

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

Case no: 2020/11723

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: No
DATE: 20 December 2021

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

MAWEZA NKOGATSI INCORPORATED

Respondent

In re: The amounts of R1 296 115.61 plus interest held in Standard Bank with account number [...];

The amount of R563 500.71 plus interest held in Standard Bank account with account number [...];

The amount of R34 618.70 plus interest held in Standard Bank with account number [...];

The amount of 164 792.87 held in First National Bank with account number [...] limited to the funds held on behalf of Moyo, and;

The amount of R1 152 460.37 held in Standard Bank account with account number [...]

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 20 December 2021 at 10h00.

PRETORIUS AJ:

Introduction

[1] This is an application by the National Director of Public Prosecutions (*"the NDPP"*) for the granting of a forfeiture order under section 48 of the Prevention of Organised Crime Act, 121 of 1998 (*"the POCA"*).

[2] The application was brought pursuant to a preservation of property order granted by Vally J on 22 May 2020 (*"the preservation order"*).

[3] The property forming the subject matter of the application is the following:

(3.1) The amount of R1 296 115.61 plus interest held in a Standard Bank account with account number [...];

(3.2) The amount of R563 500.71 plus interest held in a Standard Bank account with account number [...];

(3.3) The amount of R34 618.70 plus interest held in a Standard Bank account with account number [...];

(3.4) The amount of R164 792.87 held in a First National Bank account with account number [...], limited to the funds held on behalf of Mr Qongani Moyo; and

(3.5) The amount of R1 152 460.37 plus interest held in a Standard Bank account with account number [...]

(*"the property"*).

[4] In this application the NDPP seeks an order in the terms set out in the draft attached to its notice of motion dated 23 October 2020 marked "A". The relief sought include:

(4.1) Declaring, in terms of section 53 of the POCA, forfeiture to the state the property, which is presently subject to the preservation order;

(4.2) Dispensing with the need for a *curator bonis* to be appointed and directing any authorised representative of Standard Bank to pay the property into the account of the victim's attorney being: Standard Bank Account in the name of I Mabunda Attorneys Trust Account with account number [...] with reference "Mayo Q Jafu 26/2020" and providing the applicant with proof thereof by email to pjagnath@npa.gov.za;

(4.3) Directing First National Bank to release the hold on the amount of R164 792.87 held in the account with account number [...]; and

(4.4) Any person whose interest in the property concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the court.

[5] According to the NDPP the preservation order could not be served on Mr Qongani Moyo in terms of paragraph 5.1.1 of the order as he has absconded and is untraceable, with the result that a warrant for his arrest had been issued. The preservation order was however served on Mr Moyo's attorneys, Maweza Nkogatsi Incorporated (the respondent), on 29 May 2020.

[6] I was satisfied during the hearing of the application that the preservation order was served on the interested parties mentioned in paragraph 5 of the preservation order.

[7] The preservation order was published in the Government Gazette on 31 July 2020 and the present application was brought within the required 90-day period.

[8] The respondent entered an appearance and applied for an order excluding its alleged interest in the property in terms of section 39(3) of the POCA on 13 June 2020. The respondent also filed a notice of intention to oppose the present application on 3 November 2020 and an answering affidavit soon thereafter.

The factual matrix

[9] The NDPP contends that the property constitutes proceeds of unlawful activities and facilitated the offences of theft and money laundering. In support of the contention, the NDPP relies on *inter alia* the facts set out in an affidavit deposed to by the complainant, Mr Emmanuel Mundiya ("*Mr Mundiya*"), a Zimbabwean citizen, on 6 March 2020.

[10] According to Mr Mundiya he played and won the Ithuba National Lottery ("*Ithuba*") on 29 November 2019, when he won R8 million (later established to be the amount of R8 217 019.70). As a foreign national, Mr Mundiya did not have a South African bank account to receive the funds from Ithuba. Mr Mundiya accordingly requested a friend, Mr Qongani Moyo ("*Mr Moyo*") to receive and deposit the winnings into Mr Moyo's bank account. It was agreed between Mr Mundiya and Mr Moyo that Mr Moyo would ask Standard Bank, where his account was held, to issue two bank cards to afford Mr Mundiya the opportunity to access the funds held in Mr Moyo's account on his behalf. The bank account details provided to Ithuba was a Standard Bank account with account number [...] held in the name of Mr Moyo. Ithuba paid the funds into the said bank account of Mr Moyo.

[11] According to Mr Mundiya he was accompanied by Mr Moyo on 1 February 2020, when Mr Mundiya purchased a vehicle from the Mega Auto Garage in Pretoria. Mr Mundiya asked Mr Moyo to pay the purchase price of the vehicle, an amount of R365 000, to the motor dealer from the funds held by Mr Moyo on behalf of Mr Mundiya. Having paid the purchase price, Mr Mundiya was furnished with the original registration certificate and arranged with the dealer to collect the vehicle later.

[12] Whilst in Zimbabwe, Mr Mundiya received a call from the motor dealer on 28 February 2020, advising him that Mr Moyo collected the vehicle. Mr Mundiya was advised by the motor dealer that Mr Moyo indicated that Mr Mundiya lost the registration certificate. According to Mr Mundiya, he did not ask Mr Moyo to collect the vehicle, nor did he lose the registration certificate.

[13] Mr Mundiya attempted in vain to contact Mr Moyo. Upon Mr Mundiya's return to South Africa he discovered that his bank card was suspended. According to Mr Mundiya, Mr Moyo was avoiding him, but he discovered that Mr Moyo changed ownership of the vehicle into his name without Mr Mundiya's consent.

[14] Mr Mundiya laid a charge of fraud and theft against Mr Moyo with the South African Police Service ("*the SAPS*") on 6 March 2020.

[15] Attached to Mr Mundiya's affidavit is the winning lotto ticket which reflects the prize money in an amount of R8 217 019.70 and which contains the words "*claim validated*". Also attached is a letter by Ithuba which confirms that "*Mr Mundiya Emmanuel with passport number [...] has won a lotto of R8 217 019.70 that was played at Glen Marais Spar on the 04/12/2019 Time: 14:35*". The date in the letter, requires clarification. The lotto ticket reflects 29 November 2019 as the date the lotto was played. However, it appears that the claim was validated on 4 December 2019. It was then also confirmed in the letter that Mr Mundiya:

"wants the said fund to be transferred to the account of the following person due to the fact that he is a foreigner national and does not have a valid account in the country.

So we adhere to the instruction given to us by Mundiya Emmanuel so we transferred the funds from Ithuba to the following banking details.

BANKING DETAILS

NAME: MOYO QONGANI

BANK: STANDARD BANK

ACCOUNT NUMBER: [...]"

[16] The affidavit deposed to by Mr Mundiya in support of the charge lack particularity, but it appears from the papers that none of the allegations in Mr Mundiya's affidavit are disputed by the NDPP or the respondent and accordingly I do not deem it necessary to deal with those issues.

[17] Mr Moyo was arrested on 26 March 2020 and detained at the Midrand Police Station until 27 March 2020 when he made a first appearance in the Alexandra Magistrates Court. He was represented by the respondent and released on bail of R5 000 after the criminal case was postponed.

[18] According to the NDPP the prize money was not paid over to Mr Mundiya, and he did not receive any of the money in terms of the agreement reached with Mr Moyo. The NDPP relies on the affidavits of Mr Willem Petrus Venter (*“Mr Venter”*), an Operational Coordinator of the Financial Intelligence Centre (*“the FIC”*), and of Ms Magdél Schimper, a Financial Investigator employed by the National Prosecuting Authority (*“Ms Schimper”*), which affidavits were attached to the NDPP’s preservation application.

[19] Mr Venter explained that the prize money was paid directly into the Standard Bank account with account number [...] from Ithuba and was subsequently moved into different accounts. Mr Venter stated that, before the transaction from Ithuba was deposited into Mr Moyo’s bank account, his bank account had a negative balance of R4.36 and the only credit transaction on that account was the amount of R380 on 25 February 2020. Mr Venter went on to give a detailed analysis of the flow of the money with reference to various supporting documents.

[20] In conclusion Mr Venter stated that, from the information it is evident that Mr Moyo provided his Standard Bank account details to orchestrate payment into his other bank accounts and to take control of the prize money. Mr Venter stated that it was evident from the bank analysis that the said account was not used and only one credit was received into the account. The analysis further demonstrated that, from the time Ithuba transferred the prize money into the nominated Standard Bank account, money was transferred into other accounts held by Mr Moyo. It is also evident, so Mr Venter contended, that Mr Moyo transacted on the accounts as if the money was his own and that he did not intend to transfer the money to Mr Mundiya. Mr Venter concluded that Mr Moyo was always aware that he was not entitled to the prize money and accordingly committed the act of fraud, alternatively theft. Mr Venter concluded that there are reasonable grounds to believe that the property is the proceeds of unlawful activities.

[21] Ms Schimper was tasked to investigate the matter. Ms Schimper recorded the facts and findings of the investigation conducted by her in a detailed affidavit deposed to on 21 May 2020. She stated that her investigation revealed that substantial evidence existed which demonstrated the commission of theft and money laundering by Mr Moyo, that it was evident that Mr Moyo was well aware that he was not legally entitled to the proceeds, that Mr Moyo had the intention to dispose of the funds as soon as possible by transferring it to other accounts and to purchase goods, that Mr Moyo intended to deprive Mr Mundiya of his rightful ownership and that Mr Moyo intended to keep the funds. Ms Schimper concluded that the funds left in the accounts are the proceeds of unlawful activities and/or was an instrumentality of the offence of money laundering and theft.

[22] As a result of the investigations and on 8 May 2020 directives in terms of section 34 of the Financial Intelligence Centre Act, 38 of 2001 were implemented directing the applicable, accountable institutions not to proceed with the carrying out of any transactions or proposed transactions or any other transaction in respect of the relevant accounts and funds held with them, including the bank accounts held in the name of Mr Moyo. The institutions issued with the directives are the Standard Bank of South Africa Ltd ("*Standard Bank*") and First National Bank, a division of FirstRand Bank Ltd ("*FNB*").

[23] It is common cause that Mr Moyo has absconded late in May 2020 and is untraceable. The respondent explains that the last contact it had with Mr Moyo was on 28 May 2020 at its office. According to the NDPP, a warrant for Mr Moyo's arrest has been issued.

[24] I am satisfied that, on a balance of probabilities, the property concerned is the proceeds of unlawful activities as envisaged in section 50(1)(b) of the POCA¹ and that the NDPP has made out a case for an order for forfeiture. What remains is to determine whether the respondent is entitled to an order for the exclusion of certain interests from the operation of the order with specific reference to the provisions of section 52(2) of the POCA and ancillary issues.

¹ *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 All SA 491 (SCA) at paras 64-74

Exclusion of interest

[25] Section 50(1) of the POCA authorises the court, subject to section 52, to make a forfeiture order if it is found, as a matter of probability, that the property is the proceeds of unlawful activities. In the present matter it is not disputed with any conviction that the property is the proceeds of unlawful activities.

[26] In terms of section 52(2) of the POCA:

“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.”

[27] With reference to section 52, Nugent JA held in *Mazibuko and Another v National Director of Public Prosecutions*² as follows:

“[40] 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').³ 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

² 2009 (6) SA 479 (SCA) at para 40

³ *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) at para 24

'neither knew nor had reasonable grounds to suspect' that the property in which the interest is held is an instrumentality of the offence.”

[28] The respondent entered an appearance and applied for an order excluding its interest in the property in terms of section 39(3) of the POCA on 13 June 2020.

[29] The affidavit in support of the respondent's section 39(3) notice of appearance and application for exclusion was deposed to on 12 June 2020 by a director of the respondent, Mr Sipho Nkogatsi (“*Mr Nkogatsi*”). The interest which the respondent sought to exclude from the forfeiture order is fees earned by the respondent for legal services rendered to Mr Moyo when the respondent acted as his attorneys.

[30] The facts relevant to the application for exclusion, according to Mr Nkogatsi, are the following:

(30.1) Mr Nkogatsi was contacted by Mr Mabunda of Mabunda Attorneys on 27 March 2020 with a request that the respondent represents Mr Moyo during his first appearance in the Alexandra Magistrates Court. Mr Mabunda advised Mr Nkogatsi that Mr Moyo was charged with the theft of an amount of R8,2 million, which Mr Moyo allegedly stole from Mr Mundiya.

(30.2) Mr Nkogatsi agreed to represent Mr Moyo, who was not known to Mr Nkogatsi at the time. Mr Nkogatsi consulted with Mr Moyo at court on 27 March 2020. Mr Moyo instructed Mr Nkogatsi that he has won the money in November 2019 after playing the lottery and that he therefore did not steal the money from Mr Mundiya.

(30.3) The criminal case against Mr Moyo was postponed on 27 March 2020 for further investigation by the State. Mr Moyo was further detained but was granted bail on 21 April 2020 in the amount of R5 000, which bail was paid by Mr Moyo's family.

(30.4) Mr Nkogatsi again consulted with Mr Moyo on 21 April 2020. Mr Moyo persisted that he did not steal the money from Mr Mundiya, but that he, Mr Moyo, won the lottery. Mr Nkogatsi explained that he did not have

access to the docket and his consultation with Mr Moyo at the time was aimed at obtaining an overview of Mr Moyo's version.

(30.5) During the consultation, Mr Moyo instructed Mr Nkogatsi that the lthuba video footage would confirm the fact that he won the lotto. Mr Nkogatsi asked Mr Moyo why Mr Mundiya would implicate him. Mr Moyo explained that the relationship between him and Mr Mundiya soured over time and that Mr Moyo decided to avoid any contact with Mr Mundiya.

(30.6) Mr Nkogatsi explained that he asked Mr Moyo where the prize money was kept upon which Mr Moyo advised that the funds were deposited into his bank account with Standard Bank. Mr Nkogatsi advised Mr Moyo that he was facing a serious charge with a prescribed minimum sentence of 15 years if convicted and that it will be necessary to secure counsel in the matter in assisting him further. Mr Nkogatsi advised Mr Moyo that the fee for his bail application was an amount of R15 000 and requested payment thereof. Mr Moyo agreed to make payment.

(30.7) On 22 April 2020, Mr Moyo was informed by Standard Bank that his bank account was frozen, and Mr Moyo approached the respondent for legal advice. Mr Moyo instructed the respondent to launch an urgent application against Standard Bank to unfreeze his account. The respondent accepted the instruction and briefed counsel, the same counsel who was briefed by the respondent for Mr Moyo's criminal case, accordingly.

(30.8) On 5 May 2020, the criminal case served again before court. On the day the State advised the court that the investigations were not completed and requested that Mr Moyo's bail be cancelled. The matter was postponed to 12 May 2020 for a hearing of the State's application to cancel the bail. On 12 May 2020 the criminal case was again postponed, this time to 29 May 2020.

(30.9) On 12 May 2020, the respondent issued an urgent application on behalf of Mr Moyo against Standard Bank in the Gauteng Division, Pretoria under case number 22277/20 (*"the SB application"*). In terms of the

SB application Mr Moyo sought an order declaring unlawful the decision by Standard Bank to suspend the operation of Mr Moyo's bank account, number 10088 917 299, and to retain the moneys therein. Standard Bank opposed the SB application and delivered its answering affidavit on 18 May 2020. Heads of argument were prepared by both parties and filed on 19 May 2020. The SB application was heard on 21 May 2020. It is not clear what the outcome of the urgent application was but according to the NDPP, the said application was not finalised.

(30.10) Significantly, Mr Nkogatsi explained in his affidavit pursuant to section 39(3) that he learned from the answering affidavit of Standard Bank in the SB application, particularly the letters of the FIC which were attached thereto, that Mr Moyo's money may have been the proceeds of unlawful activities.

(30.11) Consequently, and on 25 May 2020, the respondent sent the letters of the FIC to Ithuba and sought written confirmation from Ithuba that Mr Moyo was indeed the rightful winner of the lotto. Ithuba replied on the same day advising that the request could not be honoured because it has no confirmation that the respondent has a mandate from Mr Moyo. Ithuba explained that it would be able to divulge the requested information only once Mr Moyo's identity has been confirmed and it has been satisfied that Mr Moyo has waived his right to privacy.

(30.12) Mr Nkogatsi explained that he thereafter considered the Ithuba National Lottery Games General Terms and Conditions and was satisfied that Mr Moyo must have been the rightful owner of the prize money. In particular Mr Nkogatsi relied on the following portion from the said terms and conditions:

"If a Claimant is unable to complete a Prize Claim Form due to legal, physical, or other disability, a duly authorized representative of the Claimant shall complete and sign a Prize Claim Form on their behalf. The Prize Claim Form must state the name of the Claimant and the

representative and describe the status of the signatory, if not the Claimant. ITHUBA reserves the right to request evidence of the capacity of a representative to claim on behalf of a Claimant”

(30.13) I am not convinced that the aforesaid portion of the terms and conditions could have satisfied Mr Nkogatsi that Mr Moyo must have been the rightful owner of the prize money. At best, the relevant portion would have directed Mr Moyo’s enquiries to provide Ithuba with the information required to determine the true facts. Mr Nkogatsi however does not explain why he did not obtain the mandate required by Ithuba from Mr Moyo to obtain the necessary information from Ithuba nor did he explain why he never asked Mr Moyo for the lotto ticket.

(30.14) During May 2020, Mr Moyo instructed the respondent to launch further urgent proceedings to recover the assets which were confiscated by the SAPS during his arrest on 26 March 2020. An urgent application was launched on 20 May 2020 under case no 22575/20 in the Gauteng Division, Pretoria on behalf of Mr Moyo against the Minister of Police and the Gauteng Provincial Commissioner of Police (*“the SAPS application”*). The SAPS application was opposed, and an answering affidavit was filed on 23 May 2020 on behalf of the Minister and the Commissioner. A replying affidavit and heads of argument were prepared, and the application was heard on 26 May 2020. The SAPS application was struck from the roll due to a lack of urgency.

(30.15) On 29 May 2020 Mr Moyo did not appear in the criminal case, which was then again postponed to 12 June 2020. A warrant for the arrest of Mr Moyo was issued but suspended pending Mr Moyo’s appearance on 12 June 2020. Mr Nkogatsi explained that despite attempts to contact Mr Moyo, he could not get hold of him. The last contact that the respondent had with Mr Moyo was on 28 May 2020 when Mr Moyo was at the respondent’s office.

(30.16) According to the respondent, the total amount of legal fees owing by Mr Moyo to the respondent is the amount of R254 895.32.

[31] The amount of R164 792.87 is held in the respondent's First National Bank account with account number [...], which amount is subject to the preservation order. Mr Venter explained in his affidavit, with reference to bank statements and other supporting documents, how funds were moved between accounts held by Mr Moyo since the lotto prize money was first deposited into Mr Moyo's account.

(31.1) The prize money was paid by Ithuba into Mr Moyo's Standard Bank account with number [...] on 5 December 2019;

(31.2) From there, Mr Moyo made six transfers between the period 6 December 2019 and 5 March 2020 (referred to by Mr Venter as the "*level 1 transactions*"). A transfer of R6 000 000 was made into a Standard Bank account held by Mr Moyo with number [...];

(31.3) A transfer of R1 800 000 was made into a Standard Bank account held by Mr Moyo with number [...];

(31.4) Two transfers were made to Maliviwe Joubela totalling R86 750;

(31.5) A transfer of R365 000 was made to Mega Auto Trading; and

(31.6) A transfer of R30 000 was made to an unknown Nedbank account.

[32] Several payments and transfers were made by Mr Moyo from his Standard Bank account (account number [...]) during the period 6 December 2019 to 4 May 2020 as part of the "*level 2 transactions*". One of these transfers was a transfer in the amount of R200 000 to the respondent's FNB account with number [...] ("*the respondent's account*") on 4 May 2020.

[33] When the FIC directed the Standard Bank and FNB to place a hold on and preserve the funds in the relevant accounts, the balance in the respondent's account was R164 792.87. Mr Venter concluded it is reasonable to believe that the amount transferred by Mr Moyo to the respondent's account is payment for legal representation.

[34] The issues to be determined on a balance of probabilities is, firstly, whether the respondent had acquired the funds legally and for a consideration, the value of which is not significantly less than the value of that interest, and, secondly, whether the respondent knew or had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities. If the answer to the first two issues is in the affirmative, I believe that a third issue to be determined is when the respondent gained knowledge of or had reasonable grounds to suspect that the property in which its interest is held is the proceeds of unlawful activities.

[35] As aforesaid, Mr Venter concluded it is reasonable to believe that the amount transferred by Mr Moyo to the respondent's account is payment for legal representation. The NDPP states in its founding affidavit (paras 21.10, 37 and 40) that it considered the respondent's papers and supporting documents and was satisfied that the amount held in the respondent's account is the amount owing for legal fees. As such, the NDPP sought an order releasing the hold on the respondent's account and excluding same from forfeiture.

[36] Accordingly, I find that the respondent had acquired the funds legally. Whether the funds so obtained by the respondent is for a consideration, the value of which is not significantly less than the value of that interest, requires some consideration.

[37] In its answering affidavit, the respondent contends that the NDPP made a mistake by believing that the respondent's claim for exclusion is limited to the amount held in the respondent's account (R164 792.87). Instead, so the respondent contends, the respondent claimed the exclusion of the amount R254 895.32. It is indeed so that the respondent contended in its section 39(3) affidavit that its total legal fees, including counsel's fees, are R254 895.32. However, prayer 1 of the respondent's notice of application in terms of section 39(3) does not specify an amount and merely seeks "*to exclude its [the respondent's] interest in the property concerned from the operation of the intended forfeiture order by the National Director of Public Prosecution*".

[38] The respondent's fees to which it claims entitlement are with no degree of precision dealt with in the papers. There are ten invoices attached to the respondent's section 39(3) affidavit – five invoices of the respondent and five issued by counsel. I considered the invoices attached to the respondent's section 39(3) affidavit and established the following:

(38.1) The respondent's first invoice appears to be incomplete.

(38.2) The ten invoices pertain to the various matters attended to by the respondent and counsel on behalf of Mr Moyo, which include the criminal case, the SB application, and the SAPS application.

(38.3) Both the respondent's and counsel's invoices contain calculation errors in that the items included in the invoices do not add up to the total of some of the invoices.

(38.4) There are several discrepancies and questionable entries in the invoices of the respondent and counsel.

(38.5) The total of the respondent's invoices amounts to R73 426.33.⁴

(38.6) The total of counsel's invoices amounts to R218 160.19.⁵

(38.7) The combined total amounts to R291 586.52, which is R36 691.20 more than the amount the respondent claims to be excluded.

[39] I engaged the respondent's counsel regarding these issues, but he was not able to give me any satisfactory explanation with reference to the papers before me.

[40] In its replying affidavit, the NDPP accepts that the total amount owing to the respondent in respect of legal fees is the amount of R254 895.32 and contends that the amount of R164 792.87 has already been paid to the respondent by Mr Moyo (i.e., the amount held in the respondent's account). This is not accurate. Firstly, as pointed out, there is a discrepancy between the amount alleged by the respondent to

⁴ Being the total of the items and not the total of the invoices.

⁵ Being the total of the items and not the total of the invoices.

be owing (R254 895.32) and the total of the invoices relied upon (R291 586.52). Secondly, as is evident from Mr Venter's affidavit and the supporting documents relied upon therein, Mr Moyo paid an amount of R200 000.00 to the respondent and not only the amount of R164 792.87 as alleged by the NDPP. Consequently, the contention that a balance of R90 102.45 is outstanding on the respondent's account is also inaccurate. The correct balance, accepting that the total amount is R254 895.32 as claimed by the respondent, is therefore R54 895.32.

[41] The NDPP further contends:

(41.1) Although the amount of R164 792.87 in the respondent's account constitutes proceeds of crime, such amount was paid in lieu of legal fees to the respondent and was received by the respondent as due consideration for legal fees. The NDPP did not, so it contends, consider any further amount as the funds preserved in the accounts held by Mr Moyo constitute the proceeds of unlawful activities and as a result cannot be used to pay the balance owed by Mr Moyo to the respondent.

(41.2) The NDPP further contends that it did not mistakenly believe that the respondent claimed an interest limited to the amount of R 164 792.87 as alleged by the respondent. The NDPP contends that the said amount is the only amount that the respondent can lawfully lay claim to. In this regard, the NDPP contends that the provisions of the POCA does not make provision for the payment of the legal fees and costs to be paid from the funds that are subject to the preservation order. I am not convinced that this contention is accurate. Section 44(1)(b) and section 45 provide for such legal expenses. In any event, the contention by the NDPP contradicts its contention that the R164 792.87 fee is the only amount that the respondent can lawfully lay claim to.

[42] Accordingly, I find that the respondent had acquired the funds legally and that the funds so obtained by the respondent is for a consideration, the value of which is not significantly less than the value of that interest, subject to what follows. I am satisfied that the respondent had acquired, at least initially, an entitlement to fees

legally as envisaged in section 52(2)(a) of the POCA. From the respondent's affidavits and the supporting documents, it is evident that the respondent rendered legal services to Mr Moyo in at least three litigious matters. The NDPP also does not dispute this. This disposes of the first issue for determination mentioned above.

[43] The issue whether the respondent knew or had reasonable grounds to suspect that the property in which its interest is held is the proceeds of unlawful activities as envisaged in section 52(2)(b) of the POCA is, however, more tortuous.

[44] Since the inception of the relationship between the respondent and Mr Moyo, the respondent knew that Mr Moyo was charged with theft and fraud. I do not believe that this in itself means that the respondent knew or had reasonable grounds to suspect that the concerned property is the proceeds of unlawful activities. Mr Nkogatsi explained that, during the initial consultation with Mr Moyo on 27 March 2020, Mr Moyo advised that he played and won the lotto and that he did not steal the money from Mr Mundiya. The next consultation with Mr Moyo was on 21 April 2020 when Mr Moyo insisted that it was he who played and won the lotto. According to Mr Nkogatsi the docket was not available to him and, although it may be that Mr Nkogatsi could have taken steps to obtain more information about the facts of the case, he apparently did not do so but relied on Mr Moyo's instructions. The criminal case was postponed several times thereafter. I am satisfied that, on a balance of probabilities, during the initial stages of the relationship between the respondent and Mr Moyo the respondent did not know, nor did it have reasonable grounds to suspect that the money was the proceeds of unlawful activities.

[45] However, upon a consideration of the evidence before me and on the respondent's version, the position changed. Mr Nkogatsi explained in his affidavit that Mr Moyo's legal team learned from the opposing affidavit delivered by Standard Bank in the SB application on 18 May 2020, particularly the letters of the FIC which were attached thereto, that Mr Moyo's money may have been the proceeds of unlawful activities. As a result, the respondent investigated the matter by approaching Ithuba on 25 May 2020 for confirmation that Mr Moyo was the rightful winner of the lotto. Ithuba required more information before providing the requested confirmation, which information the respondent elected not to provide to Ithuba.

Instead, the respondent considered the Ithuba National Lottery Games General Terms and Conditions, which, according to Mr Nkogatsi, satisfied the respondent that Mr Moyo must have been the rightful owner of the prize money. As mentioned before, I find this explanation to be unconvincing, particularly having regard to the facts set out in Standard Bank's answering affidavit, which was in the respondent's possession at the time.

[46] Significantly, Mr Nkogatsi states in his affidavit on behalf of the respondent that "... we have learnt the fact that the accused's money might be the proceeds of unlawful activities and or tantamount to money laundering as alleged by the Applicant in this matter ... from the Financial Intelligence Center's letter ("FIC") which was attached to the bank's answering affidavit which as I have said was served to our offices on the 18th May 2020" [my emphasis]. The respondent's counsel argued that the words "might be" are not the same as "*reasonable grounds to suspect*" as provided for in section 52(2). He argued that although the respondent might have been suspicious, that does not mean there were reasonable grounds for the suspicion. I disagree. In my view the grounds upon which the respondent had suspicion were indeed reasonable grounds as envisaged in section 52(2) if regard is had to the undisputed facts presented to the respondent in the answering affidavit of Standard Bank.

[47] Accordingly, I am of the view that the respondent knew or at least had reasonable grounds to suspect that the concerned property was the proceeds of unlawful activities from the date the respondent considered Standard Bank's answering affidavit.

[48] This then raises the question when the respondent gained knowledge of or had reasonable grounds to suspect that the property in which its interest is held is the proceeds of unlawful activities. To answer this question, it is, in my view, necessary to consider the invoices attached to the respondent's section 39(3) affidavit in more detail.

[49] Upon analysing the said invoices, the following is evident:

(49.1) The respondent received, perused, and considered the answering affidavit of Standard Bank in the SB application on 18 May 2020. As mentioned, I regard that date as the date when the respondent obtained knowledge or, at the very least, had reasonable grounds to suspect, that the concerned property was the proceeds of unlawful activities.

(49.2) The first two invoices of the respondent pertained to the criminal matter of Mr Moyo during the period 30 April to 12 May 2020. The respondent's third invoice pertained to the SB application. Although the respondent's third invoice contains three entries on 21 May 2020, those entries pertain to the Standard Bank answering affidavit and particularly the FIC letter. In my view the first three invoices of the respondent (including the 21 May 2020 entries) contain fees earned by the respondent prior to having knowledge or reasonable suspicion as envisaged in section 52(2). The total of the respondent's first three invoices is R50 814.33.

(49.3) Considering that the respondent is liable for counsel's fees, the invoices of counsel should be included and limited on the same basis. The first and third invoice of counsel pertained to the criminal matter during the period 4 May to 12 May 2020. Counsel's second invoice pertained to the SB application. I am prepared to allow all the entries on counsel's second invoice notwithstanding the fact that the last seven entries pertain to attendances after 18 May 2020. The total of counsel's first three invoices is R132 784.99.

(49.4) In addition, I believe that all the entries in both the respondent and counsel's fourth invoices (pertaining to the SAPS application) up to and including 18 May 2020 should be included in the respondent's interest. The total of these entries is R30 250.00.

(49.5) The total of the amounts in the three preceding paragraphs is R213 849.32, being the fees debited up to and including the receipt and consideration of the answering affidavit of Standard Bank and related to the SB application.

(49.6) The respondent has received R200 000.00 from Mr Moyo, of which R164 792.87 is left in the respondent's account. Excluding and releasing the amount in its account to the respondent together with an amount of R13 849.32 from the remainder of the property will be sufficient to cover the respondent's fees (including counsel's fees) for services rendered up to the time the respondent came to know or had reasonable grounds to suspect that the concerned property was the proceeds of unlawful activities.

(49.7) By virtue of the discretion afforded to me in terms of section 50(2) of the POCA, I intend ordering the exclusion and release of the amount held in the respondent's account to the respondent together with the additional amount of R13 849.32.

[50] I am therefore satisfied that the NDPP is entitled to the relief sought, save as aforesaid.

The relief sought

[51] In terms of section 57 of the POCA, a forfeiture order should be fulfilled by a *curator bonis* who may be authorised to deal with the property in the manner prescribed. This includes depositing moneys forfeited into the Criminal Assets Recovery Account ("*the Account*").

[52] In its preservation application which served before Vally J, the NDPP did not seek nor does the preservation order provide for the appointment of a *curator bonis* to deal with the property in terms of section 42 of the POCA. Instead, the preservation provides that the property, which is held in bank accounts of Standard Bank and FNB, be preserved by those banks. In the present application the NDPP again seek an order dispensing with any need to appoint a *curator bonis*. Instead of the appointment of a *curator bonis*, the NDPP seeks an order that the property, excluding the funds held by FNB in the respondent's account, be paid to the attorneys of Mr Mundiya. The NDPP is satisfied that Mr Mundiya is the lawful beneficiary of the property and seeks an order that the property be paid to him and accordingly seeks an order dispensing with the need for a *curator bonis* to be appointed. The NDPP contends that this will serve the objectives of the POCA.

[53] During the hearing of the matter, I raised with both parties the question whether the relief sought by the NDPP is authorised by the POCA. In particular, the question whether the court can grant an order that the property be paid to Mr Mundiya instead of being paid to the Account was addressed. Counsel for the NDPP argued that the relief sought by the NDPP in its draft order is authorised by the POCA and referred me to several similar matters in this Division⁶ where the same type of relief has been granted.

[54] The respondent argued that the relief the court can grant is limited to what is provided for in section 48(1) of the POCA, i.e., an order forfeiting to the State all or any of the property which is subject to the preservation order. The respondent further argued that the POCA does not empower the court to forfeit the property to anyone, except the State, in the absence of a section 39(3) application.

[55] Section 48(1) should be read with section 50 and particularly section 50(2) in terms of which the court “*may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such order.*”⁷

[56] In my view, section 50(2) affords the court a discretion to grant appropriate relief depending on the circumstances and that the relief sought by the NDPP in the present application does not offend the objectives of the POCA. I am accordingly satisfied that the relief sought by the NDPP in its draft order (with the amendments made by me) regarding the payment of the property to Mr Mundiya can be granted.

[57] I am also satisfied that an order directing Standard Bank to make payment of the funds held in the relevant accounts to the bank account nominated by the NDPP,

⁶ *The National Director of Public Prosecutions v Ntinga Health & Financial Services CC and 5 others* (case number 2015/26984) per Mokoena AJ, in Gauteng Local Division, Johannesburg (23 March 2016); *The National Director of Public Prosecutions v Dian Wilhelm Goosen* (case number 2019/08675) per Mogagabe AJ, in Gauteng Local Division, Johannesburg (12 December 2019); *The National Director of Public Prosecutions* (case number 2019/41993) per Randera J, in Gauteng Local Division, Johannesburg (26 November 2020); *The National Director of Public Prosecutions* (case number 2020/10901) per Opperman J, in Gauteng Local Division, Johannesburg (3 March 2021)

⁷ See also section 52(4) in terms of which “*A High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make an order upon the conditions that the Court deems appropriate...*”

being the account of Mr Mundiya's attorney, will render the appointment of a *curator bonis* unnecessary.

[58] During the hearing of the matter, I requested the parties to address me on the issue of service of the order on Mr Moyo. The NDPP submitted that, at the time the preservation order was obtained, Mr Moyo was served with the papers in the present application, and he elected not to oppose the application. Instead, so the NDPP submitted, Mr Moyo's attorney (the respondent), who has not withdrawn as Mr Moyo's attorney of record, filed a section 39(3) application. The NDPP submitted that there is no requirement that the order be served on Mr Moyo as same will be published in the Government Gazette. Counsel for the respondent indicated that the respondent has the telephone numbers of Mr Moyo and members of his family. I suggested that the respondent attempts to contact Mr Moyo and his family to obtain an address where this order can be served on Mr Moyo or, if not possible, on members of his family.

[59] In respect of the costs of this application, the NDPP did not seek costs in its notice of motion, or the draft order attached thereto. In its replying affidavit, the NDPP persisted with an order in terms of the draft order, which contains no provision for costs. On the other hand, the respondent sought costs of the application in its notice in terms of section 39(3). However, although the respondent had some success, I do not regard such success as substantial. In my view, the respondent may have been successful if it presented its case to the NDPP with more particularity before opposing the present application, which would have resulted therein that its opposition of the application may have been unnecessary. Accordingly, the respondent was not substantially successful, and I can find no other reason why the respondent should be awarded costs. As a result, it is in my view appropriate to make no order as to costs.

In the circumstances I make the following order:

1. In terms of section 53 read with sections 48 and 50 of the Prevention of Organised Crime Act, 121 of 1998 ("the POCA"), the property in 1.1 to 1.5 below, which is presently subject to a preservation of property order granted under case

number 2020/11723 on 22 May 2020, is forfeited to the State, subject to the conditions in paragraphs 2, 3 and 4 below. The property include:

1.1 an amount of R1 296 115.61 plus interest held in account number [...] with the Standard Bank of South Africa Ltd;

1.2 an amount of R563 500.71 plus interest held in account number [...] with the Standard Bank of South Africa Ltd;

1.3 an amount of R34 618.70 plus interest held in account number [...] with the Standard Bank of South Africa Ltd;

1.4 an amount of R164 792.87 held in account number [...] with First National Bank, a division of FirstRand Bank Ltd, limited to the funds held on behalf of Mr Qongani Moyo; and

1.5 an amount of R1 152 460.37 plus interest held in account number [...] with the Standard Bank of South Africa Ltd;

("the property")

2. The Standard Bank of South Africa Ltd is directed to pay an amount of R13 849.32 plus interest from the funds held in account number [...] with the Standard Bank of South Africa Ltd to the respondent and to provide the applicant, within five days from making the payment, with proof thereof by email to pjagnath@npa.gov.za;

3. The Standard Bank of South Africa Ltd is directed to pay the property described in the above paragraphs 1.1 (R1 296 115.61 plus interest), 1.2 (R563 500.71 plus interest), 1.3 (R34 618.70 plus interest) and 1.5 (R1 138 611.05 plus interest, being the balance after deducting the amount of R13 849.32 plus interest as provided for in 2 above) into the following account:

Account name: I Mabunda Attorneys Trust Account

Bank: Standard Bank of South Africa Ltd

Account number: [...]

Reference: Mayo Q Jafu 26/2020

and to provide the applicant, within five days from making the payment, with proof thereof by email to pjagnath@npa.gov.za;

4. I Mabunda Attorneys is directed to hold the amount paid into its trust account in terms of 3 above on behalf of Mr Emmanuel Mundiya, with passport number [...], and to make payment thereof to Mr Mundiya as instructed by him;

5. First National Bank, a division of FirstRand Bank Ltd, is directed to release the hold on the amount of R164 792.87 held in account number [...] with First National Bank;

6. The need for a *curator bonis* to be appointed is hereby dispensed with;

7. This order is to be served on responsible officials of The Standard Bank of South Africa Ltd and First National Bank, a division of FirstRand Bank Ltd;

8. The respondent is directed to make attempts to contact Mr Qongani Moyo and his family members of whom the respondent has the contact details and determine an address for service of this order on Mr Qongani Moyo and, if so determined, cause this order to be served on Mr Qongani Moyo;

9. Any person whose interest in the property concerned is affected by this order, may within 20 days after he or she or it has acquired knowledge of the order, set the matter down for variation or rescission by the court.

JF PRETORIUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING: 10 August 2021, 12 August 2021, and 9
December 2021

DATE OF JUDGMENT: 20 December 2021

COUNSEL FOR THE APPLICANT: P Jagnath

INSTRUCTED BY: The State Attorney

COUNSEL FOR THE RESPONDENT: MI Boko

INSTRUCTED BY: Maweza Nkogatsi Attorneys