



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 6/2017

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

STANDARD BANK NAMIBIA LIMITED

**FIRST INTERESTED PARTY/
RESPONDENT**

DIVUNDU RAINBOW RIVER LODGE CC

**SECOND INTERESTED PARTY/
RESPONDENT**

GIDEON JOHANNES DE WAAL

**THIRD INTERESTED PARTY/
RESPONDENT**

Neutral citation: *The Prosecutor-General v Standard Bank Namibia Limited*
(POCA 6/2017) [2019] NAHCMD 13 (1 February 2019)

Coram: ANGULA DJP

Heard: 26 July 2018

Delivered: 1 February 2019

Flynote: Practice – Applications and motions – Prevention of Organized Crime Act, Act 29 of 2009 (POCA) – Application for a forfeiture of property order – Prosecutor-General to prove on the balance of probabilities that the property is the proceeds of unlawful activities.

Section 63 of POCA – In an application for the exclusion of interests from the property which is the proceeds of unlawful activities. The applicant is required to prove on the balance of probabilities that the property concerned was legally acquired and for a consideration; and further that the applicant neither knew nor had reasonable grounds to suspect that the property in which the interest is the proceeds of unlawful activities.

Neither the Court nor the Prosecutor-General has jurisdiction over the money deposited in the account after the preservation of property order was granted. Ownership in such is governed by the bank-customer contractual relationship.

Summary: This is an application for a forfeiture of property order in respect of property preserved in terms of a preservation of property order granted by this Court on 21 April 2017 – The order together with the application papers was duly served on the respondents – Thereafter the respondents delivered to the Office of the Prosecutor-General's ('the PG') office their written notices of their intentions to oppose the making of a forfeiture order and their intention to apply for the exclusion of their interests in the preserved property from the operation of the forfeiture order sought by the PG.

Subsequent thereto, Standard Bank Namibia Limited ('the Bank') (first respondent) filed its opposing affidavit to which the PG filed a replying affidavit. Divundu Rainbow River Lodge CC ('the Lodge') (second respondent) and its sole member, Mr de Waal (third respondent) did not file an opposing affidavit, but instead filed an application for the exclusion of their interests from the operation of the forfeited order. The PG opposed the application by Mr de Waal and the Lodge's application and filed an opposing affidavit.

The Bank did not file an opposing affidavit to the exclusion application by the Lodge and Mr de Waal, but in its affidavit for the exclusion of its interest from the operation of the forfeiture order, the Bank claims that by operation of the law it is the lawful owner of the property – being the positive balances in the accounts of the Lodge and of Mr de Waal and that Mr de Waal and the Lodge have no entitlement to the money in the accounts.

The PG on the one hand and Mr de Waal and the Lodge on the other hand are in agreement that certain money paid into the accounts of the Mr de Waal and the Lodge should be 'forfeited and paid to Standard Bank' for the reason that such balances constitute proceeds of unlawful activities. The PG further concedes that certain money that was received in the Lodge's and Mr de Waal's accounts, should be excluded from the operation of the forfeiture order and should be released to them, as legitimately earned money.

Court held, that the PG has proved on a balance of probabilities that the property is the proceeds of unlawful activities.

Held further that, section 63(1) of POCA empowers the Court to exclude certain interests in the property which is subject to the order from the operation of the forfeiture order. In order for an 'innocent owner' of the property, which is the subject matter of a preservation order to succeed, he or she is required to prove on a balance of probabilities that he or she has acquired the interest in the property legally and for a consideration; and that he or she neither knew nor had reasonable grounds to suspect that the property was the proceeds of unlawful activities.

Held further that the first respondent succeeded in proving that certain money had been acquired lawfully and for a consideration and were excluded from the operation of the forfeiture order.

Held further that the Court has no jurisdiction over the money paid into the bank accounts of the second and third respondents after the preservation order was granted for the reason that such money is not subject to the preservation order.

Held further that, in the event of conflicting claims to the property that has been excluded from the operation of the operation order, the Court has no power or jurisdiction to order to whom of the claimants the property should be released or in whom of the claimants the ownership the property vests. The court is simply required to make an order either that the property has been forfeited to the State or the property has been excluded from the operation of the forfeiture order. However POCA provides that the Court has the power to make ancillary orders that it

considers appropriate, including the orders for the facilitating of the transfer to the State and the property declared forfeited to the State.

ORDER

1. The sum of N\$323 245.12 held in second respondent's account, (Divundu Rainbow River Lodge CC,) account number 241 905 451 is released from the operation of the forfeiture order and by consent between the PG, the second and the third respondents, is ordered to be paid to Standard Bank Namibia.
2. The application by the second respondent (the Lodge) for the exclusion of its interests from the operation of the forfeiture order succeeds. Accordingly the amounts of N\$112 139.91 is excluded from the operation of the forfeiture order and by consent between the PG, second and third respondents that amount is ordered to be paid to Standard Bank Namibia.
3. The balance of N\$29 319.39 held in the second respondent's (the Lodge) account number, 241 905 451, held at Standard Bank Namibia, being the total deposits paid in the said account after the preservation order was granted, in so far as it might be necessary, is hereby released from the operation of the forfeiture order.
4. The positive balance in the sum of N\$105 000 held in the third respondent's (Mr de Waal's) account, account number 247 470 163 held at Standard Bank Namibia in the name of Gideon Johannes de Waal, is by consent between the PG and the third respondent, released from the operation of the forfeiture order and is further by consent ordered to be paid to Standard Bank Namibia.
5. The positive balance in the sum of N\$59 054.88 in the third respondent's (Mr de Waal), account number 247 470 163, in so far as it might be necessary, is excluded from the operation of the forfeiture order.

6. The application by third respondent, (Mr de Waal) for the exclusion of the sum of N\$89 987.72 is dismissed and the sum of N\$89 987.72 is declared forfeited to the State as the proceeds of unlawful activities.
7. Warrant Officer Green, failing him, Warrant Officer Emilia Nambandi, and failing her, any other authorised officer of the Commercial Crime Investigation Unit: Anti-Money Laundering and Combating of Financing and Terrorism Sub-Division, Windhoek is ordered and directed to pay the monies in accordance with orders in paragraphs, 1, 2 and, 4, and 6 of this Order.
8. Standard Bank Namibia is ordered to pay the Prosecutor-General's costs in respect of the application for the preservation order and half of the costs in respect of this application by the Prosecutor-General for the forfeiture of property order.
9. The Prosecutor-General is ordered to pay the second respondent, costs occasioned by her opposition to the second respondent's application for the exclusion of its interests from the operation of the forfeiture of property order.
10. The third respondent, Mr de Waal is ordered to pay the Prosecutor-General's costs in respect of his application for the exclusion of his interest from the operation of the forfeiture order.
11. The matter is removed from the roll and considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This matter concerns two applications. The main application is an application by the Prosecutor-General ('the PG') in which she seeks a forfeiture of property¹ order in respect of the property that was placed under a preservation of property

¹ Section 61 of the Prevention of Organised Crime Act 29 of 2009 ('POCA').

order which was granted by this Court on 21 April 2017. The 'property' being certain positive balances held in two separate bank accounts held at Standard Bank Namibia ('the Bank'). One account is a business account held in the name of Divundu Rainbow River Lodge CC ('the Lodge') with a positive balance of N\$435 321.03 and the other account is a personal account held in the name of Mr Johannes Gideon de Waal ('Mr de Waal') with a positive balance of N\$194 987.72. Mr de Waal is the sole member and directing mind of the Close Corporation which owns and operates the Lodge. There has been inflow in the accounts after the preservation order was granted. The PG alleges that the property is the proceeds of unlawful activities namely money laundering, fraud and the contravention of certain statutory provisions.

[2] The second application has been brought by Mr de Waal and the Lodge in which they seek orders that portions of the positive balances in their respective accounts be released to the Bank and that the remainder of the balances be excluded from the operation of the forfeiture order and be paid to them for the reason that it had been lawfully acquired.

[3] The Bank filed an opposing affidavit in which it denies that the property is the proceeds of unlawful activities. The Bank prays that the property be excluded from the operation of the forfeiture order. The Bank asserts that it acquired the property legally and for a consideration. As against the claims by the Lodge and Mr de Waal's, that certain amount of money belong to them, the Bank points out that it is the owner of the property by operation of law, and thus no part of the money that might be excluded from the operation of the preservation order, can be released to Mr de Waal or the Lodge.

[4] Mr de Waal and the Lodge on the other hand, dispute that all the monies in the accounts belong to the Bank and contend that they are entitled to portions of the positive balance which had been legitimately earned and deposited in the accounts and further that they are entitled to the money deposited in the accounts after the preservation order had been granted.

Issues for determination

[5] The issues for determination in this matter are:

- 5.1 Firstly, did the PG prove, on a balance of probabilities, that the property is the proceeds of unlawful activities?
- 5.2 Secondly, did the Lodge and Mr de Waal on the one hand and the Bank on the other hand, prove on a balance of probabilities that they acquired the property legally and for a consideration; and further that they did not know neither did they have reasonable grounds to suspect that the property was the proceeds of unlawful activities?
- 5.3 Third, is the Court bound to make a determination regarding the conflicting claims between the Bank on the one hand and Mr de Waal and the Lodge on other hand, regarding money that has been excluded from the operation of the forfeiture order?

Background

[6] Most of the facts are common cause. It is not in dispute that during December 2016, the Bank received an alert about suspicious foreign credit card transactions that had been manually processed on its Point of Sale device ('POS') at the Lodge. The fact that the transactions were processed manually was an indication to the Bank that the credit cards were not physically present at the time of processing the transactions. Furthermore, there were chargebacks (also known as disputed charges) which meant that the transactions were rejected and not authorised by the legitimate credit card holders.

[7] According to Mr de Waal, shortly after he became owner of the Lodge, he entered into transactions with a certain Ben Woodcock and Williams Coleman who made block accommodation bookings at the Lodge over the period October 2016 to December 2016. Three credit cards, purportedly belonging to somebody from Australia, were scanned and emailed to Mr de Waal. From the investigation carried out by the Bank, it transpired that the three cards were issued by a bank in Las Vegas, Nevada, USA and did not belong to an Australian citizen as originally communicated.

[8] The investigation by the Bank further revealed that between 3 October 2016 and 23 December 2016 there were 109 different manual transactions amounting total of N\$9 464 040.60 of which 40 transactions totalling N\$2 673 398.10 were settled to the Lodge's account. Furthermore, of the total amount of the transactions disputed due to fraud which was an amount of N\$1 523 756.10. All these transactions were processed manually at the Lodge.

[9] The Bank's investigation further discovered that after receipt of the card payments, Mr de Waal transferred the funds via internet to various recipients who held their banks accounts at banks in South Africa. A total amount of N\$2 679 405 from the Lodge's account was transferred by means of electronic fund transfer. On 4 January 2017 the Lodge's account had a positive balance of N\$349 375.26.

[10] As regards to Mr de Waal's personal account, the investigation revealed that between 1 November 2016 and 28 November 2016 this account received a total deposits amounting to the sum of N\$1 027 186.23. A total amount of N\$852 497.08 was withdrawn from this account by means of electronic fund transfer and paid to various recipients in South Africa. On 4 January 2017 this account had a positive balance in the sum of N\$168 232.17.

[11] With the exception of minor discrepancies in the figures, the transactions as set out in the affidavit of the Bank by Mr Muundjua who conducted the forensic investigation, as well as in the affidavit by Warrant Officer Green, have in broad terms, been confirmed by Mr de Waal. Immediately after Mr de Waal was informed by Mr Muundjua about the fraudulent activities he went to a nearby Police Station and made some sort of a statement to the police and further registered a criminal case on 3 January 2017. The contents of his statement to the police; his founding affidavit in support of his application for the exclusion of certain interest from the exclusion of the operation of the forfeiture order; the contents of the affidavits by both Mr Muundjua and Warrant Officer Green form common ground in broad terms. In other words there is little dispute amongst the parties regarding the transactions which took place.

The PG's case

[12] The PG alleges that the property is the proceeds of unlawful activities namely fraud, contravention of section 16B of the Payment System Management Act, No. 6 of 2010 and money laundering offences listed in section 4 of POCA.

[13] In respect of the offence of fraud, the PG points out that the purported written authorization by credit cards holders which were provided to Mr de Waal by the purported travel agents to make accommodation bookings, were fraudulent as it was not written or authorised by the legitimate card holder. Furthermore, the transfers by Mr de Waal of larger sums of monies as purported travel agents' commission caused financial loss to the Bank. In addition, the funds transferred by Mr de Waal from the Lodge's account to his personal account were part of the fraudulently acquired funds that were manually processed by Mr de Waal using the POS device issued by the Bank. In this connection, the PG submits that on a balance of probabilities, the positive balances in the accounts of the Lodge and of Mr de Waal personal account as at 21 April 2017 are proceeds of fraud.

[14] As regards to the contravention of the provisions of the Payment System Act, 2010, the PG points out that the Act provides, *inter alia*, that a person who process or uses such a device and who knows or ought to reasonably have known that it has been used or is intended to be used in forging or falsifying a payment instrument or use it in defrauding a lawful holder of a payment, commits an offence. In this connection, so the allegation continues, Mr de Waal committed an offence when he used the POS device received from the Bank to process fraudulent transactions without lawful and valid authorization from the lawful credit card holders. It follows therefore, so the submission concludes, that the money paid into the Lodge's and Mr de Waal's accounts between November 2016 and December 2016 mingled with the money that was already in those bank accounts and forms part of the proceeds of fraud and money laundering.

[15] The PG therefore submits that on a balance of probabilities the property are the proceeds of the unlawful activities.

Opposition by the Lodge and Mr de Waal

[16] The Lodge and Mr de Waal filed a notice to oppose the granting of the forfeiture in terms of section 52(3), (4) and (5) of POCA and thereafter filed an application in terms of section 63(1) of POCA for an order excluding their interest in the property from the operation of the forfeiture order. They claim that their interest in the property constitute monies which were deposited in their respective accounts after 4 January 2017. I should interpose here to explain that the rationale for the 4 January 2017 is premised on what was stated in the PG's founding affidavit namely that 'as at that date, the balance in the respective accounts were N\$349 375.26 and N\$168 323.17, respectively'. In other words, those were the facts upon which the preservation order was granted on 21 April 2017. In this connection Mr de Waal and the Lodge argue that the monies received in their respective accounts after 4 January 2017 are not proceeds of unlawful activities but constitute legitimate income.

[17] The PG in her answering affidavit appears to have conceded that there were legitimate deposits received in the Lodge's account between the period 2 December 2016 and 21 December 2016. According to the analysis and calculation of the accounts conducted by Warrant Officer Green from the Commercial Crime Investigation Unit: Anti-Money Laundering Division, the Lodge account received legitimate income during the stated period in the sum of N\$103 713 minus a negative balance which was reflected on the account in the sum of N\$86 391.97 which left a positive balance of N\$17 321.03. In respect of Mr de Waal's personal account, the legitimate income was the sum of N\$18 958.43. The PG however submits that the so-called legitimate deposits mingled with proceeds of unlawful activities and accordingly it became proceeds of unlawful activities.

[18] The PG therefore denies that Mr de Waal and the Lodge are entitled to exclusion of the money that was paid into their bank accounts after 4 January 2017.

[19] The PG's position is however that the Lodge is entitled to the exclusion of the sum of N\$29 319.39 from the operation of the forfeiture order, which constitutes money paid into its account after the preservation order was granted. In respect of Mr de Waal, the PG's position is that he is entitled to the exclusion of the sum of N\$59 054.88 from the operation of the forfeiture order, which constitutes money paid into his account after the preservation was granted.

Opposition by Standard Bank

[20] The Bank's opposition is premised on two grounds: Firstly, that the PG has failed to prove on a balance of probabilities that the properties sought to be forfeited are the proceeds of unlawful activities. This is because, in terms of the law, once the money is deposited in a bank's account it becomes the property of the bank and the account holder has only a personal claim against the bank equivalent to the credit balance in the account. The Bank submits further that even if the alleged activities by Mr de Waal and other actor's amounted to unlawful activities it does not follow that the monies in the Bank's accounts are proceeds of unlawful activities.

[21] Secondly, in the alternative, in the event that it is found that the properties do constitute the proceeds of unlawful activities, the Bank submits that based on the facts, it has satisfied the requirements of section 63 of POCA which entitles the Court to exclude its interests in the property from the operation of the forfeiture order.

[22] With reference to the provisions of section 63, the Bank argues that the 'interest' that it had acquired arose from the terms of the Merchant Agreement that exists between it and the Lodge which entitled the Bank to debit the Lodge's account with chargebacks effected in accordance with the Master Card/VISA rules. Accordingly, the Bank's 'interest' is the right to debit the Lodge's account with chargebacks in terms of the Merchants Agreement. The 'consideration' paid in the present matter is the amount of all chargebacks that the Bank has refunded to the legitimate credit card holders in accordance with the terms and conditions of the Merchants Agreement.

[23] I now proceed to consider the issues identified for determination earlier in this judgment.

Did the PG prove on a balance of probabilities that the property is the proceeds of unlawful activities?

[24] I do not agree with the Bank's submission that the property is not the proceeds of unlawful activities. There is ample evidence which prove the contrary. It starts with the undisputed fact that it was the Bank which requested the PG to apply

for the preservation of property order. The Bank could have simply reversed the transactions in terms of the bank-customer relationship if it did not believe that the transactions were unlawful activities. The investigation conducted by the Bank through Mr Muundjua from its Forensic Investigation Unit concluded that the transactions between the Bank and Mr de Waal and the third parties (Woodcock and Coleman), were fraudulent.

[25] As regard to the alleged offence of fraud committed, in terms of the common law, the commission of the offence consists in the unlawful making, with intent to defraud, a misrepresentation which caused actual loss or potential loss or prejudice to another person. In my view, the investigation carried out by Mr Muundjua and subsequently verified by Warrant Officer Green, established on a balance of probabilities, that the credit card information and the purported letters of authorisation purportedly from the legitimate credit cards holders were fraudulent. Mr de Waal facilitated the transactions although he knew or should have known that the transactions were fraudulent or unauthorised by the legitimate cardholders.

[26] It is common cause that the Bank suffered actual loss as a result of the fraud perpetrated, when it had to reimburse the legitimate cardholders with the money it had paid to the Lodge and to Mr de Waal. It is further common cause that the Bank has since instituted an action against the Lodge and Mr de Waal to recover the loss of N\$1 951 420.73 it has suffered as a result of the fraud perpetrated upon it. The court is satisfied the PG has proved on a balance of probabilities the offence of fraud.

[27] In regard to the commission of the statutory offence it is not denied by the Lodge and Mr de Waal that they used the POS device to process the unauthorised credit card transactions under the circumstances where they knew or ought reasonably to have known that they were forging or falsifying the POS transactions to defraud lawful cardholders in contravention of the provisions of the Payment System Management Act, 2010, which is an offence.

[28] As regards to the offences related to money laundering, the undisputed evidence shows that the money paid by the Bank into the Lodge's and Mr de Waal's accounts was transferred to foreign bank accounts purportedly as travel agents'

commission. I agree with the PG's submission that the so-called travel agents used the accommodation bookings both to defraud the legitimate cardholders and to conceal the origin of the funds by creating the impression the money had been legally acquired as commission and causing the money to be transferred to various foreign accounts in foreign countries including China, United Kingdom and South Africa.

[29] Taking into account all those facts, the Court is satisfied that the PG has proved, on a balance of probabilities, that the property is the proceeds of unlawful activities.

[30] I next proceed to consider whether the Lodge and Mr de Waal have satisfied the requirements of section 63 of POCA, for their interests in the property to be excluded from the operation of the forfeiture order.

Did the Lodge and Mr de Waal prove, on a balance of probabilities, that they acquired the property legally and for a consideration; and further that they did not know or had no reasonable grounds to suspect that the property was the proceeds of unlawful activities?

[31] The Lodge and Mr de Waal ask that 'the amount of N\$24 359.86 in (the Lodge's account number 241 905 451) and any further deposits/payments received in the account after 4 January 2017 into the aforementioned accounts, be excluded from the preservation of property and forfeiture order'.

[32] According to Mr de Waal, between 12 December 2016 and 13 April 2017, the Lodge's account, received legitimate income in the total sum of N\$112 139.91. In support of this claim, invoices issued by the Lodge to third parties are attached. The invoices are meant to demonstrate that the monies received from third parties are not the proceeds of unlawful activities. Mr de Waal points out that in respect of two amounts, N\$5 915.82 and N\$1 500 there are no supporting invoices because they were deposits made to secure reservations. Therefore no invoice were issued. Furthermore, attached to the affidavit, is the Lodge's bank statements for the period which shows the payments received from third parties in respect of corresponding invoices issued by the Lodge.

[33] In her opposing affidavit the PG asserts that the Lodge and Mr de Waal are not entitled to the exclusion of the monies that were paid into their accounts during the period when the proceeds of unlawful activities were paid into those accounts. The PG reasons that 'this is because they retained a benefit of N\$1 314 520.02 and used the proceeds of unlawful activities during this time, to pay their expenses and to grant loans'.

[34] The PG however concedes, based on the investigation and calculations carried out on the transactions on the accounts by Warrant Officer Green, that between 21 November 2016 and 7 January 2017 the Lodge account received legitimate income in the total sum of N\$103 713.55.

[35] As mentioned earlier in paragraph 19, the PG's position towards the exclusion application is that the Lodge and Mr de Waal are only entitled to the exclusions of the sum of N\$29 319.39 and N\$59 054.88 respectively, being the money received in their respective accounts after the preservation order was granted.

[36] Section 63(1) provides that the court may exclude certain interest that is subject to the forfeiture order from the operation of the forfeiture order. In order for 'innocent owner' of the property, which is the subject matter of a preservation order to succeed, he or she is required to prove, on a balance of probabilities: firstly, that he or she has acquired the interests in the property legally and for a consideration; and secondly, that he or she neither knew nor had reasonable grounds to suspect that the property was the proceeds of unlawful activities.

[37] Mr Swanepoel for the Lodge and for Mr de Waal argues in his heads of argument that the preservation order was granted on the facts stated in the founding affidavit which stated that the positive balances were N\$349 375.26 and N\$168 323.17 respectively; and that those were the balances as at 4 January 2017. Therefore, so the argument goes, all the money paid into the account after the 4 January 2017 should be excluded.

[38] I do not agree with Counsel's submission for the reason that it loses sight of the legal principle of mingle, namely that all the money paid into the accounts

mingled with the money which is the proceeds of unlawful activities. In this connection POCA defines the proceeds of unlawful activities to include, *inter alia*, 'property which mingled with property that is the proceeds of unlawful activities'. The money can only be excluded if it meets the requirements of section 63. The argument is therefore rejected.

[39] In regard to the alleged legitimate deposits paid into the Lodge's account – on the PG's calculation being N\$103 713.55 and on Mr de Waal's calculation N\$112 139.91 – the court has considered the various invoices issued and the corresponding payments received as reflected in the bank statements. It appears that those deposits were received in the account were for legitimate considerations, namely accommodation and other related services like food served to the guests accommodated at the Lodge or dined thereat. The discrepancy of N\$8 426.36 between the two calculations appears to be the two deposits made to secure reservations, as explained by Mr de Waal in respect of which no invoice were issued.

[40] Taking all the relevant facts into account, the Court is satisfied that in respect of those deposits made into the Lodge's account between 12 December 2016 and 14 April 2017, the Lodge has proved on a balance of probabilities that the deposits have been legally acquired and for a consideration. Accordingly, the amount of N\$112 139.91 stands to be excluded from the operation of the forfeiture order. I now turn to consider Mr de Waal's application for exclusion of certain amounts in respect of his personal account.

[41] Mr de Waal applies for certain monies in his personal account (Acc. No. 247 470 163) to be excluded from operation of the forfeiture order. In support of his claim, Mr de Waal points out that: 'on 21 April 2017 the balance in my account was N\$194 987.72 less the fraudulent amount of N\$105 000 equals N\$89 987.72 which is my money and should be released/paid to me. Furthermore, any money deposited into my personal account after 21 April 2017 should be released and paid to me.

[42] The PG's position to Mr de Waal's application for exclusion, is that the sum N\$59 054.88 being the money received into Mr de Waal's account after the preservation order was granted, should be excluded from the operation of the forfeiture order.

[43] I agree that the sum of N\$59 054.88 be excluded for the operation of the forfeiture order. In my view the Court has no jurisdiction over money received into the account after the preservation order was granted. Accordingly the amount of N\$ 59 054.88, in so far as it might be necessary, is liable to exclusion from the operation of the forfeiture order.

[44] In regard to Mr de Waal's application for the exclusion, on his own admission as at 21 April 2017 when the preservation order was granted there was a sum of N\$105 000 in his account which was the proceeds of unlawful activities which mingled with whatever legitimate money was in his account. In my judgment his claim for the balance of N\$89 987. 72 cannot succeed. I say this for the reason that, apart from a claim by Mr de Waal, rather tersely, that this 'is my money' he does not state how he acquired the money and for what consideration. He does not further state that he neither knew nor had reasonable grounds to suspect that the money is the proceeds of unlawful activities. The conclusion I have arrived is that Mr de Waal failed to satisfy the requirements of section 63 on a balance of probabilities to justify the court to exclude the sum of N\$89 987.72 from the operation of the forfeiture order. Accordingly the sum of N\$89 987.72 stands to be declared forfeited to the State as the proceeds of unlawful activities. I proceed to consider the Bank's application for exclusion of its interest for the operation of the forfeiture order sought.

Did the Bank prove on a balance of probabilities that it is the 'innocent owner' of the property and that therefore the property should be excluded from the operation of the forfeiture order?

[45] It is to be observed that the Bank's main ground for the exclusion of its interests from the operation of the forfeiture order is premised on the claim that it is the owner of the money which the subject of the order. It asserts that, by operation of the law, it is the owner of the money. POCA defines 'interests' to include, 'any right'. By this definition 'ownership' is a right. It would however appear to me that, having regard to the requirements for the exclusion set by section 63, ownership by the applicant of the property is not a consideration when it comes to consider whether the property should be excluded. I say this for the reason that section 63 provides that the Court may make an order excluding certain interest in the property that is

subject to the preservation order from the operation of the forfeiture order provided that the applicant meets the requirements set out in section 63. It bears repeating that the requirements are that the applicant has to prove on a balance of probabilities that he or she has acquired the property legally and for a consideration and that he or she did not know or could not reasonably be expected to know that the property was the proceeds of unlawful activities. The section does not require the applicant to prove ownership.

[46] Ms Angula for the PG, submits that 'an exclusion can only be made if there is a forfeiture order'. I do not agree with the submission. Section 63(1) of POCA stipulates that: 'The High Court, may, on application...and *when it makes a forfeiture*, make an order excluding certain interests in the property which is the subject of the order from the operation of the order'. In my judgment the wording of the section is very clear and is not subject to interpretation. It follows therefore that exclusion must be made at the same time that the application for forfeiture order is being considered by the Court. There is a good reason why the exclusion cannot be made after the forfeiture order had already been granted: the reason is that after the forfeiture order had been made the Court would be *functus officio*.

[47] In its effort to meet the first requirement of section 63, the Bank states that it acquired the interest in the property legally in terms of the Merchant Agreement read with the Master Card and Visa relating to the principle of chargeback. The chargeback system entails a system whereby the merchant in the present matter the Lodge facilitated a transaction that is in the end is disputed by the legitimate card holder, for instance for the reason that the transaction is fraudulent in the sense that he or she did not authorised the transaction, and if the cardholder dispute is upheld as valid, the Bank is automatically obliged to reverse the transaction and reimburse the cardholder in respect of the fraudulent transaction. In regards to the second requirement, the Bank contends that the 'consideration' paid for the interest is the amount of the chargebacks it has refunded to the legitimate cardholder. These allegations are not disputed by the PG in her answering affidavit and thus stands to be accepted by the Court applying the well-known Plascon-Evans rule.

[48] As regards to the requirement whether the Bank knew or had reasonable grounds to suspect whether the property was the proceeds of unlawful activities, the

Bank states that it did not know and could not have known that the transactions were fraudulent. The PG denies the Bank's allegation in this regard.

[49] The Court is not convinced that the denial by the PG is seriously made. The denial is clearly untenable and stands to be rejected out of hand. I say this for the simple reason that, logically, the Bank would not have credited the Lodge's accounts if it knew that the transactions were fraudulently made. Such credit would be to the Bank's detriment. Furthermore, there is no evidence to show that the Bank should have known that the property is the proceeds of the unlawful activities. In this connection the Bank explains that it made the credits on the basis of the Merchant Agreements. It is, in my view, inconceivable to think that the Bank would have knowingly acted against its own interests. As matters stand now, the Bank has instituted action against the Lodge and Mr de Waal to recover its money paid out as a result of its ignorance of unlawful activities. This, in my view constitutes a further consideration to support the conclusion that the Bank did not know and could not reasonably have been expected to know that the transactions were fraudulent.

[50] I am of the considered view, that the conclusion reached in the preceding paragraph is supported by the PG's stance (albeit contradictory to her denial in par 47 *supra*), as demonstrated in her founding affidavit where she concedes that the Bank is entitled to the exclusion of the money that was in the accounts at the time the preservation order was granted, being a total sum of N\$517 698. In other words the PG is not seeking an order that the amount of N\$517 698 be forfeited to the State.

[51] Having regard to the foregoing, the Court is satisfied that the Bank has proved on a balance of probabilities that it has acquired the property legally and for a consideration, and furthermore it did not know or could not reasonably suspected that the property was the proceeds of unlawful activities. The Bank is therefore entitled to an order excluding its interest in the property from the operation of the forfeiture order.

[52] I next turn to consider this Court is in a position resolve the conflicting claims to the money deposited in the accounts found to be legitimate income and those deposited after the preservation order was granted.

Is this Court bound to make a determination regarding the conflicting claims between the Bank on the one hand and Mr de Waal and the Lodge on other hand, regarding money that has been excluded from the operation of the forfeiture order?

[53] As has been observed hereinbefore, when I set out the parties respective cases in the preceding paragraphs, the Bank contends that as a matter of law, the money paid into an account held at its bank becomes the property of the Bank regardless of the circumstance in which the money was paid and by whom. The account holder does not have real right of ownership to the money and the only right he or she has against the Bank is a personal right equivalent to the credit amount in the account. The Bank is merely re-stating, the well-entrenched principle of our law relating to the Bank and Customer relationship².

[54] The Bank accordingly contends, based on the above stated principle, that the positive balance in the Lodge's account is its property and are as the result of it having credited the account in terms of the Merchant Agreement entered into between it and the Lodge on or about 22 September 2010. As far as there is any credit balance on Mr de Waal's account such balance is subject to the bank-customer contractual relationship and is similarly subjected to the aforementioned principle.

[55] According to the deponent to the Bank's affidavit, an amount of N\$1 951 420.73, is due by the Lodge and Mr de Waal to the Bank in terms of the Merchant Agreement. Furthermore, that even if the Bank were to debit the Lodge and Mr de Waal's accounts with the total positive balances of N\$435 321.03 and N\$194 987.72 standing to their respective accounts following the preservation order, there will still be a shortfall in the sum of N\$1 321 111.98. In this connection the Bank says that it has instituted an action in this Court against the Lodge and Mr de Waal for payment of the sum of N\$1 951 420.73 that being the loss it has suffered as a result of their conducts.

² *Jose Ismael v First National Bank of Namibia Limited*, 1997 NR 31; *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 511 at 530-532

[56] Accordingly, the Bank prays that the sum of N\$630 308.75 (N\$435 321.03 + N\$194 987.72) be excluded from the operation of any forfeiture order that might be issued by this Court.

[57] Mr de Waal in his capacity as owner and sole member of the Lodge on the other hand states in his affidavit that:

'With regard to Standard Bank's claim to all the monies in the relevant accounts. They cannot lay claim to such without a civil claim. ...I have never signed a merchant agreement as alleged by Standard Bank and dispute that the unsigned agreement were the standard merchant agreement used during 22 September 2010.'

[58] Mr de Waal continues and states that he is defending the action instituted against him and the Lodge by the Bank and further that he intends to institute a counter-claim against the Bank for damages suffered as a result of the Bank's negligence.

[59] The PG suggests that the balances in respect of the amount received in the accounts after the preservation order was granted, being the sum of N\$29 319.39 in the Lodge's account and N\$59 054.88 in Mr de Waal's account be release to them from the effect of the preservation order.

[60] I do not agree with the PG's suggestion for the reason that in terms of section 59(1) of POCA an application for a forfeiture order can only be made in respect of properties which are subject to a preservation order³. In my view, the deposits which were paid into the account after the preservation order was granted, are not subject to the preservation order. Accordingly, neither the PG nor the Court has jurisdiction or any say over such money.

[61] There are conflicting claims between the Bank and the Lodge in respect of the money in the Lodge's account which have been excluded from the operation of the forfeiture of property order, because the Lodge has complied with the provisions of section 63 of POCA. The Bank claims that the money belongs to it based on the bank-customer contractual relationship.

³ *The Prosecutor General v New Dimensions CC and Others* POCA 10/2012 [216] NAHCMD 123 (20 April 2016).

[62] In my view, the resolution of the dispute between the Bank on the one hand and Mr de Waal and the Lodge on the other hand whether the money found to be excluded from the operation of the forfeiture order should be paid to either of them is not squarely before this Court. In my judgment, the present case is not an appropriate forum to determine the dispute between the said parties. I am of the view, that this Court has no power or jurisdiction to determine the ownership of the said money in the present proceedings. In that regard, I am of the view that this Court cannot make an order as to whom the said money should be paid upon being released from the operation of the forfeiture order other than to make an order that the money has been forfeited to the State or the money has been excluded from the operation of the forfeiture order. In other words for the purpose of this proceedings the Court is not called upon to determine the ownership of the property. The ownership of the money in the accounts is to be determined based on the contractual relationship between the Bank on the one hand and Mr de Waal and the Lodge, as customers on the other hand. That issue is not squarely before this court.

[63] In my view, the foregoing conclusion is supported by the fact that the Bank states that it has instituted a claim against the Lodge and Mr de Waal to claim damages it has suffered as a result of their alleged unlawful conducts. Mr de Waal and the Lodge on their part have indicated they intend to institute a counter-claim against the Bank for the damages they suffered as a result of the alleged negligence by the Bank.

[64] In the light of the foregoing conclusion there is no basis upon which this Court can make an order in respect of the money found to be excluded from the operation of the forfeiture order. In other words under the circumstances of this case, the Court cannot make an order to whom the money should be paid or released.

Costs:

[65] The PG asks for a costs order against the Bank. It is common cause that the Bank urged the PG to institute the application for the preservation of property order on the basis that it believed that fraudulent activities had been committed by the Lodge and Mr de Waal. The Bank made the request to the PG despite the fact that

the Bank could have reversed the transactions in terms of the Merchant Agreement between and the Lodge. The PG duly complied with the Bank's request, and as she was in law duty – bound to do, applied and obtained the preservation of property order. The PG had succeeded to have the money preserved as proceeds of unlawful activities, however in this application to have the money declared as the proceeds of unlawful activities, the Bank as its main ground of opposition, opposed the PG's application. In my judgment the opposition was misconceived and ill-advised. The opposition caused the PG to incur unnecessary costs. As it appears from the judgment, the PG was at all times agreeable that a large portion of the money held under the preservation order be released to the Bank. The Bank could simply have applied for its property to be excluded from the operation of the forfeiture order in terms of section 63 of POCA. Yet the Bank made this claim in the alternative.

[66] In regard to the Bank's conduct, I am of the considered view that the Bank should be ordered to pay the PG's costs in relation to the application for the preservation of property order, as well as the PG costs occasioned by the Banks opposition to the property being declared as proceeds of unlawful activities. In the exercise of my discretion, I would order that the Bank should be liable for half of the costs of the forfeiture application.

[67] As regards to the application by the Lodge and Mr de Waal for the exclusion of their properties from the operation of the forfeiture order, the Lodge has succeeded in having some of its property excluded from the operation of the forfeiture order. Mr de Waal on the other hand failed in his application. The application was opposed by the PG. Accordingly, in my view, the general rule that costs follow the result applies: The PG is liable to pay the Lodge's costs associated with the application by the Lodge to have its property excluded from the operation of the preservation order. Mr de Waal would be ordered to pay the costs of the PG associated with his application to have his property excluded from the operation of the forfeiture order.

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

1. The sum of N\$323 245.12 held in second respondent's account, (Divundu Rainbow River Lodge CC,) account number 241 905 451 is

released from the operation of the forfeiture order and by consent between the PG, the second and the third respondents, is ordered to be paid to Standard Bank Namibia.

2. The application by the second respondent (the Lodge) for the exclusion of its interests from the operation of the forfeiture order succeeds. Accordingly the amounts of N\$112 139.91 is excluded from the operation of the forfeiture order and by consent between the PG, second and third respondents that amount is ordered to be paid to Standard Bank Namibia.
3. The balance of N\$29 319.39 held in the second respondent's (the Lodge) account number, 241 905 451, held at Standard Bank Namibia, being the total deposits paid in the said account after the preservation order was granted, in so far as it might be necessary, is hereby released from the operation of the forfeiture order.
4. The positive balance in the sum of N\$105 000 held in the third respondent's (Mr de Waal's) account, account number 247 470 163 held at Standard Bank Namibia in the name of Gideon Johannes de Waal, is by consent between the PG and the third respondent, released from the operation of the forfeiture order and is further by consent ordered to be paid to Standard Bank Namibia.
5. The positive balance in the sum of N\$59 054.88 in the third respondent's (Mr de Waal), account number 247 470 163, in so far as it might be necessary, is excluded from the operation of the forfeiture order.
6. The application by third respondent, (Mr de Waal) for the exclusion of the sum of N\$89 987.72 is dismissed and the sum of N\$89 987.72 is declared forfeited to the State as the proceeds of unlawful activities.
7. Warrant Officer Green, failing him, Warrant Officer Emilia Nambandi, and failing her, any other authorised officer of the Commercial Crime Investigation Unit: Anti-Money Laundering and Combating of Financing and Terrorism Sub-Division, Windhoek is ordered and directed to pay

the monies in accordance with orders in paragraphs, 1, 2 and, 4, and 6 of this Order.

8. Standard Bank Namibia is ordered to pay the Prosecutor-General's costs in respect of the application for the preservation order and half of the costs in respect of this application by the Prosecutor-General for the forfeiture of property order.
9. The Prosecutor-General is ordered to pay the second respondent, costs occasioned by her opposition to the second respondent's application for the exclusion of its interests from the operation of the forfeiture of property order.
10. The third respondent, Mr de Waal is ordered to pay the Prosecutor-General's costs in respect of his application for the exclusion of his interest from the operation of the forfeiture order.
11. The matter is removed from the roll and considered finalized.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT: L ANGULA
Of Office of the Prosecutor-General, Windhoek

FIRST RESPONDENT: P KAUTA (with him M KUUZEKO)
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

SECOND AND THIRD
RESPONDENT: S SWANEPOEL
Of Swanepoel Legal Practitioners, Windhoek