IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***YES***

Date: ***13th MAY 2016*** Signature: _____

CASE NO: 2014/29695

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

- And -

AIRPORT CLINIC JHB INTERNATIONAL (PTY) LTD First Respondent
SOLANKI, DR VIVEK SAVJI Second Respondent

JUDGMENT

ADAMS AJ:

[1]. The applicant applies in terms of chapter 6 of the Prevention of Organised Crime Act 121 of 1998 *('POCA')* for the forfeiture of foreign currency presently held in cash by the South African Reserve Bank *('SARB').* The forfeiture is sought on the basis that the foreign currency in cash constitutes the proceeds of unlawful activities.

[2]. The application is opposed by the first respondent, Airports Clinic Johannesburg International (Pty) Limited, and the second respondent, Vivek Savji Solanki, the sole shareholder of the first respondent. I interpose here to note that the first respondent is at times incorrectly cited by the second respondent himself. However, on the version of the applicant himself the correct citation of the first respondent is as per the aforegoing and the case heading.

[3]. The foreign currency consisting of US$184,420.00, €4,280.00 and £1,080.00 in cash *('the property'),* was seized at the instance of the South African Revenue Services *('SARS')* on the 5th February 2010 and was handed over to the South African Reserve Bank *('SARB')* on the 2nd March 2010.

[4]. The property was acquired lawfully by the first respondent and represented amounts paid by patients to it in respect of medical services rendered and medication supplied by the clinic to patients from time to time. The property was not the proceeds of criminal activities in that it was not acquired by the respondents in the commission of a crime, and accordingly it cannot be described as ill – gotten gains.

[5]. The first and second respondents have breached the provisions of Regulation 6(1) of the Exchange Control Regulations which provides as follows:

> *'Every person resident in the Republic who becomes entitled to sell or to procure the sale of any foreign currency, shall within 30 days after becoming so entitled, make or cause to be made, a declaration in writing of such foreign currency to the Treasury or to an authorised dealer'.*

[6]. The applicant contends that the property constitutes the proceeds of unlawful activities in that the first respondent infringed Exchange Control Regulation 6(1) by failing to sell the property to an ADLA within 30 days of accrual. This violation constitutes a criminal offence in terms of Exchange Control Regulation 22.

[7]. The aforegoing is the sum total of the bases on which the applicant endeavours to bring the property within the confines of the section 50 *('Making of Forfeiture Order')* of POCA, which provides thus:

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

[8]. The first and second respondents oppose the application. The opposition is based mainly on a claim that they (the respondents) were not aware that their conduct amounted to a criminal offence.

[9]. As rightly contended by Mr Latif, who appeared on behalf of the applicant, this *'defence'* is untenable as it is far – fetched if regard is had to the circumstances of this matter, most notably the fact that prior to the seizure of the property the respondents had been involved with SARB with respect to foreign exchange issues. This means that they were familiar with the regulations, and I find it hard to believe that the first and second respondents would have been ignorant of the fact that their conduct constituted a criminal offence.

[10]. I therefore reject the version of the respondents as false on this particular aspect.

[11]. The applicant has also raised a few points *in limine* in relation to the respondents' opposition to the application. These points are of a very technical / legal nature. For the reasons mentioned below I am of the view that there is no merit in any of the preliminary points raised by the applicant.

[12]. The applicant takes issue with the citation of the first respondent. However, as I alluded to above, the applicant himself confirms the correct citation of the first respondent and any incorrect citation can at best be attributed to a *bona fide* error.

[13]. The applicant furthermore questions the *locus standi* of the second respondent and whether he has the necessary authority to act on behalf of

the first respondent. I agree with the submission made on behalf of the respondents in the regard that *Eskom v Soweto City Council*, 1992 (2) SA 703 (W) finds application in this matter. This means that challenging the authority of the first respondent to be represented should have been directed at the authority of the attorney representing it. That was not done in this matter, and the legal point relating to *locus standi* stands to be dismissed.

[14]. The only issue which remains for me to decide is whether the property falls within the ambit of Section 48(1) as being *'the proceeds of unlawful activities'.*

[15]. The principles relating to this issue was dealt with extensively by the Supreme Court of Appeal in the matter of *National Director of Public Prosecutions v Seevnarayan*, (111/03) [2004] ZASCA 38; [2004] 2 All SA 491 (SCA). At paragraph [18] the Court explains the philosophy behind the relevant provision of POCA as follows:-

> *'[18] The inter-related purposes of chapter 6 therefore seem to us to include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime, (c) eliminating or incapacitating some of the means by which crime may be committed ('neutralising', as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal. We accordingly*

agree the provisions must be restrictively interpreted, though not for the narrow reasons counsel advanced'.

[16]. At paragraph [64] the court deals with the concept of *'Proceeds of unlawful activities'* and has this to say:

*'[64] The statute defines '*proceeds of unlawful activities' *as meaning* –

> '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'.

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. For this approach he relied on the Act's short title ('prevention of organised crime'), and noted that its long title suggested that it was intended to 'combat organised crime, money laundering and criminal gang activities'. From this and the preamble he concluded that evasion of personal income tax by a single individual could not be considered 'organised crime' and that 'the Act was never intended to be applied in situations such as the present'. For these and other reasons he applied a restrictive approach.

[65] 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.*

… … … …

[73] In our view, even viewing the definition broadly, there is no such connection between the interest earned and any of the offences Seevnarayan committed. The interest did not accrue to him in consequence of his conduct in proffering false information to Sanlam, but from his conduct in making the investments. Nor did the interest accrue to him in consequence of his conduct in proffering false income tax returns. It might be said that the interest accrued to him in consequence of his intention to commit fraud on the revenue services by submitting false returns in the future. But it was still not an accrual that flowed from the commission of that offence. On the contrary, the offence was committed in consequence of the accrual of the interest. It is true that the offence was committed with the object of evading liability for the income tax payable on the interest earned, but that is not to say that Seevnarayan 'retained' (or attempted to retain) any part of the interest 'in connection with or as a result of the offence'.

[17]. In the end, the SCA, applying the above principles, found that Mr Seevnarayan's interest earned on investments made with a view to evading tax, did not fall within the definition of *'proceed of unlawful activities'.*

[18]. Applying these principles to the present matter, I am not persuaded that the property constitutes the proceeds of unlawful activities. I cannot see my way clear to find that the foreign currency, which the respondents acquired lawfully in the ordinary course of their business as a travel clinic, was the proceeds of unlawful activities, that being the contravention of Exchange Control Regulation 6(1). In the words of the SCA, I consider that the *'connection'* the definition envisaged 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. *In casu* there is no such connection between foreign currency and the respondents' contravention of Regulation 6(1).

[19]. Accordingly, the application for forfeiture in terms of section 53 of COPA, of the property identified as US$184,420.00, €4,280.00 and £1,080.00 in foreign currency, currently held by the South African Reserve Bank under receipt number 1248 *('the property'),* stands to be dismissed.

COSTS

[20]. The first and second respondents have successfully opposed the application for forfeiture of the property, and in the normal course of events the cost should follow the suit.

[21]. However, the respondents have contravened the provisions of the Exchange Control Regulations, which is a criminal offence, and I am advised that to date hereof they have not been prosecuted for the offence. The applicant was justified in bringing this application especially in view of the many issues relating to the correct procedures not being followed by the respondents from the inception of this matter.

[22]. Therefore, in the exercise of my discretion I intend granting no order as to the cost of the application.

ORDER

Accordingly, I make the following order:

1. The application is dismissed.

2. Each party shall bear his / its own costs.

L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	10th May 2016
JUDGMENT DATE:	13th May 2016
FOR THE APPLICANT:	Adv F Latif
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE RESPONDENTS:	Adv Hodes SC
INSTRUCTED BY:	BBM Attorneys