Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 17837/17

In the counter-application of:

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS **APPLICANT**

and

FIVE STAR IMPORT AND EXPORT

(PTY) LTD **RESPONDENT**

In re: In the matter between

FIVE STAR IMPORT AND EXPORT

(PTY) LTD **APPLICANT**

and

THE MINISTER OF POLICE **FIRST RESPONDENT**

THE DIRECTOR OF

PUBLIC PROSECUTIONS;

WESTERN CAPE **SECOND RESPONDENT**

JUDGMENT DATED: 30 AUGUST 2018

<u>LE GRANGE, J</u>:

[1] On 21 October 2016, a person with the name of Nabeel Mohammed Aboo ("Aboo"), was travelling from Durban, Kwazulu-Natal, on Kulula Flight M702 to Cape Town. He was scheduled to fly on the same date to Hong Kong via Dubai on an Emirates flight. At the domestic arrival's hall in Cape Town, two officers of the South African Police Services Border Unit were in the process of conducting random stop and search inspections.

[2] At the time Aboo was carrying three suitcases and was stopped by the Border Unit. According to the Police, Aboo confirmed that the suitcases belonged to him and that he packed the contents thereof. In the suitcases, a large amount of cash was found.

[3] The monies were counted at the airport in the Customs office in the presence of Aboo and his attorney who arrived at the Customs offices while the counting process was underway.

[4] The Police found an amount of R6 175 150 in cash in dominations of R50, R100 and R200 notes, inserted in 82 unmarked size A4 white and brown envelopes. Each envelope contained between R50 000 and R60 000 in cash.

[5] Arising out of these events, the Applicant ("Five Star") launched an application on 3 October 2017 for the return of the monies from the South African Police Services ("SAPS") as it claims ownership thereof. SAPS opposed the relief sought. As a result of Five Star's application, the Asset Forfeiture Unit of the National Director of Public Prosecutions ("the NDPP") applied in November 2017, for leave to intervene as a party to the proceedings. The NDPP also applied in a counter-application for an order in terms of section 38(1) of the Prevention of Organised Crime Act 121 of 1998 ("POCA") for a preservation order of the monies that was seized by the Police, and to oppose Five Star's application (the main application) for the return of the property.

[6] In terms of section 38(2) of POCA, a High Court is obliged to make an order as contemplated in section 38(1) if there are reasonable grounds to believe that the specified property is either the proceeds, and or alternatively, an instrumentality of an offence specified in Schedule 1 in POCA, or both. Five Star was cited by the NDPP as a party in the counter-application. According to the NDPP, the purpose of seeking the preservation order was to ensure that the monies that were seized would be preserved pending the outcome of an application for a forfeiture order in terms of section 48 of POCA. Five Star did not oppose the preservation order that was sought by the NDPP but did oppose the forfeiture order, as contemplated in section 48 read with section 50(1) of POCA.

[7] In the counter-claim, Five Star remains adamant that it acquired the monies by ordinary trade and lawful means and is the owner thereof.

[8] Five Star was incorporated on 23 July 2013 as a private company. Its sole director is Petros Sibusiso Khanyile ("Khanyile"). The basis upon which Five Star claims it is the legitimate owner of the monies was set out in the founding affidavit, as deposed to by Khanyile.

[9] The versions advance by Khanyile, on behalf of Five Star can be summarized as follows: since January 2016 Five Star imported agricultural tools and other hardware from various suppliers in China; all custom and excise duty on these goods were paid and Five Star had currently no liability to SARS; in turn, Five Star sold the imported goods to clients in South Africa who paid in cash; Five Star as a result had a large amount of cash at hand; the cash enables Five Star to conclude business deals expeditiously without the delays; this format of doing business suits Five Star as bank transfers where substantial sums are involved often cause delays; the cash was utilized as soon as soon as possible to generate further profit; on advice from other businessmen, it was decided by Khanyile that Five Star would purchase prepaid cellular phone airtime and resell it within a short period of time.; this method of business would allow Five Star to 'spin the cash quickly' and to generate quick profit and additional cash flow; due to Five Star's ability to pay in cash, ERZ Telecom CC ("ERZ") was prepared to sell large quantities of prepaid airtime to it at a price of R6 000 960.

[10] Khanyile further recorded that on 21 October 2016, he liaised with Zubair Ghood ("Ghood") a representative of ERZ; Ghood required a meeting with a representative of Five Star for purpose of depositing the funds in the bank account of ERZ and for the release of the prepaid cards from the MTN depot in Canal Walk; Junaid Bassa, an acquaintance of Khanyile was Five Star's representative in Cape Town; a meeting was scheduled with one Ridwaan of ERZ, to finalise the transaction after the arrival of Aboo in Cape Town.

[11] Khanyile described his relationship with Aboo and the reason for his (Aboo's) possession of the monies as follows: they are friends and former neighbours. He had known Aboo in excess of ten years; Aboo lives in Durban and often travels to Dubai to visit his family; He was aware that on 21 October 2016, Aboo would travel to Cape Town from where he would travel to Dubai later that day; as a result of this information he requested Aboo to take the R6 000 960 in cash with him to Cape Town where he had to deliver it to Bassa.

[12] The meeting arrangements that needed to happen when Aboo arrived in Cape Town was described by Khanyile as follows: He (Khanyile) had to contact Bassa the moment Aboo landed in Cape Town. Bassa would then meet with Aboo at the airport.

[13] The handling of the monies was recorded as follows: According to Khanyile he trusted Aboo and agreed to hand him the cash. Aboo, signed a receipt on 21 October 2016, acknowledging receiving the cash. Khanyile also signed the receipt. It was also recorded that Aboo must hand the cash in the amount of R6 000 960 to Bassa.

[14] According to Khanyile, Aboo was detained by the Police for a few hours. The Police apparently seized his cellular phone and denied him access to it. Bassa could not get hold of Aboo at his arrival in Cape Town. On discovering that Aboo was arrested, the attorneys were instructed to assist Aboo.

[15] After the monies were counted, Aboo was released. He left the airport with his attorney. Aboo did not continue with his onward journey to Dubai.

[16] Khanyile further recorded that despite after almost a year since the seizure of the monies, the Police had failed to established that any offence has been committed and demands the return of the monies.

[17] According Khanyile despite his detailed version of proof of ownership of monies, and the fact that the Second Respondent on 1 September 2017 decided that they will not institute any prosecution in connection with the matter at that stage, SAPS refuse to return the monies.

[18] According to Khanyile, large sums of cash are regularly used to pay for supplies and are often transported from one city to another in business generally. It was further stated that the interests of justice can certainly not demand that in each instance, such a customary transport of money for business purposes, will give rise to reasonable grounds to believe that the money is concerned in the commission or suspected commission of an offence.

[19] The Police version of what transpired after Aboo was confronted at the airport is somewhat different to what Khanyile stated, and can be summarized as follows. Aboo confirmed that all three suitcases belonged to him and that he packed it himself; he informed the Police that the monies belonged to his boss and that he needed to deliver it to a person in Cape Town; Aboo could not or was unwilling to provide any further identification or information as to the person(s) who gave him the monies or to whom he needed to deliver it.

[20] Aboo also failed to inform them that he was on his way to Dubai and showed no urgency to get on the flight which at that time was starting to board. The Police accidentally came upon his passport with his travel itinerary. According to the Police they formed the view that Aboo attempted to remove the cash from the country in contravention of the Exchange Control Regulations (section 9 of the Currency and Exchanges Act 9 of 1933) which makes it a criminal offence to remove cash in excess of R 25 000 when visiting countries outside our borders.

[21] The monies were counted in the presence of Aboo. His attorney arrived whilst the counting was in process. The total amount counted was R6 175 150. The monies were seized in terms of section 20 of the Criminal Procedure Act 51 of 1977 ("the CPA"). A criminal docket was registered and further investigation took place. The attorney that arrived did not engage the Police on the monies. Aboo was released with the understanding that the Police would require his co-operation in the investigation. Aboo did not proceed to Dubai. On further investigation, Aboo could not be located at the address he provided to the Police.

[22] In respect of the further investigation, the Police recorded the following: on 2 November 2016, the attorneys of Aboo were requested to help locating him; the Police needed to obtain further information from Aboo as to the origin of the monies; the response from the attorneys on 17 November 2016 was they are waiting for further instructions from their client.

[23] On 10 January 2017, the attorneys of Aboo were again contacted to assist, as the Police needed to obtain a warning statement from him. This was apparently necessary to forward the police docket to the Director of Public Prosecutions. No further communication was received from the attorneys until early March 2017. Upon that date the Police collected certain documents from the attorneys. An affidavit which was deposed to by Khanyile was part of the

documents. In that affidavit Khanyile recorded that he was the owner of the monies seized. The affidavit was however silent on the amount of monies Khanyile claimed to be the owner of. In fact, a space was left open on the page in the affidavit where the amount needed to be reflected. It was further explained that the monies were generated due to the import and export business of Five Star.

[24] In the counter-application the NDPP had set out a detail version why they were of the view that the factual matrix in this instance was typical of the *modus operandi* criminal syndicates would adopt in transnational offences, which includes offences like money laundering and terror financing.

[25] The version advanced by the NDPP can be summarized as follows: There had been a significant increase in incidents of transnational crimes which among others include the smuggling of vast amounts of cash through the International Airports of South Africa; the amount of cash seized at the various border posts during the period 2015 to 2016 amounted to approximately R225 million; in most of these instances the organized crime syndicates would normally employ couriers or “mules” to transport their criminal proceeds out or into the Country; in most cases the crime syndicates would be protected from investigation and or prosecution as most couriers would have no direct knowledge of the operations of crime syndicate; in this instance the conveyance of the cash was not done in a manner that is expected or observed in the normal course of legitimate personal or business

operations as it was not deposited into a bank account and/or transferred electronically to another party or a cheque drawn.

[26] According to the NDPP, Aboo travelled a route, and to a destination that is known for terror financing, money laundering and for Black Market Exchange systems where cash monies need to be laundered; the actions of Aboo's was indicative of a deliberate attempt to avoid the organized banking and money regulatory environment; the Immigration Movement Control Information on Aboo has established that since 21 February 2016 until September 2016 he entered and exited South African borders 21 different times being out of the country for not more than two or three days at a time; He travelled to Dubai and Hong Kong often which trips had short turnaround times and could only be indicative of illegal activities where cash or contraband was merely couriered to the foreign destination with no paper trail; such actions are consistent with persons involved in unlawful activities.

[27] According to the NDPP, the fact that Aboo arrived at 15h30 from Durban and was due to fly to Dubai at 18h05 supports the views that the cash was destined to be taken out of South Africa as there was insufficient time between the two flights to still meet a third party to hand over the suitcases as alleged by Khanyile; the NDPP was adamant that the cash is the proceeds of unlawful activities of money laundering in that it was acquired and/or possessed by persons, who in the absence of anything to the contrary,

knew or ought reasonably to have known that the cash was or formed part of the proceeds of unlawful activities.

[28] The NDPP has also applied to SARS for the relevant Income Tax and VAT information relating to Aboo; Khanyile; Five Star and ERZ Telecom. It was established from SARS that Aboo and Khanyile at the time were not registered with SARS for Income Tax and VAT. Five Star was registered with SARS for Income Tax from 2015 but the information relating to its gross income, source of income and assets from 2015 were outstanding as it never submitted any tax returns. Furthermore, Five Star was registered with SARS for VAT from 2014 but did not submit any VAT returns since the date of its registration.

[29] ERZ Telecom was registered with SARS for Income Tax from 2010 and has declared information relating to its gross income, source of income and assets. ERZ Telecom was registered with SARS for VAT from 2009 and its first return period due was 2009 to 2011.

[30] According to the NDPP, having regard to the information of SARS, it is an inevitable conclusion to draw that the flight tickets of Aboo could only have been paid from unlawful activities as he (Aboo) was not registered with SARS as a taxpayer but managed to travel over 16 times overseas in 2016. Furthermore, according to the NDPP, Five Star has from date of registration with SARS failed to submit any tax or VAT returns and the reasonable

inference from that fact is that Five Star did not generate any significant sales or income during that period. According to the NDPP it follows that Five Star could not have lawfully generated sales or profit of R6 175 150.

[31] According to the NDPP the allegation that Five Star entered into an agreement with ERZ Telecom and would utilize the cash to buy prepaid airtime is also highly questionable. According to the NDPP Five Star could easily have deposited the cash amount into the account of ERZ in Durban. Furthermore, the email by Ghood to Five Star dated 21 October 2016 contradicts the version by Khanyile that it was to be a cash sale, as Ghood disclosed that his representative would accompany Five Star to deposit the monies into a bank account. The NDPP has further questioned the sales order invoice from ERZ dated 21 October 2016 as they have established from MTN that it does not sell card airtime vouchers in denominations of R 25 and R 50 as reflected on the sales order invoice.

[32] The NDPP was also adamant that Five Star cannot be the lawful owner of the monies as there is a discrepancy in the amount that Five Star claim being R6 000 960 as owner and the amount that was seized by the Police being the amount of R6 175 150.

[33] Against this factual matrix, the question to be decided is whether the monies in terms of section 20 of the CPA were unlawfully seized from Aboo by the Police and whether in terms of section 31(1)(a) of the CPA, Five Star is lawfully entitled to the return of the monies.

[34] Adv. Van Rooyen, SC assisted by Adv N Mbangeni, appeared for Five Star. Adv. H Cronje, assisted by Adv. U Gcilishe appeared for SAPS and Mr. M Kagee appeared for the NDPP.

[35] The principle submissions that were made on behalf of Five Star were the following: SAPS and the NDDP failed to advance any cogent reasons why the seized monies should not be returned to Five Star; more than sixteen months had lapsed since the monies were seized and nobody had been charged and no specificity regarding any alleged offence has been divulged; since March 2017, SAPS and the NDPP were aware of the origin and source of the monies and have known who the relevant role-players were but failed to advance proper reasons why the investigation has not been completed. Moreover, no criminal proceedings have been instituted and it has been shown on a balance of probabilities that there is not a reasonable likelihood of criminal proceedings in the foreseeable future. Furthermore, SAPS has failed to discharge the onus to show on a balance of probabilities that Five Star may not lawfully possess the money.

[36] Section 20 of the CPA reads as follows:

> *"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-*

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[37] Section 20 has been considered in many cases by the Courts. In *Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D) at 511D-E, it was held that section 20 '*calls for the existence in fact on reasonable grounds and whether these exist in a given case must be determined objectively*'. It is trite that in interpreting section 20 of the CPA, the onus is on the Police to prove, objectively viewed, the existence of sufficient facts upon which the Police had based the reasonable belief, which facts must exist at the time when the Police acted without a warrant, and not at a later stage. See also *Mnyungula v Minister of Safety and Security & others* 2004 (1) SACR 219 (TkH) at paras 8-9.

[38] In the present instance, on the objective facts, the Police's reasonable belief that Aboo at the time attempted to remove the cash from the Country

in contravention of the Exchange Control Regulations (section 9 of the Currency and Exchanges Act) which makes it a criminal offence to remove cash in excess R 25 000 when visiting countries outside our borders, can hardly be criticized and or faulted.

[39] Aboo, when confronted by the Police confirmed that all three suitcases belonged to him and that he packed them himself. The Police were also told by Aboo that the monies belonged to his boss and that he needed to deliver it to a person in Cape Town. Aboo could not, or was unwilling to, provide any further identification or information as to the person(s) who gave him the monies or to whom he needed to deliver it. Aboo also failed to inform the Police that he was on his way to Dubai and showed no urgency to get on the flight which at that time was starting to board. The Police accidentally came upon his passport with his travel itinerary. On these facts, the reasonable belief by the Police that Aboo was involved in unlawful activities can hardly be faulted.

[40] Moreover, Five Star elected not to oppose the preservation order brought by the NDPP in terms of section 38 of POCA. It needs to be mentioned that a preservation order may only be granted on '*reasonable grounds to believe that the property is concerned'* with the commission of an offence as per section 38(2) of POCA. Five Star's election not to oppose the preservation proceedings could only mean it has accepted the Police must

have established reasonable grounds that an offence had been committed at the time the cash was seized.

[41] In all these circumstances, the challenge that the seizure of the cash was executed in an unlawful manner by the Police is without merit and falls to be dismissed.

[42] With regard to section 31(1)(a) of the CPA, the relevant provisions read as follows:

> '*If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such an article, to the person who may lawfully possess it.*'

[43] It is trite that in the context of the provisions of section 20 of the CPA (*which permits the seizure of certain articles by the State*) reads with section 31 (*which permits the return of a seized article to the a person who may lawfully possess it*), the main objective of the seizure authorized by Chapter 2 in the CPA is obviously to enable the Police to obtain possession of the articles for the purpose of investigating crime and to prosecute suspected offenders. In *Ntoyakhe v Minister of Safety and Security and Others* 1999 (2) SACR 349 (E) at 355H-356A, the Court held as follows:

> *"The provisions of s 20, read with s 31, indicate that the main objective of the seizure authorised in chap 2 is to enable the police to obtain possession of articles for the purpose of investigating crimes and prosecuting suspected offenders. The chap 2 provisions however do not confer on the State the right to deprive a person of the lawful possession of an article indefinitely. Considerations of fairness and reasonableness which underlie our criminal justice system, dictate that the criminal proceedings contemplated in s 31 shall be instituted within a reasonable time. What constitutes a reasonable period will of course depend on the facts of each case. In such regard it seems to me, furthermore, that on general principles the police are required to place facts and circumstances before the court on which the reasonableness of the further detention shall be adjudged."*

[44] It is evident that the provisions of section 31 of the CPA do not confer on the State the right to deprive a person of the lawful possession of an article indefinitely. Consideration of fairness and reasonableness dictate that criminal proceedings as contemplated in Chapter 2 (seizure and forfeiture) of the CPA must be instituted within a reasonable time. What constitute a reasonable time would obviously depend upon the circumstances of each case. There can be little doubt that the length of the period during which a seized article had been detained without any reasonable likelihood of criminal proceedings in the foreseeable future is an important consideration. In this

regard see *Dookie v Minister of Law and Order and Others* 1991 (2) SACR 153 (D).

[45] It is clear that section 31(1)(a) calls for two enquiries. The first is for an applicant to show on a balance of probabilities that no criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future, as contemplated in the section 31(1)(a): '*if no criminal proceedings are instituted*'. If the former onus is discharge then the second enquiry is whether the Police can prove on a balance of probabilities that an applicant may not lawfully possess the article seized. In this regard see *Dookie* supra at 156-7.

[46] Counsel for SAPS had a different view on the latter point. According to the argument advanced the onus had not shifted upon SAPS to show on a balance of probabilities that Five Star may not lawfully possess the money in question. For its proposition, Counsel for SAPS relied upon on the Constitutional Court case of *Van der Merwe & Another v Taylor NO & Others* 2008 (1) SA 1 (CC) at paras 58-9 where the following was held:

> *"The return of an article under section 31(1)(a) prior to the completion of criminal proceedings may, as indicated earlier, be prejudicial to trial. For that reason, the burden is on applicants who seek its return to show on a balance of probabilities that the requirements of s 31(1)(a) have not been met and the State is therefore not entitled to hold the article.*

However, in this case Mr van der Merwe claims the return of his euros in terms of the rei vindicatio and not under s 31(1)(a) of the CPA. Once Mr van der Merwe proves ownership, the burden, unlike s 31(1)(a), is on respondents to show why the currency should not be returned forthwith…"

[47] In my view the Constitutional Court did not reverse the burden of proof in section 31(1)(a) where the question of the lawful owner or possessor of a seized item, is concerned. On the contrary, the Constitutional Court indeed accepted the reasoning in *Dookie* as authority, that section 31(1)(a) calls for a two-stage enquiry. In the first enquiry, the onus is on an applicant and in the second, it is on the Police. In this regard see *Van der Merwe* at para 59, footnote 67.

[48] Returning to the present instance, the first enquiry is obviously whether Five Star on a balance of probabilities has proven that no criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future, as contemplated in the section 31(1)(a): '*if no criminal proceedings are instituted*'. If Five Star succeed in discharging the onus as mentioned above, then '*the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such an article, to the person who may lawfully possess it'.* In the latter enquiry the onus would then ordinarily shift to the Police to show on a balance of probabilities that Five Star may not lawfully possess the monies seized.

[49] In the present instance, it seems clear to me that SAPS had insufficient evidence at their disposal to warrant the prosecution of any individual unless they can get hold of Aboo to obtain further information. Aboo's current whereabouts are unknown to the Police and it appears that there is no likelihood of him being located in the foreseeable future. The Second Respondent has also decided, after almost a year of police investigation, in September 2017, not to institute any prosecution at the time, due to the insufficient evidence at their disposal. On these stated facts, I am satisfied that Five Star has succeeded in proving that this is a case where '*no criminal proceedings are instituted*' within the meaning of the section.

[50] Turning to the second enquiry, whether Five Star may lawfully possess the monies that were seized, on a conspectus of all the evidence, I am satisfied that SAPS had indeed discharge its onus and established on a balance of probabilities that Five Star may not lawfully possess the monies.

[51] Khanyile of Five Star, throughout the founding and replying affidavits, asserts that Five Star is the owner of the cash and is entitled to possess the cash. In support of its claim to ownership of the cash, Five Star had contended that from January 2016, it imported agricultural tools and other hardware from various suppliers in the East, mainly China, which it then sold for cash to clients in South Africa.

[52] To this end, Khanyile had annexed more than 200 pages of documents to substantiate the claim that Five Star had purchased and paid customs duty on various goods imported from India and China. Khanyile also stated that it had paid all its custom and excise duty on these goods and had currently no liability to SARS.

[53] Sadly, all of the paper produced by Khanyile lacked one fundamental truth and that is it fails to establish real ownership of the amount of monies found in the possession of Aboo. No invoices have been annexed to substantiate the claim that Five Star had received any cash from sales on the items it imported or that Five Star had sales in the amount of R6 000 960. In fact, on the information from SARS, Five Star has since inception failed to render income tax and VAT returns. It has not paid any income tax or VAT on the sales that Five Star alleges generated the amount of R6 000 960 in cash. The information from SARS clearly refutes the claim by Khanyile that Five Star has no liability to SARS.

[54] On the undisputed version of SAPS, an amount R6 175 150 was found in the possession of Aboo, who at the time, informed the Police that the monies belonged to his boss. Aboo was however unwilling or could not, provide any further identification or information as to the person(s) who gave him the monies or to whom he needed to deliver it. The monies were counted in the presence of Aboo and his attorney that arrived whilst the counting was in process.

[55] Surprisingly, the attorney that arrived to represent Aboo did not engage the Police on the monies. Aboo was released with the understanding the Police would require his co-operation in the investigation. If indeed there was any credence in the version of Khanyile, common sense dictates that Aboo and or the attorney could simply have informed the Police that the cash was meant to be handed over to Abbas who would collect it at the airport. Furthermore, it escapes logic that Aboo decided not provide the Police with the name and contact information of Khanyile and or Bassa, given that he knew Khanyile for over 10 years' and that Bassa would be at the airport waiting for the money.

[56] Khanyile's version that he entrusted to a 24-year-old friend that was on his way to Dubai with the task of transporting cash in excess of R6 million from Durban to Cape Town, only to have the cash banked as soon as it arrived in Cape Town is not only highly unlikely but borders on being preposterous.

[57] Moreover, it does indeed appear that Aboo travelled frequently to Dubai and Hong Kong in 2016, in fact his passport is stamped almost on a monthly basis throughout 2016, evidencing frequent short stays in Dubai and Hong Kong. For a 23-year-old (at the time), who has no discernible income and in fact is not even registered for income tax purposes, he must have had

access to considerable cash to fund his visits to Hong Kong and his alleged visits to his family in Dubai. However, on the day in question, Aboo gave no indication to the Police of his imminent departure to Dubai, and left with his attorney from the airport and his whereabouts are still unknown to the Police.

[58] In my view the suspicion by SAPS that Aboo's regular travelling to Dubai and Hong Kong which often had short turnaround times could only be indicative of illegal activities where cash or contraband was merely couriered to the foreign destination with no paper trail, cannot be regarded as unreasonable in the face of all the objective evidence in this case. Furthermore, the fact that Aboo arrived at 15h30 from Durban and was due to fly to Dubai at 18h05 supports the view that the cash was destined to be taken out of South Africa as there would have been insufficient time between the two flights to still meet a third party to hand over the suitcases as alleged by Khanyile.

[59] Lastly, there is another difficulty with Five Star's claim that it is the owner of the monies. In our law, the rule is that once monies are mixed with other money without the owner's consent, ownership in it passes by operation of law. In this regard, see *FNB v Perry N.O. and Others* [2001] 3 All SA 331 (SCA) at para 16. In this instance, on the undisputed evidence, the monies Five Star are allegedly laying claim to were mixed with an amount of R 174 190. The mixture of these monies clearly occurred without the consent of Five Star. Furthermore, there are no identifiable bank notes to which Five Star

can base its claim of ownership on. It follows that Five Star in law cannot be the owner of the amount of R 6 000 960.

[60] In my view, on a conspectus of all the evidence, and for the reasons stated, I am satisfied that SAPS has discharged the onus resting on it and that Five Star is accordingly not entitled to lawfully possess the monies that were seized from Nabeel Mohammed Aboo on 21 October 2016 at Cape Town International Airport.

[61] In view of the abovementioned, the reasons advanced by the NDPP in the counter-application seeking a forfeiture order are far more plausible and is accepted. It follows that the NDPP's counter- application should succeed.

[62] In the result, the following order is made:

1. The main application is dismissed with costs.
2. The counter-application succeeds with costs and the cash amount of R6 175 150 is declared forfeited to the State.

   2.1 The Registrar of this Court is directed in terms of s50(5) of POCA to publish a Notice of this Order in the Government Gazette as soon as reasonably possible.

   2.2 In terms of s50(6) of POCA read with section 54(1), Lieutenant Colonel Hendrik Matheus of SAPS under who the property is currently held must deposit the monies into the SAPS bank account number […] at ABSA and is further directed to cause the cash to be paid into the bank account of the Criminal Asset Recovery account [...] as established under s63 of POCA at the Reserve Bank.

LE GRANGE, J