Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 2746/2017

In the matter between:

YANFANG QUI Appellant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Coram: Lever J, Nxumalo J & Nobanda AJ

JUDGMENT

LEVER J

1. This appeal comes before the full Court of this division by way of leave granted to the appellant by the Supreme Court of Appeal (SCA) on the 23 September 2020. The appeal is against the judgment and order of Mamosebo J handed down on 12 July 2019 in this matter. In terms of

the said judgment, Mamosebo J made an Order declaring the relevant property forfeited to the State. The relevant portion of such Order reads as follows:

"[1] That in terms of s50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) the VW Polo with registration numbers and letters CL 16 YR GP, chassis number WVWZZZ6RZDY137775 and engine number CTH033333 currently in the custody of the police at the Colesburg Police Station and the cash amount of R2 448 240.00 booked into the Colesburg SAP 13 and deposited in the South African Police Services (SAPS) ABSA bank designated account with reference number 686018 is declared forfeit to the State with immediate effect.

...(the omitted portions of the Order deal with procedural aspects of a forfeiture order which are not relevant to the current appeal) ...

[6] The respondents are ordered to pay the costs of the suit the one paying the other to be absolved."

2. The underlying facts that eventually led to the above forfeiture order are to a large degree, not really in dispute. Accordingly, they will not be dealt with in any great detail. To the extent that it is necessary to give context to this judgment an outline of such facts will be set out in this judgment.

3. In the early hours of the morning on 21 September 2017 Jermaine Johnson (Johnson Jnr) and his cousin, one of whom was driving the relevant vehicle at that time, were stopped just outside Colesberg by the South African Police Services (SAPS) at a roadblock. The vehicle was searched. A locked briefcase, which was ultimately found to contain an amount of R2,430,000.00 (two million four hundred and thirty thousand

Rand), was found in the said vehicle. Also, a plastic bag containing R18,240.00 (eighteen thousand two hundred and forty Rand) was found in the vehicle.

4. Johnson Jnr was to transport the briefcase and the funds contained therein from Pretoria to Cape Town and deliver the locked briefcase containing the cash to a specified person. The R18,240.00 mentioned above was part of R20,000.00 (twenty thousand Rand) where R5,000.00 (five thousand Rand) was intended for fuel and other expenses and the R15,000.00 (fifteen thousand Rand) was intended to pay Johnson Jnr for his troubles.

5. Johnson Jnr and his cousin were arrested and charged with money laundering. The criminal matter was reportedly struck off the roll. The charges against the two were withdrawn and to date hereof have not been reinstated. To date hereof, no one else has faced any criminal charges related to the relevant cash and VW Polo.

6. In papers filed in both opposing the preservation order as well as the forfeiture order proceedings, the appellant stated that she was approached by two individuals, Yehong Wu and Yexing Wu, collectively referred to as the Chinese nationals in the papers, to assist them in sourcing oysters and exporting them to China.

7. The appellant had contact with a private company referred to as Salmar in the papers that formed the record in this appeal. Salmar was

represented by Tsz Cheung who was also referred to as Gabriel in the papers. The appellant contacted the said Tsz Cheung and for the specified tonnage of oysters a required price of R2,430,000.00 (two million four hundred and thirty thousand Rand) was agreed.

8. The Chinese nationals enquired if they could pay this amount in United States of America Dollars (US Dollars). The position of the company Salmar was that only South African Rands paid to them in advance and in cash would be acceptable. These terms were agreed, and the Chinese nationals left the cash with the appellant so that she could finalise the transaction on their behalf.

9. The Chinese nationals brought a large sum of money in the form of US Dollars into the country and after staying at and gambling in various casinos in the country where they had allegedly won large sums of money. This on their version is the source of the funds that ultimately found its way into the relevant locked briefcase. On the appellant's version there was nothing illegal or unlawful in relation to the way the funds came to be the property of the Chinese nationals. These contentions and circumstances set out above were verified by way of affidavits from the Chinese nationals and Tsz Cheung. By virtue of the Order that it made in the matter, clearly the court *a quo* did not accept this version.

10. There are three questions to be considered in this appeal:

10.1. Firstly, does appellant have a right to oppose the application for forfeiture or stated differently, a right and interest to prosecute this appeal in respect of the said sum of money in particular. It is clear that as the owner of the VW Polo she has a direct interest in the said vehicle;

10.2. Secondly, interpretation of s50(1)(a) of POCA[1] and its application to the facts of this matter, i.e. whether the motor vehicle concerned was an instrumentality of an offence; and

10.3. Finally, interpretation of s50(1)(b) of POCA and its application to the facts of this matter, i.e. whether the sum of money concerned was the proceeds or derived from unlawful activity.

11. Turning to the first question, it was never in dispute that the vehicle concerned was registered in appellant's name. In regard to the relevant sum of money, the appellant deposed in her opposing affidavits that the Chinese nationals entrusted the money to her. That in accordance with their business practice and custom she would be obliged to reimburse the said Chinese nationals if the money was lost whilst in her care.

12. In debating this issue with Ms Van Dyk who appeared for the respondent in this matter, she correctly conceded that this would give the appellant an interest in the relevant sum of money sufficient to

[1] Prevention of Organised Crime Act 121 of 1998.

prosecute this appeal. This effectively disposes of the first question set out above.

13. Turning to the second and third questions set out above. Section 50(1)(a) of POCA deals with property that is an instrumentality of an offence referred to in Schedule 1 of the said Act and section 50(1)(b) of POCA deals with property that constitute the proceeds of unlawful activity. Both the court *a quo* and the respondent in arguing this appeal approached the issue of dealing with the question of whether the relevant vehicle was an instrumentality of an offence first. This is how it appears chronologically in the POCA. However, on the facts of the present case, the question of the status of the said vehicle as an instrumentality in committing an offence depends upon the question of whether the relevant sum of money is tainted by criminality.

14. It therefore makes sense, on the facts of the present matter, to first determine whether the respondent has established on a balance of probabilities that the money concerned is the proceeds of any unlawful activity.

15. It is important to note that forfeiture proceedings under the provisions of s50 of POCA are civil proceedings as provided for in s37 of POCA. Specifically, s37(2) of POCA provides that the rules of evidence applicable in civil proceedings apply to such forfeiture applications.

16. The respondent relies on the following grounds, as set out in paragraph 7 of its founding affidavit in the forfeiture application[2] to establish that the relevant sum of money is the proceeds of unlawful activities and that the relevant vehicle was an instrumentality of an offence:

> "7. For reasons that will be dealt with below, it is submitted that the property (sic) are instrumentalities of an offence or the proceeds of unlawful activities referred to in schedule 1 i.e. items 26 (any offence relating to exchange control), 32 (any offence referred to in chapter 3 or 4 of POCA), 33 (any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine i.e. section 64 of the Financial Intelligence Centre Act 38 of 2001) and/or 34 (any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1 of POCA)(the offences)."

17. It is evident from the passage quoted above that at least to some extent, the respondent, has mixed and matched the concepts of what is an instrumentality of an offence and what are the proceeds of unlawful activities. In the context of s50 of POCA, Schedule 1 of POCA relates only to property that is an instrumentality of an offence. On the facts of this case, this would only relate to the relevant vehicle.

18. However, also in the context of the facts of the present case, the grounds upon which the respondent alleges that the vehicle is an instrumentality of a crime also informs us of the basis upon which the

[2] Page 299 of the record on appeal.

respondent relies for contending that the sum of money concerned is derived from or is the proceeds of unlawful activity.

19. In summary, the respondent in the forfeiture application, relied on the following contentions in asserting that the sum concerned derived from or was the proceeds of unlawful activity:

19.1. It derived from any offence relating to exchange control;

19.2. On the facts of this case chapter 3 of POCA and specifically the offence of money laundering as defined in s4 of POCA is relevant. Chapter 4 of POCA would on the facts of this case not be relevant;

19.3. There was a contravention of s64 of the Financial Intelligence Centre Act[3] (FIC Act) on the basis that such offence would attract a sentence exceeding the period of one year as set out in item 33 of Schedule 1 to POCA; and

19.4. The contention of a conspiracy, incitement or attempt to commit any offence contemplated in Schedule 1 of POCA was not seriously pursued by the respondent and need not enjoy any further consideration in this judgment.

20. Mr Hodes SC, who appeared for the appellant in this matter, submitted that the basis upon which the respondent contended in the forfeiture application that the property concerned was an instrumentality

[3] Act 38 of 2001.

of an offence or the proceeds of unlawful activity does not stand up to scrutiny.

21. The court *a quo* found that the said sum of cash was the proceeds of a contravention of s64 of the FIC Act.

22. Mr Hodes submitted that the court *a quo* erred in making such a finding for the following reasons:

22.1. On a proper interpretation of s64 of the FIC Act, the said section was intended to address the issue of "smurfing". Smurfing involves breaking up larger sums so that they do not exceed the reporting threshold. That the said section applies to banks, being accountable institutions or other accountable institutions or reporting institutions as defined in schedules 1 and 3 of the FIC Act. That the relevant cash was not broken up into smaller parcels and paid to an accountable institution, such as a bank. Therefore, s64 of the FIC Act had no application in the present case;

22.2. The cash was being transported to Cape Town so that it could be paid to Salmar to procure oysters for export to China. Mr Hodes pointed out that the court *a quo* correctly found that in and of itself the act of transporting a large sum of money by road was not an offence[4]. Consequently, Mr Hodes submitted that considering such finding of the court *a quo*, there was no logical basis for the court *a*

[4] Para 23 of the Judgment of the Court a quo in the forfeiture matter to be found in vol.4, p 409 of the appeal record.

quo to find that the relevant sum of cash was the proceeds of unlawful activities;

22.3. On the interpretation of the phrase "proceeds of unlawful activity" provided by the SCA in the R O COOK PROPERTIES case[5], the question arises whether the cash accrued to the appellant as a result of a contravention of s64 of the FIC Act. Mr Hodes submitted that this question must be answered in the negative. He further submitted that the cash did not accrue to the appellant as a result of the offence contemplated in s64 of the FIC Act, which in any event could not be committed without a transaction with a reporting institution in terms of the FIC Act;

22.4. Therefore, Mr Hodes argued that even if the appellant had committed the offence created by s64 of the FIC Act, which appellant denied, the cash could not be the proceeds of such an offence since the cash would have been the subject of, as opposed to being the consequence of an offence created in terms of s64 of the FIC Act.

23. Ms Van Dyk for the respondent argued that s64 of the FIC ACT had application on the facts of the present matter, as it appears from the version of Johnson Jnr that was given to the police after being stopped at the roadblock and the evidence given by his father who is a General in the police that the Polo was used by Johnson Jnr to transport cash on more than one occasion. That the use of the vehicle in this way on more

[5] NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan [2004] 2 All SA 491 SCA particularly at para [72].

than one occasion brought the conduct of Johnson Jnr and the appellant within the ambit of s64 of the FIC Act.

24. It is convenient to deal with the submission of Ms Van Dyk on behalf of the respondent first. Section 64 of the FIC Act reads as follows:

> "64 Any person who conducts, or causes to be conducted, two or more transactions with the purpose in whole or in part, of avoiding giving rise to a reporting duty under this Act, is guilty of an offence."

25. In the context of dealing with this submission by the respondent, it is important to remember that the relevant roadblock took place on the 21 September 2017. On that date the FIC Act included a definition of the term "transaction". The said definition read as follows:

> "'transaction' means a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution."

26. Accountable institutions are as listed and defined in Schedule 1 of the FIC Act. On the facts of the present case no such institution was involved in the purported transaction relied upon by the respondent.

27. The said definition of "transaction" was deleted from the FIC Act by Act 1 of 2017. Such deletion came into effect on the 2 October 2017[6].

[6] Government Notice No. 563 in Government Gazette 40916 of 13 June 2017.

28. The roadblock in which Johnson Jnr and the briefcase with the money was discovered occurred on 21 September 2017. Any unlawful activity that the respondent wishes to rely on must have been completed by that date.

29. There are two presumptions in interpreting legislation that would apply in these circumstances. Firstly, the presumption against retrospective or retroactive operation of legislation. Secondly, the presumption that the legislature concerned intended fair treatment to be meted out to those subject to the relevant law.[7] It is an important consequence of this second presumption that any person is entitled to regulate her or his conduct in accordance with the law as it stood on the relevant date. On the facts of the present matter, the relevant date is 21 September 2017 before the definition of "transaction" was deleted from the FIC Act. Ms Van Dyk's submission is not compatible with the definition of "transaction" which was still applicable on the relevant date. Accordingly, we cannot find in favour of the respondent on such submission.

30. The definition of "transaction", which we have found to have still been of application on the relevant date supports Mr Hodes' first submission summarised in para 22.1 above. In the circumstances, we uphold such submission.

[7] A succinct statement of both presumptions is set out in LAWSA., 2nd Ed., Vol 25 (Part 1) para 341.

31. In the present circumstances, it is not necessary to make a finding on the submissions made by the appellant which are summarised in para 22.2 above, i.e. that there was no rational basis for finding a contravention of s64 of the FIC Act after the court *a quo* found that it was not unlawful to transport a large sum of money in a suitcase. Accordingly, we make no finding in that regard.

32. On the submissions in relation to the SCA's application and interpretation of the phrase "proceeds of unlawful activity" in the R O Cook case[8], we respectfully agree with and are bound by the position adopted by the SCA and believe it is applicable to the facts of the present appeal. The respondent has not established a connection between the cash concerned and any unlawful activity contemplated in s64 of the FIC Act. Accordingly, on the facts of this appeal we find that the respondent has not established that the relevant cash accrued as a result of an offence contemplated in s64 of the FIC Act.

33. For all of these reasons we find that the respondent has in relation to the cash sum concerned not established that such cash sum is derived from or is the proceeds of an offence as contemplated in s64 of the FIC Act.

34. Turning to the question contemplated by item 26 of Schedule 1 of POCA, being that the cash is derived from or is the proceeds of any

[8] Above.

offence relating to exchange control. The court *a quo* found that the then respondents (one of whom is the present appellant) stood to be charged of any offence relating to the Exchange Control Act based on their own version as was placed before the court *a quo*[9].

35. Mr Hodes, on behalf of the appellant, submitted that the court *a quo*, erred in making such a finding for the following reasons:

35.1. Firstly, there is no legislation known as the "Exchange Control Act";

35.2. Secondly, even if such legislation existed, no specific provision of that legislation was relied upon by the NDPP or the court *a quo* to be able to find that there was a contravention of the relevant legislation;

35.3. Thirdly, the cash was in South African Rands and not in US Dollars which would have been subject to any declaration in terms of the "Exchange Control Act";

35.4. Fourthly, failure to declare foreign currency could not have resulted in any amount in cash being derived from such a failure to declare, because when the conduct of failing to declare took place the cash would have been in the possession of the person who would have been obliged to declare. In other words, the cash would have been the subject of the failure to declare and not the consequence of the failure to declare; and

[9] Para [18] of the court a quo judgment, appeal record Vol. 4 pp 407-408.

35.5. Finally, it is not a criminal offence to win and be paid out in South African Rands in cash by a casino.

36. There is indeed no single piece of legislation known as the "Exchange Control Act". This assertion by Mr Hodes ties into the second argument on this point, being that the NDPP and the court *a quo* did not rely on any specific provision of the exchange control legislation.

37. In the R O Cook Properties case[10] and in the context of a fixed property being utilised as an instrumentality of an offence, the SCA stated:

> "We do not think that the NDPP can claim forfeiture of property by an oblique invocation of statutory infractions, still less by mistaken allusions to them. If our approach seems technical, we think this is rightly so. Assets forfeiture is a serious matter. Where an owner stands to lose property because the asset was 'concerned in the commission of an offence', the papers must set out clearly the case he or she is called to answer."[11]

38. The appellant dealt with the matter on the basis that this same principle will apply when the "proceeds of unlawful activity" are in issue. The respondent did not raise any factual or legal basis to counter this approach. In our view it is axiomatic that on whatever basis the appellant stood to lose an asset under the provisions of POCA she was entitled to know with the requisite precision what case she had to meet.

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[10] Above.

[11] Above at para [44].

39. Although the respondent, in the founding affidavit specifically relied upon item 26 of Schedule 1 of POCA, which relates to any offences in relation to exchange control, no factual basis is set out at all in the founding affidavit for relying on or invoking item 26 of Schedule 1 of POCA.

40. To place this aspect in its proper context it is important to note that the founding affidavit was deposed to by the respondent's representative on 6 March 2018. At that stage the preservation application had not yet been disposed of. The appellant had filed her answering affidavit in the preservation application on 25 January 2018. Therefore, at the time that the respondent deposed to the founding affidavit in the forfeiture application it knew of the Chinese nationals bringing US Dollars into the country. Yet in such founding affidavit this is not dealt with at all.

41. What happens next is that the respondent then files a Notice in terms of Rule 35(12) of the Uniform Rules of Court (the Rule/s) seeking access to certain documents. The said request in terms of Rule 35(12) can in no sense be seen as a legitimate and valid request under and in terms of Rule 35(12)[12]. Rule 35(12) allows for access to documents mentioned generally or specifically in an opponent's pleadings or affidavits. It does not need a detailed or descriptive reference to the relevant document

[12] The said Notice is to be found at pp 270-273 of Vol 2 of the appeal record.

but the document itself must be referred to. The rule cannot be invoked if it is only through a process of reasoning or inference drawing that a conclusion may be reached that the documents concerned do or may exist.[13]

42. However, the appellant did not object to the Rule 35(12) Notice but responded thereto. In these circumstances despite the illegitimate request under the provisions of Rule 35(12) the request and the response thereto form part of the record in these proceedings. The preservation proceedings were incorporated by reference in the founding affidavit of the forfeiture application.

43. The material issue in the present appeal is that despite the appellant raising the issue of the Chinese nationals bringing US Dollars into the country and despite the response to the Rule 35(12) Notice and the subsequent affidavits, the appellant still does not know which specific legislation was allegedly transgressed nor does the appellant know which specific provision of such legislation was allegedly transgressed. In these circumstances, it cannot be said that appellant has been fairly and properly appraised of the case she had to meet, nor has she been given a fair opportunity to meet such case. On this ground alone the appellant should succeed on this aspect of the appeal.

[13] Penta Communication Services (Pty) Ltd v King and Another 2007 (3) SA 471 (C) at 476C.

44. Respondent has not established an infringement based on item 26 of Schedule 1 of POCA that would taint the relevant cash concerned as being the 'proceeds of unlawful activity' in relation to exchange control violations. In these circumstances, it is not necessary to deal with the other arguments raised by Mr Hodes.

45. The next aspect of this appeal to consider is whether the respondent has established on a balance of probabilities that either the appellant, Johnson Jnr or any other persons were engaged in money laundering in respect of the relevant cash concerned. This is an offence as provided for in s4 of POCA.

46. For the purposes of POCA, money laundering is defined in section 4 thereof. The said definition *inter alia* requires or presumes: prior unlawful activities from which the funds concerned are derived; direct knowledge of, or circumstances where the persons involved ought to have known of such 'unlawful activities'; conduct which amounts to an agreement, arrangement or transaction whether legally enforceable or not, which has or is likely to have the effect – of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership thereof or concealing the interest any person may have in such property, or enables any person who has committed or commits an offence to either avoid prosecution or enables such person to remove or diminish any property acquired directly or indirectly as a result of the

commission of an offence, any person engaging in such activities shall himself be guilty of an offence.

47. In respect of money laundering the respondent would have to prove the above elements that are applicable on the facts of the present case, on a balance of probabilities. The question on appeal is whether the respondent had indeed established the required elements of the offence of money laundering on a balance of probabilities.

48. Mr Hodes submitted that the court *a quo* erred in finding that the cash is the proceed of money laundering. In support of such submission, he raised the following arguments:

48.1. Firstly, s4 of POCA requires that it must be shown that the cash concerned is the proceeds of unlawful activity;

48.2. Secondly, it must be shown that the person dealing with the cash concerned knew or ought to have known that the cash was the proceeds of unlawful activities; and

48.3. Finally, that on the basis that the respondent had not shown that the money concerned derived from a contravention of s64 of the FIC Act or that such money was derived from a violation of the "Exchange Control Act". Accordingly, it was submitted that there can be no violation of s4 of POCA without the predicate offence from which the cash whose origin or source is sought to be concealed has been derived. That this had not been established on the papers.

49. Ms Van Dyk for the DPP sought to establish that money laundering had taken place on the basis of, *inter alia* the following submissions:

49.1. The fact that the money was concealed in a locked briefcase;

49.2. Allegations that the vehicle concerned had been used on more than one occasion to transport money in similar circumstances. That the statement to the SAPS by Johnson Jnr at the time of the roadblock and the statement by the General (Johnson Snr) to the SAPS supports this submission;

49.3. That both Johnson Jnr and the appellant knew that there was a large amount of money in the suitcase and that it was transported in the vehicle concerned for an illegal purpose;

49.4. The fact that the Chinese nationals and the appellant in the relevant answering affidavits set out a list of casinos that the Chinese Nationals stayed at, gambled and apparently won sufficient funds to finance the oyster export transaction to China. Then Ms Van Dyk points out that in response to the Rule 35(12) request another list of casinos was provided that does not properly correspond to the first list; and

49.5. Submitted that on the basis of the contentions summarised in paragraphs 49.2 and 49.4 above that the appellant's version was fabricated and false.

50. Ms Van Dyk referred this court to the case of S v De Vries[14] in support of her contentions. However, the facts of the De Vries case clearly establish that as a fact the persons concerned in that case knew of the underlying criminal activity. It is however our view, that this is not the case in the appeal before us. The facts in the appeal before us do not establish the underlying unlawful activity (or predicate offence).

51. In and of itself the fact that the money concerned was in a locked briefcase does not take the matter any further. Even if one looks at this undisputed fact in conjunction with all of the other evidence put before the court *a quo*, as reflected in the record on appeal, it does not establish the underlying unlawful activity necessary to establish that money laundering as defined in s4 of POCA took place. This is so even when one reminds oneself that the lesser burden of proof being on a balance of probabilities is applicable in this case.

52. Certainly, the appellant knew that there was a large sum of money being transported in the locked suitcase. Johnson Jnr's version was that he wasn't aware of the cash and that his job was to transport the locked case to Cape Town. There is no evidence to show that both the appellant and Johnson Jnr knew that the cash transported in this manner, was transported for an illegal purpose. At best what is contained in the

[14] 2012 (1) SACR 186

respondent's papers on this aspect amounts to no more than suspicion and supposition.

53. Mr Hodes submitted that the rule in Plascon-Evans was applicable in this matter. On reading the restatement of the rule in the Plascon-Evans case[15] by Corbett JA (as he then was), I think Mr Hodes is correct. A forfeiture application under POCA is clearly an application brought on Notice of Motion for final relief. Where disputes of fact arise in such application they fall to be determined in terms of the said rule.

54. The full Bench of what was then the Witwatersrand Local Division in the matter of NDPP v ZHONG[16] stated that the rule in Plascon-Evans should apply in considering a forfeiture order. This is also the position of the High Court of Namibia Main Division, Windhoek[17]. The Namibian POCA legislation appears to be similar to ours and in particular the provisions of their Act relating to money laundering are almost identical to the provisions of our legislation.

55. For the reasons set out in paragraph 53 above, it is our view that the rule in Plascon-Evans does apply in the case of an application on Notice of Motion for a forfeiture order under the provisions of POCA.

56. The rule in Plascon-Evans provides:

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[15] Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634E to 635C.
[16] NDPP v Zhong 2005 (2) SACR 544 at 550 a-b.
[17] The Prosecutor-General v Paulo (POCA 13/2015) [2021] NAHCMD 112 (17 March 2021)

"It is correct that, where proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."[18]

57. There are two provisos to the Plascon-Evans Rule, which I paraphrase as: Firstly, where the denial of the respondent may be such as not to raise a real, genuine or bona fide dispute of fact. Plus, the respondent has not sought to have the dispute referred to oral evidence in terms of the Rules and the court is satisfied with the inherent credibility of the applicant's factual averment.[19] Secondly, where the allegations or denials of the respondent are so far-fetched that the court may reject them simply on the papers.[20]

58. Although Ms Van Dyk did not expressly argue that the appellant and Johnson Jnr's denial that the car was used on several occasions for the transport of money was so far-fetched and untenable that this court would be justified on dismissing such denial on the papers alone, I accept that in raising these issues, she intended to do so.

59. A bare denial can in certain circumstances be a real and *bona fide* dispute of fact. I believe that in this case the denial of Johnson Jnr and the appellant does constitute a real and bona fide dispute of fact. In the

[18] Above at 635H.
[19] Above at 634I to 635A.
[20] Above at 635C.

circumstances, and having regard to where the onus lies, what more could they do than simply deny the contentions of the Investigating Officer and Johnson Snr (the General) if they honestly believe their version to be correct. The respondent on the other hand could have applied to lead the oral evidence of the Investigating Officer and the General. They would have given their evidence in open court. They would have been cross-examined by the appellant. The Judge in the court *a quo* would then have been in a position to make a credibility finding. In the circumstances we have to conclude that there is a real and *bona fide* dispute on this issue.

60. On the issue of the apparently contradictory statements on the casinos the Chinese nationals resided at. When one looks at the source documents Ms Van Dyk relied on for asserting this apparent contradiction in her Heads of Argument, this apparent conflict is not nearly as impressive as presented in her Heads of Argument.

61. The relevant passage in the confirmatory affidavit of Mr Yehong Wu reads as follows:

> "8. During our stay in South Africa, Wu and I visited and stayed at numerous casinos in South Africa to gamble, including Good (sic) Reef City Casino, Sun City Casino, Emerald Casino and Emperors Palace Casino where we often won substantial sums of cash exceeding R2 500 000.00"[21] (our emphasis)

[21] Appeal record pp222 to 223.

62. Then in its request to ostensibly have access to certain documents relevant to the appellants version, under Rule 35(12) the respondent asks for:

"15. Proof of the accommodation at the various casinos as referred to by Wu in paragraph 8 of his affidavit."[22]

63. To which the appellant's attorney responded:

"16 AD PARAGRAPH 15
The Chinese Nationals stayed at the following hotels during their stay in South Africa:
16.1 Sun City;
16.2 Grand West Casino;
16.3 Sibaya Casino.

Proof of accommodation could not be secured at the time of finalising this response as the Chinese Nationals are in China at such time."[23]

64. Presumably, the appellant's attorney provided such information on instructions from the appellant and/or Wu. It seems to us that in the context of a request for access to documents, that the appellant's attorney focused on the gambling institutions where the Wu's were accommodated as that would be the most likely places where documentation would be issued. Further, that is precisely what the respondent asked for in its Rule 35(12) request. If one merely visited a casino, and even if one gambled in such casino there would not

[22] Appeal record p272.
[23] Appeal record p279.

necessarily have been any paperwork or documentation to substantiate the fact that a visit had taken place.

65. If one looks at the first passage highlighted by us in Wu's affidavit as quoted above, it seems that Wu intended to distinguish between casinos visited and those where they stayed over. At the very least this issue is ambiguous and capable of different meanings. Further, by indicating that they visited and stayed at numerous casinos *including* those set out in paragraph 8 of his affidavit, this was not intended to be a closed and definitive list of the casinos they visited and stayed at. Also, the respondent's Rule 35(12) request was not aimed at obtaining a definitive list of all the casinos visited by or where the Wu's took up accommodation. Nor could it be having regard to the purpose and provisions of Rule 35(12).

66. The appellant's case is not without any difficulties or problems. These difficulties and problems are of concern to us but at the same time it must be remembered that the appellant does not seek to merely establish an interest in the property to be excluded in terms of POCA. She challenges the very basis upon which the respondent seeks the forfeiture order. The respondent has the onus of establishing this basis albeit only on a balance of probabilities.

67. A lie, inaccuracy and in certain circumstances even an inconsistency in the statement of a person opposing a forfeiture order does not

necessarily and/or automatically mean that the applicant for a forfeiture order has established a factual basis for such an order. This is the approach adopted by the full Court in Zhong's case[24]. We respectfully agree with this approach.

68. We accordingly find that the respondent had not established a factual basis for asserting that the relevant cash sum is the proceeds of any unlawful activity. The predicate or underlying offence that would be required to establish the crime of money laundering has not been established on a balance of probabilities. The FIC Act and in particular s64 thereof cannot apply in this case. The exchange control legislation cannot be invoked on the facts of this case. In the circumstances of this case and for the reasons set out above we find that the respondent has not established that the cash sum of money concerned is the proceeds of unlawful activity as contemplated in s50(1)(b) of POCA.

69. It follows that if the cash money has not been established to be the proceeds of unlawful activity and this being the only basis alleged for the said Polo vehicle being an instrumentality of an offence set out in Schedule 1 of POCA, that the respondent has not established that the said vehicle is an instrumentality of an offence in s50(1)(a) of POCA. In short, the respondent has not established the jurisdictional requirements for a forfeiture order under s50(1) of POCA.

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[24] NDPP v Zhong, above, particularly at paras [12] to [13].

70. In these circumstances the order of the court *a quo* stands to be set aside.

71. There is one loose end that needs to be considered. The court *a quo* ordered that the entire cash amount of R2,448,240.00 was to be forfeited under s50 of POCA. This amount was made up of two amounts. The R2,430,000.00 claimed by the appellant and the R18,240.00 found separately in a plastic bag in the vehicle. This was part of the amount paid to Johnson Jnr for expenses and his wages. Johnson Jnr did not seek to establish an interest in the said sum as contemplated in POCA and he is not an appellant in the present appeal. However, he did oppose the forfeiture application on the basis that the present respondent in this appeal had not established the jurisdictional basis for a forfeiture order.

72. We have found that the respondent has indeed not established the jurisdictional basis for a forfeiture order. In these circumstances the forfeiture order in respect of the R18,240.00 can also not stand and that this sum of money must also be returned. In this case to Johnson Jnr.

73. Insofar as costs are concerned both parties approached the matter on the basis that costs should follow the result. In our view there is no reason to depart from this general rule.

In the circumstances, the following order is made:

1) The appeal succeeds.
2) The order of the court *a quo* is set aside and is replaced with the following order:
    a. The application for forfeiture brought by the applicant (in that application) under Notice of Motion dated the 7 March 2018 is dismissed.
    b. The applicant (in that application) is to pay the costs of such application.
3) The respondent (in the present appeal) is to pay the costs of the appeal.

L. Lever

LG Lever
Judge,
Northern Cape Division, Kimberley

I agree,

APS Nxumalo
Judge,
Northern Cape Division, Kimberley

I agree,

pp LP Nobanda
Acting Judge,
Northern Cape Division, Kimberley

APPEARANCES:

APPELLANT: Adv LM HODES (SC) & Adv G NGCANGISA oio Ian Levitt Attorneys c/o Duncan & Rothman

RESPONDENT: Adv L VAN DYK oio Office of The State Attorneys

Heard: 18 October 2021

Delivered: 04 February 2022