IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 6959/2015

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

ASEN GEORGIEV IVANOV *alias* ALEX NOVAK First Respondent

JANA CIPKALOVA Second Respondent

Court: Justice J Cloete

Heard: 6 and 7 June 2017

Delivered: 25 August 2017

JUDGMENT

CLOETE J:

Introduction

[1] On 23 April 2015 the applicant ("NDPP") obtained an *ex parte* order against the respondents in terms of s 38 of POCA[1], to preserve cash totalling some R2.6 million seized in rands and foreign currency from an immovable property in Durbanville occupied by the first respondent, together with the immovable property itself which is registered in the name of the second respondent.

[2] Subsequently, on 28 July 2015 the NDPP obtained a forfeiture order in respect of these assets in terms of s 50 read with s 53 of that Act. The respondents thereafter launched an application to rescind the forfeiture order, to which the NDPP consented, and it was thus the forfeiture application that was argued before me.

[3] The NDPP's case is that the assets fall to be forfeited to the state because, on a balance of probabilities, they constitute the proceeds of unlawful activities, namely the contravention of s 15(1)(a) of the Customs Act[2], regulation 2 of the Exchange Control Regulations[3], and money laundering in contravention of s 4 to s 6 of POCA read with item 26 and/or 27 of Schedule 1 thereof.

[4] More particularly, the NDPP contends that the cash seized is foreign currency or the proceeds thereof smuggled into South Africa by the first respondent and/or his associates. It is also contended that the Durbanville property was purchased with the proceeds of diamonds, jewellery or both, smuggled by the

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1 Prevention of Organised Crime Act 121 of 1998.
2 Act 91 of 1964.
3 Of 1961, promulgated in terms of s 9 of the Currency and Exchange Act 9 of 1933.

second respondent into this country. The first respondent is a Bulgarian national and the second respondent is a Slovakian national. The first respondent no longer resides in South Africa and the second respondent has never resided here.

[5] The respondents deny these allegations. The first respondent's defence is that he was loaned some of the cash by a third party, some was legitimately exchanged by him, and that he was given the foreign currency by others. The second respondent's defence is that she entered South Africa with a diamond and gold bracelet, which was a personal possession, and that she was therefore not obliged to declare it. She only decided to purchase immovable property after her arrival. She subsequently sold the bracelet and utilised the proceeds to purchase the Durbanville property as an investment.

Background

[6] On 24 February 2014 Warrant Officer Johann Combrinck of the DPCI[4] received information from a reliable source that mandrax was being manufactured in the garage at the Durbanville property. He was also informed that the mandrax powder used in the manufacturing process was being transported to the premises in a Toyota Hilux bakkie with registration number CA 214 030 and that foreign nationals were residing there.

[7] On the same day, at approximately 20h00, Combrinck went to the estate complex where the Durbanville property is situated to carry out an observation. He saw the bakkie parked outside the premises. He observed

[4] Directorate for Priority Crime Investigation.

that the garage door was partially open and that activities were taking place inside the garage. He noticed that the garage windows were covered with white plastic bags and saw an individual exiting the house wearing a white overall and safety mask. According to Combrinck he also smelt a strong odour of sulphur, which is usually released during the manufacturing process of mandrax. The mask and overall appeared similar to those worn by him and his team to protect themselves from dangerous substances when destroying clandestine laboratories.

[8] On 25 February 2014 Combrinck made enquiries from residents in the complex and established that three foreign nationals were residing at the premises. He then obtained a search warrant from a magistrate to conduct a search and seizure operation. The search warrant authorised the police to search and seize *'drugs, documents, electronic equipment and manufacturing equipment'*.[5]

[9] At approximately 16h30 on the same day Combrinck and his colleagues executed the warrant. He knocked on the front door and it was opened by the first respondent, who informed Combrinck that he was in charge of the premises.

[10] Upon entering, Combrinck saw two men sitting in the living room, who identified themselves as Kiril Kirilov and Asen Checharov. In the garage what appeared to be a hidden channel, approximately 2 metres in depth, was being

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5 Annexure MC2 Record p97.

constructed on the floor. The first respondent told him that they were building a jacuzzi, although Combrinck observed built-in panels inside the channel which he considered to be at odds with the explanation given by the first respondent.

[11] Combrinck and his colleagues proceeded to the main bedroom. The first respondent told him that its occupant was away in Europe and that he did not know his name. Combrinck opened one of the cupboard doors and found a blue Karimor bag containing a large amount of cash. In an adjoining cupboard he found a black Fabia bag which also contained considerable cash. Combrinck seized the bags and cash because the first respondent could not give him a reasonable explanation about the owner and source thereof. He also seized loose cash which he found in the bedside drawer.

[12] Combrinck then proceeded to one of the spare bedrooms which the first respondent acknowledged that he occupied. There he found a yellow plastic bag also containing a large amount of cash which, according to Combrinck, the first respondent said belonged to him and was the proceeds of foreign currency that he brought into South Africa. Combrinck asked the first respondent where he had exchanged the foreign currency and requested that he furnish documentary proof thereof. The first respondent replied that he had exchanged the foreign currency with a person somewhere in Sea Point but did not know the person and had no proof of the transaction. Combrinck then seized this cash as well.

[13] In the other spare bedroom Combrinck found further loose cash in a bedside drawer. The first respondent told him that he did not know who it belonged to and that the bedroom was unoccupied. This cash too was seized.

[14] In the living room Combrinck found a laptop and yet more cash, which the first respondent said belonged to him. This cash was seized along with other items including cellphones and laptops. The three men did not want to disclose the owners of the cellphones.

[15] Combrinck then searched an Audi Q7 vehicle with registration number CA 510 743 parked in front of the premises, after the first respondent informed him that he was the driver and handed over the keys. Cash found in the glove compartment and boot, which the first respondent identified as his, was similarly seized. According to Combrinck, upon returning to the house, he saw a false R200 note lying at the front door. This too was seized after the first respondent could not provide an explanation.[6] Combrinck then invited the three men to attend at his office the following day to provide a written explanation about the source of all the cash but they did not do so, or at any stage thereafter, although he was contacted by an attorney who indicated that it was unlikely that the men would want to provide such an explanation.

[16] The cash seized was thereafter counted at the Durbanville branch of Absa Bank and found to be made up of South African currency totalling R2 032 040 and an undisclosed amount of foreign currency, mainly in US dollars and

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6 Affidavit of Combrinck para 9 Record p127.

Euros. On 10 March 2014 the foreign currency was exchanged into South African currency totalling R617 285.90.

[17] In the preservation application Detective Constable Mandy Carelse of the DPCI, who took over the investigation, set out the basis for the NDPP's contention that the cash constitutes the proceeds of unlawful activities as follows:

> *'64. The evasive manner in which the first respondent acted when confronted by warrant officer Combrinck during the search in his explanations about the source of the money and the manner he chose to act subsequent thereto, by failing to make a simple statement setting out the origin of the money, leads me to have reasonable grounds for believing that the cash is the proceeds of unlawful activities, to wit, unlawfully bringing goods including foreign currency without declaring it at point of entry into South Africa…'*[7]

[18] Similar sentiments were expressed in the founding affidavit of Mr Gcobani Bam, the regional head of the Asset Forfeiture Unit of the National Prosecuting Authority in the Western Cape, in that application:

> *'73. To me it seems very strange and indeed suspicious that people could reasonably keep such huge cash in a residence.*
>
> *74. I submit that although on its own such conduct is not unlawful, in the circumstances under which it was seized and the subsequent investigations relating thereto, such conduct justifies reasonable suspicions that such cash is the proceeds of unlawful activities such as*

[7] Para 64 Record pp73-74.

the ones alleged herein, including the avoidance of the banking system to conceal its origin and retention as well as tax evasion.'[8]

[19] I will deal with the "subsequent investigations" below. Regarding the false bank note allegedly found at the front door Bam stated:

'83. I understand the latter to be a "fake" note that could have been reproduced by what is known as a "black dollar" scam that refers to the manufacturing of fake notes by use of, amongst others, electronic equipment.

84. I note that amongst the exhibits appearing in the copy of the photo attached to Constable Carelse's affidavit that there is also a cardboard (sic) *depicting what appears to be a card skimming device.*

85. This to me seems reasonably possible in the circumstances of this case, more so that there was also electronic equipment seized from the premises.'[9]

[20] The electronic equipment to which Bam referred comprised only of cellphones and laptops. It is common cause that no drugs, drug manufacturing equipment or materials, or any equipment which could be identified as being used to generate fake currency, were found at the premises. None of the police officers involved in the raid made mention of a strong smell of sulphur. There is also no indication in the papers that Combrinck, Carelse or any other SAPS member took steps to ascertain the owners of the Toyota bakkie and Audi Q7 motor vehicle parked at the premises at the time of the raid, or whether any forensic tests were ever carried out on these vehicles, or indeed at the

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8 Paras 73 – 74 Record p28.
9 Paras 83 – 85 Record p30.

premises searched. No evidence was produced by the NDPP as to the authenticity or otherwise of the "fake" note and there is no indication that the built-in panels in the channel in the garage were searched.

[21] Carelse was handed a bag of documents by Combrinck which had also been seized during the raid. Among these documents she found an original deed of transfer for the Durbanville property, annexed to a covering letter from David Muller Attorneys dated 1 November 2013 and addressed by hand to the second respondent.[10] The deed of transfer reflects that the second respondent purchased the Durbanville property on 21 July 2013 for the sum of R3 175 000 and took transfer thereof on 1 November 2013. Mr Muller was the conveyancing attorney.

[22] Carelse was able to locate Muller who had since emigrated to Australia. Under subpoena Muller informed her that the second respondent paid the full purchase price with the proceeds of jewellery sold to a Mr Andrzey Rachwal, a jeweller trading as Shillings & Things ("S&T"). Rachwal paid over the proceeds by way of electronic transfers to Muller's trust account and provided him with the required documentation as proof of the transaction. Muller did not receive any cash directly from the second respondent, who signed the transfer documents before him personally and handed over her original passport for him to copy. Muller provided Carelse with copies of the passport, a VAT invoice, a tax invoice from Rachwal for R3 174 000, relevant bank statements, final statements for both seller and purchaser, ledger and journal entries for the transaction and proof of the payments that he could locate.

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[10] Record pp129 – 133.

[23] The documentation provided by Muller showed that the purchase price was paid by Rachwal in 8 electronic fund transfers over the period 24 July 2013 to 22 August 2013. The payments totalled R3 380 841.15 which, together with interest accrued while held in Muller's trust account, increased to R3 391 065.90. The tax invoice from S&T dated 24 July 2013 was addressed to the second respondent at […], Milnerton, and described the goods sold by her as *'4 x diamonds as per register number 15517'*[11] for the sum of R3 174 000.

[24] Carelse noted that the tax invoice from S&T made no reference to *'jewellery'* but to diamonds only, and that the total of the electronic fund transfers made by Rachwal did not tally with the amount reflected in the tax invoice. Rachwal had transferred R205 841.15 more than the purchase price of R3 175 000 and R206 841.15 more than the amount reflected on his tax invoice.

[25] Carelse also referred in passing to the deed of sale.[12] This reflects that the second respondent made the offer to purchase on 17 July 2013 (the seller accepted it on 21 July 2013). The purchase price was to be paid by way of a deposit of R500 000 within 5 days of acceptance and the balance of R2 675 000 within 21 days thereafter, to be held in trust by Muller pending registration of transfer which was to take place *'as soon as possible, but not*

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[11] Annexure MC32, Record p152. Compare Record p378 where the second respondent refers to register number 11557 – this appears to be a typographical error.

[12] Annexure MC33, Record p153.

before 31 August 2013'[13]*.* The second respondent was to pay the costs of the transfer. Her *domicilium* address was reflected as *'[…], Cape Town'* which is similar to that on the S&T tax invoice. According to Carelse, this address does not exist.

[26] As regards these apparent discrepancies, Carelse stated:

> *'82. In light of the above, I have reasonable grounds for believing that the immovable property was purchased with the proceeds of unlawful activities, namely smuggled diamonds and not the sale of jewellery as claimed by the second respondent to Muller, when she was asked about how she would pay for the immovable property…*
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> *83. In addition to the above, I have reasonable grounds for believing that the diamonds sold by the second respondent to Shillings & Things were smuggled by the second respondent to South Africa, when she entered South Africa from abroad in contravention of section 15(1)(a) of the Customs Act.*
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> *84. The fact that the purchase price for the sale of diamonds was not made directly to a bank account of the second respondent and the manner in which the payments were made, to wit, by several tranches and not made in one lump sum is suspicious and gives me reasonable grounds for believing that the second respondent and/or any person she might have been acting for in the sale of the smuggled diamonds, were determined to conceal the original source of the funds for the* [purchase] *of the immovable property.*
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> *85. Further, the second respondent in instructing the jeweller to transfer the proceeds of the sale of the diamonds from his bank directly to the trust account of the attorney dealing with the sale and transfer of the immovable property instead of it being transferred to her own account, indicates a modus operandi of concealing the origin and the nature of the proceeds of unlawful activities, to wit, illegal sale of smuggled*

[13] Clause 5 of the deed of sale, Record p154.

diamonds, from being able to be traced to herself through her bank account.

86. As a consequence, I have reasonable grounds for believing that the immovable property is the proceeds of unlawful activities of smuggling of diamonds into South Africa in contravention of section 15(1)(a) of the Customs Act and money laundering in contravention of section 4 of the POCA.[14]

[27] Amongst the documents seized from the premises Carelse found some containing personal information of various South African citizens.

[28] One of these was a document bearing the heading *'Personal Particulars'*[15] containing the name, address, banking details, contact telephone numbers and details of next of kin of a certain John Adams of Mitchells Plain.

[29] On 4 September 2014 she interviewed Adams at the Table Bay Harbour police station. He told her that he was an engineer working on the ship "Defiant" which is owned by one Alex Novak, who Adams identified as the first respondent from photographs downloaded from the cellphones seized during the raid. He was also shown a copy of the second respondent's passport photograph and identified her as the first respondent's wife.

[30] Adams told Carelse that the Defiant was based in the Red Sea close to Sudan and was used as a floating armoury (firearms and ammunition) for security companies operating in that zone. According to Carelse messages

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[14] Record pp79 – 80.
[15] Annexure MC34, Record p160.

downloaded from the seized cellphones showed a number having been sent from, or received by, a person named Alex. Adams told her that Alex usually carried a bag of cash with him, conducted most of his business in cash and regularly paid the Defiant's crew in cash. On one occasion the first respondent had invited Adams to visit his house in Durbanville when his wife and daughter came to South Africa, but at the time of his interview with Carelse the visit to this house had not yet materialised. Adams did not depose to a confirmatory affidavit.

[31] Carelse also received information that the first respondent was renting a property in Saldanha Bay from one Hester Potgieter who resides in Pretoria. She interviewed Potgieter on 10 March 2015.

[32] Potgieter explained that after advertising the property for rental she was contacted towards the end of April 2013 by a foreigner who identified himself as Alex. He expressed interest, informing her that he would be working in Saldanha Bay, that his company would lease the premises and pay the rental, and that he would reside there with his wife and daughter. After concluding the lease an amount of R114 400, being the full rental for the one year lease period (1 June 2013 to 31 May 2014) was paid into her husband's Absa Bank account with the reference "Ilias Manolis" who also signed the lease and was employed at the time by Hellenic Shipping.[16] Carelse established from the copy of his passport annexed to the lease that Manolis is a Greek citizen.[17]

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[16] Affidavit Carelse Record p83, Affidavit Potgieter Record p161, Lease Agreement Annexure MC35 Record p166.

[17] Copy of passport of Manolis Record p176.

[33] Carelse then obtained a statement from attorney Muller in relation to the negotiations and signature of the sale transaction in relation to the Durbanville property. It appears that Muller acted as both agent and conveyancer.

[34] According to Muller in July 2013 he received a telephone call from a man identifying himself as Alex. He told Muller that he and the second respondent, whom he referred to as his "friend", had seen his advertising board outside the estate complex. The friend was interested in purchasing a property in the complex and Alex was assisting her as an interpreter as she was not fluent in English.

[35] The respondents then viewed the property together in Muller's presence. The second respondent expressed interest and a few days later submitted an offer for the asking price of R3 175 000 which was accepted. When the transfer documents were ready for signature the second respondent attended personally at his office to sign them assisted by Alex as interpreter.

[36] Further investigation by Carelse also revealed that the first respondent contracted with one Gerhardus Loubser of Western Screens (Pty) Ltd for the installation of roller shutters at the Durbanville property in October 2013 at the quoted price of R73 618.62 and that it was the first respondent (and not the second respondent) who made payment for the installation.[18]

[18] Affidavit Carelse Record pp84-86, Western Screens quotation Record p190.

[37] Enquiries made by Carelse to a Christine Steyn (also known as Penny Steyn) of the managing agents of the complex revealed the following. When the property was transferred on 11 September 2013 a sum of R13 248.08 was received from Muller's trust account towards future monthly levies for the owner. Steyn was furnished with two email addresses to which she transmitted the monthly levy statement, namely […]@live.com and […]@outlook.com. She was told that these were the owner's email addresses. When the levy account fell into arrears in March 2014 she sent reminders to these addresses and on 7 June 2014 an amount of R10 000 was paid which covered the arrears plus the levy for one month. In August 2014 the levy account again fell into arrears and on 21 October 2014 she sent a final reminder to the same email addresses. On 3 November 2014 the owner settled the arrears by making payment of R5 740. This was the last payment that she received and at 27 March 2015 the account was again in arrears in the sum of R15 802.44. According to Steyn, the Durbanville property had been vacant since the raid conducted by the police in February 2014.

[38] Carelse also established from the movement control system of the Department of Home Affairs that the first respondent regularly entered South Africa from 2012 until 26 February 2015 when he left the country through OR Tambo airport. The second respondent arrived in South Africa through Cape Town International Airport on 4 July 2013 and left on 17 July 2013 to Botswana. There is no record of her returning to South Africa although she left this country again on 25 July 2013, again through Cape Town International Airport. She then returned to South Africa on 13 September 2013 and left on

22 September 2013. The second respondent was not present in South Africa on 1 November 2013, being the date upon which Muller addressed the letter to her, for delivery by hand, enclosing the original title deed to the Durbanville property, which was found at those premises during the raid.

[39] Carelse submitted that:

> *'107. In light of* [this] *evidence, it appears that it is the first respondent's modus operandi to avoid concluding transactions benefitting him, or his transactions, in his personal name, but to use other people to enter into his transactions as his nominees.*
>
> *108. The first respondent has done this with Ilias* [i.e. Manolis] *in respect of the Saldanha lease…I have a reason to believe that he may have done the same with regard to the sale transaction of the immovable property concerned in this matter, by appointing the second respondent as the nominee in whose name the immovable property was registered…'*[19]
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> *143. …I have a reasonable ground for believing that the* [title deed] *must have been delivered to the first respondent for his safekeeping, which he kept accordingly in order to secure his control over the property and its ownership.'*[20]

[40] Referring to the different nationalities of the respondents as well as Manolis, Carelse submitted that:

> *'149. In the circumstances, I have reasonable grounds for believing that the first respondent has connections beyond his Bulgarian counterparts.*

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[19] Affidavit Carelse Record p84.
[20] Affidavit Carelse Record p92.

150. I have reasonable grounds for believing that this benefits the first respondent in that such connection would facilitate and make it easy for him to easily launder his proceeds of crime, irrespective of the origins thereof, without easy detection, as at first glance his nominees may be found to be far and unrelated to him.'[21]

[41] During the course of her investigation Carelse applied to the Bellville magistrate's court for a subpoena to secure certain bank statements in terms of s 205 of the Criminal Procedure Act.[22] A copy of her sworn statement in support of that application is annexed to her affidavit and includes the following allegations:

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2.

I am currently the investigating officer of Cape Town Central Organised Crime Enquiry 20/02/2014. The aforementioned enquiry relates to the investigation of alleged dealing in drugs and possible money laundering…

3.

The suspects have been identified as Asen Georgiev Ivanov alias "Alex Norvek" with Bulgarian ID […] and passport number […], Kiril Hristov Kirilov with Bulgarian ID […] and passport number […] and Asen Checharov with Bulgarian ID […] and passport number […].

4.

The suspect [sic] *is linked by means of information that was received under oath and through Interpol. A search warrant was conducted and the suspect* [sic] *was at the said premises at the time of the search.'*[23]

[42] Carelse deposed to the sworn statement on 18 September 2014, some seven months after the raid at the Durbanville property. However she did not deal

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21 Affidavit Carelse Record p93.
22 Act 51 of 1977.
23 Annexure MC36 to Carelse's Affidavit, Record p177.

pertinently with these allegations in these proceedings, and they were only dealt with in passing by Bam as follows:

> *'144. In the said statement Constable Carelse, apart from the facts dealt with hereinabove, …specifies also that the suspects including the respondents are under investigation under Cape Town Central Enquiry reference number 20/02/2014 and that they have been linked by information received through Interpol.'*[24]
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> [emphasis supplied]

[43] Subsequent to the preservation order the curator bonis, Mr Quintin Joseph, established that the respondents had instructed a Vily Groudeva to market the Durbanville property after the February 2014 raid, but before the preservation application was launched on 21 April 2015.

[44] Email correspondence attached to Joseph's report[25] revealed that the mandate was given in late March 2015 by one Peter with email address [..]@live.com. On 8 April 2015 he informed Groudeva that '[r]*egarding the big hole in the garage as far as I know* [it] *was supposed to be* [a] *wine cellar but wasn't completed. The house is for* [sale] *as it is with furniture…Jana* [i.e. the second respondent] *will sign power of attorney…'.* On 24 April 2015 Joseph provided Groudeva with a copy of the preservation order granted the previous day. She consequently informed Peter that she could no longer market the Durbanville property.

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[24] Affidavit Bam Record p41.
[25] Record pp315-321.

[45] Bam pointed out that the aforementioned email address is the same as that of the first respondent. He submitted that:

> *'29. It is important to bring to the attention of the honourable court that the first respondent disguised his true identity to the estate agent and gave his name to the estate agent as "Peter" and not by his real name set out hereinabove, using the email of […]@live.com, which was one of the addresses to which the preservation order and the supporting papers were served.*
>
> *30. This resonates with the first respondent's modus operandi, as indicated in the preservation application papers whereby he always avoided entering into transactions in his own name but in the name of other parties or his alias name "Alex Novak" referred to hereinabove.*
>
> *31. In the circumstances, it is submitted that the first respondent is the central figure in the unlawful activities of money laundering committed in relation to the property concerned in these proceedings.*
>
> *32. I submit that on a balance of probabilities the evidence set out in the preservation papers and hereinabove indicates that the first respondent is used to committing unlawful money laundering activities in order to build up his portfolio of properties and seems to have done so successfully in the past…*
>
> *37. It is further submitted that had the transaction of the sale of the immovable property been completed before the preservation order was granted, the respondents would have completed their unlawful activities of money laundering, as the source of the funds repatriated from South Africa to the respondents wherever they are overseas would have reflected as the proceeds of a sale of the immovable property as the source thereof, instead of the diamonds that were surreptitiously smuggled to South Africa and used to finance the*

purchase of the property when the second respondent acquired its ownership…

39. In the circumstances, from all the evidence adduced to date in this matter, I submit that the applicant has established on a balance of probabilities that the property is proceeds of the unlawful activities referred to hereinabove.'[26]

[46] In her affidavit in support of the rescission application the second respondent confirmed that the first respondent uses the alias Alex Novak. She also confirmed that the email addresses of […]@live.com and […]@outlook.com are those of the first respondent. She denied that these addresses were hers and stated that her email address is […]@gmail.com. Given the sequence in which their affidavits were filed, I will first deal with the second respondent and then with the first respondent.

[47] The second respondent's version is as follows. On 4 July 2013 she travelled to South Africa to join her husband, Robert Cipkala, on vacation and also met up with the first respondent, who is a close friend. She had by then become interested in purchasing immovable property in South Africa as an investment. Given that the first respondent had been in South Africa for some time, she thought that he would be able to assist her.

[48] After viewing the Durbanville property the first respondent accompanied her to Muller. She had in her possession a gold and diamond bracelet which had been in her family for years, and was able to sell it to purchase the

[26] Bam Affidavit Record pp282-285.

Durbanville property. Muller advised her that it would be easier to sell the diamonds and gold separately.

[49] The first respondent, who told her that he had previously rendered this type of assistance to other foreign nationals, introduced her to Rachwal of S&T as a reputable dealer in precious gemstones and jewellery. She has a poor command of the English language and the first respondent thus assisted her in her dealings with S&T.

[50] The bracelet was presented to Rachwal for valuation and the four diamonds removed and thereafter certified at the Gemological Laboratory in order to verify their authenticity. The remainder of the bracelet was sold separately.

[51] After the diamonds were certified they were entered into S&T's second hand register and retained as legally required for seven days. Thereafter they were sold by Rachwal and she was provided with the invoice dated 24 July 2013 for R3 174 000 annexed to Carelse's affidavit. She also received smaller amounts for the remainder of the bracelet. She did not recall the exact amounts but the full proceeds of both the diamonds and the gold were paid by Rachwal to Muller, on her instructions, on account of the purchase price of the Durbanville property. As a foreign national she did not have a bank account in South Africa and it seemed that this would be the safest option.

[52] Thereafter Muller made the relevant enquiries with Rachwal regarding the source of the funds and was provided with the necessary documentation as well as a full explanation for FICA purposes. She was unable to obtain any

further documentation from Rachwal since he sold S&T in November 2014 and it was thus no longer in his possession. She pointed out that despite the documentation given to Carelse after the raid no-one from her unit (or the NDPP) ever contacted Rachwal in relation to the transaction and its validity. Rachwal deposed to an affidavit confirming the second respondent's version.[27]

[53] The second respondent left South Africa on 25 July 2013. The first respondent asked whether he could make use of the Durbanville property while he remained in Cape Town and she agreed. Given her friendship with him and his assistance in the acquisition of the Durbanville property, they agreed that he could reside there rent free but would pay all charges in relation to the property, as is evidenced by the monthly levy account emailed to the first respondent and not to her directly, although the second respondent also agreed that any surplus due to her after payment of the purchase price and transfer costs could be appropriated by the first respondent towards the charges at the property.

[54] The second respondent again entered South Africa on 13 September 2013 to finalise the property transaction by attending on Muller personally to sign the transfer documents and to hand him her original passport for copying. She was informed that she had to sign the documentation in person and she duly complied. She departed from South Africa on 22 September 2013.

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[27] Record pp438-439.

[55] Given her position as landlord *vis-à-vis* the first respondent she had no control over activities at the Durbanville property nor, indeed, any knowledge thereof. She was shocked when she learned of the raid and only become aware of the construction in the garage when she later received a copy of the preservation application. She confronted the first respondent who informed her that he wanted to build a wine cellar and this would not diminish the value of the property in any way. He also told her that he had improved its security by installing *inter alia* shutters and she had no objection thereto.

[56] She was not aware that anyone other than the first respondent was residing at the property at the time of the February 2014 raid. According to him the men present at the time of the raid lived nearby and were only visiting him. She was unable to comment on the cash found other than to refer to the first respondent's explanation which I deal with later.

[57] According to the second respondent she and her husband stayed in a rented apartment at […], Milnerton during their Cape Town holiday in 2013. She herself rented the apartment through the website FZP.co.za.[28]

[58] The second respondent denied that she was in any way a suspect or linked to information received through Interpol. She pointed out that Carelse herself made no reference to her (but only to the first respondent, Kirilov and

[28] According to this website FZP offers a comprehensive range of self-catering Cape Town accommodation including luxury Cape Town holiday apartments and fully serviced holiday apartment rentals throughout the city. It claims to be the leader in holiday apartment rentals, offering the widest choice in self-catering accommodation from luxury to budget.

Checharov) in her sworn statement made in support of her application in terms of s 205 of the Criminal Procedure Act.[29]

[59] The second respondent declared that she did not enter South Africa with undisclosed diamonds with the intention of selling them to purchase an immovable property, but rather came to South Africa and thereafter decided to sell jewellery in her possession to enable her to purchase the Durbanville property. She specifically sought the assistance of Muller in this transaction and attended personally to the signature of all documentation to ensure that the transaction was correctly and legally concluded. She confirmed that she decided to sell the Durbanville property after the raid and that she instructed the first respondent to attend to this on her behalf. She feared for the security of her investment given the circumstances of the raid and the events that followed. Her intention is still to sell the property (the contents belong to the first respondent) and she has undertaken to take all lawful steps in this regard including the payment of any taxes attendant thereon. She denied that she has abandoned the property.

[60] Carelse deposed to a supplementary affidavit after interviewing Groudeva who was mandated to sell the Durbanville property on behalf of the second respondent. According to Groudeva she was mandated by a Peter Voites, who informed her that he was acting as the middle man between her and the lawful owner who is Slovakian.[30]

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[29] Record pp177-178.
[30] Supplementary Affidavit Carelse Record p454, Affidavit Groudeva Record p461.

[61] The first respondent confirmed the second respondent's allegations in relation to the Durbanville property. He did not recall introducing or referring to himself as *"Peter"* during his interactions with Groudeva. His version is further as follows.

[62] One Marcel Kacvinsky is a friend of his who travelled to South Africa during June/July 2013. Kacvinsky told him that he wanted to sell some personal jewellery whilst in South Africa. The second respondent introduced him to Rachwal who made payment for the jewellery items in cash. The first respondent was uncertain of the exact amount but knew that the sum paid was in excess of R2 million as he was personally involved in the transaction.

[63] Neither he nor Kacvinsky had any documentation relating to the transaction which, as far as he knew, had been handed by Rachwal to the South African attorney previously appointed to represent the respondents to defend these proceedings. Despite request the attorney failed to hand it over to the respondents' current attorney. As far as the first respondent knew the transaction between Kacvinsky and Rachwal complied with all legal requirements. This was confirmed under oath by Rachwal.[31]

[64] According to the first respondent Kacvinsky did not have a bank account in South Africa and was unable to exchange the cash received from Rachwal as he is not a South African citizen. The first respondent thus offered him *'a solution'*. This entailed the conclusion of an agreement in terms of which the

[31] Record pp438-9.

first respondent would be entitled to use the cash and was obliged to repay Kacvinsky at a later stage with interest. This suited the first respondent as he had potential business dealings in South Africa (he had previously applied for a business visa) and the cash would be of considerable assistance in covering expenses. He also did not have a bank account in this country. The cash seized from the main bedroom during the February 2014 raid was that loaned to the first respondent by Kacvinsky.[32]

[65] Kacvinsky deposed to an affidavit confirming the jewellery transaction with Rachwal as well as the agreement with the first respondent. The latter conceded that when he informed the search team that the cash found in the main bedroom belonged to a friend who was currently in Europe this was *'not entirely correct'*, but maintained that he had been placed under severe stress by the search team who did not want to believe anything he had to say.

[66] The first respondent also conceded that he had foreign currency in his possession at the Durbanville property at the time of the raid which, according to him, was given to him by the second respondent, Kacvinsky, Kirilov and Checharov, but could not recall how much or which amounts were given to him by whom.[33] The second respondent however made no mention of handing over foreign currency to the first respondent and neither did Kacvinsky; Kirilov and Checharov did not depose to affidavits. Although the first respondent did not disclose the currency in which Rachwal made payment to Kacvinsky, it is fair to accept that it was in South African rands.

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[32] Affidavit first respondent Record pp431-2.
[33] Affidavit first respondent Record p432.

[67] According to the first respondent the cash found in the Audi Q7 parked at the Durbanville property was money for crew members' wages. He had paid some of them that day but others had not arrived at work to be paid.

[68] Combrinck's initial observations of the bakkie, plastic covered windows, individuals dressed in protective clothing and activities in the garage all related to the construction of the wine cellar and nothing more.

[69] The first respondent was never questioned about a false bank note. Kirilov and Checharov did not attend at Combrinck's office as he requested because they had no involvement and had already explained that they resided elsewhere, pursuant to which their premises had in fact also been searched. The first respondent himself consulted with his previous attorney on the day following the raid and was given the assurance that he would take care of the matter on his behalf. It was for this reason that the first respondent did not attend at Combrinck's office.

[70] The first respondent only *'helped'* Manolis to rent the Saldanha Bay property on his request.[34] Although he vacated the Durbanville property after the raid, the first respondent returned to South Africa on four occasions thereafter.[35] He uses the alias "Alex Novak" in South Africa simply because his birth name is difficult to pronounce. According to the respondents, this is not uncommon amongst individuals from Eastern Europe when travelling or conducting business in western countries.

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[34] Affidavit first respondent Record pp383-4.
[35] Affidavit first respondent Record p430.

[71] The first respondent managed the ship "MFV Defiant" on behalf of its owners and made substantial cash payments, not only to its crew, but also for maintenance and supplies. Adams had been dismissed by the first respondent and was apparently nothing more than a disgruntled former employee. The first respondent had only referred to the Durbanville property as his house because he occupied it.

Discussion

[72] Section 15(1)(a) of the Customs Act provides that:

> *'**Persons entering or leaving the Republic and smugglers.**---(1) Any person entering or leaving the Republic shall, in such a manner as the Commissioner may determine, unreservedly declare---*
>
> *(a) at the time of such entering, all goods (including goods of another person) upon his person or in his possession which---*
>
> *(i) were purchased or otherwise acquired abroad or on any ship, vehicle or in any shop selling goods on which duty has not been paid;*
>
> *(ii) were remodelled, process or repaired abroad;*
>
> *(iii) are prohibited, restricted or controlled under any law; or*
>
> *(iv) were required to be declared before leaving the Republic as contemplated in paragraph (b)…*
>
> *and shall furnish an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer, and shall pay the duty assessed by such officer, if any, to the Controller.'*

[73] Section 1 of the Customs Act defines *'goods'* as including anything classifiable in terms of Part 1 of Schedule 1, as well as currency. Part 1 of

Schedule 1 in turn refers to *'articles of jewellery and parts thereof, of precious metal or of metal clad with precious metal as goods'*.[36]

[74] Rule 15.1 of the Customs and Excise Rules for Section 15 of the Customs Act provides *inter alia* that where a traveller enters the Republic and:

74.1 red and green channels are not provided for processing travellers, he or she may, without declaring any goods on forms TC-01 (Traveller Card) and TRD1 (Traveller Declaration) exit the restricted area if the goods upon his or her person or in his or her possession are personal effects (rule 15.01(b)(i)(aa));

74.2 red and green channels are provided for processing travellers, he or she may choose the green channel to exit the restricted area if the goods upon his or her person or in his or her possession are personal effects, and shall thus be regarded as declaring that he or she has no declarable goods (rule 15.01(d)(i)(aa) and (ii)).

[75] Personal effects are defined in Rule 15.01 of these Rules as:

> '● ***"personal effects"*** *means subject to item 407.01 of Schedule No.4, goods (new or used) in the accompanied or unaccompanied baggage of a traveller which that traveller has on or with him or her or takes along or had taken along for, and reasonably required for, personal or own use, such as any wearing apparel, toilet articles, medicine, personal jewellery, watch, cellular phone, automatic data processing machines, baby carriages and strollers, wheelchairs for persons living with disability,*

[36] Item 71.13.

sporting equipment, food and drinks and other good evidently on or within that person for personal or own use, but excludes goods that must be declared on forms TC-01 and TRD1 and commercial goods;'

[76] Schedule 4 (of Part 1) deals with specific rebates of customs duties. It presents in tabulated form. Item 407.01 refers *inter alia* to personal effects imported by non-residents for their own use during their stay in the Republic. Under the column heading "Extent of Rebate" appear the words "Full duty". Accordingly therefore no duty is payable on personal effects, including jewellery.

[77] Sections 81 and 83 of the Customs Act deal with the consequences of non-declaration of declarable goods and/or irregular dealing with, or in, declarable goods and provide as follows:

*'**81. Non-declaration in respect of certain goods.**---Any person who contravenes or fails to comply with the provisions of section 15, shall be guilty of an offence and liable on conviction to a fine not exceeding R8 000 or treble the value of the goods in question, whichever is the greater, or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment, and the goods in question and any other goods contained in the same package as well as the package itself shall be liable to forfeiture…*

***83. Irregular dealing with or in goods.**---Any person who---*

(a) deals or assists in dealing with any goods contrary to the provisions of this Act; or

(b) knowingly has in his possession any goods liable to forfeiture under this Act; or

(c) makes or attempts to make any arrangement with a supplier, manufacturer, exporter or seller of goods imported or to be imported into or manufactured or to be manufactured in the Republic or with any agent of any such supplier, manufacturer, exporter or seller, regarding any matter to which this Act relates, with the object of defeating or evading the provisions of this Act,

shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment, and the goods in respect of which such offence was committed shall be liable to forfeiture.'

[78] Section 87(1) of the Customs Act makes it clear that any penalty (including forfeiture) imposed under that Act does not exclude a penalty or punishment under any other law, and accordingly POCA nonetheless remains applicable.

[79] Before dealing with the relevant provisions of POCA, regulation 2 of the Exchange Control Regulations provides that:

'RESTRICTION ON PURCHASE, SALE AND LOAN OF FOREIGN CURRENCY AND GOLD

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

(2) (a) An authorised dealer shall not buy, borrow or receive or sell, lend or deliver any foreign currency or gold except for such purposes or on such conditions as the Treasury may determine.

(b) The Treasury may, in its discretion, by order prohibit all authorised dealers or any one or more of them –

(i) from selling, lending or delivering to, or buying, borrowing or receiving from, any specified person, fund or foreign government any foreign currency or gold; or

(ii) from so selling, lending, delivering, buying, borrowing or receiving any foreign currency or gold for any specified purpose or except for such purposes or on such conditions as the Treasury may determine.

(3) Every person other than an authorised dealer desiring to buy or borrow or sell or lend foreign currency or gold shall make application to an authorised dealer and shall furnish such information and submit such documents as the authorised dealer may require for the purpose of ensuring compliance with any conditions determined under sub-regulation (2) of this regulation.

(4) No person other than an authorised dealer shall –

(a) use or apply any foreign currency or gold acquired from an authorised dealer for or to any purpose other than that stated in his application to be the purpose for which it was required; or

(b) do any act calculated to lead to the use or application of such foreign currency or gold for or to any purpose other than that so stated.

(5) If a person has, as a result of an application in terms of sub-regulation (3) of this regulation, obtained from an authorised dealer any gold or foreign currency and no longer requires all or any part of such gold or foreign currency for the purpose stated in his application, he shall forthwith offer for sale to the Treasury or an authorised dealer that gold or foreign currency which is not so required, which may be repurchased at the price at which it was sold to him or such other price as the Treasury may determine.'

[80] Section 1(2) of POCA imputes knowledge of unlawful activities, or knowledge of the proceeds of unlawful activities, to a person if:

79.1 The person has actual knowledge; or

79.2 A court is satisfied that (a) the person believes that there is a reasonable possibility of the existence of that fact; and (b) he or she fails to obtain information to confirm the existence of that fact.

[81] Section 1(3) of POCA sets out the test to be applied to determine whether a person ought reasonably to have known or suspected a fact:

> *' (3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-*
>
> *(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and*
>
> *(b) the general knowledge, skill, training and experience that he or she in fact has.'*

[82] Sections 4 to 6 of POCA provide as follows:

> *'**4. Money laundering.**---Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and---*
>
> *(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or*
>
> *(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,*

which has or is likely to have the effect---

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere---

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence.

5. Assisting another to benefit from proceeds of unlawful activities.*---Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby---*

(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

shall be guilty of an offence.

6. Acquisition, possession or use of proceeds of unlawful activities.*--- Any person who---*

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.'

[83] Given the nature of these proceedings the *Plascon-Evans* rule applies.[37] I must be persuaded that the respective versions of the respondents, taken together with the admitted facts, justify the orders sought (subject to the proviso that the respondents' versions are not so far-fetched or untenable that they fall to be rejected on the papers as they stand).

[84] Mr Titus, who appeared for the NDPP, argued that the documentary evidence produced by it, in particular that procured from Muller, was sufficient to show that the second respondent failed to raise a genuine dispute of fact. He submitted that it was incumbent upon the second respondent – who was best suited to know what she sold to Rachwal – to produce other documentary evidence in the form of a further invoice or invoices to support her version that she not only sold diamonds but also gold to Rachwal. He also argued that in any event the only reasonable inference to be drawn from the papers was that the second respondent entered South Africa with diamonds, without declaring them, for the specific purpose of purchasing immovable property in order to promote the first respondent's money-laundering activities. He referred to the movement control records indicating that the respondent left South Africa for Botswana on 17 July 2013 (being the date that she signed the offer to purchase the Durbanville property) and that there is no record of her returning to South Africa before her departure from this country on 25 July 2013.

[85] On the other hand Mr Loots, who appeared for the respondents, submitted – correctly in my view – that the central question is whether the second

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[37] 1984 (3) SA 623 (A) 634G-635C.

respondent had a duty to declare the goods on her arrival in South Africa through Cape Town International Airport on 4 July 2013. This is because Carelse herself averred in her supplementary affidavit filed in support of the forfeiture application that:

> *'16. It is reiterated that SARS had not raised any assessment relating to any goods brought by the second respondent in South Africa on 4 July 2013, as the second respondent had failed to make the requisite declaration.*
>
> *17. In the circumstances, I submit that an inference may be drawn that the second respondent failed to comply with the provisions of section 15(1)(a) in respect of any goods that she had brought with her in her possession into South Africa when she entered on 4 July 2013, as indicated in her movement control records.*
>
> *18. Therefore, it is submitted that the goods brought by the second respondent into South Africa on 4 July 2013, being diamonds or any jewellery items, were not declared by her and fall within the definition of proceeds of unlawful activities as defined in section 1 of the Prevention of Organised Crime Act, 1998 (POCA) and are liable to be forfeited to the State both in terms of POCA and the relevant provisions of the Customs and Excise Act 94 of 1964 (Customs Act).'*
>
> [emphasis supplied]

[86] These averments were made *after* Carelse had scrutinised the second respondent's movement control records (and completed her investigation) and this was accordingly the case that the second respondent was called upon to meet. It is also fair to accept that Carelse, upon completion of her investigation, placed no reliance on the second respondent's alleged trip to

Botswana. Placing reliance on this during argument – as Mr Titus did – does not assist the NDPP.

[87] The second respondent's version that she arrived in South Africa with a bracelet, a personal effect, is supported by the following. Her allegation that it was Muller who advised her to sell the diamonds and gold separately was never taken up by Carelse with Muller and thus stands uncontested. Muller himself confirmed that the respondent paid for the Durbanville property with the proceeds of *'jewellery'*. Rachwal confirmed the second respondent's version that he removed the diamonds from the bracelet and sold them separately from the gold.

[88] It is also common cause that Rachwal paid over monies into Muller's trust account of some R200 000 in excess of the amount paid for the diamonds as reflected on the S&T invoice. There is no logical explanation for this other than that he must also have sold something else for the second respondent. Moreover, if it had been the second respondent's intention to conceal the transactions, it makes no sense that she approached a reputable dealer (the NDPP conceded in the heads of argument that Rachwal is such a dealer) who, she must have anticipated, would comply with all legal requirements, and in addition, that she willingly allowed an easily accessible paper trail to be created and retained by both Rachwal and Muller. There is also no evidence to suggest that the second respondent could not have been in possession of the bracelet when she entered South Africa on 4 July 2013.

[89] In addition, the second respondent only made the offer to purchase the Durbanville property about two weeks after her arrival in South Africa. It stands to reason that if she was conspiring with the first respondent to launder money, the first respondent – who, it is common cause, had been in South Africa for some time – would already have identified a suitable property by the time that the second respondent entered this country in order that the transaction could be concluded immediately thereafter. There would also have been no reason for the second respondent to have viewed the Durbanville property before making an offer to purchase it if, as the NDPP contends, she simply intended to hold it as the first respondent's nominee.

[90] Furthermore, Groudeva herself (who was appointed as agent to sell the property after the raid) stated that Peter Voites identified himself as the *'middle man'* between her and the lawful owner who is Slovakian. Whether or not the first respondent used an alias for this purpose does not detract from the weight of the other evidence in support of the second respondent's version.

[91] In *Tieber v Commissioner for Customs and Excise*[38] the court, in considering the Customs Act, held that:

> *'The only purposes of declaring goods are:*
> *(a) to enable the customs officer to determine whether duty is payable; and*
>
> *(b) to prevent prohibited or restricted goods being brought into the country.*

[38] 1992 (4) SA 844 (AD).

> *Goods in transit do not fall into either of those two categories. No purpose would be served in declaring goods in the hold of an aircraft or ship which are not to be brought into the Republic. An indication that s 15(1) does not apply to such goods is also to be found in the provision there for a customs officer to require the person declaring the goods to produce and open them for inspection. In the usual situation such a requirement would be impossible to fulfil in respect of goods in transit and not in the physical possession of the traveller. It follows that the provisions of s 15(1) do not apply to goods which remain in a transit area.'*[39]

[92] In *Capri Oro (Pty) Ltd and Others v Commissioner for Customs & Excise and Others*[40] the second appellant entered South Africa through OR Tambo Airport, carrying 77kg of jewellery in his hand luggage which was the property of the third appellant. He intended to fly to Namibia later the same day to sell the jewellery to a third party who would be responsible for clearing it through customs. There was a 3 ½ hour delay between the time of his arrival and the departure of his flight to Namibia. He arranged to meet his father at the airport and obtained permission from an official at passport control to leave the transit area for that purpose. He went through the green *'nothing to declare'* channel and, after passing the customs point, he was detained by the police who seized the jewellery. The Supreme Court of Appeal found that the second appellant had contravened s 15(1) of the Customs Act and rejected his argument that the principles set out in *Tieber* applied, holding, with reference to s 15(1) that:

> *'The position under that section is that whether or not goods in the possession of a person entering the Republic as the second* [appellant] *did*

[39] At 850H-851A.
[40] [2002] 1 All SA 571 (A).

> *are, in the long or the short term, intended by him to be removed to another country, they have to be declared when they are brought into South Africa if they fall within one of the categories specified in section 15(1)(a). Given the purpose behind section 15(1) as stated in the* Tieber *case (*supra*)…it is evident that the final destination of the goods is irrelevant: the necessity for the declaration is triggered by the nature of the goods and the fact that they are brought into South Africa as opposed to remaining in transit or in bond."*[41]
>
> [emphasis added]

[93] Mr Titus argued, on the basis of *Capri Oro*, that the Supreme Court of Appeal has confirmed that all jewellery constitutes goods that must be declared at point of entry in accordance with the provisions of s 15(1)(a) of the Customs Act, and that non-compliance with s 15(1) renders such jewellery liable to forfeiture under the provisions of s 87 thereof.

[94] However it is clear from the facts in *Capri Oro* that it was never suggested by the second appellant that the 77kg of jewellery in his hand luggage was a *'personal effect'* and I do not understand the Supreme Court of Appeal to have found that jewellery, of any nature, attracts the forfeiture and similar provisions of the Customs Act if it is not declared. As held in *Tieber*, the only purposes of declaring goods are to enable the customs officer to determine whether duty is payable, and to prevent prohibited or restricted goods being brought into the country. In my view, the evidence shows that the bracelet which the second respondent brought into South Africa does not qualify as prohibited or restricted for purposes of the Customs Act; and in any event, no duty would have been payable even if she had declared it. I am thus not

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[41] Para [17].

persuaded that the second respondent's failure to declare the bracelet upon her arrival in South Africa through Cape Town International Airport on 4 July 2013 was unlawful or constituted a contravention of s 15(1)(a) of the Customs Act. Given that the NDPP relied squarely on a contravention of this nature to constitute unlawful activity for purposes of POCA, it follows that its case against the second respondent cannot succeed.

[95] The first respondent's position is different. Over the period leading up to the raid he regularly moved across the borders of South Africa. He was known to carry large amounts of cash and, on his own version, he conducted his various business activities in cash. He conceded that these activities occurred not only in South Africa but also abroad (at least in the Red Sea zone near Sudan). He was found in possession of a considerable sum of money in rands and foreign currency and was unable to provide any reasonable explanation, either to the police or to this court.

[96] The first respondent lied to the police about the cash found in the main bedroom in the Durbanville property. Despite his claim that he was pressurised and felt intimidated, he clearly did not have the same difficulty as regards the other cash found. His explanation for the cash found in his bedroom is dubious to say the least. All that he could tell Combrinck was that it was the proceeds of foreign currency that he exchanged with a person somewhere in Sea Point but did not know the person and had no proof of the transaction.

[97] As to the foreign currency seized during the raid, his version that he was given it by the second respondent, Kacvinsky, Kirilov and Checharov cannot be believed. He could not say which of these individuals had given what amounts and in what currency. The second respondent made no mention of this and neither did Kacvinsky, despite both of them deposing to affidavits. No evidence was adduced that Kirilov and Checharov supported his version. It is also difficult to accept that if – as both he and Kacvinsky later maintained – there was a vague understanding between them concerning the "loan", that Kacvinsky would also *'donate'* foreign currency to the first respondent.

[98] Furthermore the first respondent's credibility is tainted in other ways. According to Combrinck the first respondent told him that he was constructing a jacuzzi in the garage at the Durbanville property. The first respondent told the second respondent that it was a wine cellar. He confirmed that he told her this, yet in his correspondence with Groudeva he stated that *'regarding the big hole in the garage as far as I know it was supposed to be a wine cellar…'* [emphasis supplied]. The first respondent pertinently failed to deal with the allegations concerning the lease of the Saldanha Bay property. He did not deny Potgieter's version and the best he could offer was that he had *'helped'* Manolis. The first respondent did not suggest that Manolis had at any stage worked for the same company which was ostensibly to lease the Saldanha Bay property on the first respondent's behalf, and the lease itself shows that Manolis was in fact employed by another company, Hellenic Shipping, at the time of conclusion of the lease.

[99] Moreover, both Kacvinsky and the first respondent are silent on whether Kacvinsky ever declared the jewellery which he purportedly sold to Rachwal when he entered South Africa during June or July 2013. The first respondent had ample opportunity to obtain an explanation from Kacvinsky and to take the court into his confidence on this important aspect. That he failed to do so, and taking all of the above factors into account, leads me to conclude that the NDPP has proven its case against the first respondent on a balance of probabilities.

[100] During argument Mr Loots addressed the issue of proportionality in the event of a forfeiture order being granted in respect of either respondent. There was some debate between Mr Loots and Mr Titus about whether the proportionality requirement applies outside of cases where there is a finding of instrumentality of an offence for purposes of POCA. Mr Titus referred to a string of Supreme Court of Appeal and Constitutional Court decisions, all of which dealt with proportionality within the context of a finding of instrumentality. He argued that where there is a finding of the proceeds of unlawful activities, proportionality plays no role. Mr Loots in turn relied on *National Director of Public Prosecutions v Salie and Another*[42] where the court held at para [135] that proportionality is indeed a requirement for the forfeiture to the state of the proceeds of unlawful activities under POCA.

[101] Be that as it may, the first respondent did not deal at all with proportionality in his papers, nor in heads of argument filed on his behalf. It was simply raised

[42] 2015 (1) SACR (WCC).

for the first time when Mr Loots addressed the court. There is nothing to indicate, given the particular facts of this case, that it would be disproportionate to order that the first respondent forfeit the full amount of the cash seized.

Conclusion

[102] **In the result the following order is made:**

1. **In terms of section 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) the property consisting of the following:**

   1.1 R2 032 040 in cash seized from the premises situated at[…], Vygeboom Avenue, Durbanville, Western Cape; and

   1.2 R617 285.90, which is the proceeds of foreign currency seized from the premises situated at[…], Vygeboom Avenue, Durbanville, Western Cape, which has been converted by the South African Police Service (SAPS);

   and held in the SAPS bank account at ABSA Bank, is declared forfeit to the state.

2. **The Chief Accounting Clerk of the SAPS is directed to transfer the above amounts to the Criminal Asset Recovery Account established in terms of section 63 of POCA, held at the Reserve Bank under**

account number […], within 45 (forty five) days of the date of this order.

3. **The Registrar of this court is directed to publish a notice of the forfeiture ordered in terms of paragraph 1 above, in the Government Gazette as soon as practicable in compliance with section 50(5) of POCA, and the state attorney is directed to draw the attention of the Registrar to the provisions of this paragraph.**

4. **The application for the forfeiture of the second respondent's immovable property situated at […], Vygeboom Avenue, Durbanville, is dismissed and the applicant is directed to pay the second respondent's costs, including any reserved costs orders.**

_____

J I CLOETE

For Appellant: Adv Mododa **Titus** – 4877070
Instructed by: State attorney (asset forfeiture) Mr Z. Karjiker – 4419301
For Respondents: Adv Hanri **Loots** – 4261771
Instructed by: De Waal Boshoff Inc. Charl Boshoff – 4245446