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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 81710/2019

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(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 17 MARCH 2022

SIGNATURE

In the matter between:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

ZOLANI WALTER PHANSI

Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The National Director of Public Prosecutions (NDPP) seeks an order for the forfeiture of property in terms of section 48 of the Prevention of Organised Crime Act, 121 of 1998 (POCA). The property consists of the balance of funds (with accrued interest) held in eight bank accounts in terms of a preservation order issued by this court on 1 November 2019. It is a sum exceeding some R16 million.

[2] The NDPP's case

The NDPP's case emanates from a report by a forensic investigator in the employ of the NDPP. It has been extracted from the investigator's affidavit and summarized in heads of argument submitted on behalf of the NDPP as follows:

“21.1 On 29 August 2019, the Financial Sector Conduct Authority received a complaint about Humble Security and its owner, the Respondent. According to the complaint Humble Security accepts depositors' money but do not pay out the promised returns. Phansi [the Respondent] has also accumulated a lot of wealth.

21.2 The Financial Sector Conduct Authority investigated the complaint and found that Humble Security is a private company registered in 2019 with its sole director, the Respondent, who purports to trade in forex.

21.3 Neither Humble Security, nor the Respondent is registered as an authorised FSP terms of the Financial Advisory and

Intermediary Act, No 37 of 2002, which is a requirement when receiving deposits from the public.

- 21.4 *Humble Security offered returns on investments as much as 100% in one month and 700% in three months. They use different platforms to promote their business, including their website and Facebook. They also operate two physical offices.*
- 21.5 *Humble Security holds a Standard Bank with account number [...]. This account was opened on 2 July 2018 and the Respondent is the only signatory.*
- 21.6 *For the period 2 July 2019 to 19 September 2019, a total of R36 805 919.52 was deposited into this account. The deposits are in round figures and the references are in person's names, presumably the investors.*
- 21.7 *The Respondent also holds 5 Capitec accounts, 1 Bidvest Bank account, and 1 Absa account in his personal name. He moved funds between the Standard Bank account and his personal accounts. Very few, if any trading transactions are reflected in any of the accounts. The accounts also reflect some payments to investors.*
- 21.8 *The Respondent also holds a personal bank account with First National Bank, account number [...]. On 23 August 2019 this account reflected a balance of R26 416 336.79. The account has since been closed and the funds transferred to the Standard Bank account of Humble Security.*

21.9 *Very little trading took place. For instance, for the period of 24 May 2019 to 29 May 2019 a total amount of R253 000 was transferred into seven trading accounts of JP Markets (Pty) Ltd. The balances in the accounts left were only \$5.94 and R384.07 which suggests that the trading was not profitable and, in all likelihood, stifled the Respondent's appetite for trade.*

21.10 *Considering the total amount of deposits Humble Trading received, a trading amount of R253 000 is negligible.*

21.11 *The Respondent transferred substantial amounts of the funds to his eight personal bank accounts (of which one has since been closed by him), none of which were Trading accounts. The trading was supposedly done by Humble Security and there would be no reason to transfer such substantial amounts into his personal bank accounts”.*

[3] Based on the above, the NDPP argues that the only reasonable conclusion is that Humble Security (actually being Humble Security and Trading (pty) Ltd) had no underlying on independently sustainable business model. The result of this was that, when losses were sustained and investors had to be paid what was promised to them, these payments came from new investors investments. The result is clearly a Ponzi Scheme.

[4] The respondents' case

Despite denials of contraventions of any act and denials that funds in the accounts are the proceeds of unlawful activity, the answering affidavit reveals the following:

- 4.1 The respondent, an erstwhile police officer knew that, in order “to trade for profit”, one has to be registered as a Financial Services provider (FSP).
- 4.2 Contrary to the affidavit submitted by the respondent in terms of Section 39 of POCA, the respondent admitted that he was indeed trading and not Financial Sector Conduct Authority (FSCA) compliant. This admission accords (in part) with a disclaimer put up on the website of Humble Security which read: “*Currently we do not render financial services in respect of FAIS or FSP Acts and Regulations although we are in the process of being registered as a fully-fledged financial institution*” (my emphasis).
- 4.3 A later advertisement proclaimed that Humble Security was registered as an FSP. This was untrue, it was registered as a credit provider, which is substantially something different. The respondent blames a business partner, one Ndlovu, for him being misled.
- 4.4 The respondent asserted that the deposits received by Humble Security on its one Standard Bank account during the period from 2 July 2019 to 19 September 2019, totaling some R36 million, was not “*Forex Investment Funds but were subscription fees paid by other personal traders for information provided by me relating to the movement of currency prices*”.

4.5 The respondent admits a loss was sustained with funds invested with JP Morgan Trading, but that the investors were still paid out. He claims this was from “funds generated in the Forex market”.

[5] In heads of argument delivered on behalf of the respondent by Adv Nene, the following was placed on record as common cause facts, namely that the respondent was the sole director and signatory of Humble Security (referring to the company named in paragraph 3), that Humble Security was not registered as a FSP and that funds received by Humble Security in its Standard Bank account were dispersed into various other accounts belonging to the respondent. Despite this, it was argued that the granting of a forfeiture order was “inappropriate” as there was insufficient proof that a Ponzi Scheme was being run and that the explanation by the respondent that the transfer of funds from Humble Security’s account to other accounts was necessitated by the fact that “some” forex brokers did not accept funds from business bank accounts, should be accepted. The required onus on a balance of probabilities has therefore not been met by the NDPP. Lastly, it was submitted that this court has no jurisdiction to hear the matter.

[6] Evaluation and conclusions

6.1 The suggestion by the respondent that the R36 million received constituted subscription fees, is rejected out of hand as false. No subscription fees have been sought, advertised or explained by Humble Security on any of its websites. The proffered explanation is devoid of particularity, particularly taking into account the enormity of the alleged subscription fees. The fact that this explanation is only raised now, also detracts from its credibility. Surely, if the funds were really innocently raised subscription fees, rather than funds constituting the contraventions of which the respondent was accused of, one would have expected such a

simple and straight-forward answer to have been furnished in the preceeding section 39 affidavit. It was not.

- 6.2 The admitted payment of investors in respect of whom losses had been sustained without any independent source of income of Humble Security, leads one to the inescapable conclusion that other (or new) investors funds had been used for this purpose. The lack of indication of alternate sources by the respondent as well as the extremely limited trading which have actually taken place, therefore confirm the inference sought to have been drawn by the NDPP as the only inference on these facts. If the receipt of funds from the public, coupled with promises of huge returns and actual payout are not linked to actual trading, then a Ponzi Scheme has been operated. The facts lead to no other conclusion.
- 6.3 The allegation by the NDPP that Humble Security has offered returns on investment far exceeding those permitted in section 43(2) of the Consumer Protection Act 37 of 2002, have not been refuted.
- 6.4 The other bare denials made by the respondent were not made in such a fashion that “real” or “genuine” disputes of facts were created thereby. See inter alia: *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras [12] and [13].
- 6.5 The court is therefore satisfied that the funds which were preserved by way of an order of this court are indeed the proceeds of unlawful activity as contemplated in POCA and that it should be declared forfeited in terms of section 48 of that Act.
- 6.6 In respect of the issue of jurisdiction, the argument was simply that the respondents’ address and that of Humble Security in KwaZulu Natal do not fall within the geographical area of jurisdiction of this court.

However, the services that the respondent and Humble Security offered and indeed, the invitation to members of the public (and/or forex investors or brokers) and the solicitation of funds, took place within the area of jurisdiction of this court by way of the nationwide online advertisements and website access. All the courts in the country would have similar and concurrent jurisdiction and the location of the person of the respondent in one geographical jurisdiction whilst committing “unlawful activities” by being “on-line” in another geographical jurisdiction, does not oust the jurisdiction of a court situated in the latter jurisdiction. The definition of “proceeds of unlawful activities” contained in section 1 of POCA also reflects the intention of the Act to cast a net as wide as possible in combating crime and the forfeiture of assets. It reads as follows: *“it means any property, service, advantage or benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere”*. “Unlawful activity” is similarly widely defined as *“any conduct which constitutes a crime or which contravenes any law ... whether such conduct occurred in the Republic or elsewhere ...”*. Section 48 of POCA contains no limitation on this wide scope and simply refers to “a High Court”. According to POCA then, the unlawful activities have occurred within the area of jurisdiction of this court. This court then has jurisdiction to try those offences in terms of section 21(1) of the Superior Courts Act 10 of 2013 and therefore it has the necessary jurisdiction to make orders in terms of section 48 of POCA in respect of forfeiture of the proceeds of such offences.

- 6.7 Having regard to the nature of the application and the order to be granted as well as the general proposition that costs should follow the event, the respondent should be liable for the costs of the application.

The order is as follows:

1. An order is granted in terms of the provisions of section 50 of the Prevention of Organised Crime Act 121 of 1998 (the POCA) declaring forfeit to the state certain property (the property), which is presently subject to a preservation order granted by this court under the above case number on 1 November 2019, namely:
 - 1.1 The positive balance with interest accrued held in Standard Bank account number [...] held in the name of Humble Security;
 - 1.2 The positive balance with interest accrued held in Capitec Bank account number [...] held in the name of Zolani Walter Phantsi;
 - 1.3 The positive balance with interest accrued held in Capitec Bank account number [...] held in the name of Zolani Walter Phantsi;
 - 1.4 The positive balance with interest accrued held in Capitec Bank account number [...] held in the name of Zolani Walter Phantsi;
 - 1.5 The positive balance with interest accrued held in Capitec Bank account number [...] held in the name of Zolani Walter Phantsi;
 - 1.6 The positive balance with interest accrued held in Capitec Bank account number [...] held in the name of Zolani Walter Phantsi;
 - 1.7 The positive balance with interest accrued held in Bidvest account number [...] held in the name of Zolani Walter Phantsi;
 - 1.8 The positive balance with interest accrued held in ABSA bank account number [...] held in the name of Zolani Walter Phantsi;
2. The requirement to appoint a *curator bonis* is dispensed with.

3. Standard Bank, Capitec and Bidvest are ordered and authorised to pay the above balances in the respective accounts into the Criminal Assets Recovery Account (CARA) established under section 63 of the POCA, number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria, upon notice to do so by the National Director of Public Prosecutions, subject to the terms of paragraph 6 hereunder. Until then, the preservation order referred to in paragraph 1 shall continue to operate.
 4. The Registrar of this court must publish a notice of this order in the Government Gazette as soon as practical after the order is made.
 5. Any person affected by the forfeiture order, and who was entitled to receive notice of the application under section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the Gazette, apply for an order under section 54 of the POCA, excluding his or her interest in the property, or varying the operation of the order in respect of the property.
 6. All the paragraphs of the order operate with immediate effect, except paragraph 3, which will only take effect on the day that a possible appeal is disposed of in terms of section 55, or on the day that an application for the exclusion of interests in forfeited property in terms of section 54 of the POCA is disposed of, or after expiry of the period in which an appeal may be lodged or application be made in terms of section 54 of the POCA.
 7. The respondent is ordered to pay the costs of this application.
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N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 10 March 2022

Judgment delivered: 16 March 2022

APPEARANCES:

For Applicant: Adv J Wilson

Attorney for Applicant: The State Attorneys, Pretoria

For Respondent: Mr N E Nene

Attorneys for Respondent: Phila Manyathi Yenziwe Cele Inc,
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