endowment Plan policy 8550060814*

[144] Savithree confirms that the payments into the policy are as set out by Ms Ramdeen. She seeks to exclude a payment of R200 000 from such policy as this payment was made by her from her personal account on 6 July 2014 into Jocatus' bank account. Such amount emanated from her personal FNB account 62013370325. These were amongst the legitimate payments which were made into this account in the total sum of R16 128 812. Consequently, such amount should be excluded as it is not the proceeds of unlawful activities.

*Discovery Endowment Plan policy 8550019612*

[145] This policy was taken out on 1 October 2010 and a monthly payment of R1 000 was paid towards the policy. These payments emanated from her FNB account into which legitimate payments were made. Consequently, she seeks to have the entire policy excluded from any forfeiture order.

*Discovery Endowment Plan policy 8550070958*

[146] Savithree indicates that the payment for this policy was made from her son Caleb's FNB account and that she does not seek to exclude any portion of the R1 700 000 paid into this policy on 18 March 2015. She did, however, make enquires with her broker at FNB and discovered that a further sum of R300 000 was paid into this policy on 27 March 2015.

[147] As she was not able to establish the source of the additional R300 000, she invited the applicant to investigate the payment and its origin. She stated that she would conduct her own investigations, and reserved her right to supplement her affidavit to seek the exclusion of the sum of R300 000 in the event that it represents

legitimate proceeds. She has not supplemented her affidavit to deal with the exclusion of such amount.

*Sanlam Stratus Endowment policy 44000077X6*

[148] This policy was taken out on 17 January 2014 and the monthly premiums of R12 100 were paid from her personal FNB account 62013370325. She seeks to exclude the entire policy from any forfeiture order, as although Ms Ramdeen contended that from 4 August 2009 her FNB accounts began receiving the proceeds from the alleged Jocatus fraud, Savithree contends that the applicant has failed to have regard to the fact that legitimate proceeds were also in her personal FNB account from which payments for this policy could have been made.

*Sanlam Stratus Endowment policy 44007869X9*

[149] This policy commenced on 30 January 2014 and the monthly premiums were being paid for from her FNB personal account 62013370325. She submits that these payments emanated from legitimate proceeds in her FNB account and the applicant has failed to prove that the monthly payments were made from the proceeds of unlawful activities. Consequently, this entire policy should be excluded from any forfeiture order.

*Sanlam Matrix Top Cover policy 18902291X6*

[150] The policy commenced on 1 August 2004, long before the commission of the alleged fraud by Gonaseelan. The fraudulent payments, according to Ms Ramdeen, only commenced on 4 August 2009 which was more than five years after the policy was taken out. The applicant does not quantify which portion of this policy was serviced from the proceeds of unlawful activities and which portion is from legitimate income. Consequently, she submits that all payments toward the policy were legitimate. She is unable to state the precise dates when the policy was first serviced from Jocatus' bank account during the period prior to the alleged fraud and thereafter from her personal FNB account.

[151] She submits that the applicant has a duty to quantify the proceeds of unlawful activities before it is entitled to claim forfeiture and therefore as it has not done so, the applicant has not made out a case for forfeiture. In addition she submits that the

applicant has not demonstrated that the monies in Jocatus' bank account prior to 2009 are the proceeds of unlawful activities and any payments up until that time are therefore legitimate.

[152] Her interest in this policy should be excluded from the forfeiture order as the policy commenced in 2004. In addition, as it is a life policy, it has no cash value and the applicant cannot sell the debt value in the policy.

*Caleb*

[153] Caleb seeks to have his FNB account 62470144679 excluded from the operation of any forfeiture order as this is his personal bank account and the monies consist of his salary and other lawful income due to him. It is submitted that none of these monies are the proceeds of unlawful activities. In addition, he submits that Kenneth Samuel in his founding affidavit<sup>62</sup> has not disputed that there is legitimate income, being a salary. In addition, he submits that such bank account is not included in annexure B to the forfeiture application and consequently the applicant accepts that such bank account must be excluded.

[154] In addition, he does not oppose the granting of the forfeiture order in respect of the two properties listed as items 17 and 18 of annexure B as he was not aware that the monies utilised to purchase the properties were the proceeds of unlawful activities.

*Titus*

[155] He seeks to have item 3 in annexure B, being section 30, Cupido Gardens, Chatsworth, excluded from any operation of a forfeiture order. He is the registered owner of the property, which is a flat. He indicates that the property was lawfully purchased with legitimate funds. In addition, he reiterates the grounds of opposition advanced in his section 39(3) notice. The purchase price paid for the property, being R475 000, consisted of six payments made from his mother Savithree's personal account and this was from legitimate sources of funds in her bank account and not from the proceeds of the fraud from Jocatus' bank account.

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<sup>62</sup> Para 21.16 of the affidavit.

[156] In addition, he submits that the deposits for the period from 31 March 2011 to 1 December 2014 in the total sum of R558 752 are payments which he had made into his mother's FNB account. He indicates that his mother was amongst a group of investors who invested in various business opportunities to secure profitable returns on their investments. She utilised her personal FNB bank account 62013370325 to receive, manage and distribute some of the investments. The amounts referred to in annexure TES1 to his mother's affidavit are legitimate amounts paid by investors into her bank account. He was informed by Savithree that the monies deposited were invested in resources and commodities and the returns on his investment were paid into her FNB account where after she accounted to him together with the interest which he had earned.

[157] He was aware of Savithree's business relationship with Gonaseelan as Gonaseelan was the accountant for Jocatus. His mother also informed him that for the period from 2013 to 2014 the investments were deposited with attorneys, Ms Motala and Mr Gosai who were managing an investment in a development by the Ethekwini Municipality. The returns from this investment were also paid into his mother's personal FNB account.

[158] He submits that the monies that were utilised to purchase the properties were proceeds of legitimate earnings, loans and/or legitimate investments and consequently are not the proceeds of unlawful activities. For the period from 28 November 2013 to 9 September 2014, a total return of R30 000 was paid by his mother to him constituting the return of his investments. He had agreed that his mother would pay the purchase price for the property rather than making these payments directly to him.

[159] He was unaware of the fraud perpetrated by Gonaseelan against Tiger Brands utilising Jocatus and any monies deposited into his mother's personal FNB bank account did not emanate from the fraud.

[160] In summary, Titus submits the following:

- (a) the applicant had not shown that the immovable property constitutes the proceeds of unlawful activities as this is contradicted by proof of legitimate deposits into his mother's personal FNB account;
- (b) the applicant has failed to prove that the immovable property was purchased with monies received from the proceeds of the Jocatus fraud and there was a mixture of legitimate money with alleged unlawful proceeds and the legitimate income in Savithree's personal FNB account exceeded the amount received from Jocatus' bank account;
- (c) the return on his investments was utilised by Savithree to make the payments for the purchase of the immovable property; and
- (d) the immovable property is an indivisible asset and it would be disproportionate and inequitable to order its forfeiture.

#### *Joash's*

[161] Joash also seeks to have the immovable property listed as items 1 and 2 in annexure B, being a flat situated at section 35 Cupido Gardens and a garage situated at section 232 registered in his name, excluded from the operation of the forfeiture order. He submits that the extract of Savithree's personal FNB bank account 62013370325 reflects deposits from legitimate sources unrelated to the fraud and the proceeds of unlawful activities in Jocatus' bank account.

[162] For the period from 22 January 2010 to 20 August 2014, a total sum R731 716 constitutes amounts legitimately earned which are deposits he made into her account. His mother, together with Gonaseelan, were part of a group of investors who invested in resources and he verily believed that these investments were legitimate and the returns of these investments were legitimate. The amounts which he deposited into his mother's accounts are not the proceeds of unlawful activities but are legitimate income earned by him. For the period from 5 August 2009 to 9 September 2014, he received a return on his investments in the sum of R689 850. Rather than pay the money over to him, he agreed with his mother, Savithree, to make payment of the purchase price for the property to Maritz Boshoff and Du Preez Attorneys on his behalf.

[163] In respect of unit 232, although the applicant submits that 27 percent of the property was paid for from the proceeds of unlawful activities, there is a denial and

submission that these were paid from legitimate income earned by him. The balance of the purchase price of R55 000 is not the proceeds of unlawful activities nor does the applicant allege same to be. Blue Dot Properties was an agent collecting rentals on his behalf for the leasing out of 35 Cupido Gardens and the payment of R21 800 was the proceeds of legitimately earned rental income.

[164] He disputes the following allegations by the applicant that:

- (a) Unit 35 Cupido Gardens has been paid for from the proceeds of unlawful activities: none of the payments totalling R475 000 from Savithree's personal FNB account emanated from Jocatus' bank account; and
- (b) Unit 232 which is the garage, was not paid for entirely from the proceeds of unlawful activities, as only a percentage of the purchase price was paid for by Savithree using her personal FNB account which allegedly received the proceeds of the fraud from the Jocatus account.

[165] Consequently, he opposes the granting of any forfeiture order on the following grounds:

- (a) The properties are not the proceeds of unlawful activities as they were paid for by Savithree from her personal FNB account. Savithree's personal bank account reveals legitimate payments in excess of payments received from Jocatus' bank account;
- (b) The applicant has failed to prove that the immovable properties were purchased with monies received from the proceeds of the fraud and there is a mixture of legitimate monies with unlawful proceeds. The legitimate monies exceed the amount received from Jocatus' bank account;
- (c) He believed that Savithree used the legitimate proceeds of his investments to make the payments for the purchase of the immovable properties and the applicant has not advanced any evidence to gainsay this; and
- (d) The immovable property is an indivisible asset and cannot be apportioned between the applicant and him. Only 27 percent of the immovable property is claimed to have been paid for from illegitimate sources and consequently it would be disproportionate and inequitable in the circumstances to forfeit the properties to the applicant.

*The fifth and sixth respondent*

[166] It is common cause that the fifth and sixth respondents are married to each other in community of property and that Mr Dhruvasan Govender is the brother of Gonaseelan. It is also common cause that the fifth and sixth respondents resided at a residential property situate at 9 Taunton Close, Somerset Park in Umhlanga.

[167] In opposition to the grant of any forfeiture order, they admit that the property was purchased for them by Gonaseelan but submit that they did not know it was purchased with the proceeds of unlawful activities and are innocent owners.

[168] They committed no criminal conduct nor can they be found to be complicit in any criminal conduct by Gonaseelan, the fifth respondent's late brother. The fifth respondent indicates that he and his wife owned their own home in Amanzimtoti, both having worked and formerly been employed by the Department of Education. He had been responsible for taking care of their parents, specifically their aged mother. None of his siblings wanted to look after their mother and in 2013 he was approached by Gonaseelan who informed him that as he had taken care of their parents, he Gonaseelan had purchased a home for them with the proviso that the fifth and sixth respondents look after their mother.

[169] At the time, the fifth respondent had the foresight to question his brother as to how he could afford to buy them a home. Gonaseelan indicated that he had shares in Tiger Brands and even showed the fifth respondent a share certificate. In addition, he indicated that he had been a chartered accountant for in excess of 25 years and had funds to purchase the property. Gonaseelan informed them that he was also going to enter into a business venture for a service station with one Mr Yashen Persadh.

[170] The fifth and sixth respondents indicate that they had no reason to doubt Gonaseelan's *bona fides* and when he presented the share certificate, it seemed that he had sufficient monies available to purchase the property. As a consequence, they agreed and allowed him to purchase the property for them. They were none the wiser as to where the money came from to purchase the property at the time.

[171] In addition, the fifth respondent resigned from his employment with a view of assisting his brother to run the service station. However, he subsequently learned that his brother was a 'fraudster' and a thief. On the day that the Asset Forfeiture Unit attended at their home, he attempted to contact his brother who refused to take his calls.

[172] He was arrested for trespassing on his own property when he tried to access the property to remove some of his furniture. He was evicted from his old home in Amanzimtoti as he was in jail, and could not provide the necessary emotional support to his wife and two young children at the time. His brother contacted him some three days later but did not provide an explanation as to what transpired. He has subsequently accepted that his brother was a fraudster and a liar and had defrauded Tiger Brands.

[173] In addition, he has cooperated throughout the Asset Forfeiture Unit's investigation and was instrumental in providing them with bank statements as well as other information which has led them to trace the R50 000 000 which they have recovered.

[174] They admit that the investigations uncovered that Gonaseelan facilitated the alleged fraudulent acts committed against Tiger Brands, that these fraudulent invoices were processed and payment approved in favour of Jocatus, and that Gonaseelan was the accounting officer for Jocatus from 28 September 1995 until 24 March 2014.

[175] The fifth and sixth respondents admit that once payment was made by Tiger Brands into Jocatus' bank account, direct payments were then made to three bank accounts belonging to Savithree, who was the sole member of Jocatus, Ms Maligavathee Naidoo and Ms Lingasprie Pillay. Certain monies were also transferred into a Discovery Invest account. The fifth and sixth respondents deny knowing any of these individuals or meeting them. They further admit that the proceeds from the bank accounts were also channelled into two accounts belonging to his brother Gonaseelan.

[176] They were completely unaware that the property purchased in Somerset Park was purchased with the proceeds of unlawful activities and only became aware of this



when the applicant served the preservation order on them on 11 October 2016. Numerous attempts to contact Gonaseelan proved fruitless.

[177] The fifth and sixth respondents submit that the basis of their defence is the following:

- (a) They had documentary evidence to show that certain officials tasked with investigating this case for the NPA are corrupt and abused their powers;
- (b) The senior financial investigator from the Asset Forfeiture Unit, Ms Ramdeen was involved in this case two years prior to it being referred to the NPA in 2015 for investigation. Ms Ramdeen was seen in the fifth respondent's mother's home in La Lucia visiting his sister. At the time they did not know who she was. Ms Ramdeen has concealed monies paid by Gonaseelan to their sister Mrs T Rajah;
- (c) Ms Ramdeen is guilty of concealing a R25 million loan agreement concluded between Gonaseelan and Mr Persadh;
- (d) These funds were deposited into various bank accounts belonging to inter alia Persadh's family members and his wife Ms Reshni Misra, an attorney who is also a school friend of Ms Ramdeen. The fifth and sixth respondents also allude to amounts paid to various family members of Mr Persadh;
- (e) Ms Kay Padayachee who is Gonaseelan's wife, is a school friend of Ms Ramdeen and Ms Misra and has also been excluded from the investigations. According to the fifth and sixth respondents, she received R4 million of the fraudulent funds from Gonaseelan. In addition Ms Ramdeen has failed to specify the account number into which Mr Vernon Naidoo transferred the R1,8 million. In a nutshell, the fifth and sixth respondents submit that Ms Ramdeen is disqualified and not impartial nor objective when it comes to the investigations conducted by the applicant in the matter;
- (f) The NPA officials had sent prospective purchasers to their home before it obtained the preservation order. The prospective purchasers advised him that the property was going up on auction;
- (g) They have been caught up in his brother's fraudulent scheme and are literally out on the street. They have no income, pension fund or medical aid and have survived on the charity of his wife's family;
- (h) Given their "innocence", even though the property may have been purchased from the proceeds of unlawful activities, it would constitute an arbitrary deprivation of

property in contravention of section 25 of the Constitution, should they not be allowed to continue to live on the property. There is no evidence against them and consequently they are innocent owners;

(i) They rely on *Mohunram*<sup>63</sup> that the commission of the offence in this matter was 'relatively far from the heartland of organised crime'. They submit that this was not an offence involving organised crime, and the court ought not to arbitrarily deprive them of property. In addition, when applying the proportionality test, it is clear that the purpose of forfeiture is to remove the proceeds of crime from the offender rather than to enrich the State. When compared with the personal situation of the fifth and sixth respondents, being a family of two children with no income, no home, no pension and no medical aid, living in an out building not fit for human habitation because they have nowhere else to go as they are both unemployed, forfeiture would not be proportionate; and

(j) In addition, the *curator bonis* has placed an official from the Department of Human Settlement on the property and no income is being received. In addition, the home was vandalised and the electricity reconnected in his name and a huge arrears has arisen. Relying on *Van Staden*,<sup>64</sup> they submit that a court does have discretionary powers to refuse a forfeiture order where the deprivation is so disproportionate that it renders it arbitrary.

### ***The applicant's response to the opposition and applications for exclusion***

#### ***Savithree***

[178] The applicant points out that as at 24 May 2016, the balance in Savithree's personal FNB account 62013370325 was R96 026.86. On 22 May 2017, the balance in the account was R13 796.26 and a hold was put on the account. The applicant indicates that it will not seek a forfeiture order against this account as there is no value in that account.

[179] The applicant denies that the majority of funds deposited into Savithree's FNB account were not the proceeds of fraud. It submits that it has proved on a balance of

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<sup>63</sup> *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) para 154.

<sup>64</sup> *National Director of Public Prosecutions v Van Staden and others* [2006] ZASCA 107; 2007 (1) SACR 338 (SCA); [2007] 2 All SA 1 (SCA) para 8.

probabilities that the money in such account originated from Jocatus' bank account. Ms Ramdeen's analysis of such account shows that Savithree's personal FNB account 62013370325 received the total amount of R37 856 251.37. This account received the proceeds of fraud from Savithree's second FNB account 62196714333 and also received monies from Ms Naidoo, Ms Pillay and Gonaseelan, who in turn received payments from Jocatus' bank account.

[180] An analysis of Ms Naidoo's FNB account 62254855392 reflects a number of deposits from various persons named Tweety, Mali, Collen, Lallie, Titus, Roxanne, J E Samuel, Chantelle, Loyce, Theron, and Esther to name but a few. This is evident from a schedule of Ms Naidoo's bank account. If one considers Ms Naidoo's bank account, the description part on the payments by Ms Naidoo to the said depositors was marked with the same reference 'Rita'. Savithree is also known by the name Rita and this is supported by annexure KMS32 which is a summons issued by Savithree under case number 7954/2016. These same depositors made deposits into Savithree's FNB account 62013370325.

[181] Accordingly, the applicant submits that the funds are the proceeds of unlawful activities which emanated from Ms Naidoo, who had received the proceeds of unlawful activities from Jocatus' bank account into her account. These deposits which were purportedly made by the depositors, were made in an attempt to create the impression that the funds in Savithree's FNB account 62013370325 emanated from legitimate sources, whereas the original source of the funds came from Ms Naidoo's FNB account 62254855392 which in turn had received the proceeds of unlawful activities from Jocatus' bank account.

[182] An analysis of Ms Naidoo's account reflects payments from Jocatus' bank account and in turn payments from Ms Naidoo to depositors. The said depositors thereafter made payments into Savithree's account and consequently such funds deposited into her FNB account 62013370325 are the proceeds of the fraud committed by Jocatus. This is evident if one has regard to annexures KMS27 to KMS31.

[183] In addition, Savithree's version that she used her FNB account to receive deposits from alleged depositors towards investments also contravened section 11 of

the Banks Act 94 of 1990 (Banks Act), as she received deposits from the public without being registered as a bank. According to her, she received deposits from more than 20 investors or depositors amounting to more than R500 000, in contravention of section 11 of the Banks Act. Confirmation that Savithree is not registered as a bank in terms of the Banks Act, nor as a mutual bank in terms of the Mutual Banks Act 124 of 1993 (Mutual Banks Act) is to be found in the affidavit of Ms Jane Makele Brander, an employee of the South African Reserve Bank.<sup>65</sup>

[184] Although the applicant admits that Titus and Joash made deposits into Savithree's FNB account, it is disputed that those funds are legitimate and in addition, the applicant points out that they have not disclosed the source of the funds. In any event, Titus received payments from Ms Naidoo's account which held the proceeds of the Jocatus fraud in the sum of R677 500, if one has regard to annexure KMS34. In addition, Joash also received payments from Ms Naidoo's account which also held the proceeds of the Jocatus fraud and according to annexure KMS35, Joash received the sum of R1 401 490. In addition, although the applicant admits that Savithree paid the purchase price towards the properties owned by Titus and Joash, it submits that the payments were the proceeds of unlawful activities as the money emanated from Jocatus' bank account.

[185] In addition, although Savithree, Joash and Titus submit that the purchase price paid towards the unit emanated from rental collected by Blue Dot Properties for unit 35 Cupido Gardens, it is evident that the purchase price for unit 35 was received from the proceeds of unlawful activities, and consequently the rental amount must also be proceeds of unlawful activities. In addition, the applicant submits that because Savithree has not discharged the onus to show that the funds in her personal FNB account were legitimate, any payments toward policies in her name are tainted by the fraud and were paid from the proceeds of unlawful activities.

[186] In relation to the investments and the policies taken out by Savithree, the applicant submits that although the monthly instalments were made from her personal FNB account 62013370325, this personal account received payments from Jocatus'

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<sup>65</sup> Ms Brander's affidavit, annexure KMS33.

bank account which is indicative of the fact that the monies in her personal account were not the proceeds of legitimate income.

[187] In support of this, bank statements relating to four payments made for the policy are annexed as annexures KMS36 to KMS39. These show the following:

- (a) On 21 January 2014, a payment of R150 000 was made into account 62013370325 by Jocatus. On 28 January 2014, the same account received three payments from Simeon on two occasions and from Titus for the sum of R8 000. On 31 January 2014, a premium of R10 000 was paid towards Savithree's Sanlam policy;
- (b) On 25 March 2014, a payment of R50 000 from Jocatus was made into Savithree's FNB personal account. On 31 March 2014, a premium of R10 000 was paid to the Sanlam policy;
- (c) On 1 December 2014, a payment of R32 200 was made by Titus into Savithree's FNB account. On the same day, a premium of R10 000 was paid towards the Sanlam policy; and
- (d) On 31 December 2014, a payment of R30 000 was made by Titus to Savithree and on the same day a premium of R10 000 was paid towards the Sanlam policy.

*Sanlam Stratus Endowment Policy, policy number 44007869X9*

[188] Savithree's FNB account 62013370325 received monies from her second FNB account 62196714333. This bank account received payment from Ms Naidoo, Ms Pillay and Gonaseelan, who in turn each received payments from Jocatus' bank account. In addition, Ms Naidoo's bank account received payments from Jocatus' bank account and then in turn Ms Naidoo effected payment to the depositors who in turn made payment into Savithree's FNB account. It would appear that the majority of the funds deposited into Savithree's FNB account are the proceeds of the Jocatus fraud.

[189] Although the monthly instalments in respect of the policy were paid from Savithree's personal account, the applicant submits that these were the proceeds of the Jocatus fraud.

[190] The applicant demonstrates by means of four examples from the extracts of the bank statements how the proceeds from the Jocatus fraud were routed through

Savithree's bank account. Having regard to annexures KMS40 to KMS44, the following becomes evident:

- (a) On 4 June 2014, a payment of R30 000 was made by Jocatus into Savithree's FNB personal account. A premium of R5 000 was paid towards the Sanlam policy on 10 June 2014;
- (b) On 8 July 2014, Ms Naidoo paid R40 000 into Savithree's FNB account. A premium of R5 000 was paid towards the policy on 10 July 2014;
- (c) On 10 July 2015, a premium of R5 500 was paid towards the Sanlam policy, subsequent to a payment of R30 000 from Jocatus on 3 July 2014 into Savithree's FNB personal account; and
- (d) On 7 September 2015, a payment of R188 700 was paid by Joash into Savithree's personal FNB account. A premium of R5 000 was paid on 10 September 2015 towards this policy.

*Sanlam Matrix Top Cover Policy, policy number 18902291X6*

[191] It is evident from the curator's report that this policy lapsed on 17 January 2017, and consequently the applicant no longer seeks a forfeiture order in respect of this policy. Although the applicant no longer seeks its forfeiture, it denies that the policy was paid for using legitimate proceeds in Savithree's personal FNB account.

[192] It is evident that FNB account 62013370325 received proceeds from transfers made from Savithree's second FNB account 62196714333. This account in turn received payments from Ms Naidoo, Ms Pillay and Gonaseelan whom in turn received payments from Jocatus' bank account. It is accordingly submitted by the applicant that the majority of the funds deposited into Savithree's account are the proceeds of fraud, such funds originating from Jocatus' bank account.

*Caleb*

[193] Caleb is not opposing the granting of the forfeiture order in relation to his Sanlam Glacier investment account 4294450 but only seeks to exclude his FNB bank account 62487822051. It is evident that Caleb's Glacier Policy was paid for using funds from Ms Pillay's FNB account 62433322667. This, the applicant submits, is an admission that Ms Pillay received proceeds from the Jocatus fraud.

*Titus*

[194] The applicant, once again, reaffirms the following, namely that the majority of funds used to purchase the property and to pay for the transfer emanated from Savithree's FNB account 62013370325. Payments were made into this account from Savithree's second FNB account 62196714333. This account in turn received payments from Ms Naidoo, Ms Pillay and Gonaseelan who in turn received payments from Jocatus' bank account. Consequently, the payments made were not from monies legitimately invested with Savithree by Titus, but were the proceeds of the Jocatus fraud.

[195] In addition, an examination of Ms Naidoo's FNB account 62254855392, shows payments to Tweety, Mali, Collen, Lallie, Titus, Roxanne, J E Samuel, Chantelle and Ester, being the various depositors having regard to annexures KMS27 to KMS30. The description by Ms Naidoo were marked with the reference 'Rita'. Rita is the name by which Savithree is also known. These depositors then made deposits into Savithree's FNB account, although the original source of these funds was Jocatus' bank account.

[196] Having regard to Savithree's FNB personal account 62013370325, six payments were made towards the purchase of Titus' property. This is evident from annexures KMS45 to KMS46. However, the flow of the funds interestingly reveals that ultimately these are the proceeds of unlawful activities in that:

(a) On 4 February 2013, a payment of R1 million was made from Savithree's FNB account 6219671433 into her FNB account 62013370325. The original source of these funds was Jocatus' bank account, which funds originally emanated from payments made by Tiger Brands. On the same day R40 000 was paid to Maritz Boshoff and Du Preez Attorneys;

(b) Between the period from 12 to 16 February 2013, Tweety, Naidoo and Collen Govender made deposits into Savithree's FNB account for the sum of R332 000. These depositors had received payments from Ms Naidoo, which in turn emanated from the Jocatus fraud. These persons then in turn made payments into Savithree's FNB account 62013370325. On 21 February 2013, R100 000 was paid by Savithree to Maritz Boshoff and Du Preez Attorneys;

- (c) Between 25 and 26 February 2013, Tweedie Naidoo, Phylene Naidoo and Loyce made deposits into Savithree's FNB account in the total sum of R83 200. These payments were received by them from Ms Naidoo. They then made deposits into Savithree's FNB account, and on 27 February 2013, Savithree paid R50 000 to Maritz Boshoff and Du Preez Attorneys;
- (d) On 4 March 2013, Savithree paid R40 000 to Maritz Boshoff and Du Preez Attorneys and on the same day a payment of R2 610 000 was received from Jocatus' bank account; and
- (e) On 22 March 2013, a payment of R800 000 was received from Gosai and Company into Savithree's FNB account. This is payment of the proceeds of fraud from Jocatus' bank account that Savithree made into the attorneys' account towards an investment. On 23 March 2013, Savithree paid R240 000 to Maritz Boshoff and Du Preez Attorneys towards the purchase price of the flat. In addition, Titus was one of the depositors who received payments from Ms Naidoo as is evident from annexure KMS34. According to this schedule, Titus and his wife, Roxanne, received R 710 000 in total from Ms Naidoo.

[197] Dealing with the alleged payments which were made to two attorneys, Ms Motala and Mr Gosai, the applicant submits that these were payments from funds that had their origin from Jocatus' bank account, and not from investors. Funds from Ms Naidoo, Ms Pillay and Gonaseelan, who in turn received payments from Jocatus' bank account were paid into Savithree's second FNB account 62196714333. Transfers were then made from this bank account to Savithree's first FNB personal account 62013370325. Ms Naidoo, who had received payments from Jocatus' bank account, made payment to various depositors who in turn thereafter made payments to Savithree's FNB bank account. It is for these reasons that the applicant submits that most of the payments that were deposited by Savithree into either Gosai and Company's trust account or Rabia Motala's trust account were the proceeds of fraud, emanating from Jocatus' bank account.

[198] By way of example, the applicant annexes as annexures KMS48 to KMS54, extracts from Savithree's FNB personal account depicting payments to the attorneys and the source of funds. These payments were made on 3 January 2013 in the amount of R2 million; 8 January 2013 in the amount of R1 015 000; 14 January 2013 in the



amount of R400 000; 4 March 2013 in the amount of R2 600 000; 10 April 2013 in the amount of R2,5 million; 3 May 2013 in the amount of R1 million; 6 June 2013 in the amount of R1 150 000; and 8 May 2013 in the amount of R1 800 000.

[199] If one then correlates this with Savithree's bank accounts, the following becomes evident:

- (a) On 3 January 2013, Savithree's personal bank account received a payment of R90 000 from Jocatus and R1 910 000 from her second bank account 62196714333. On the same day, she made payment of R2 million into Rabia Motala's bank account;
- (b) On 7 January 2013, Joash, Collen and Loyce made payments in the amount of R280 000 into Savithree's FNB account 62013370325. R760 000 was paid on 8 January 2013 by Phylene and from Savithree's second bank account 62196714333. On the same day, Savithree paid R1 015 000 into Rabia Motala's bank account;
- (c) On 14 January 2013, a payment of R837 000 was made from Savithree's second bank account 62196714333 into her FNB personal bank account 62013370325. On the same day, she paid R400 000 into Gosai and Company's trust account;
- (d) On 4 March 2013, R2 610 000 was paid by Jocatus into Savithree's FNB account 62013370325 and R33 000 was paid from her second bank account 32196714333. On the same day, R2,6 million was paid by her into Gosai and Company's trust account;
- (e) On 10 April 2013, Savithree's personal FNB account received a payment of R2 500 000 from her second bank account 62196714333. On the same day, she made a payment of R2,5 million into Gosai and Company's trust account;
- (f) On 3 May 2013, a payment of R1 million was received from Jocatus into her personal bank account, and on the same day she paid R1 million into Gosai and Company's trust account;
- (g) On 5 June 2013, Savithree's personal bank account received payments from N Govender, Collen Govender and Tweedie in the total sum R683 000. Two further payments were received on 6 June 2013 from Tweedie Naidoo and Savithree's second bank account 62196714333 in the total sum of R458 000. On the same day, Savithree paid R1 150 000 into Gosai and Company's trust account; and
- (h) Savithree was one of the 24 plaintiffs who issued summons under case number 7954/2016 against Gosai and Company and Rabia Motala, claiming payment of

R21 806 050 which is the balance of the total sum of R24 756 050 which had allegedly been invested with the attorneys. This is reflected in annexure KMS32.

[200] The applicant submits that Titus has not discharged the onus to show that the monies paid were derived from legitimate sources of income. Furthermore, the proceeds of Savithree's personal FNB account that were invested with Gosai and Company were the proceeds of unlawful activities which emanated from Jocatus, Gonaseelan and from Savithree's second bank account 62196714333. These are not legitimate sources of income. In addition, Ms Ramdeen has confirmed that an analysis of Titus' bank account reflects that Ms Naidoo paid R677 500 to Titus and his wife from the bank account which had held the proceeds of the Jocatus fraud.

[201] The applicant, in dealing with the payments made by Savithree to Titus, indicates that these payments are not the returns from investments as pleaded, but are the proceeds of the unlawful activities. In doing so, it refers to annexures KMS55 to KMS57 which reflect the following:

- (a) On 28 November 2013, Roxanne Samuel, Titus' wife paid R175 000 into Savithree's FNB personal bank account. In addition, having regard to KMS57A, Roxanne is also one of the depositors who had received payments from Ms Naidoo's bank account. On 28 November 2013, Titus made a payment of R10 000 into Savithree's personal bank account and on the same day, Savithree paid Titus R10 000;
- (b) On 5 March 2014, Joash and Gonaseelan made payments of R103 000 into Savithree's personal FNB account. They also formed part of the group of depositors who received payments from Ms Naidoo's bank account. On 6 March 2014, Savithree paid Titus R10 000; and
- (c) On 2 September 2014, two payments totalling R30 000, reflecting as salary, were made into Savithree's personal FNB account. These payments were received by her from Jocatus' bank account and on 9 September 2014, she paid Titus.

[202] Although Titus submits that he is an innocent owner of the property as his mother had made payments for the purchase of the property which were the proceeds of his investments and legitimately due to him, the applicant submits that this is not so. The applicant submits that Titus, together with Savithree, were aware of the fraud

perpetrated by Gonaseelan against Tiger Brands using Jocatus and the monies deposited into Savithree's account emanated from such fraud.

[203] The investigations show that Titus received five payments directly from Jocatus over the period from 27 July 2014 to 27 May 2015, in the total sum of R105 600. This is evident from annexure KMS58 which also shows a first payment of R600 made into Titus' account 62201210284 and the remainder of the payments made into Titus' other bank account 62258493164. In addition, further payments were received from Ms Naidoo's bank account which held the proceeds of the unlawful activities from Jocatus' bank account. Consequently, the applicant submits that Titus, together with Savithree, were involved in money laundering by disguising or concealing the nature or source of the funds, which emanated from the Jocatus fraud, to appear as legitimate funds. In addition, it submits that the property was wholly obtained from the proceeds of unlawful activities, as it was paid from Savithree's personal bank account.

[204] In addition, Titus has not shown that the deposits made into the accounts are legitimate and that they do not form part of the proceeds of the unlawful activities received from Jocatus. If one has regard to the deposits paid into Savithree's personal FNB account, Savithree made six payments for the purchase of the property and not one of these is received from Titus to show that these were the legitimate proceeds of his investments which he paid over for the purchase of the immovable property.

#### *Joash*

[205] Although Joash denies that the property constitutes the proceeds of unlawful activities, the applicant submits that it has shown that it was wholly acquired from the proceeds of unlawful activities in his hands, as it was paid for in full from funds in Savithree's personal FNB account. It is evident from deposits made by Ms Naidoo that the money in Ms Naidoo's bank account emanated from the fraud perpetrated by Jocatus. Money in Ms Naidoo's bank account then made its way into Savithree's FNB personal bank account, as is evident from annexures KMS27 to KMS30. In addition, Joash has not filed any statements from any of the alleged depositors to corroborate his version that the deposits made originated from untainted funds.

[206] The nine payments made from Savithree's personal bank account to acquire Joash's property depict the following:

- (a) On 21 February 2012, a payment of R13 000 was made from Savithree's second bank account 62196714333 into her FNB personal account 62013370325. On the same day, a payment of R5 000 towards the purchase price was made to Maritz Boshoff and Du Preez Attorneys;
- (b) A payment of R44 000 was made on 4 April 2012 from Savithree's second FNB account into her personal bank account and on the same day, a payment of R5 000 was made to Maritz Boshoff and Du Preez Attorneys;
- (c) Tweedie Naidoo made a payment of R40 000 on 28 March 2013 into Savithree's FNB account 62013370325. This is one of the depositors who had received payments from Ms Naidoo's bank account. On the same day, R40 000 was paid by Savithree to Maritz Boshoff and Du Preez Attorneys;
- (d) On 4 June 2013, a payment of R50 000 was received from Jocatus' bank account into Savithree's personal FNB account. On the same day, the same amount was transferred to Maritz Boshoff and Du Preez Attorney;
- (e) R100 000 was received from Ms Naidoo's account 622548855392 into Savithree's FNB personal account on 19 July 2013 and on the same day, the same amount was paid to Maritz Boshoff and Du Preez Attorneys;
- (f) R100 000 was once again received from Ms Naidoo's account and paid into Savithree's personal FNB account on 20 August 2013 and on the same day, the same amount was transferred to Maritz Boshoff and Du Preez Attorneys;
- (g) On 4 September 2013, R100 000 was received from Jocatus' bank account and transferred into Savithree's personal bank account. This amount was on the same day paid to Maritz Boshoff and Du Preez Attorneys;
- (h) A payment of R221 256.92 was received from a Sanlam policy into Savithree's personal bank account on 18 September 2013. On 20 September 2013, a further payment of R74 404.77 from this source was also received into her personal bank account. Titus made two payments of R42 000 into Savithree's FNB account on 27 September 2013; and
- (i) On 2 October 2013, Savithree paid R25 000 to Maritz Boshoff and Du Preez Attorneys towards the purchase price of the flat. On the same day, the bank statement shows Savithree making various payments to other depositors.

[207] It is for these reasons that the applicant submits that Joash has not disclosed the source of his funds nor has he shown that these were legitimate funds earned and that the deposits into Savithree's account were not legitimate sources of income. Joash is also one of the depositors who received payments from Ms Naidoo's bank account which in turn unlawfully received the proceeds from the Jocatus fraud. Annexure KMS35 is a schedule of payments made from Ms Naidoo's account into Joash's account which total R1 401 490. Fifteen payments were received by Joash from Jocatus' bank account for the period from 31 July 2009 to 16 July 2015, as depicted in annexure KMS67, and are therefore the proceeds of fraud which first appeared in Jocatus' bank account.

[208] The payments which were made by Savithree into Rabia Motala and Gosai and Company's trust account had their origin in Jocatus' bank account, which contained the proceeds of the unlawful activities. In light of Joash's lack of explanation as to where these funds were derived from, the payments made by Savithree to the attorneys, which constituted the purchase price of the immovable property, are the proceeds of unlawful activities. In addition, the payment of the balance of the purchase price which Joash submits were derived from the proceeds of legitimate rental income by Blue Dot Properties, are also the proceeds of crime, in that as the property was paid for by illegitimate sources of income, any rental derived from the purchase of the property is also the proceeds of unlawful activity.

*The fifth and sixth respondents*

[209] The applicant denies that the fifth respondent had no knowledge that the property was purchased with the proceeds of unlawful activities and submits that same cannot be excluded from the operation of the forfeiture order. In addition, the applicant indicates that it has no knowledge of whether the fifth respondent knew or met Savithree, Ms Naidoo and Ms Pillay. It submits that despite the fifth and sixth respondents denying knowing Ms Naidoo, there exists a payment by her on 2 September 2013 of R2 050 000 to Ponnen Pienaar and Associates towards the purchase of the Taunton Road property.

[210] In addition, the applicant denies that any of its officials are involved in corruption and invites the fifth and sixth respondents to lay criminal charges of corruption against

them, which criminal charges and allegations can be thoroughly investigated. In addition, Ms Ramdeen in reply indicates that she was not involved in the matter two years prior to its registration and indicates the matter was only registered with their office in August of 2015 when she became aware of the investigation by Ernst and Young and Tiger Brands. She does not know the fifth or the sixth respondents nor has she ever met the fifth respondent's mother or sister and denies having visited them at their residence.

[211] Ms Misra attended the same high school as her and was much younger than her but she has had no contact with her. In addition, she has no knowledge of a loan agreement concluded between Gonaseelan and Mr Persadh and denies knowing Mr Persadh's wife and Ms Kay Padayachee. The applicant denies the remainder of the allegations contained in the fifth and sixth respondents' affidavits and submits that they had reasonable grounds to suspect or knew that the immovable property was purchased with the proceeds of unlawful activities and consequently same ought to be forfeited.

*Mr Vernon Naidoo*

[212] Amongst the property which the applicant seeks a forfeiture order in respect of, are the proceeds in an Investec Bank account 1100505436500. It is common cause that the bank account is operated by Mr Vernon Naidoo. When Mr Vernon Naidoo was served with the application papers and the preservation order, he filed an affidavit deposed to on 27 January 2017 in which he indicated that he did not intend opposing the granting of a forfeiture order and 'consent[s] to the funds preserved in the aforesaid bank account to be dealt with in accordance with any Order granted by the above Honourable Court in regard thereto'.<sup>66</sup>

## **Analysis**

### ***Onus***

[213] It appears to be common cause that the parties accept that the applicant obtained the preservation order and now seeks to obtain a forfeiture order on the basis that the property listed in annexure B constitutes the proceeds of unlawful activities,

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<sup>66</sup> Affidavit of Vernon Naidoo, Volume 17, pages 1601–1603.

namely fraud. Whether or not the applicant is entitled to a forfeiture order depends on whether the evidence adduced by the applicant in support of its case establishes on a balance of probabilities that the property concerned represents the proceeds of unlawful activities.

[214] The first question to be answered is whether the applicant has succeeded in establishing that the monies in Jocatus' bank account are the proceeds of unlawful activities.

[215] Proceeds of unlawful activities is defined in section 1 of POCA as '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.'

[216] In deciding how to deal with the aforementioned definition, *National Director of Public Prosecutions v Komane and others*,<sup>67</sup> paraphrasing *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and another*; *National Director of Public Prosecutions v Seevnarayan*<sup>68</sup> held that:

'first . . . that the definition should be approached on the basis that, subject to necessary attenuation of the linguistic scope of "in connection with", it should be given its full ambit; and second . . . that bearing in mind that the objective of the Act is to render forfeit the returns that might accrue from unlawful activity, the "connection" the definition envisages requires some form of consequential relation between the return and the unlawful activity, in other words, the proceeds must in some way be the consequence of unlawful activity.'<sup>69</sup>

[217] In *RO Cook Properties*<sup>70</sup> the court held that the definition of proceeds of unlawful activities requires the property in respect of which a forfeiture order is sought

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<sup>67</sup> *National Director of Public Prosecutions v Komane and others* [2013] ZAKZPHC 73.

<sup>68</sup> *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and another*; *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA); [2004] 2 All SA 491 (SCA) paras 64-72 ('*RO Cook Properties*').

<sup>69</sup> *National Director of Public Prosecutions v Komane and others* [2013] ZAKZPHC 73 para 77.

<sup>70</sup> *RO Cook Properties* para 64.

to have been “derived, received or retained” “in connection with or as a result of” unlawful activities’.

[218] This is so because section 50 of POCA casts the onus on the applicant to prove on a balance of probabilities that it is entitled to a forfeiture order. This is consistent with the interpretation of section 50 by our courts.<sup>71</sup>

[219] In *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)*<sup>72</sup> Moseneke DCJ dealt with the onus. He held that:

‘the NDPP bears the *onus* to establish on a balance of probabilities that the forfeiture sought is justified. Naturally, the respondent in forfeiture proceedings will have to adduce evidence if she or he hopes to disturb or rebut the facts that the NDPP relies upon in the founding depositions.’<sup>73</sup>

[220] What one must also bear in mind is the difference between onus of proof and evidentiary burden. This was succinctly dealt with by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* as follows:

‘As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word *onus* has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it “the overall *onus*”. In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (“weerleggingslas”). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.’<sup>74</sup>

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<sup>71</sup> *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA); [2006] 1 All SA 317 (SCA) para 18.

<sup>72</sup> *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC).

<sup>73</sup> *Ibid* para 131.

<sup>74</sup> *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).



[221] As far back as 1913, Innes J in *Union Government (Minister of Railways) v Sykes* remarked as follows:

‘The important point is that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.’<sup>75</sup>

[222] The authors in *Law of Evidence*<sup>76</sup> explain it in the following manner:

‘The availability of evidential material, the opportunities to obtain it, or (to use the established expression) the fact that one of the parties has peculiar knowledge of a fact, does not alter the standards for assessing evidential material nor, normally, do they alter the onus of proof. The party having exclusive evidence or peculiar knowledge of a fact is therefore not required to prove the fact if, according to the usual criteria, the burden rests on his opponent. Peculiar knowledge is, nevertheless, a factor to be considered when the court has to decide whether evidence reaches the required standard.’ (Footnote omitted.)

[223] In support of the submission that the applicant has not discharged the onus, *Mr Howse SC* submits that as Ms Ramdeen has not put up an affidavit in the forfeiture application relating to the first to fourth respondents, the onus has not been discharged. This submission is misplaced. The applicant in its founding papers in the forfeiture application indicates that it relies on the affidavits submitted in the preservation application and specifically asked that they be incorporated. In dealing with the opposition to the forfeiture application and the section 39(3) application for the exclusion of interest, the applicant relies on the affidavits and the annexures to the preservation application. In my view, it is not necessary for the applicant to pertinently regurgitate the contents of Ms Ramdeen’s affidavit in the forfeiture application to discharge the onus.

[224] Although the applicant does not refer to onus in its founding affidavit, it is clear that it is aware thereof given the heads of arguments filed but also having regard to the authorities. In any event, I have considered the onus and evidentiary burden which both parties face in the current application in reaching my conclusions.

[225] A further submission was made that the applicant has attempted to make out a

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<sup>75</sup> *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173–174.

<sup>76</sup> CWH Schmidt and H Rademeyer *Law of Evidence* (May 2023 – Service Issue 21) para 3.2.2 at 3-28.

case in reply. The applicant, in its forfeiture application, relied on the preservation application and the affidavits annexed thereto. It subsequently in reply dealt with certain of the allegations and objections raised by the respondents both in their section 39(3) affidavit as well as the affidavits filed in opposition to the forfeiture application and for the exclusion of their interests. It must follow that I do not accept the submission that a case was made out in reply-all the applicant did was deal with the opposition advanced for the first time in the forfeiture application, logically it could not have done so in the preservation application as it was not at that stage aware of the nature of the opposition.

***The approach to be adopted by a court considering final relief in forfeiture proceedings***

[226] Any factual dispute arising on the papers should be resolved in terms of the *Plascon-Evans* rule.<sup>77</sup> The principles established in *Plascon-Evans* for the resolution of factual disputes was further clarified and amplified by the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* as follows:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.’<sup>78</sup> (Footnote omitted.)

[227] Whether or not a denial by a respondent of a fact alleged by an applicant is sufficient to raise a real, genuine or *bona fide* dispute of fact, was dealt with by the

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<sup>77</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C.

<sup>78</sup> *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA) para 26.

Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* as follows:

‘A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’<sup>79</sup>

[228] Although the first to fourth respondents attempt to suggest that there are disputes of fact on the papers in light of their opposition, specifically in relation to the source of monies, I do not agree that these are genuine and bona fide disputes of fact envisaged in *Wightman and Zuma* referred to hereinbefore. In this particular matter, the first to fourth respondents have contented themselves with a mere denial and have attempted to shift the onus to the applicant.

[229] In circumstances where the respondents were faced with a *prima facie* case that the property is the proceeds of unlawful activities, it not does not assist the respondents to ask that the applicant investigate the monies and properties to

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<sup>79</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) para 13

establish that they are in actual fact the proceeds of unlawful activities. Matters peculiarly within the knowledge of the respondents require them to place all the information before the court. This is especially so in relation to the first respondent and the monies allegedly paid by investors. In addition in opposition Savithree has indicated that she would supplement her papers to deal with the exclusion of certain interests. She did not do so.

### ***The forfeiture application***

[230] It is against this backdrop that the issues in this application fall for determination. Part of the answer to deciding this issue involves one having regard to the purpose of POCA, the reasons for its enactment and what it attempts to achieve.

[231] POCA's purpose was carefully considered by a unanimous judgment of the Constitutional Court in *National Director of Public Prosecutions and another v Mohamed NO and others* as follows:

'[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

[15] It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the

purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature.<sup>180</sup>

[232] In order to succeed in the present application, the applicant has to prove on a balance of probabilities that the property concerned is ‘the proceeds of unlawful activities’ as contemplated by section 50(1)(b) of POCA.

[233] The applicant submits that it has established on a balance of probability that the property is the proceeds of unlawful activity, namely fraud. The property was derived from funds which were deposited into Jocatus’ bank account by Tiger Brands based on a fraudulent misrepresentation that Jocatus had rendered services to Tiger Brand and was thus entitled to these funds.

[234] The applicant submits further that neither of the respondents, save for the second respondent who has abandoned his opposition, have adduced sufficient proof to rebut its allegations and to have their interest in the property excluded. The first respondent also admits that the funds paid to Jocatus from Tiger Brands are the proceeds of unlawful activities.

[235] In addition, it submits that the third to sixth respondents have not proved their legally acquired interests and/or innocent owner defences on a balance of probability. The first and third to sixth respondents admit that the funds paid by Tiger Brands to Jocatus were the proceeds of unlawful activities. There is also a concession that certain of the immovable properties acquired were acquired with proceeds of unlawful activities and with legitimate funds.

[236] The offences and unlawful activities on which the applicant relies are fraud. It is common cause that fraud falls within the ambit of Schedule 1 to POCA. In determining whether the offences/unlawful activities have been proved on a balance of probabilities, one must bear in mind that the respondents, with the exception of the fifth and sixth respondents, deny that the monies are the proceeds of unlawful activities. The first respondent seems to concede that a certain portion of the monies

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<sup>80</sup> *National Director of Public Prosecutions and another v Mohamed NO and others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) paras 14-15.

are from illegitimate sources, albeit that she also alleges that she had legitimate sources in her bank account.

[237] This in turn involves a question as to whether or not one applies a wide or narrow definition of ‘proceeds of unlawful activities’. Given the defence raised, the question is whether or not the property concerned can be forfeited as it was ‘derived or received’ in part before any unlawful activity had taken place.

[238] In *NDPP v Carolus*,<sup>81</sup> which was confirmed on appeal by the Supreme Court of Appeal,<sup>82</sup> Blignault J held the following with regard to the definition of proceeds of unlawful activities in the context of section 38(2)(b) of POCA

‘In order to be able to rely on subpara (b), that is the “proceeds of unlawful activities”, it is clear that the applicant must establish a connection or link between the alleged unlawful activity and the property concerned. In terms of the definition there must be evidence that the property was derived, received or retained, directly or indirectly, in connection with or as a result of the unlawful activity carried out by any person.’<sup>83</sup>

[239] If the applicant has failed to establish a connection or link between the alleged unlawful activity and the property concerned, then it raises the further question as to whether it can be found that the property was ‘retained as a result of any unlawful activity’. In relation to the purpose and nature of preservation orders in chapter 6 of POCA, the primary focus is on property that has been used to commit an offence or which constitutes the proceeds of crime rather than the offenders themselves. Consequently ‘the guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings’.<sup>84</sup>

[240] By the same token, our courts have held that POCA ‘requires property owners to exercise responsibility for their property and to account for their stewardship of it in

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<sup>81</sup> *The National Director of Public Prosecutions v Carolus and others* 1999 (2) SACR 27 (C); [1999] 2 All SA 607 (C).

<sup>82</sup> *National Director of Public Prosecutions v Carolus and others* 2000 (1) SA 1127 (SCA); [2000] 1 All SA 302 (A).

<sup>83</sup> *The National Director of Public Prosecutions v Carolus and others* 1999 (2) SACR 27 (C); [1999] 2 All SA 607 (C) at 39B-D.

<sup>84</sup> *National Director of Public Prosecutions and another v Mohamed NO and others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) para 17. See also *RO Cook Properties* para 10.

relation to its possible criminal utilisation'.<sup>85</sup> However, a constitutionally permissible relationship

'between the purpose of the forfeiture and the property to be forfeited must be close, that the purpose of the forfeiture must be compelling and that a proportionality analysis - in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role it played in its commission - may at the final stage in addition be appropriate.'<sup>86</sup>

[241] In this matter the applicant seeks the forfeiture on investments made by Savithree on the basis that these are proceeds of crime. *Seevnarayan*<sup>87</sup> concerned investments totalling R4 115 738.58 that a taxpayer had made under false names with Sanlam. The purpose thereof was to conceal the money and the proceeds to evade income tax. The fraudulent scheme was uncovered when the taxpayer tried, with the assistance of his attorney, to withdraw the investments from Sanlam and Sanlam demanded proof of identity. The NDPP sought a forfeiture of the investments and the interest earned either as instrumentalities of offences alternatively the proceeds of unlawful activities.

[242] Griesel J dismissed the application as he found that the money was not the means by which the fraud and tax evasion was committed and that the NDPP had not shown that the capital amount or the interest earned were 'proceeds of unlawful activities'. The NDPP took the matter on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal did not agree with the court *a quo*'s reasoning and stated the following in paragraph 58 .."In our view, this states the issue too narrowly. As we showed earlier, the Act's definition of 'instrumentality' goes deliberately wider than the 'means' by which an offence is committed. It embraces property 'concerned in' the offence. The question is thus not whether the fraud was committed 'by means of' the investments, but whether the money invested was 'concerned in the commission' of the fraud on either Sanlam or the revenue services within the intendment of the statute'

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<sup>85</sup> *RO Cook Properties* para 29.

<sup>86</sup> *RO Cook Properties* para 30.

<sup>87</sup> *National Director of Public Prosecutions v Seevnarayan* 2003 (1) SACR 260 (C); [2003] 1 All SA 240 (C).

[243] In considering whether the property was the proceeds of unlawful activities, the SCA considered the definition as follows

‘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. Griesel J considered that a literal application of the definition would lead to absurd and grossly inequitable results, and that a restrictive interpretation was therefore imperative.’<sup>88</sup>

The Supreme Court of Appeal found that in coming to this conclusion, Griesel J had relied on the short title of POCA and applied a restrictive approach.

[244] It did not agree with the approach adopted by Griesel J and opined that POCA applied to cases of individual wrong-doing. It held the following

‘We cannot agree with this construction, which radically truncates the scope of the Act. It leaves out portions of the long title, as well as the ninth paragraph of the preamble. These show that the statute is designed to reach far beyond “organised crime, money laundering and criminal gang activities”. The Act clearly applies to cases of individual wrong-doing.’<sup>89</sup>

[245] It further held the following

‘It is evident that the definition of “proceeds of unlawful activities” is cast extremely wide, and the interpretative caution Miller JA expressed regarding “in connection with” in *Lipschitz NO v UDC Bank Ltd* . . . applies. But with that adjustment made, we consider that the amplitude of the definition should be approached somewhat differently from that in the case of “instrumentality of an offence”. This is because the risk of unconstitutional application is smaller.’<sup>90</sup>

[246] The court concluded that the definition should be given its full ambit ‘subject to necessary attenuation of the linguistic scope of “in connection with”’.<sup>91</sup>

[247] The issue was whether the capital and interest constituted the proceeds of unlawful activities. On appeal, the NDPP in *RO Cook Properties* made two submissions in relation to the capital, namely firstly, that based on inferences it asked the court to draw, the whole sum invested represented the proceeds of unlawful

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<sup>88</sup> *RO Cook Properties* para 64.

<sup>89</sup> *RO Cook Properties* para 65.

<sup>90</sup> *RO Cook Properties* para 66.

<sup>91</sup> *RO Cook Properties* para 67.



activities and secondly, that ‘the entire amount was “retained” in connection with or as a result of unlawful activities’.<sup>92</sup> In relation to the first submission, the Supreme Court of Appeal declined to draw the inference that the funds were derived from unlawful activities. As regarded the alternative argument, the court also rejected this on the basis that it would entail ‘that the sum invested somehow changed its character in the course of the scheme so as to taint it with the fraud’.<sup>93</sup> The Supreme Court of Appeal similarly rejected this argument as the fraud was committed by Mr Seevnarayan investing under false names.<sup>94</sup>

[248] In relation to the interest earned on the investments, the NDPP in *RO Cook Properties* submitted that such interest represented the proceeds of unlawful activities. The Supreme Court of Appeal held that the question to be answered was whether ‘the interest was earned “in connection with or as a result” of his unlawful activity in making false representations to Sanlam and to the revenue service’. The Supreme Court of Appeal took the view

‘that Seevnarayan did not derive, receive or retain the interest “as a result of” his unlawful conduct in making false representations to Sanlam and to the revenue service. The interest was the direct result of his investment, and not his false statements.’<sup>95</sup>

[249] In determining whether Mr Seevnarayan derived, received or retained the interest in connection with his unlawful activity, the Supreme Court of Appeal likewise did not agree that he did. It opined that even if the words “in connection with” were intended to broaden the scope of the definition, the accrual of property must flow in some way directly or indirectly from the unlawful activity.<sup>96</sup> This would be consistent with the objective of POCA to forfeit the returns accrued from unlawful activity and in keeping with the definition that ‘the proceeds must in some way be the consequence of unlawful activity’.<sup>97</sup>

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<sup>92</sup> *RO Cook Properties* paras 68-69.

<sup>93</sup> *RO Cook Properties* para 69.

<sup>94</sup> *Ibid.*

<sup>95</sup> *RO Cook Properties* para 70.

<sup>96</sup> *RO Cook Properties* para 71.

<sup>97</sup> *RO Cook Properties* para 72.

[250] Even in applying a broad interpretation to the definition, the Supreme Court of Appeal took the view that there was no connection between the interest earned and any of the offences which Mr Seevnarayan had committed. The interest did not accrue to him as a consequence of his conduct in providing false information to Sanlam but from his conduct in making the investments. The interest accrued to him was not an accrual that flowed from the commission of the offence.

### ***The evidence***

[251] The applicant relied on the evidence contained in the affidavits of Mr Kenneth Mark Samuel and specifically that of Ms Ramdeen and the annexures to the affidavits. Firstly, it is evident from the internal investigations conducted by Tiger Brands that there was never an enterprise development agreement with Jocatus in terms of which it rendered logistics services. We also know that a fraud was perpetrated on Tiger Brands by Gonaseelan who manufactured invoices and handed these to Ms Mewalall to process.

[252] We know that Tiger Brands made payment to Jocatus in the total amount of R121 679 095.70. Savithree was the sole member of Jocatus and has conceded that the monies paid into Jocatus' bank account by Tiger Brands were the proceeds of the fraud perpetrated on Tiger Brands by inter alia Gonaseelan. The fraud was perpetrated by way of fraudulent invoices submitted by Gonaseelan. Ms Ramdeen who conducted the investigation, demonstrated that subsequent to the payments by Tiger Brands to Jocatus, funds were disbursed to other bank accounts belonging to Savithree, and other individuals and entities, including among others Mr Vernon Naidoo, Ms Naidoo, Ms Pillay, Sanlam and Discovery Invest. The investigation of various bank accounts, entities as well as individuals revealed that Jocatus made payments of R119 729 812.90 to the following individuals:

- (a) Savithree's FNB Premier Cheque account 62013370325 in the sum of R4 908 600;
- (b) Savithree's FNB Money Market Investor account 62196714333 in the sum of R6 909 000;
- (c) Ms Naidoo's FNB Money Market Investor account 6225 4856 332 in the sum of R70 581 369.90;

- (d) Ms Naidoo's FNB Gold Cheque account 62254855392 in the sum of R6 220 000;
- (e) Ms Pillay's FNB account 62433322667 in the sum of R28 610 843; and
- (f) Savithree's Discovery Invest policy in the sum of R2 500 000.

[253] In addition, Ms Ramdeen's analysis and investigations revealed that the proceeds of the funds in Jocatus' bank account were also channelled and paid to the following persons:

- (a) Gonaseelan received R64 106 507.39 from Savithree, Ms Naidoo, Ms Pillay and Caleb;
- (b) Caleb received R70 500 000, which was paid into his Sanlam Policies by Ms Pillay and Savithree. There were also indirect payments from Jocatus' bank account, as Savithree and Ms Pillay had received the money from Jocatus earlier on;
- (c) Mr Vernon Naidoo received R15 000 000 from Gonaseelan that was channelled through Gonaseelan's bank accounts to Mr Vernon Naidoo's Investec account;
- (d) Both Titus and Joash received the proceeds of unlawful activities, being the three sectional title properties in Cupido Gardens, Chatsworth, as these were paid for by Savithree with the proceeds of the funds from Jocatus' bank account; and
- (e) Mr Dhruvasen and Ms Sally Govender received an immovable property which was purchased from the proceeds of the unlawful activities being the monies in Jocatus' bank account that was paid for by Ms Naidoo.

[254] The internal investigations done by Tiger Brands revealed that there was no valid enterprise development agreement, and in fact, there was no indication that Jocatus was running a logistics transportation or logistics company. Ms Mewalall confirmed that the fraudulent purchase orders were generated and processed in favour of Jocatus through the Tiger Brands computer system, after these invoices were handed over to her by Gonaseelan. She confirmed that she had processed these on the instruction of Gonaseelan. In addition, Gonaseelan contrived a plan with regard to the coding of these invoices, and instructed Ms Mewalall to debit them to different financial accounts to avoid detection. Various employees of Tiger Brands confirmed that they were not familiar with Jocatus nor were any logistics services provided by it. It is irrefutable that as a consequence of Gonaseelan's fraudulent conduct, Tiger

Brands was induced into making payment to Jocatus into its FNB account in the amount of R121 679 095.70.

[255] Before dealing with each of the individual respondents, I propose to deal briefly with the affidavit filed by Mr Vernon Naidoo<sup>98</sup> in respect of the Investec account 1100505436500. Mr Vernon Naidoo in such affidavit indicates that he consents to the funds which have been preserved in the Investec account being dealt with in any manner which this court deems fit. Given the nature of his involvement and the transfer of funds from his Investec account to Gonaseelan, it is clear that the monies which made their way into his Investec account are the proceeds of crime and consequently fall to be forfeited in the absence of any opposition.

[256] Turning now to each of the individual respondents and their request for the exclusion of their interests.

*Caleb*

[257] Although he initially filed an affidavit in terms of section 39(3) seeking to have his interest in the property and bank accounts excluded from the operation of the forfeiture order, it is evident that he no longer opposes the granting of the forfeiture order, specifically in relation to the immovable property situated at Cupido Gardens. In addition, the applicant no longer seeks the forfeiture of the monies in his bank account as these are legitimate sources of income. The second respondent does not oppose the granting of a forfeiture order in respect of his Glacier Investment account 4294450 and the credit balance in his FNB account 62487822051.

[258] The relevance though of Caleb's affidavit and the documents put up in support of his opposition is that it shows a stream of income from his account into that of Savithree and Gonaseelan. The applicant has consented to an order excluding his FNB account 62471044679 from the operation of forfeiture order as this is the account from which he conducts his personal banking and his salary and other legitimate income are paid into their account.

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<sup>98</sup> Annexure KMS25, Volume 16, pages 1599–1600; Volume 17, pages 1601–1603.

*Titus*

[259] Titus submits that he is the registered owner of section 30 of Cupido Gardens and that such property was acquired from funds lawfully earned. He admits that some of the funds paid towards the purchase price were paid by his mother Savithree, but indicated that this was money due to him based on the return of his investments. He submits that any assistance which he received from his mother Savithree was based on the understanding that such funds were legitimate funds. In addition, he also indicates that it would be disproportionate to order the forfeiture of the entire property, considering that a portion of it was paid from legitimate funds.

*Joash*

[260] Joash seeks to exclude the property situated in sections 35 and 232 of Cupido Gardens from the operation of the forfeiture order. He submits that these were paid for from funds due to him based on his investment in his mother's investment business. He was at all times under the impression that even though she paid for it, the money used was money legitimately owing to him. In addition, he indicates that it would be disproportionate to forfeit the property on the basis that not all the funds were illegitimate.

[261] It is evident that the monies and immovable properties are property which fall within the definition of property in section 1 of POCA. The monies in Jocatus' bank account are the proceeds of unlawful activities, in this instance fraud, and any property obtained with such monies constitute the proceeds of unlawful activities.

[262] The facts of the current matter are different from those which existed in *Seevnarayan*. In this instance one has the proceeds of the monies from the fraud on Jocatus being utilised when making the investments. The applicant has established in my view on a balance of probabilities that monies from the Jocatus account were channelled through various bank accounts and ultimately to Savithree and Caleb which resulted in the investments with Discovery and Sanlam. None of these monies were from legitimate sources of income. In relation to Savithree's one policy it has no value and it is therefore not necessary to deal with whether it was partially paid for prior to Jocatus monies finding their way into Savithree's FNB accounts.

[263] Consequently, the funds utilised for such investments and the interest accrued are the proceeds of unlawful activities. The interest earned on the investments are as a 'consequence of the unlawful activity, being the fraud.

[264] The applicant has adduced evidence that the three Sanlam policies acquired by Savithree were partly serviced from funds received from Jocatus as these monies were paid into her FNB account 62013370325. From 4 August 2009, Savithree's FNB account started receiving the proceeds of the Jocatus fraud. The monthly premiums of the Matrix Top Cover policy, although taken out on 1 April 2004, were subsequently serviced with the funds from Savithree's FNB account. In addition, both the Stratus Endowment policy 44000077X6 and the Stratus Endowment policy 44007869X9 were taken out on 30 January 2014, subsequent to Savithree's FNB account receiving funds from Jocatus. Consequently, these two policies were fully serviced from the fraudulent funds received from Jocatus.

[265] The Discovery Endowment Plan policy number 8550060814 was paid for by Savithree in the sum of R4 million. R2,5 million was received from Jocatus' bank account on 8 July 2014 and paid directly to Discovery and R1,5 million emanated from Caleb's FNB account 62471044679, also on 8 July 2014. The amount of R1,5 million was the proceeds that were initially received by Jocatus, paid over to Ms Pillay's account who in turn then paid these proceeds into Caleb's Sanlam Glacier Investment account. Caleb withdrew the R1,5 million from the Sanlam Glacier Investment account and paid it into Savithree's policy. Consequently, this policy is the proceeds of unlawful activities.

[266] The Discovery Endowment Plan policy 8550019612 in terms of Ms Ramdeen's affidavit were serviced entirely from Savithree's FNB account 62013370325 which were the proceeds of the Jocatus fraud. The policy commenced on 1 October 2010 and Savithree had already commenced receiving payments from Jocatus into her FNB account 62013370325 from which the monthly premiums for this policy were paid.

[267] In respect of the Discovery Endowment Plan policy 8550070958, Savithree paid a lump sum contribution of R1,7 million into the policy which amount had been received from Caleb's FNB accounts 62487822051 and 62510028831 on 18 March 2015. This

R1,5 million which emanated from Caleb, was withdrawn from his Sanlam Glacier Investment account on 16 March 2015. Consequently, at least 80% of the policy represents the proceeds of unlawful activities and these monies were received by Caleb from the withdrawal of his Sanlam Glacier Investment account. What is also evident is that Caleb's Sanlam Glacier Investment account withdrawals were paid into his FNB account 62471044679, which shows that his FNB account received the proceeds of unlawful activities.

[268] The facts of the current matter are different from those which existed in *Seevnarayan*. In this instance one has the proceeds of the monies from the fraud on Jocatus being utilised when making the investments. The applicant has established in my view on a balance of probabilities that monies from the Jocatus account were channelled through various bank accounts and ultimately to Savithree and Caleb which resulted in the investments with Discovery and Sanlam. None of these monies were from legitimate sources of income. In relation to Savithree's one policy it has no value and it is therefore not necessary to deal with whether it was partially paid for prior to Jocatus monies finding their way into Savithree's FNB accounts.

[269] Consequently, the funds utilised for such investments and the interest accrued are the proceeds of unlawful activities. The interest earned on the investments are as a 'consequence of the unlawful activity, being the fraud.

[270] If one considers Ms Ramdeen's affidavit and the payments to Maritz Boshoff and Du Preez Attorneys, the sum of R475 000, which was the purchase price of the property, was paid by Savithree to the attorneys. These are monies which were paid from Savithree's FNB account 62013370325, which account received the proceeds of the Jocatus fraud. Similarly, the attorneys received nine payments in the sum of R475 000 by Savithree towards Unit 35 Cupido Gardens in the name of Joash. Similarly, the purchase price was paid for with the proceeds from the Jocatus fraud from Savithree's FNB account.

[271] Similarly Savithree made two payments to the attorneys totalling R15 000 in respect of Unit 232 and once again these are the proceeds of crime which emanate from Savithree's FNB account which in turn received the proceeds of the Jocatus

fraud. The applicant acknowledges that the source of two payments in the amount of R18 200 and R21 800 were not investigated by Ms Ramdeen. The purchase price was R55 000, and although the source could not be established, R21 800 was paid from rental income derived for the property. Such rental income are the proceeds of crime as the property was purchased with the proceeds of crime. Consequently, a major portion of the purchase price for the property was paid by Savithree using the funds from the Jocatus fraud in her FNB account 62013370325.

[272] It is evident that Savithree did not have any legitimate source of income apart from the fraudulent monies which emanated from the Jocatus fraud. In addition, the deposits made into her account were not legitimate. It is evident that Ms Naidoo made payments to the depositors, who then in turn made payments to Savithree's FNB account and therefore these were not legitimate deposits. In addition, it would have been a simple matter for Savithree to obtain affidavits from these alleged "depositors" to verify the legitimacy of the deposits. In addition, none of the persons who deposited money into her account have been verified.

[273] As the names have not been verified, and the fact that these funds emanated from Ms Naidoo's payments to them, points to the fact that they are not legitimate and that Savithree's version in relation to the origin of these funds is not corroborated. In any event, Ms Brander from the South African Reserve Bank confirmed that the first respondent was not registered as a bank in terms of the Banks Act nor was she registered as a mutual bank in terms of the Mutual Banks Act. Consequently, these deposits were in contravention of section 11 of the Banks Act, as Savithree received deposits from more than 20 investors in excess of R500 000.

[274] Most notably, the third and fourth respondents have not disclosed the source of their funds for their investments with Savithree. Given that the third respondent received payments from Ms Naidoo's account, which money emanated from the Jocatus fraud, and Roxanne his wife received R677 500 000 from Ms Naidoo, the most probable version is that these funds emanated from the Jocatus fraud, as is evidenced by annexure KMS34. The fourth respondent received payments from Ms Naidoo's account which account held the proceeds of the Jocatus fraud, which according to annexure KMS5 totalled R1 401 490.



[275] The monies of the alleged depositors reveals the following. Monies were paid from Jocatus' bank account into Savithree's account 62196714333 and not to Ms Pillay's nor Gonaseelan's accounts. Ms Naidoo used her FNB account 62254855392 to make payments to Tweety, Mali, Collen, Lully, Titus, Roxanne, JE Samuel, Chantelle and Esther (being among the depositors). Ms Naidoo's bank account reflects payments to the said depositors with the reference 'Rita'. It is common cause that Savithree is also known by the name Rita. Savithree has not denied this.

[276] These depositors then in turn made payments into Savithree's FNB account 62013370325. These funds emanated from Ms Naidoo's account, which in turn received the proceeds of crime from Jocatus' bank account. These deposits were made by depositors in an attempt to create the impression that the funds in Savithree's FNB account 62013370325 emanated from a legitimate source, whereas the original source of these funds was Ms Naidoo's FNB account, which in turn had received the proceeds of crime from Jocatus' bank account.

[277] Firstly, there is a concession by Savithree that the monies from Jocatus are the proceeds of the fraud committed by Gonaseelan. She, Caleb, Joash and Titus in addition submit that some of the monies emanated from investors and were thus legitimate income. legitimate money was mixed with illegitimate money, albeit on a small scale. This is often referred to as commixtio. In insolvency law, the principle which emerges is that money deposited into a banking account becomes the property of the bank by virtue of commixtio but the resulting credit belongs to the customer and the account holder has a personal right to the funds held in the account. This was considered in the decision of *South African Reserve Bank v Leathern NO and others*.<sup>99</sup> In this instance if one accepts Savithree's say so then the monies in account do not belong to her and she has no right to lay claim to them.

[278] In my view, Savithree has not established that these are legitimate monies from investors. All she has done is content herself with an allegation to such effect. One would have expected that these persons would have put up confirmatory affidavits confirming this. Secondly, even if she was taking money from investors she had no

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<sup>99</sup> *South African Reserve Bank v Leathern NO and others* [2021] ZASCA 102; 2021 (5) SA 543 (SCA); [2021] 4 All SA 368 (SCA) ('Leathern').

entitlement to do so as she was not registered as a Bank or mutual bank as indicated by the applicant.

[279] In addition I do not accept that these monies are from investors. The applicant demonstrated that these were monies channelled to various persons to create the impression that they were monies from investors. In fact Ms Ramdeen's affidavit relating to the flow of these funds demonstrates they were not. In my view the applicant has discharged the onus of demonstrating that these were the funds from Jocatus which were channelled to disguise the true source thereof. Consequently, it must follow that I do not accept that the first to fourth respondents have discharged to onus of establishing that the properties fall to be excluded from forfeiture.

[280] I have no doubt that Savithree was a party to Gonaseelan's fraud. How else would he have perpetrated the fraud? In addition, I have no doubt that she, her sons, Mr Vernon Naidoo, Ms Naidoo, Ms Pillay and others also knew of the fraud and assisted in disbursing the funds and trying to conceal the true source of the funds.

[281] In my view, the applicant has established that the funds in Jocatus' bank account were the proceeds of crime, namely fraud. An elaborate plan was hatched to disguise the true origin of the funds. No legitimate income was earned by Savithree and the property acquired in annexure B was acquired with the proceeds of the unlawful activities. No investors exist. These were the Jocatus funds cleverly disguised.

#### *The fifth and sixth respondents*

[282] Section 50(1) of POCA authorises the court, subject to section 52, to make a forfeiture order if it is found as a matter of probability that the properties are proceeds of unlawful activities. It cannot be disputed that the property in the present matter is the proceeds of unlawful activities. In terms of section 52(2) of POCA:

'(2) The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order—

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.’

[283] Nugent JA held the following in *Mazibuko and Another v National Director of Public Prosecutions*:

‘Section 52 of POCA provides what has loosely been called an “innocent owner” defence to a person whose interests are affected by a forfeiture order (though that is a misnomer because, as pointed out in *Cook Properties*, “innocence [of the offence] is not enough”). That section permits a court to exclude “from the operation of [a forfeiture order]” what are called “certain interests” in the property concerned, if it is shown by the applicant for such an exclusion that the interest was legally acquired, and that he or she “neither knew nor had reasonable grounds to suspect” that the property in which the interest is held is an instrumentality of the offence.’<sup>100</sup> (Footnotes omitted.)

[284] In this matter the fifth and sixth respondents contend they are innocent owners. *Mazibuko* concerned an appeal by the appellants, who were married to each other in community of property, against a forfeiture order granted by Nicholson J in the court *a quo*. The court *a quo* ordered the forfeiture of a farm jointly registered in their names to the State on the basis that it was an instrumentality of an offence involved in the unlawful manufacture of drugs. It was common cause that both appellants relied on the ‘innocent owner’ defence as contemplated in section 52(2A) of POCA. It was conceded that the farm was an instrumentality of an offence and that in relation to the proportionality argument this was in favour of the NDPP. The second appellant, who was the wife, submitted that she neither knew nor had reasonable grounds to suspect that the farm was used as an instrumentality of an offence.

[285] It emerged in the court *a quo* that the first appellant knew of the unlawful manufacture of drugs on the farm. The conundrum facing the court *a quo* related to the fact that the second appellant’s interest in the farm formed an undivided and indivisible part of the joint estate by virtue of her marriage in community of property to the first appellant. The NDPP had argued that to exempt the second appellant’s

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<sup>100</sup> *Mazibuko and another v National Director of Public Prosecutions* [2009] ZASCA 52; 2009 (6) SA 479 (SCA); [2009] 3 All SA 548 (SCA) para 40 (‘*Mazibuko*’).

interest from the immovable property would defeat the purpose of POCA and would be inimical to the spirit and purpose of POCA, as by allowing her to retain her half share in the property, the first appellant would enjoy the proceeds of his illegal activities.

[286] Bosielo AJA, in a minority judgment, took the view that even if the first appellant did not have actual knowledge of the operations on the farm, 'because he did not act like a reasonably diligent and vigilant property owner as envisaged by sections 1(3)(a) and (b) of POCA', he could not abdicate his responsibility over the farm, and '[g]iven the magnitude of the illegal activities on the farm' it could not be said that he did not know what was happening on the farm. Both the first and second appellants had a 'responsibility to ensure that the farm was not used for unlawful purposes'.<sup>101</sup>

[287] Bosielo AJA<sup>102</sup> approved of the following dictum by Supreme Court of Appeal in *RO Cook Properties*:

'We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional State law-abiding property-owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to encourage this. Here constitutional principle recognises individual moral agency and encourages citizens to embrace the responsibilities that flow from it.'<sup>103</sup>

[288] Bosielo AJA then held that a court can exercise a discretion, when faced with an application for forfeiture, to grant the order and the applicant for the exclusion of his or her interest 'has to prove that he or she acquired the property lawfully and further that he or she did not know or did not have reasonable grounds to suspect that the property was used as an instrumentality of an offence referred to in Schedule 1'.<sup>104</sup> Bosielo AJA acknowledged that the effects of forfeiture are draconian and invasive of people's rights to their property. There as a conflict between the right to property as

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<sup>101</sup> *Mazibuko* paras 16-18.

<sup>102</sup> *Mazibuko* para 17.

<sup>103</sup> *RO Cook Properties* para 28.

<sup>104</sup> *Mazibuko* para 21.

entrenched in section 25(1) of the Constitution and an order for the forfeiture of property under section 50(1) of POCA.

[289] Bosielo AJA took the view that the forfeiture order granted by the court *a quo* against the second appellant did not pass constitutional muster and constituted an arbitrary deprivation of her right to property. It offended the purpose of POCA and could not stand. He took the view that there was nothing wrong with a forfeiture order being granted save that the curator *bonis* ought to pay to the second appellant her half share from the proceeds of the sale of the immovable property once all legitimate claims against their property had been settled. He found that this order was appropriate as the forfeiture was aimed at the instrumentality of offence, being the property and not the proceeds. Such proceeds derived from the sale of the property can never be equated with an instrumentality of an offence. He was of the view that there was no legal impediment for the second appellant to be paid her half share of the proceeds after the sale of the farm.

[290] Nugent JA did not agree with the order proposed by Bosielo AJA and was of the view that Bosielo AJA's judgment did not address the difficulty which presented itself in the matter. He was of the view that the court *a quo* declined to make an order excluding Mrs Mazibuko's interests in the operation of the forfeiture order as it was not in law permitted to do so as the interest in the property which was enjoyed by the second appellant was not capable in law of separation. Nugent JA held that the court is not concerned with ordinary rights of co-owners.

[291] The section was however capable of a construction that avoided yielding an unconstitutional result. Nugent JA held that the second appellant had an 'interest in the proceeds of the property as she has in the property itself, albeit that the accrual of that interest might be contingent on its sale, and I see no reason why that contingent interest does not fall within the wide definition of the term in the statute. Clearly the proceeds of the sale are susceptible to separation. It seems to me in the circumstances that Mrs Mazibuko's contingent interest in the proceeds of a sale is capable of being excluded from the operation of the order so far as the order operates to require the curator *bonis* to deposit the proceeds into the Account.'

[292] In my view the facts of this matter are decidedly different from that which pertained in *Mazibuko*. The fifth and sixth respondents deny being part of any criminal acts and confirmed that it was Gonaseelan, the fifth respondent's brother, who was responsible for the fraud. In addition, this was an affected gift and consequently because they knew nothing of the criminal conduct and the fraudulent manner in which the property was purchased, it ought to be excluded from the operation of the forfeiture order.

[293] I have no doubt that the fifth respondent was not a party to Gonaseelan's fraudulent conduct. He had the foresight at the time his brother purchased the home for him to enquire where the money was coming from for him to purchase the property. There is no basis to doubt his sincerity that he looked upon this as a gesture from his brother as he was taking care of his parents and had been taking care of them their entire lives.

[294] In relation to the fifth and sixth respondents, no matter how sympathetic I am to their plight, I have to accept that the property is the proceeds of unlawful activities and purchased from the proceeds of the fraud perpetrated on Tiger Brands. There is evidence in the affidavit of Ms Ramdeen that these monies were paid for by Ms Naidoo and she in turn received these funds from Jocatus' bank account. It is clear that the property so derived is the proceeds of unlawful activities. In addition the fifth and sixth respondents have conceded this. They have acknowledged that their suspicions were aroused when the purchase of the property occurred. They do not in my opinion constitute innocent owners as envisaged in *Mazibuko* or in s 52 which justify the exclusion of their interest in the immovable property.

[295] Turning now to deal with the proportionality enquiry. Prior to granting a forfeiture order under POCA a court must enquire as to whether such an order would amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution. In *National Director of Public Prosecutions v Van Staden and others*, Nugent JA states the proportionality rule thus

'To avoid an order for forfeiture in such cases being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination, the extent to which the deprivation

is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function.<sup>105</sup>

[296] The SCA, with reference to *Van der Burg and another v National Director of Public Prosecutions and another*,<sup>106</sup> has held that ‘the standard of proportionality under POCA amounts to no more than that forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution’.<sup>107</sup> The proportionality ‘enquiry is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, against the right not to be arbitrarily deprived of property’.<sup>108</sup> The primary focus of forfeiture is ‘aimed primarily at crippling or inhibiting criminal activity; and that it is likely to have its greatest remedial effect where crime has become a business.’<sup>109</sup>

[297] The considerations applicable in dealing with forfeiture, and the proportionality enquiry were succinctly dealt with by the Constitutional Court in *Mohunram*.<sup>110</sup> Although the judgment consisted of a majority and a minority judgment, all the members of the court were of the view that the property concerned was an instrumentality of an offence as contemplated by POCA. The court endorsed the interpretation and application of the concept of an instrumentality of an offence which was fully considered by the Constitutional Court in *Prophet v National Director of Public Prosecutions*.<sup>111</sup> The members of the court were split in relation to whether or not the offences for which forfeiture was authorised in terms of chapter 6 of POCA were limited to those created by POCA or involved all crimes.

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<sup>105</sup> *National Director of Public Prosecutions v Van Staden and others* [2006] ZASCA 107; 2007 (1) SACR 338 (SCA); [2007] 2 All SA 1 (SCA) para 8.

<sup>106</sup> *Van der Burg and another v National Director of Public Prosecutions and another* [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) para 25.

<sup>107</sup> *Brooks* para 21.

<sup>108</sup> *Brooks* para 39.

<sup>109</sup> *Brooks* para 40.

<sup>110</sup> *Mohunram and another v National Director of Public Prosecutions and another* (Law Review Project as amicus curiae) [2007] ZACC 4; 2007 (4) SA 222 (CC) (*‘Mohunram’*).

<sup>111</sup> *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC) (*‘Prophet’*).

[298] The Constitutional Court was also divided on the issue of whether the forfeiture was disproportionate. The majority consisting of Moseneke DCJ (Mokgoro and Nkabinde JJ concurring) and Sachs J (O'Regan J and Kondile AJ concurring) upheld the appeal, set aside the order of the Supreme Court of Appeal, and dismissed the application to declare the property forfeited to the State. The minority consisting of Van Heerden AJ (Langa CJ, Madlala, Van Der Westhuizen, and Yacoob JJ concurring) concluded that the forfeiture was not disproportionate.

[299] In addition, the members of the Constitutional Court considered it necessary to clarify the confusion which had emerged from judgments on the standard of proportionality applicable in the assessment of the relationship between the nature and value of the property subject to forfeiture, the nature and gravity of the crime involved and the role the property played in the commission of the offence. Having considered the minority and majority views in various judgments from the Supreme Court of Appeal, Van Heerden AJ opined that it would be wrong for POCA to be used in a manner which blurred 'the distinction between the purposes and the methods of criminal law enforcement, on the one hand, and those of civil law, on the other'.<sup>112</sup>

[300] There was 'no justification for resorting to the remedy of civil forfeiture under POCA as a *substitute* for the effective and resolute enforcement of "ordinary" criminal remedies'.<sup>113</sup> Whilst acknowledging that it would be difficult to 'draw a clear distinction in many cases between "organised crimes", on the one hand, and "ordinary crimes", on the other . . . it is potentially problematic to link a yardstick of "significant disproportionality" with the former type of crime and that of "disproportionality *simpliciter*" with the latter type'.<sup>114</sup>

Van Heerden AJ opined that

'[74] ...there should be only one evaluative standard applicable to all the offences that fall within the ambit of the forfeiture provisions of POCA. That standard simply involves asking the question whether the forfeiture of the property concerned is, in all the circumstances of the case (including the nature and seriousness of the offence), disproportionate in the sense discussed above. Adding labels and qualifiers to the degree of "disproportionality" required can only give rise to unnecessary confusion. The organised crime element, while significant

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<sup>112</sup> *Mohunram* para 72.

<sup>113</sup> *Mohunram* para 72.

<sup>114</sup> *Mohunram* para 74.



in assessing whether a forfeiture order should be made in a particular case, is not necessarily decisive. The criminal activities of an efficient and energetic individual miscreant may well have a more extensive reach and a greater negative social impact. So, for example, an individual drug dealer selling “tik” (the drug being manufactured in *Prophet*) through city schools may well have a larger client base and more outlets than a drug syndicate.

[75] It is the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a *legal* one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The *onus* of establishing that all the requirements for a forfeiture order in terms of s 50 of POCA - including that of proportionality - have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a *prima facie* case established by the NDPP would in the usual course be well-advised to place this material before the court. This does *not*, however, shift the *onus* of proof to the owner in question; it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal.<sup>115</sup> (Footnotes omitted.)

[301] Among the considerations which the court *a quo* and the Supreme Court of Appeal took into account in deciding on the proportionality, was the value of the property and the profits which emanated from the casino which had been operated on the property. In this regard, Van Heerden AJ said the following.

‘A note of caution must be sounded. It is certainly not *necessary* for a court, in considering whether or not a forfeiture order applied for will be disproportionate, to undertake the kind of “financial exercise” set out in the four preceding paragraphs. However, as the figures were available in this case and were referred to by the applicants and the NDPP, it is useful to take them into consideration in the present matter.’<sup>116</sup>

[302] It would appear that as the figures were available, the court took them into account when performing a proportionality analysis. It also held that

‘The relevant question for purposes of the proportionality enquiry is therefore not whether the *whole* of the property was used in furtherance of the crime. It is whether forfeiture of the whole property would be disproportionate to the seriousness of the crimes committed and the benefits derived from those crimes.’<sup>117</sup>

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<sup>115</sup> *Mohunram* paras 74-75.

<sup>116</sup> *Mohunram* para 92.

<sup>117</sup> *Mohunram* para 95.

And that

‘Statutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime. And yet there is no gainsaying that, in effect, it is Draconian. It is premised on the notion that it is a civil remedy and that the prosecution or the State has to show only on a balance of probabilities that the property may be seized and forfeited to the State.’<sup>118</sup>

[303] A question which has arisen time and time again in matters where a court is asked to issue a forfeiture order in respect of the proceeds of crime, has been whether the proportionality test and the arbitrary deprivation provisions in section 25 of the Constitution are applicable. In *National Director of Public Prosecutions v Komane*<sup>119</sup> in which Seegobin J had to determine whether the property was the proceeds of unlawful activities. In finding that it was, the aspect of proportionality arose. Counsel who had appeared for the applicant in that case had indicated that proportionality has generally been dealt with in applications concerning instrumentalities of an offence. Seegobin J opined that the enquiry related proportionality required an examination of *inter alia* the nature and severity of the crime in relation to the property concerned. He took the view that proportionality was not strictly a requirement of POCA but was a factor to be taken into account in determining whether or not the forfeiture was arbitrary, having regard to the provisions of section 25(1). He referenced *Mohunram* where Constitutional Court held the following:

‘It is the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a *legal* one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The *onus* of establishing that all the requirements for a forfeiture order in terms of s 50 of POCA - including that of proportionality - have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a *prima facie* case established by the NDPP would in the usual course be well-advised to place this material before the court. This does *not*, however, shift the *onus* of proof to the owner in question; it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal.’<sup>120</sup>

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<sup>118</sup> *Mohunram* para 118.

<sup>119</sup> *National Director of Public Prosecutions v Komane and others* [2013] ZAKZPHC 73.

<sup>120</sup> *Mohunram* para 75.

[304] It must however be noted that *Mohunram* dealt with an instrumentality of an offence and not the proceeds of unlawful activities.

[305] In *National Director of Public Prosecutions v Salie and another*<sup>121</sup> Breitenbach AJ had to consider a forfeiture order in circumstances where the property was the instrumentality of an offence, but was also alleged to have been purchased with the proceeds of crime. He took the view, having regard to the distinction between chapters 5 and 6 of POCA, that

‘. . . the definition of “proceeds of unlawful activities” makes it clear that the connection between the proceeds and the unlawful activities need not be direct. The proceeds, for instance, include benefits which someone legitimately acquired but retained by or as a result of his or her offences.’<sup>122</sup>

He considered the definition of proceeds of unlawful activities in section 1 of POCA and after having had regard to *RO Cook Properties*, held following:

‘In *Cook Properties* supra para 64 Mpati DP and Cameron JA pointed out that in essence the definition requires that the property in question be “derived, received or retained” “in connection with or as a result of” unlawful activities. In para 66 applying *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 804C – G, they added that, although the words ‘in connection with’ may literally have a very wide connotation, they are seldom used in legislation in their wide, literal sense and they are not used in that sense in the definition of “proceeds of unlawful activities”. When the judgment in *Cook Properties* is read as a whole, the implication is that the words “in connection with” in the definition of “proceeds of unlawful activities”, like the words “concerned in” in the definition of “instrumentality of an offence”, require a reasonably direct link between the crime committed and the property to be forfeited.’<sup>123</sup>

[306] In deciding on the proportionality aspect, Breitenbach AJ took the view that there were three sections in POCA which support the proposition that proportionality was a requirement for the forfeiture to the State of proceeds of crime, not just instrumentalities. In this regard he referenced section 18(1) of POCA which falls under chapter 5, and section 51(b) of POCA which falls under chapter 6.<sup>124</sup>

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<sup>121</sup> *National Director of Public Prosecutions v Salie and another* 2015 (1) SACR 121 (WCC); [2014] 2 All SA 688 (WCC) (‘*Salie*’).

<sup>122</sup> *Salie* para 102.

<sup>123</sup> *Salie* para 101.

<sup>124</sup> *Salie* para 120.

[307] After a discussion of the cases and the provisions of this section, Breitenbach AJ specifically concluded that proportionality is indeed a requirement for the forfeiture of proceeds of unlawful activity under POCA.<sup>125</sup> In concluding that the forfeiture of the properties was justified, he had regard to the fact that the properties were used to generate income which had been derived from the commission of offences. He took the view that there was a relatively close connection between the property and the commission of the offences. He then undertook a comparison between the value of the respondent's interest in the property and the value of the proven total benefit from the unlawful activities. Even though there was a discrepancy in these two, he was of the view that forfeiture to the State of the whole property would not be disproportionate when viewed in monetary terms, and ordered forfeiture as he was of the view it would not constitute an arbitrary deprivation.

[308] In *Bobroff and another v National Director of Public Prosecutions*<sup>126</sup> the Supreme Court of Appeal had to consider two issues which arose in a forfeiture application, the first being the jurisdiction of the court to make a forfeiture order and the second, which is of relevance to this judgment, is whether the applicant had established that the property forfeited was the proceeds of unlawful activities. Essentially, the NDPP had sought to preserve and forfeit credit balances in Israeli bank accounts held by Mr Ronald Bobroff and his son, Mr Darren Bobroff. The NDPP had contended that the credits in these accounts were the proceeds of unlawful activities pursuant to complaints lodged by former clients. The NDPP contended that the credit balances represented the proceeds of unlawful activities in particular, theft, fraud, money laundering and various transgressions of South African tax legislation. In confirming that the monies were indeed the proceeds of unlawful activities, the NDPP had relied on an affidavit by a whistle blower who was an accountant. The Bobroffs had embarked on an elaborate scheme to transfer monies into Australian bank accounts and had indicated that these monies were from money legitimately earned by them but flowed through financial institutions as they travelled frequently and deposited travel allowances into various accounts abroad. The court found that the

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<sup>125</sup> *Salie* para 135.

<sup>126</sup> *Bobroff and another v National Director of Public Prosecutions* [2021] ZASCA 56; 2021 (2) SACR 53 (SCA); [2021] 3 All SA 1 (SCA) ('*Bobroff*').

scheme which the Bobroffs had embarked upon was to 'to disguise the origin and identity of the money. This practice bore all the hallmarks of money-laundering'.<sup>127</sup>

[309] In considering whether the NDPP had established that the amounts held in the bank accounts constitute the proceeds of unlawful activities, it held the following:

'The definition of "proceeds of unlawful activities", quoted earlier, relates to any property, benefits or reward which has been derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity, and it includes any property representing property so derived. In order to bring property within the ambit of the definition, a link must be established, on the balance of probabilities, between the identified assets and the alleged offences. A benefit derived "directly" will include, for example, funds paid for a bribe, or amounts actually stolen by a thief. "Indirect" benefits do not accrue directly from the commission of the offence and would, it seems to me, include the appreciation in value of an asset stolen, interest accrued on embezzled funds held in a bank account, or a stock portfolio purchased with stolen funds. It would also include ancillary benefits that would not have accrued but for the commission of the offence.'<sup>128</sup>

[310] It referenced the wide definition to be applied to the proceeds of unlawful activities as enunciated in *RO Cook Properties*. It held further that:

'Where proceeds of crime have been laundered with the very purpose of disguising the origin and identity thereof, they may be mixed with other assets which may not be the proceeds of crime, and they may be converted into other forms of asset which technically are not direct proceeds of crime. In the case of money, this would typically be the case.'<sup>129</sup>

[311] And further, the court found that:

'Once it is shown, however, on a balance of probabilities, that the funds had been derived from fraudulent activity, it follows, for the reasons set out earlier, that any appreciation thereof must also be proceeds of that activity.'<sup>130</sup>

[312] The court was of the view that a sufficient link had been established between the credit balances in the account and the offences which were referred to. In deciding on the aspect of proportionality, the court took the view that the NDPP must

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<sup>127</sup> *Bobroff* para 38.

<sup>128</sup> *Bobroff* para 39.

<sup>129</sup> *Bobroff* para 40.

<sup>130</sup> *Bobroff* para 50.

demonstrate that the forfeiture is proportional to the proceeds received.<sup>131</sup> An examination of the credits in the various accounts also demonstrated that certain amounts were not the proceeds of unlawful activity. However, given the extent of the fraud and theft which had been perpetrated over a considerable period of time and the failure by the Bobroffs to explain the origin of the matter which was exclusively within their knowledge, the court found that the forfeiture order would not be disproportionate to the proceeds received from the unlawful activity proved. This was despite the fact that certain of the credits were not shown to be the proceeds of unlawful activity.<sup>132</sup>

[313] Whether or not a proportionality test is to be applied in respect of proceeds of crime was settled by the Constitutional Court in *National Director of Public Prosecutions v Botha NO and another*.<sup>133</sup> The minority judgment penned by Victor AJ found that a proportionality analysis applied to the proceeds of crime. In the majority judgment, the court took the view that the judgment of Victor AJ which concluded that a proportionality exercise applied equally to a forfeiture of proceeds of an unlawful activity was incorrect as it proceeded from the incorrect premise. The court found that in the instance of Mrs Botha she had no right to the money paid by Trifecta for the renovations affected on her house and the money constituted the proceeds of an unlawful activity. Consequently, there was no question of the deprivation of a right in property, and the majority held the following:

‘All of the foregoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of a crime, in circumstances where the person from whom the proceeds are taken does not have any interest which is lawfully recognised.’<sup>134</sup>

[314] In this matter, none of the respondents have an interest in the property being forfeited and therefore the proportionality analysis does not apply following on the majority judgment in *Botha*. Even if I am incorrect in this conclusion, the forfeiture will not be disproportionate having regard to the total value of the fraud perpetrated on Tiger Brands. The properties were acquired with the proceeds of the fraud and liable to forfeiture.

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<sup>131</sup> *Bobroff* para 59.

<sup>132</sup> *Bobroff* para 59.

<sup>133</sup> *National Director of Public Prosecutions v Botha NO and another* [2020] ZACC 6; 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) (*‘Botha’*).

<sup>134</sup> *Botha* para 131.

### **The exclusion of items 5, 6 and 12 in Annexure B from the operation of the forfeiture order**

[315] I have, when considering the items to be forfeited in annexure B, taken into account the replying affidavit of Mr Kenneth Mark Samuels and the submissions in the heads of argument of the first to fourth respondents. I do not agree with the submission of Mr Howse that the 'concessions' in the replying affidavit amount to an abandonment of the forfeiture application and that this is indicative that no case for forfeiture has been established.

[316] In respect of item 5 which is Savithree's FNB Premier Cheque account 62013370325, the applicant no longer seeks the forfeiture of the monies in the account as there is no value in the account.<sup>135</sup> Item 6, which is Savithree's FNB Money Market Call account 62176714333, was closed on 1 April 2016 prior to the preservation order being granted and it is for this reason that no order is being sought against it.<sup>136</sup>

[317] As regards item 12 which is the Sanlam Matrix Topcover policy 18902291X6, this policy lapsed on 17 January 2017, hence no order is being sought by the applicant against it.<sup>137</sup>

### **Costs**

[318] There is no reason to depart from the usual rule in relation to costs. The successful party is entitled to its costs. Having mentioned this, in my view the fifth and sixth respondents' opposition was that of persons who sought to place information before the court to assert their rights as innocent owners. In my view, as they were lay persons and co-operated with the *curator* and NDPP, a costs order against them is not warranted.

### **Conclusion**

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<sup>135</sup> Replying affidavit of Kenneth Mark Samuel annexure KMS26, Volume 18, para 7, page 1743.

<sup>136</sup> Replying affidavit of Kenneth Mark Samuel annexure KMS26, Volume 18, para 14, page 1748.

<sup>137</sup> Replying affidavit of Kenneth Mark Samuel annexure KMS26, Volume 18, para 24, page 1754.

[319] The delivery of the judgment has regrettably been delayed by a number of factors. The first being that I have not had the necessary secretarial support for a considerable period of time. This has been brought to the attention of the Office of the Chief Justice as well as the Judge President, Acting Judge President and Deputy Judge President of the division.

[320] In addition, the application papers themselves are some 22 volumes and in excess of 2 000 pages. Moreover, the nature of some of the issues canvassed have not previously been dealt with and the research and judgment itself has taken some time. This has further been complicated by the issues placed in dispute by the respondents. This has also contributed to the judgment being a lengthy one.

[321] The applicant has annexed to the notice of motion a draft order as well as annexure B and C. I have excluded items 5, 6 and 12 from annexure B in line with the content of the replying affidavit of Mr Kenneth Mark Samuels. In addition, to avoid any confusion, it is also appropriate to grant an order dismissing the application by the first to sixth respondents for the exclusion of their interest in the property listed in Annexure B.

[322] In addition, paragraph 5 ( c ) of the order is not in the usual form in line with the provisions of s 57 and 63 of POCA which make provision for the proceeds to be paid into the Criminal Assets Recovery Account. This is reflected in the draft order annexed to the papers and I am aware that in matters where the victim is capable of being compensated, the Asset Forfeiture Unit of the applicant does request such an order. In any event, there was no objection raised to such relief by the respondents in the application.

## **Order**

[323] In the result the following orders will issue:

1. The respondents are granted condonation for the late filing of their heads of argument and practice note.
2. An order is granted in terms of section 50 of the Prevention of Organised Crime Act 121 of 1998 (the Act), declaring forfeited to the State, the property listed in



Annexure B (the property) to the notice of motion, save for the exclusion of items 5, 6 and 12. The property is currently in the custody of the *curator bonis*.

3. Phinda Shembe of Shembe Attorneys, who was appointed as *curator bonis* in terms of the preservation order, is authorised to continue to act as such.

4. In terms of section 56(2) of the Act, the property shall vest in the *curator bonis* on behalf of the State on the date on which this order takes effect.

5. In terms of section 57 of the Act, the *curator bonis* is authorised, as of the date on which this order takes effect, to perform all the powers and functions specified in the Act, including the following:

- (a) to take possession of the property on behalf of the State;
- (b) to deduct his fees and expenditure;
- (c) to deposit the balance of the proceeds of the sale of the property into the bank account of Tiger Brands and Treats, a division of Tiger Consumer Brands Ltd, Nedbank, account number 1454082313, branch code 145405, being the victim in the matter; and
- (d) to perform any ancillary acts which, in the opinion of the *curator bonis*, are reasonably necessary to effect such fulfilment.

6. In terms of section 50(6) of the Act, this forfeiture order shall not take effect before the period allowed for an application under section 54 of the Act or an appeal under section 55 of the Act has expired or before such application or appeal is disposed of.

7. In terms of section 50(5) of the Act, the registrar of this court, or the State Attorney (KZN) on the request of the registrar, is to publish a notice of this forfeiture order in the form set out in annexure C to the notice of motion in the *Government Gazette* as soon as practicable after this order is granted.

8. The first to fourth respondents are directed to pay the costs occasioned by their opposition to the forfeiture application.

9. The application by the first and third to sixth respondents for the exclusion of their interests in the property in Annexure B is dismissed.



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HENRIQUES J

### Case Information

Date of Set Down : 19 June 2020  
 Date of Hearing : 03 July 2020  
 Date of Judgment : 30 June 2023

### Appearances

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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 30 June 2023.