REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 12099 / 2007

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
STARPLEX 47 CC (Registration No. 2003/086303/23)	First Intervening Respondent
WILLIAM NGIMBI VUNDA	Second Intervening Respondent
ANTONION MARCOS	Third Intervening Respondent
JOAO JORGE KANJNJA GONCALVES	Fourth Intervening Respondent
CLAY NKUMINPOYI	Fifth Intervening Respondent

In re:

The *ex parte* application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
DOUMBIA MAMADOU (A.K.A. MOHAMMED MOLAMU)	First Respondent
FATOU FOFANA	Second Respondent

JUDGMENT : 20 MARCH 2008

BOZALEK, J:

[1] This is an application for a final order in terms of s 38(1) of Chapter 6 of the Prevention of Organised Crime Act, 121 of 1998 ("the Act") preserving certain cash amounts seized at premises at the Cape Town railway storage facility on 13 December 2006.

[2] On 5 September 2007, pursuant to an *ex parte* application, applicant was granted a *rule nisi* for the preservation of R191 145, 00, €21 825,00 , US $63 817 and £130,00. At that stage only first and second respondents were cited by applicant. After service of the *rule nisi*, first to fifth intervening respondents filed notices of opposition declaring an interest in the property and indicating their intention to oppose any application for the confirmation of the preservation of property order. The intervening respondents filed opposing affidavits which were answered by replying affidavits from applicant.

[3] First intervening respondent opposes the granting of a preservation order in respect of R148 145,00, second intervening respondent the granting of a preservation of property order in respect €20 250,00 and third intervening respondent the granting of a preservation of property order in respect of US $16 517,00. Fourth intervening respondent opposes the granting of a preservation of property order in respect of US $10 000,00 whilst fifth intervening respondent opposes the granting of a final order in respect of US $30 000,00.

[4] A curator *bonis* was appointed in terms of the rule *nisi*. According to his report, filed on 21 September 2007, when the money seized was counted it amounted to R190 635, US $66 634 and €21 880. There are thus relatively minor discrepancies between the amounts cited in the provisional preservation order and what the curator *bonis* presently holds. There is opposition only in respect of R148 145,00, US $56 517 and €20 250. There is no opposition in respect of the balance of the monies seized and held i.e. R42 490.00 US $10 117,00 and €1 650,00. These latter amounts coincide approximately, save in the case of the US dollars where there is a discrepancy of some $3 000,00, with the currency apparently seized from second respondent who does not oppose the finalisation of a preservation order.

[5] Ms. Smit, who appears on behalf of applicant, contends that a preservation order should be granted in respect of these latter monies as the case made out by applicant is to that extent, uncontroverted. She also seeks an order in respect of the balance of the monies contending that the claims of the intervening respondents do not carry sufficient weight to justify the discharge of the preservation order. Mr. JC Tredoux, who appears on behalf of all the intervening respondents, seeks the discharge of the rule *nisi* to the extent of the claims made on the property by the various intervening respondents. In doing so he challenges many aspects of applicant's case including the propriety of the applicant obtaining the rule *nisi* on an *ex parte* basis and the

legality of the search and seizure in terms of which the monies were initially found and seized.

STATUTORY BACKGROUND

[6] Section 38(2) of the Act provides as follows:

> ***1. The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.***
> ***2. The High Court shall make an order referred to in subsection 1 if there are reasonable grounds to believe that that the property concern:***
> ***(a) is an instrumentality of an offence referred to in schedule 1; or***
> ***(b) is the proceeds of unlawful activity ……..***

"Instrumentality of an offence" is defined as meaning any property

> ***"which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of the Act, whether committed within the Republic or elsewhere"***.

"Proceeds of unlawful activities" is defined as meaning

> ***"any property or any service, advantage, benefit or reward which is derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the 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"***.

"Property" is defined as including money. Item 26 in schedule 1 relates to "any offence relating to exchange control".

[7] In *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) at para 3, Nugent JA highlighted the principal components of chapter 6 of the Act as follows:

> ***"It authorises the NDPP to apply to a High Court, without notice, for an order that has the effect of temporarily depriving a person of property, so as to preserve the property in anticipation of an order being sought for its forfeiture. A court is required to make such an order 'if there are reasonable grounds to believe that the property concerned... is an instrumentality of an offence referred to in schedule 1' of the Act. Once such an order has been made the NDPP is required to give notice of the order to interested parties that are known to him and they are entitled to intervene in the subsequent proceedings. Within 90 days of a preservation order being made the NDPP may apply to***

> ***a High Court for an order declaring all or any of the properties forfeited to the State. A court is required to make such an order if it finds, as a matter of probability, that the property is an 'instrumentality' of such an offence, subject to its power to exclude from the operation of the order certain interests that are shown to have been acquired in specified circumstances."***

[8] As regards the standard of proof required in order to obtain a preservation order, in *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA), Mlambo AJA, on behalf of the majority of the Court, rejected the notion that disputed evidence in such applications must be dealt with in accordance with the principles set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) and *Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). He stated as follows (at page 384 [I] to 385 [B]):

> ***"Section 25(1)(a) confers a discretion upon a court to make a restraint order if, inter alia, 'there are reasonable grounds for believing that a confiscation order may be made...'. While a mere assertion to that effect by the appellant will not suffice..., on the other hand the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order."***

[9] Although the *Kyriacou* case dealt with restraint orders under chapter 5 of the Act rather than preservation orders under chapter 6, the two procedures are analogous inasmuch as they are temporary orders pending the institution and determination of a forfeiture action. In *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (WLD) in dealing with the question of what degree of proof is required of the applicant in s 26 i.e. restraint proceedings in terms of

chapter 5 of the Act, Heher J, as he then was, stated as follows at para 12:

> ***"In my view an application for a restraint order is analogous (although not identical) to an application for an interim interdict and attachment*** *pendente lite****. Insofar as such relief contains elements of finality, the Legislature could never have intended that it should be defeated by reason of conflicts of fact*** *per se****. Nor would a reference to evidence be appropriate: that might well anticipate the enquiry at the criminal trial and impinge on the right of silence. The*** *prima facie* ***case is proof of a reasonable prospect of obtaining both a conviction in respect of the charges levelled against the respondent and a subsequent confiscation order under s 18(1). It is appropriate in determining whether the onus has been discharged to apply the long accepted test of taking the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the innate probabilities, the applicant should on those facts obtain final relief at a trial (for this purpose, the confiscation hearing). The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the applicant's case, he cannot succeed."***

This approach was endorsed by this Court in the case of *National Director of Public Prosecutions v Van Heerden* 2004 (2) SACR 26 (C) (page 33 – 34), where Meer J stated as follows:

> ***"A preservation order under section 38 of POCA is akin to an interim interdict. Its aim is to preserve property for up to 90 days pending proceedings for a forfeiture order under section 48 of POCA… . The appropriate standard of proof at the preservation order stage must therefor be the well established one of*** *prima facie* ***proof applicable to interim interdicts. In Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 as qualified in Gool v Minister of Justice 1955 (2) SA 682 (C) at 688 C – D the degree of proof required was formulated as follows: 'In an application for a temporary interdict the applicant's right need not be shown on a balance of probabilities; it is sufficient if such right is*** *prima facie* ***established, though open to some doubt. The proper manner of approach is to take the facts set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the applicant's case, he could not succeed.'***
>
> ***"At the preservation stage therefore the applicant is required to establish under section 38(2) no more than a prima facie case that there are reasonable grounds to believe that the property concerned is (a) an instrumentality of an offence referred to in schedule 1; and (sic) (b) is the proceeds of unlawful activities. It is only at forfeiture stage under section 48 that proof on a balance of probabilities is specified by the legislature. Had the intention been for the higher standard to have applied also at the preservation stage, the legislature would also have specified. It provided instead for reasonable grounds to believe."***

I am in agreement with the approach to standard of proof as set out in *Phillips's* and *Van Heerden's* case.

FACTUAL BACKGROUND

[10] On 13 December 2006 members of the immigration inspectorate of the Department of Home Affairs and members of the SAPS attached to both the Railways police and the commercial crime unit executed a warrant to enter and search certain premises at the Cape Town railway station. The warrant was an entry and search warrant in terms of s 33(5)(a) and (b) of the Immigration Act, 13 of 2002. In the office occupied by first respondent certain files, documents and a large sum of cash made up in bundles of South African rand and foreign currency was found. Further, large sums of cash, mainly South African rand were found in the drawers of the table. A safe allegedly concealed behind a door was opened and searched where further monies were found. The police officers also searched a room that appeared to be used as a kitchen where they found three women cooking. At second respondent's feet one of the police officers found a large paper bag filled with the foreign and South African currency corresponding approximately with those amounts in respect of which there is no opposition in this matter as referred to in paragraph 4 above. Second respondent was identified as a citizen of Mali residing illegally in South Africa. She explained that the money in question was the proceeds of her business of selling foreign food.

[11] According to the police official, when asked to explain the balance of the money found on his premises, first respondent replied that it was the proceeds of his money exchange business. He added that he kept

money in his safe as it was difficult for foreigners to operate bank accounts in South Africa. When asked to show proof that he was authorised to operate a money exchange business or any document justifying his possession of the foreign currency found in his office, first respondent replied that he could not find the documents and asked for permission to call his wife. This was refused.

[12] The cash, documentation and various other articles which were regarded as evidencing a money exchange business were seized and confiscated. In due course first respondent produced a South African identity document and was charged in the magistrates' court with contravening the exchange control regulations of 1961 as amended by Government Notice R885 published in Government Gazette Number 20299 of 23 July 1999. Regulation 2(1) of those regulations provides:

> ***"Except with the permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose no person other than a authorised dealer shall buy or borrow any foreign currency or gold from, or sell or lend any foreign currency or gold to any person not being an authorised dealer."***

Regulation 22 provides for a fine not exceeding R250 000,00 or imprisonment for a period not exceeding 5 (five) years or both for a contravention of the regulations. First respondent appeared in the magistrates' court on the charge but the matter was struck from the roll some months later when the docket went missing. The State now proposes to reinstate the prosecution.

ONUS

[13] As regards the question of *onus* I understood Mr. Tredoux's argument to be that the test of establishing a *prima facie* case in the present context must be understood and determined as involving the discharge of an *onus* on a balance of probabilities. In this regard he relied on the case *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A). However, to approach the question of *onus* on the basis that the applicant must make out his case on a balance of probabilities is to disregard not only the cases cited earlier but the explicit wording of s 38(2) which requires that applicant must do no more than establish that there are *"reasonable grounds to believe that the property concerned is an instrumentality of and offence or the proceeds of unlawful activities"*. This clearly fall short of overall proof of such a case on a balance of probabilities. Such a level of proof is clearly not what the legislature envisaged since in s 38(2) of the Act, which makes provision for a forfeiture order following upon a preservation order, the test for the granting of such an order is explicitly stated to be proof that the property concerned is an instrumentality of an offence or the proceeds of unlawful activity "on a balance of probabilities".

[14] In my respectful view, the formulation of the test for a preservation order is well set out by Heher J in the *Phillips's* case as endorsed in *Van Heerden's* case, both of which make provision for weighing up of the probabilities but in the context of the applicant having to make out a *prima facie* case.

PRELIMINARY POINTS

[15] The intervening respondents sought in the first place a discharge of the *rule nisi* on the grounds that it was improperly sought on an *ex parte* basis. Reliance was placed on *National Director of Public Prosecutions v Braun and Another* 2007 (1) SA 189 (CPD) where it was held that since an applicant invoking 38 of the Act on an *ex parte* basis was obliged to adhere to the requirements of the *uberrimae fides* rule, if such an applicant withheld material facts which might influence the Court in coming to a decision, it would be entitled to reconsider and rescind the order irrespective of whether non-disclosure was wilful or *mala fide*.

[16] It was further contended that first and second respondents should have been given notice of the initial application for a preservation order and there was no good reason why the matter was brought *ex parte* inasmuch as the monies were at all material times held by the police pursuant to the provisions of the Criminal Procedure Act, 51 of 1977 ("the Code") pending the outcome of the prosecution against first respondent.

[17] It is common cause that when the prosecution was withdrawn first respondents' legal representative contacted the police with a view to recovering the monies on behalf of his client pursuant to the provisions of s 31 of the Code. When advised that the asset forfeiture unit intended to bring an application for the preservation of the funds in

terms of the Act, first respondent's legal representative contacted the applicant's office seeking an assurance that any such application would be brought on notice to first respondent. Acting on behalf of applicant, the State Attorney declined to give any such undertaking explaining his client's position as follows:

> ***"As you are aware your client is at liberty to demand the return of his property from the SAPS at any time, given that the criminal case against him has been struck from the roll. Without a court order in place to secure the property, the monies seized may be dissipated. Your client, on the other hand, will not suffer any prejudice as a result of the decision to obtain the order ex parte, given that he is currently not in possession of the property and will be able to exercise his rights to oppose confirmation of the interim preservation order at any stage. In any event, this correspondence will be brought to the attention of the Judge hearing the preservation application who will no doubt apply his/her mind to the matter."***

The correspondence in question was placed in front of the judge who granted the provisional order and there is thus no question of any material fact not having been drawn to the attention of the Court. Furthermore, I am persuaded by the reasoning behind applicant's approach. Whilst casting no aspirations on the *bona fides* of first respondent's legal representative, it appears to me that it was always open to first respondent, after withdrawal of the charges, to unilaterally approach the SAPS and demand the release to him of the monies seized. In my view, applicant was justified in adopting a prudent approach in bringing an application to secure the monies without notice to the respondents.

THE LAWFULNESS OF THE SEARCH AND SEIZURE

[18] On behalf of the respondents Mr. Tredoux contended that the seizure of the property was illegal and irregular much as it was not authorised by the only warrant in existence and nor by the provisions of the Code.

Again I disagree with these submissions. The Department of Home Affairs officials who comprised part of the group which conducted the search and seizure operation obtained a warrant from the magistrate, Cape Town for the entry onto and search of premises in terms of s 33(5)(a) of the Immigration Act on the basis of information that a group of foreign nationals were issuing fraudulent documents and permits. The immigration officers were assisted by the South African Police Services. During the search operation it became apparent to SAPS members that further offences were being committed on the premises, namely, contraventions of the exchange control regulations. The SAPS members, in searching the premises and seizing the property which is the subject of this application, purported to act in terms of s 22 of the Code. It provides that a police official:

> ***"may without a search warrant search any person or container or premises for the purposes of seizing any article referred to in s 20 –***
> ***(a) if the person concerned consents to the search for and the seizure of the article in question... or***
> ***(b) if he on reasonable grounds believes:***
> ***i that a search warrant will be issued to him under paragraph (a) of s 21(1) if he applies for such warrant; and***
> ***ii that the delay in obtaining such warrant would defeat the object of the search".***

[19] Had the police authorities, upon finding the currency in question, left the premises in order to apply to a magistrate for a search warrant, there is every chance that some or all of the currency would have disappeared by the time that they returned. In my view, further, it is impractical to suggest, as respondents' counsel did, that any such possibility would have been obviated by posting a guard at the premises. Money is inherently capable of quick flight and can be

difficult to trace. I am satisfied therefore that the search and seizure operation was lawfully conducted and that the provisional preservation order granted cannot be discharged on the grounds of an illegal search or seizure.

RESPONDENTS' CASE

[20] First respondent does not dispute that the currency was seized from premises occupied by him, as described by the police. He denies, however ever telling the police that it emanated from a money exchange business which he operated. He lays no claim to any of the preserved property in his personal capacity stating that all the South African currency belongs to first intervening respondent, a close corporation of which he is the sole member. He states that

R148 145,00 was the proceeds of first intervening respondent's business operations, namely, the operation of parking facilities at the Cape Town railway station, which involved a lease, and the wholesale selling of clothing and apparel from the premises where the currency was found.

[21] First respondent claims, furthermore, that he was born in South Africa in 1974 of a South African father and an Ivorian Coast mother but returned to that country with her shortly after his birth. In 1995 he returned to South Africa seeking his father and, after succeeding in doing so and obtaining refugee status some years later, was eventually issued with identity document and a South African passport. He

testified that of the foreign currency seized, €20 250,00 is the property of the second intervening respondent. Of the US $56 517,00 seized, US $16 517,00 belongs to the third intervening respondent, US $10 000,00 belongs to the fourth intervening respondent and US $30 000,00 to the fifth intervening respondent. As for the balance of the dollars and euros seized, he states that this must have been seized from second respondent or someone else.

[22] First respondent admits that the police found and seized a single file titled “Galileo” in his office but denies any knowledge of the further documents which were allegedly seized by the police and upon which they rely as proof of currency transactions. To the extent that such documents include certain diaries first respondent states that he does not recognise them and that none of the entries therein are in his handwriting. He goes further, stating that the entries make no sense to him and that he is not even in a position to guess at their meaning. He adds that a certain Mr. Traore who occupied the offices alongside his and whose premises were also searched, told him that the diaries belonged to him. Regarding the question of what he told the police, first respondent states that he chose not to answer them telling them that he first wanted to speak to his lawyer. His reasons for doing so were that he did not want to be distracted from observing the search and, secondly, that his experience of police officers is that they misconstrue or misrepresent what one tells them.

[23] In a bid to substantiate his claims in regard to the businesses allegedly run from the premises, first respondent attached copies of first intervening respondent's financial statements for the financial years 2006/2007 as well as extracts from its banking account records, a sample parking ticket, two invoices relating to payments in respect of the parking area lease and certain documentation issued by the Registrar of Companies and Close Corporations.

[24] All these documents revealed less than they promised, however. The financial statements point to a modest but ill-defined business whose principal asset is a property worth approximately R500 000,00, the details of which are not disclosed. The only salary apparently paid is one to first respondent himself in the amount of R10 000,00 per month. First intervening respondent's revenue for the 2006 year was R650 000,00 and for 2007 R360 000,00 odd and the profits for those years respectively R35 000,00 and R18 000,00 odd. It is not possible to determine from these financial statements what businesses made sales or generated profits.

[25] A scrutiny of the bank account extracts indicate that the main regular debits were payments in respect of a home loan whilst the main source of income were regular deposits in the amount of several thousand rand every few days ascribed to "Africa Parking". The invoices appear to reveal payments of rental in the amount of approximately R16

000,00 monthly in respect of a parking area at the Cape Town Good Hope concourse.

[26] No details are given by first intervening respondent of the levels of income generated weekly or monthly by either the clothing business or the parking business or of the size of the parking business which appears to be the main income generator. The sample ticket states that one parking bay would earn R6,00 per hour for a maximum of R48,00 in a day.

[27] In an effort to explain the substantial cash amount found on his premises, first respondent explained that the parking business generates mainly cash, the bays operating seven days a week. Similarly, the clothing business was also conducted largely on a cash basis. According to first respondent first intervening respondent made some of its purchases in cash and also pays some of its expenses in cash. He did not explain how much cash the respective businesses generate on a daily, monthly or weekly basis. This lack of detail, coupled with the limited amount of information revealed by the documentation attached by first intervening respondent and first respondent, is perplexing. For example no detail is provided as to what salaries are paid on a regular basis in cash relating to the parking business, nor what purchases are made by either business, let alone any proof thereof.

[28] I turn to consider the explanations tendered by the various intervening respondents in respect of the foreign currency found on the premises. Second intervening respondent is, a citizen of the Democratic Republic of the Congo, holding refugee status in this country. He states that he is a business entrepreneur living in Cape Town conducting business as an entrepreneur principally in buying and selling motor vehicles to foreign traders outside of South Africa and in particular from Angola. He states that he sources the motor vehicles from motor dealers in Durban, these purchases being made in US dollars or euros.

[29] Second intervening respondent states that he has no bank account since no bank is willing to open one for him given his refugee status. He therefor operates only with cash. In December 2007 he received €20 250,00 from two Angolans. These two persons were existing customers and gave him the money in order to purchase two used 4 x 4 motor vehicles which he was to source from a motor dealership in Durban. On the same day he approached first respondent, whom he has known for several years, and asked him if he could place the currency in his safe for safekeeping for a few days until he travelled to Durban to source and purchase the vehicles. This was in keeping with similar arrangements he had made in the past. He stated also that he had introduced third and fourth intervening respondents to first respondent a day or two before 10 December when first respondent allowed them also to place their money in his safe. First intervening

respondent insisted that the money which he deposited in the safe was at all times his property.

[30] Third intervening respondent states that he is a businessman and a citizen of Angola where he is resident. His business is to purchase used Japanese motor vehicles imported by specialist motor dealers in Durban for resale in Angola. In early December 2006 he arrived in Cape Town on his way to Durban to purchase two Hi-Ace motor vehicles from *Tokyo Cars* in Durban bringing with him US $16 517 for this purpose. In Cape Town he met second intervening respondent whom he had known for a couple of years and arranged to deposit the money in question in first respondent's safe which was duly done. Some three days later second intervening respondent informed him that his monies had been seized by the police. He claims the return of the monies. Fourth intervening respondent deposed to an affidavit stated that he was likewise a businessman resident in and a citizen of Angola whose business was buying and selling pre-owned motor vehicles. This he did mainly by sourcing them from motor dealers in Durban who specialise in importing such vehicles from Japan for resale to the African market. He too had arrived in Cape Town in early December 2006 bringing US $10 000,00 in cash with the intention of purchasing two Hi-Ace motor vehicles in Durban. Just as in third intervening respondent's case, he met second intervening respondent on his arrival in Cape Town and, through him, arranged to deposit his

money for safekeeping in first respondent's safe. A few days later he was advised that the money had been seized by the police.

[31] The fifth intervening respondent testified that he was a citizen of the Democratic Republic of the Congo who has resided in South Africa for the past few years on the basis of his refugee status. The main focus of his business was the buying and selling of motor vehicles for his cousin, one Mendes in Angola. He sources most of these vehicle from various motor dealers in Durban and resells them to his cousin at a profit. If his cousin has "sourced" the vehicle directly from the dealer, he, the deponent, attends to the purchase and delivery of the vehicles to his cousin for a fee.

[32] In early December 2006 his cousin gave him US$30 000,00 with the purpose of purchasing two Hi-Ace 18 seater motor vehicles from Nismo Cars in Durban. On 9 and 11 December 2006 he deposited these monies in two instalments into first respondent's safe for safekeeping as he had done on previous occasions, pending his departure for Durban to purchase the vehicles. A few days later he had been advised that the monies have been seized by the police and he now lays claim to these monies.

EVALUATION AND ANALYSIS

[33] Faced with these versions as to the provenance and ownership of the monies seized by the SAPS, it must now be determined whether

applicant has made out a case establishing that there are "*reasonable grounds to believe that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities*".

[34] Applicant's case is that both the South African and the foreign currency was either the instrumentality of the offence of buying and selling foreign currency without being authorised to do so or the proceeds of such activities. It seems clear that if the foreign currency found on the first respondent's premises was indeed bought by him or intended for sale to his clients then it was either an instrumentality of the said offence or the proceeds thereof. Similarly, if the R148 145,00 represented first respondent's working capital i.e. was to be used by him for purchasing of foreign currency or if it represented the proceeds of foreign currency he had sold then it could satisfy the requirements of subsections 38(2)(a) or (b) of the Act.

[35] The only evidence that first respondent was engaged in buying and selling foreign currency was his alleged admission thereof to the police, the presence of the foreign currency and the large amount of South African rands on his premises and the various documents seized by the police allegedly evidencing such transactions. First respondent denies making any such admission to the police and it seems somewhat unlikely that he would do so. On the other hand his explanation, that he said nothing to the police because he does not trust them, is also unlikely. If all the currency found on his premises

was legitimately there and with a substantial amount thereof allegedly belonging to third parties, one would have expected first respondent to have made this clear from the outset. Furthermore, the version given by the police officials, namely, that when asked for proof of authority to conduct such a business he stated that he needed to contact his wife, adds some detail to the broad allegation.

[36] The documentation seized by the police goes some way to bolstering applicant's case. The loose pages found in the diaries annexed to the record (annexure "AWM" at pages 401 – 404) appear to be handwritten notes of foreign currency transactions conducted on various dates in 2004 or are simply recorded in a 2004 diary. They appear to indicate a busy trade, mainly in euros and dollars, with the headings "buy" and "sell". Figures for certain amounts of euros and dollars are given together with what appears to be an exchange rate. First respondent disavowed all knowledge of these notes and stated that he could not even guess what they meant, a comment which I regard as disingenuous. Annexure "AWM" 2 (1) (at pages 405 – 410 of the record) are extracts from a 2004 diary seized from first respondent's premises which similarly appear to record foreign currency transactions. On some days it is recorded that there was "no business" whilst on other days the "total profit of the week" and expenses are recorded. It is not possible to say with any certainty what these various documents record but the probabilities are that they indeed record foreign exchange buy and sell transactions which, coupled with first

respondent's alleged admission to the police officers, calls for a convincing response from him. Instead, first respondent, apart from certain documentation contained in the Galileo file simply denied any knowledge of the documents allegedly seized by the police. He suggests, on the basis of hearsay evidence, that the documentation was seized from Traore's premises but no affidavit from that person is attached nor any explanation as to why such an affidavit could not be filed.

[37] This brings one to the third area of dispute, namely, the explanations tendered for the presence of the foreign currency and the South African currency in first respondent's premises. I am prepared to accept that first intervening respondent, also referred to as *"Starplex"*, did business from the premises in question. Although Starplex's business is described in CIPRO documentation as "general wholesale", it appears to have been an all-purpose vehicle used by first respondent. I am prepared to accept, furthermore, that from time to time Starplex may have sold clothes on a wholesale basis. Small stocks of clothing were found in the office during the raid. There is however no evidence before the court of any systematic trading in clothing when such evidence should have been easily obtainable. From the documentation made available by Starplex there are strong indications that it conducted a parking business but again details of its turnover, income and sales are notably lacking.

[38] Starplex conducted a bank account into which regular deposits, apparently relating to the business of *Africa Parking*, were made as well as regular payments. In the circumstances first respondent's explanation that he kept a large sum of cash on his premises to pay unnamed expenses is, in my view, bald and unconvincing. Furthermore, even accepting that Starplex conducted a parking business and a wholesale clothing business from the premises, this by no means excludes the possibility that first respondent also ran a business buying and selling foreign currency from the same premises. Indeed, if he was engaged in such a business, it would be foolish of him not to have some sort of cover at the same time in the form of one or more legitimate businesses. In my view first respondent and Starplex have not satisfactorily explained the presence of such a substantial cash amount, namely R148 145,00 on the premises.

[39] This leads to the question of the foreign currency found in the safe. The explanations furnished by the second to fifth intervening respondents were remarkably similar in each case, namely, that the currency was intended for purchasing vehicles in Durban from specialist importers of such vehicles from Japan for on-sale to African countries outside of South Africa. In each case the monies had been deposited but a few days before they were seized by the police and because the possessors or owners of the foreign currency had no better place for safe-keeping of the currency in Cape Town. Apart from the remarkable coincidences involved in the provenance of each of these four sums of

money, other puzzling features were pointed out by applicant's counsel. In none of the cases was there any record of proof of the deposit in the form of a receipt or book entry. Secondly, third and fourth intervening respondents deposited these substantial sums of money with first respondent, although he was virtually a stranger to them, shortly after being introduced to him by the second intervening respondent. In the case of the second and fifth intervening respondents, notwithstanding the fact that both had lived in Cape Town for years, both claimed to have no safer place to deposit monies than in first respondent's safe. Coincidentally each intervening respondent, save for the first intervening respondent, deposited large sums of foreign currency in second respondent's safe but days before these were found and seized by the police. In each case they were on their way to Durban to purchase imported vehicle for on sale to other parts of Africa. Another factor not satisfactorily explained is that none of these sums of money were apparently separately held by first respondent, for example, in an envelope. Instead, all the foreign currency was bundled together.

[40] Apart from copies of business cards relating to some of the Durban motor dealers mentioned, none of the four intervening respondents produces any documentation in support of their version that they were travelling to Durban to purchase vehicles from such dealers. Applicant contacted the various Durban motor dealers mentioned by second to fifth intervening respondents to make specific enquiries as to whether

they had reserved any vehicles for sale to the said intervening respondents or had had any previous dealings with them. The only positive response received related to fifth intervening respondent who had purported to annex documentation to his affidavit relating to a vehicle which he had allegedly purchased from Nismo Cars on an earlier occasion for resale to his cousin, Mendes. In reply, an affidavit was filed from a member of Nismo Cars stating that the vehicle in question had been sold directly to Mendes and that they had no record of any dealings with fifth intervening respondent at any stage.

[41] As was argued by applicant's counsel, it seems unlikely that second to fifth intervening respondents would travel, in some cases from Angola, but at the least from Cape Town, to Durban with large sums of foreign currency to purchase vehicles without seemingly having made any enquiry as to whether such vehicles were available let alone without making prior arrangements for the purchase thereof.

[42] There is a further problem relating to the claims made by second and fifth intervening respondents, both of whom allege that the monies they deposited with first respondent belonged to third parties and were to be used by them to purchase vehicles on such third party's behalf. Although both these intervening respondents claim ownership of the currency, I have serious doubt whether this was so in fact or law. It appears to me that, at best for the intervening respondents, the true owners were the third parties in question. Not only did these third

parties not lay claim to the monies in person but they filed confirmatory affidavits despite in each case the intervening respondent having indicated that the person/s from whom he had received the monies was aware of these proceedings.

[43] I have considerable doubt whether a court could ever discharge a preservation order and direct that monies apparently belonging to third parties should be returned to persons who, at best, were acting as their agents in holding the money. However, in the view that I take of this matter, it is not necessary for me to determine this question nor the related question of whether, pursuant to a mandate allegedly given to these intervening respondents by the original sources of the funds, they became owners of the funds.

[44] In the light of the lack of any substantiation for the claims of the second to fifth intervening respondents and the sheer improbability of their versions, as detailed above, I must conclude that applicant has established its case in respect of the particular amounts of foreign currency claimed by these parties. A consequence of this finding is its effect upon the credibility of first respondent and thus upon first intervening respondent's claims. In the absence of an acceptable explanation for the presence of the foreign currency in the safe upon first respondent's or first intervening respondent's premises, the inference that it was an instrumentality or the proceeds of the offence of unlawfully conducting a foreign exchange business operation is

considerably strengthened. This in turn strengthens the probability that the rand amount found in the possession of first respondent was either his working capital for such business or the proceeds thereof. Although it is possible that some of these monies claimed by first intervening respondent may well relate to either the parking business or even the wholesale clothing business, it is equally possible that they do not. Certainly no such dividing line can be drawn on the sparse information furnished by first intervening respondent. In the circumstances, particularly given that at this stage it is a preservation order which is being sought, I do not consider that the Court should attempt to draw an arbitrary line between funds which may have been lawfully generated by first intervening respondent and other funds.

[45] In the result, in respect of the monies to which the first to fifth intervening respondents lay claim, I am satisfied that by taking the facts set out by applicant together with those facts set out by the various respondents which applicant cannot dispute and having regard to the innate probabilities, applicant should on those facts obtain a forfeiture order in due course. Taking into account, furthermore, the facts set up in contradiction by the various respondents I have come to the conclusion that they do not throw serious doubt upon applicant's case. In the circumstances I am satisfied that applicant has made out , in respect of the property, a case that there are reasonable grounds to believe that it represents the instrumentality of an offence or the proceeds of such an offence.

[46] There is a dearth of evidence regarding the balance of the funds seized by the police, namely, the amount in respect of which there is no opposition to the confirmation of the preservation order. It would appear that these were either seized from second respondent or alternatively from first respondent but were not claimed by him or any of the intervening respondents. Accordingly applicant must be taken to have made out its case in respect of those monies as well and the preservation order must be confirmed in respect of all the monies presently held by the *curator bonis*.

COSTS

[47] Mr. Tredoux argued that even in the event that the preservation order being confirmed no costs should be awarded against the respondents at this stage pending the outcome of any forfeiture application. However, the interim preservation order made provision for a costs order only in the event of confirmation of the interim order being opposed.

[48] Although applications for preservation and forfeiture order are interlinked it appears to me, in the circumstances of this matter at least, that they are sufficiently distinct to justify a costs order in favour of applicant where the interim preservation order has been confirmed in the face of opposition. In the circumstances I can see no good reason

to depart from the general rule that costs follow the event and not to award costs to applicant.

ORDER

[49] The following order is made:

1.1 In terms of section 38 of the Prevention of Organised Crime Act, 21 of 1998, (the Act), the cash amounts of R191 145,00 (one hundred and ninety one thousand one hundred and forty five rand), €21 825,00 (twenty one thousand eight hundred and twenty five euros) and US $63 817,00 (sixty three thousand eight hundred and seventeen United States dollars) ("the property") seized at a Cape Town railway station storage facility on 13 December 2007 is preserved.

1.2 Andre Van Heerden of SAB&T is appointed as *curator bonis* over the property in terms of section 42 of the Act, with all such powers, duties and authority as are reasonably incidental thereto.

1.3 The property shall be brought under the control of the *curator bonis* and shall remain in his custody until the expiration of the period prescribed in section 40 of the Act or until the conclusion of the forfeiture proceedings instituted by applicant in respect of the property under section 48 of the Act.

1.4 The fees and expenditure of the *curator bonis* shall, in terms of section 42(2) of the Act, be paid from the proceeds of such property as may be forfeited to the State in terms of section 50 or section 53 of the Act and, in the event of no such order being granted, such fees and expenditure shall be paid by the State.

1.5 **Applicant shall cause the preservation of property order to be published in the Government Gazette as soon as is practicable after the order has been made final.**

1.6 **The respondent and intervening respondents and any other person wishing to oppose the making of a forfeiture order, are to file notice of their intention to do so in terms of section 39(3) and 39(5) of the Act within 14 days after service upon them of the notice of the preservation order.**

1.7 **In the case of any other person, notice of their intention to oppose the forfeiture order should be filed within 14 days after the date of publication of the notice of the preservation order in the Government Gazette.**

2 **First to fifth intervening respondents are ordered to pay the applicant's costs of this application, jointly and severally, the one paying the others to be absolved.**

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LJ BOZALEK, J