FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: No
Of Interest to other Judges: Yes
Circulate to Magistrates: No

Case No. : 1540/2018

The ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

IN RE an application in terms of section 38 of the Prevention of Organised Crime Act No. 121 of 1998 for the preservation of certain property

---

CORAM: DAFFUE, J

HEARD: 15 MAY 2018

JUDGMENT BY J P DAFFUE

DELIVERED: 12 JUNE 2018

I INTRODUCTION

[1] The Bank of Baroda ("Baroda") wants this court to reconsider a preservation order granted *ex parte* and on an urgent basis on 27 March 2018 by Naidoo J.

[2] The order was obtained in terms of s 38(2) of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") and it is not in the form of a rule *nisi.*

[3] The only parties featuring in this reconsideration application in terms of rule 12(1)(c) of the Uniform Rules of Court is Baroda and the National Director of Public Prosecutions ("the NDPP") that obtained the preservation order.

[4] An amount of R33 205 871.86 held by Baroda in its Nedbank correspondent account no [....] has been preserved and Baroda seeks the setting aside of this order.

II THE PARTIES

[5] The NDPP is the applicant in the application and it was represented by Advv N A CASSIM SC, NTIMUTSE, R NAIDOO and S FREESE before me.

[6] Baroda is the aggrieved entity who applies for reconsideration, referring to itself as the reconsideration applicant. It its papers the NDPP, Eugene Nel (the person appointed as *curator bonis)*

and Nedbank Ltd are cited as 1st, 2nd and 3rd respondents respectively. Advv A BHAM SC and L M SPILLER appeared for Baroda. The reconsideration application is opposed by the NDPP only. In order to avoid confusion I shall hereinafter refer to the parties as Baroda and the NDDP respectively.

III HISTORY OF THE LITIGATION

[7] On 18 January 2018 the NDPP obtained an *ex parte* order under application number 168/2018 for preservation of property against several affected parties including Baroda. The order against Baroda was for the preservation of an amount of R30 m standing to the credit of its Nedbank account, the details of which are mentioned *supra.* Baroda applied for reconsideration of this order and on 9 March 2018 Jordaan J, who gave the preservation order, set aside that order and directed the release of the amount of R30 m.

[8] A few days later, *i.e.* on 27 March 2018, Naidoo J was approached with yet another urgent application brought *ex parte.* The learned judge granted orders against Baroda and another entity. In terms hereof an amount of "R33 205 871.86 received by the Bank of Baroda (South Africa) on or about 14 October 2013 from an account conducted by Estina (Pty) Ltd with the Bank of Baroda under account no. [....] which sum may be held for the benefit of the Bank of Baroda (South Africa) at Nedbank Ltd in account no [....] or in any other bank account or fund" was preserved in terms of s 38(2) of POCA. I added the emphasis. The importance of the amount and date of receipt in particular will appear *infra.*

[9] The object of this second preservation order was to preserve funds received by Baroda on or about 14 October 2013 in the amount of R33 205 871.86 in Baroda's account number [....] held with Nedbank. It is common cause that the credit balance of the particular account is made up of deposits by numerous depositors and the account is therefore referred to as a "pool account". Estina (Pty) Ltd ("Estina") does not have any right, personal or real, to the amount standing to the credit of Baroda in this account. The matter is not as simple as would be the case where Estina's bank account with Baroda was seized in order to preserve funds. I shall explain later.

IV THE NDPP'S CASE

[10] Estina received R250 202 652.00 from the Free State Department of Agriculture for the Vrede Dairy Project, but instead of using the funds for *bona fide* dairy farming, most of the money were paid to companies and individuals who had nothing to do with farming. The curator *bonis* appointed in terms of the first preservation order, Mr E Nel, investigated the matter and showed that R110 450 000.00 of these funds were paid into the Baroda account held with Nedbank.

[11] In order to obtain its preservation order the NDPP's counsel referred in their heads of argument to the history of the Vrede Dairy Poject and the flow of funds and submitted that money laundering occurred. They stated also that "R33 205 871.86 was paid to the Bank of Baroda to settle the loans of Kamal Vasram who was a sole Director of Estina." It was specifically submitted that "the offence of money laundering was committed when money was transferred from Estina to other companies whose core function was not agriculture...." Reliance was placed in the founding affidavit of the NDPP on evidence presented by Messrs Schalkwyk and Nel, a financial investigator and the appointed curator *bonis* respectively. No doubt, counsel's submissions must have influenced the court to grant a preservation order.

[12] The application presented to Naidoo J consisted of 933 pages contained in three lever arch files. The whole purpose was to present evidence of the alleged fraudulent nature of the Vrede Dairy Project and the fact that money allocated to the project was not used for *bona fide* farming, but to unlawfully channel funds to several third parties. According to the NDPP's papers several people, including Mr Kamal Vasram ("Vasram"), have been charged recently in the Bloemfontein Magistrate's court in respect of various offences.

[13] Nel, who was apparently placed in possession of all relevant documentation pertaining to transactions between Baroda and Estina and Baroda and Vasram, made it clear in paragraph 12 of his supporting affidavit that the Baroda account with Nedbank mentioned *supra* was utilised by Baroda to "receive deposits on behalf of Baroda, which deposits were intended for the benefit of Baroda's

clients and from which account payments were made to third parties on the instructions of Baroda and its clients." He submitted that the aforesaid sum should be subjected to a preservation order, it being the proceeds of unlawful activities. However he stressed in paragraph 17 that Baroda was not accused of being a participant in any unlawful activities. On his version, relying on two judgments, the proceeds of crime may be preserved "even if the recipients of such proceeds were innocent recipients and did not participate in the unlawful activities which generated such proceeds." The NDPP's main deponent did not refute this stance in the founding affidavit, but a change of heart can be identified in the replying affidavit.

[14] In the replying affidavit the NDPP indicated that Nel's opinion is not supported. The deponent went so far to state that, on the objective facts, Baroda is not an innocent party. It is stated that no explanation was proffered for the large loans advanced to Estina's sole director. On the NDPP's version Baroda knew on the probabilities that it was unlawful to utilise the proceeds of Estina to repay Vasram's loan. It is alleged that the money received to discharge Vasram's liability remained the proceeds of unlawful activities and therefore subject to preservation. The argument in the affidavit went further and the deponent submitted that it was "not required of the NDPP to show that those self-same monies remain in the Nedbank account." According to the NDPP "Vasram obtained the funds illegitimately from his business relationship" and Baroda "is the holder of those funds having received repayment of a loan it advanced."

V BARODA'S DEFENCE

[15] Baroda is of the view that the NDPP's argument, based on Nel's submission, is wrong and "premised upon the same flawed understating of the law relating to money held in correspondent bank accounts and the nature of the bank/customer relationship as was the first preservation order." Therefore the order should be rescinded on the same basis that Jordaan J rescinded the first order against Baroda.

[16] It is submitted that "once Estina's personal right against the bank was extinguished (namely, when Estina withdrew the funds) there are no 'proceeds' that can be attached in the hands of the bank." The argument continues to the effect that the NDPP seeks to preserve Baroda's personal right against Nedbank for payment of R33 205 871.86 in circumstances where neither Estina nor Vasram has a significant credit balance in any account with Baroda. The credit balance in Baroda's Nedbank account constitutes a personal right against Nedbank and represents the deposits of innocent customers of Baroda, having been made in the lawful conducting of the business of a bank, and does not constitute the proceeds of crime.

[17] Furthermore, Baroda is not implicated in whatever misdeeds Estina and its cohorts may have committed and it is not the NDPP's case that Baroda is part of the Estina scheme or a beneficiary thereof.

[18] It is common cause that Baroda advanced loans to Vasram and that fixed deposits made by Estina with Baroda served as security. Baroda used the pool of funding available to it (being the aggregate of all deposits) to advance the loans to Vasram and its other borrowing customers. It is the bank's case that Estina at a later stage gave a lawful instruction to the bank to make payment to Vasram in an amount equal to Vasram's indebtedness to the bank, i.e to credit Vasram's loan account with an amount equal to his indebtedness to the bank. Simultaneously Estina's account was debited (and therefore reduced) with the same amount. Baroda is not in possession of the "proceeds of crime" for the same reason that the other banks like Standard Bank and FNB were never in possession of the proceeds of crime.

VI **BARODA'S RELATIONSHIP WITH BANKS AND CUSTOMERS**

[19] Until 31 March 2018 Baroda operated as a "foreign institution" in South Africa as defined in the Banks Act, 94 of 1990. It had only two branches in this country, respectively in Johannesburg and Durban. On 31 March 2018 it ceased to operate and conduct the business of a bank in South Africa. Baroda did not operate as a clearing bank and as a result it had to conduct a correspondent banking relationship with clearing banks which it did with *inter alia* Nedbank. Consequently it had a general account with Nedbank, a so-called "pool" account which reflected inflows and outflows from Baroda's customers without

any connection between such inflows and outflows. All monies paid to customers of Baroda or paid by such customers holding accounts with Baroda had to pass through the "pool" account.

[20] Baroda does not challenge the evidence of the unlawful and fraudulent nature of the Vrede Dairy Project. This appears to be common cause. Several people and entities have been charged with serious and wide-ranging counts of criminal misconduct. Bearing in mind the findings herein as will be recorded infra, this is irrelevant in the determination of Baroda's liability as neither Baroda, nor any of its officials have been charged. I shall deal with fingers pointing to Baroda's possible knowledge of unlawful and criminal activities *infra*.

VII PURPOSE AND NATURE OF PRESERVATION ORDERS

[21] Section 38 falls in Chapter 6 of POCA. The primary focus of this chapter is on property that has been used to commit an offence or which constitutes the proceeds of crime, rather than the offenders themselves. The guilt or wrongdoing of the owners or possessors of property is not primarily relevant to the proceedings. See: *NDPP v Mohamed* NO 2002 (4) SA 843 (CC) at para [17] and *NDPP v R O Cook Properties, 37 Gillespie Street Durban (Pty) Ltd and Seevnarayan (Seevnarayan)* 2004 (2) SACR 208 (SCA) at para [20].

[22] As mentioned in *Mohamed NO supra* a two-stage approach is provided for in Chapter 6 of POCA. During the first stage a

preservation order is obtained. The purpose of a preservation order is to preserve the particular property until the court is able to deal with the NDPP's application for forfeiture of the property in favour of the State during the second stage.

[23] The court must grant a preservation order in terms of s 38(2)(b) if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities. See: *Mohamed NO supra* at para [22].The two other circumstances set out in s 38(2)(a) and (c) are not relevant for purposes hereof.

VIII <u>THE LAW IN RESPECT OF APPLICATIONS IN TERMS OF RULE 6(12)(C)</u>

[24] Counsel argued *in limine* how the reconsideration application should be adjudicated. Mr Bham submitted, as the heading of the so-called reconsideration application makes clear, that Baroda is in actual fact the applicant in this application and therefore it had a right to reply to the NDPP's "answering" affidavit. What is more, two further affidavits were filed by the parties. He requested me to consider all the affidavits in order to have a proper conspectus of all the relevant facts.

[25] Mr Cassim did not agree. He submitted that Baroda's first affidavit in support of its application for reconsideration shall be regarded as an answering affidavit to the NDPP's founding affidavit and that the NDPP's response thereto is in essence the replying affidavit as the NDPP aptly referred thereto. He submitted that

the court should not consider any of the further affidavits filed by the parties, including the NDPP's supplementary affidavit.

[26] The authorities are not harmonious on the topic. Therefore I ruled that the parties should address me on all issues and facts placed before me in all the affidavits and reserved the right to eventually decide whether or not to consider the extra sets of affidavits.

[27] The court has a wide discretion under subrule 6(12)(c) and several factors may be taken into account in order to reconsider an order obtained *ex parte. See: Erasmus, Superior Court Practice* vol 2 at D1-89 and authorities quoted. These include whether an imbalance, oppression or injustice has resulted, and if so, the nature and extent thereof and whether alternative remedies are available.

[28] The aggrieved party may approach the court in invoking rule 6(12)(c) by not filing an answering affidavit in which case the applicant shall not be allowed to file a supplementary affidavit in an attempt to bolster his/her case. However, if the respondent does file an answering affidavit, the applicant has the right to reply thereto in which case the usual rules pertaining to application procedure will apply: no new matter may be introduced in the replying affidavit by the applicant. In a case as in the second scenario the parties on reconsideration will be in the same position, had they come to court on notice in the ordinary way. I agree with the pronouncement of the law by Sutherland, J in *IDC v Sooliman* 2013 (5) SA 603 (GSJ) at 606 I – 607 A.

[29] I do not agree with the procedure followed by Baroda or Mr Bham's arguments in support thereof. If this procedure is allowed as of right, it would mean that parties will be allowed filing four sets of affidavits which is contrary to the norm applicable in application procedure. There is no reason whatsoever why an aggrieved party seeking the reconsideration of an order granted in his absence shall be allowed as of right the luxury of an additional affidavit. However, special circumstances may exist and it is accepted that further sets of affidavits may be allowed if it would be fair to both sides and considering the fundamental principle that disputes should be adjudicated upon all relevant facts.

[30] *In casu* Baroda filed its so-called reconsideration application on 13 April 2018 whereupon the NDPP responded by giving notice to oppose on 18 April 2018 and filed its "answering" affidavit on 30 April 2018. Baroda's "replying" affidavit was filed hereafter and the matter was set down to be heard as an urgent application on Tuesday, 15 May 2018. On Friday 11 May 2018 two further affidavits were filed, to wit a supplementary affidavit by the NDPP and Baroda's response thereto. None of the parties sought leave from the court prior to filing the further affidavits to file these. In fact, leave was never formally sought.

[31] I have difficulty in understanding why the matter was set down for a Tuesday whilst the parties' legal representatives should have been aware of this Division's Practice Directives in terms whereof opposed applications are heard on Thursdays. I was

expected to read more than a thousand pages in a short time. By the time the matter came before me, being six weeks after Baroda had closed its business in this country, it could hardly be regarded as urgent anymore. However I made it clear that I was prepared to hear the application, but my consent should not be regarded as laying down a precedent.

[32] My approach should perhaps have been to decline considering the affidavits following upon the NDPP's answer (actually the replying affidavit). However, the NDPP invited Baroda in paragraph 31 of this affidavit to place further information and documents before the court which opportunity it was just too eager to accept. The NDPP filed a supplementary affidavit out of time, but Baroda responded thereto. Again, and without trying to lay down any precedent, I decided to consider all the evidence contained in all the affidavits on the basis of expediency and in fairness to both parties.

IX LEGAL PRINCIPLES APPLICABLE TO *EX PARTE* APPLICATIONS

[33] Preservation orders are often brought by the NDPP *ex parte.* This is allowed and the rationale is clear. It is important to note that the granting of such orders deprives the affected party of a fundamental right to be heard, *i.e.* an opportunity to state their case. These applications should be considered and adjudicated with regard to s 34 of the Constitution: the right to a fair hearing. Yacoob J stated the following at paragraph [11] in the

unanimous judgment of *De Beer NO v North-Central Local Council and South*-Central *Local Council and others* 2002 (1) SA 429 (CC):

"It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case."

[34] In *NDPP v Braun and another* 2007 (1) SACR 326 (C) at paras [20] and [21] Traverso DJP made it clear that applications under s 38 of POCA do not relieve the NDPP from the normal burden imposed on every applicant who approaches the court for an *ex parte* order. She continued that it "should be invoked where there is some good cause or reason for the procedure such as genuine urgency or where the giving of notice would defeat the very object for which the order is sought."

[35] Traverso DJP summarised the principles applicable to *ex parte* applications in paras [22] to [27] with reference to the *locus classicus, Schlessinger v Schlessinger* 1979 (4) SA 342 (W) at 349A – B as well as the SCA judgment of Southwood AJA in *Powell NO and others v Van der Merwe NO and others* 2005 (1) SACR 317 (SCA). I do not intend to repeat that. In the first judgment Le Roux J made the point that "…unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant." In the latter judgment Southwood AJA went further and stated that "….the approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out …. or, as in this case, because they have not been sufficiently investigated….."

[36] Sutherland J emphasised that the "principle of audi alteram partem is sacrosanct' and "the only times that a court shall consider a matter behind a litigant's back are in exceptional circumstances." The learned judge explained that this means that "it must mean 'very rarely' - only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation is allowed." See: *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 561 (GJ) at para [22].

[37] In *Thint v NDPP* 2009 (1) SA 1 (CC) at para [102] the Constitutional Court reiterated that an applicant in *ex parte* applications bears a duty of utmost good faith in placing all the relevant material facts within his/her/its knowledge before the court. The court accepted that the test of materiality should not be so high to render it "practically impossible for the State (in that case – or in my view any other applicant –) to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges."

X EVALUATION OF THE EVIDENCE WITH REFERENCE TO LEGAL PRINCIPLES

[38] I intend to deal firstly with legal principles and some case law whereafter I shall consider the evidence and submissions of counsel. The full bench of this Divsion summarised the bank/customer relationship as follows in *Standard Bank of SA v Mokoena* (A59/2015) [2016] ZAFSHC 69 (12 May 2016) at para [14]:

"It is trite that the relationship between a banker and customer is regarded as a contractual one. The basic although not sole relationship between a banker and customer in respect of a current account is one of debtor and creditor. If the current account of the customer reflects a credit balance he/she is the creditor and the bank the debtor. The customer is the debtor and the bank the creditor if the current account is overdrawn. The roles of the bank and the customer are then reversed insofar as the bank becomes the creditor and the customer the debtor. In either of these two situations the bank still acts as agent when carrying out the instructions of its customers to make payment against their accounts. See: **Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd** 1995 (4) SA 510C at 530G – 532C and **Absa Bank Bpk v Janse van Rensburg** 2002 (3) SA 701 SCA at para 16."

[39] The effect of the relationship between a bank and its customer is that a bank becomes entitled to funds deposited in the customer's account, but obliged to give effect to the customer's payment instructions. See: *Muller NO and another v Community Medical Aid Scheme* 2012 (2) SA 286 (SCA) para [13]. The bank becomes the owner of the funds deposited and the customer obtains a personal right or claim against the bank based on the bank/customer relationship.

[40] In my view the legal principle remains the same even in a case such as the present where Baroda was a non-clearing bank and had to make use of other clearing banks such as Nedbank.

[41] Although POCA was not applicable in the dispute adjudicated by the SCA in *Absa Bank v Lombard Insurance* 2012 (6) SA 569 (SCA) the legal principle enunciated must be considered. The question to be answered was whether receipt of stolen funds by

the two appellants, Absa and FNB, operated as a discharge of their mutual customer's respective debts to them. The customer fraudulently obtained funds from Lombard Insurance and paid that into her current account with FNB from where she transferred funds to her other FNB accounts to extinguish her debts with FNB and also transferred money to her Absa account from where further transfers were made to extinguish her Absa debts. The court held that the customer who caused the fraudulent transfer of money intended to discharge her indebtedness and found in favour of the two appellants by dismissing Lombard Insurance's claims for the amounts of the stolen funds used to discharge the fraudster's debit balances. The court confirmed that it did not matter that payments were made by electronic transfer.

[42] We are concerned with Chapter 6 of POCA. This chapter provides for the forfeiture, by civil proceedings, of the very proceeds of crime. A preservation order was obtained in terms of s 38. It serves as interim protection or preservation whilst s 48 is utilised to obtain final forfeiture of the actual proceeds of crime. Both these sections are confined to the very proceeds of crime. Both sections require the NDPP to show that the property concerned is the proceeds of unlawful activities.

[43] It is important to deal with some aspects of POCA and applicable authorities before I evaluate the evidence. The legislature intended to introduce strict measures to combat organised crime and in the process to *inter alia* provide for the recovery of the

proceeds of unlawful activity. I refer to the long title and preamble of POCA. Clearly the intention is to ensure that criminals are not only severely punished by the introduction of severe sentences, but also to prevent these criminals from benefitting from their heinous deeds. I shall consider two relevant definitions and some authorities.

[44] "Proceeds of unlawful activities" are broadly defined in s 1 of POCA. It relates to "any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, …., in connection with or as a result of any unlawful activity, … and includes any property representing property so derived."

The Constitutional Court stated in *S v Shaik* 2008 (5) SA 354 (CC) at para [25] that this definition is widely cast, especially if the definition of "property" is considered. "Property" is defined as "money or …. and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof."

It is accepted that the court in *Shaik* dealt with Chapter 5 and not Chapter 6 of POCA, but the principle enunciated remains applicable.

[45] In *Mohamed NO* and *Seevnarayan supra* the Constitutional Court and the Supreme Court of Appeal respectively referred to the broad approach to be applied when interpreting the definitions of "property" and "proceeds of unlawful activities". In *Seevnarayan* the respondent made several investments under fictitious names with the purpose to conceal the origin of the funds in order to evade income tax. The court found at paras [57] to [61] that he

committed fraud, but that the funds were not an "instrumentality of an offence." It also found at paras [68] and [69] that the NDPP at no stage claimed that the capital of the investments originated in unlawful activities by the respondent; also that no basis was laid for an inference that they originated in unlawful activities. At paras [70] to [73] the court also found that, even bearing in mind the broad definition of "proceeds of unlawful activities", the interest earned could not be regarded to be "in connection with or as a result of the offence." At para [72] it was emphasised that there must be "some form of consequential relation between the return and the unlawful activity", or put otherwise "the proceeds must in some way be the consequence of unlawful activity."

[46] In *NDPP v Abrina 6822* 2011(1) SACR 419 (KZP) Wallis J (as he then was) accepted the following based on authorities such as *Mohamed NO and RO Cook Properties supra:*

> "that the guilt or wrongdoing of owners or possessors of property is not primarily relevant to forfeiture proceedings…. Similarly, where one is dealing with s 38(2)(b), one is concerned, not with the mind of the owner of the property, but whether the property constitutes the proceeds of unlawful activities as defined. The phrase must be interpreted independently of the guilt or innocence of the owner of property."

It must be emphasised that the conclusion the learned judge arrived at pertaining to several farms and certain movable properties distinguishes the case from the facts *in casu,* notwithstanding the wide ambit of the definitions quoted *supra.* Here, the Estina credit balance in its Baroda account has been utilised, as duly instructed, to settle Vasram's debt. The amount standing to the credit of Estina was extinguished (albeit not completely) in the process.

[47] I am convinced that the Lombard and Seevnarayan judments should be followed and in so doing the established principles pertaining to the bank/customer relationship should be upheld.

[48] I dealt with the test applicable to these kinds of proceedings *supra*, but it is perhaps apposite to reiterate that the SCA stated in *Singh v NDPP* [2007] SCA 82 (RSA) at para [17] that the NDPP must "…prove facts giving rise to reasonable grounds for believing that the property is an instrumentality of the offence" (or constitutes the proceeds of unlawful activities.)

[49] Estina was registered on 24 June 2008. Its core business was "business consultant." On 19 October 2012 Estina's core business changed to "agriculture, farming and related activities." Its registered address changed to the same address as that of Oakbay. On 31 July 2012 Estina opened a bank account with Baroda. By that time it was also a customer of Standard Bank. Vasram was Estina's only director. Previously he was a retail sales manager at Sahara Computers, a flagship Gupta company, and he had no farming or agricultural experience. Three loans were granted to Vasram by Baroda in 2013. Security in the form of Estina's fixed investments with Baroda was provided to the bank. On 14 October 2013, the date mentioned in paragraph 2.1 of the second preservation order, the loans in the total amount of R33 205 871.86 were settled by

way of a transfer of funds. In order to effect this, Estina's account with Baroda was debited with the amount and Vasram's loan accounts credited.

[50] Mr Bham started off his argument on the merits by conceding that Baroda did not have any problem with Naidoo J's declaratory order that the proceeds of unlawful activities dealt with in the NDPP's affidavits amounted to R250 202 652.00. However, he argued that Naidoo J overlooked the principles applicable to a bank/customer relationship set out *supra.* According to him lawful loans were made to Vasram and the payments to settle the loans were not the proceeds of unlawful activities.

[51] Mr Bham's main argument is that the NDPP's founding papers do not contain evidence of a factual link between the funds which are alleged to be proceeds of unlawful activities and the funds used to pay the Vasram debt. In fact, Nel's affidavit shows that the Vasram debt was paid using funds from a source other than the Estina Standard Bank account. This argument appears to be sound if Nel's affidavit and the bank statements relied upon is considered thoroughly. On 14 October 2013 (the date mentioned in the preservation order) the credit balance in the Estina Baroda account was only R343 653.78 and on that day two deposits of R25 m and R10 m respectively were made. These amounts were not paid from the Estina Standard Bank account and neither Nel, nor anybody else, alleges that these deposits constituted the proceeds of crime. In fact, Nel only identified payments in the total sum of R110 450 000.00, paid from the Estina Standard

Bank account to the Estina Baroda account during the period between 18 April 2013 to 19 August 2014, as the proceeds of unlawful activities. I refer to paragraph 15 of Nel's affidavit, read with annexure EN 27. On 14 October 2013, *i.e.* the day when the two deposits were made, Estina Baroda's account was debited when Vasram's debt was paid and his account thus credited in order to extinguish the total debt of R33 205 871.86.

[52] Mr Bham's secondary argument is that there is no consequential relation between the R33 205 871.86 that has been preserved and the alleged unlawful activity, the reason being that the credit balance in Baroda's Nedbank account is the result of the conducting of normal banking business. Therefore, Baroda's personal right against Nedbank for payment of the credit balance standing to Baroda's account could not be preserved. Reliance is then placed on *Lombard supra* and it is furthermore submitted that nothing in POCA purports to create an exception to the rule in *Lombard.* Mr Bham pointed out that money received by a bank can only be preserved if it stands to the credit of a particular customer of the bank. I agree. Where the customer's account has a nil or debit balance there is nothing to be attached or preserved.

[53] The NDPP's arguments failed to take the above legal principles into consideration. Also, the issue of *commixtio* was not properly addressed. No doubt, it is clear that the credit balance of a criminal's bank account may be frozen or preserved even if the funds deposited therein consist of so-called clean and dirty (or tainted) money. That does not mean that the bank's money can

be preserved. Cachalia JA stated the following in *Trustees, Estate Whitehead v Dumas* 2013 (3) SA 331 (SCA) at para [13], writing for a unanimous court:

"Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of commixtio, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made."

The learned judge continued to refer to the bank/customer relationship set out *supra.*

[54] The judgment of Jordaan J is apposite *in casu*. He held that the R30m that the NDPP wanted to preserve was not the proceeds of crime for the following reasons: 1) Baroda held all its customers' money in a single pool and individual amounts lost their identity in the pool: 2) Baroda did not hold the money in the pool on its own behalf but on behalf of customers and 3) the amount of R30m had in any event been transferred to a call-account and was no longer in Baroda's possession. The learned judge concluded that "(i)n the same way that preservation orders are sought in respect of specific accounts of affected entities in other banks, if a preservation order is sought it should seek to preserve the account of the specific client's (sic) and affected entities held by the bank and not the Nedbank account of the bank itself."

[55] Although Mr Cassim strenuously argued that the facts *in casu* differ from those in the case on which Jordaan J made his finding, I am not persuaded. Again, as in that case, Baroda's Nedbank account was preserved. The amounts differ by about R3 m but that is immaterial as the principle remains the same. In the first case there was an instruction by Estina to transfer the funds to a

call account, whilst in this case funds were transferred, as instructed, to settle another customer's debt, *i.e* that of Vasram.

[56] Mr Cassim submitted that the dispute can be adjudicated based on two short answers, i.e. the broad definition of "proceeds of unlawful activities" and a common sense approach based on reasonableness referred to by Samela AJ in *NDPP v Madatt*, case no 6488/2007, a judgment in the Cape of Good Hope Division delivered on 25 January 2008. It has to be mentioned that the learned judge relied on several judgments, but in particular *Mohamed NO* and *Seevnarayan supra.* I have already referred to both judgments earlier herein.

[57] Mr Cassim's submission that it was proved that the funds used to settle Vasram's debt were reasonably suspected to be the proceeds of crime does not hold water. I have dealt with the authorities *supra,* but reiterate the following. Even if stolen money was used to pay the Vasram debt, which was not proven, the current credit balance in Baroda's Nedbank account consists of the deposits of many other customers as a result of Baroda's normal banking business and it cannot be suggested or submitted with conviction that the credit balance is the consequence of or connected to any unlawful activities. There is just no consequential relation as mentioned in *Seevnarayan supra*.

[58] I am satisfied that when Estina's money was withdrawn from its Baroda account to settle the Vasram debt, Baroda's liability to

Estina was discharged, save for any amount that might have been standing to its credit at that stage. We know that as at 29 December 2017 the credit balance was a mere R2 394.50. These funds could have been preserved, but it is accepted that the NDPP is not interested to do that.

[59] Although, with the benefit of hindsight and bearing in mind all negative press reports published lately, not to speak of the belated action by the SAPS and the NDPP, one may argue that Baroda should have been aware of irregularities and even fraudulent actions, it would be wrong to jump to such conclusions. I have my suspicion about the involvement and role that Baroda's manager played in granting the loans to Vasram and the settlement thereof, but I am not prepared to go as far as the NDPP wants me to go. Now, in 2018 and after being told how the participants in the fraudulent Vrede Dairy Project went about their business, it may be easy to point fingers and accuse those allegedly involved of money laundering by making use of a "complex system of camouflage" as our courts have referred to such schemes. However, none of the banks, as Baroda's deponent testified without contradiction, had reason to believe in 2013 that irregularities were the order of the day pertaining to the Vrede Dairy Project and/or Estina and/or Vasram. No evidence was provided that Baroda knew or ought to have known that the proceeds of unlawful activities were deposited into its Nedbank account. Suspicion is not enough.

[60] Nel attached the first preservation order and two amendments thereof to his supporting affidavit which formed part of the

documentation considered by Naidoo J. There is no indication that Jordaan J's judgment was placed before the learned judge and I have reason to believe that the pertinent issues raised therein were never canvassed during an obviously one-sided argument put forward on behalf of the NDPP. Although Mr Cassim tried his best to distinguish the two matters in order to persuade this court not to set aside the second order, I was not convinced. This is sufficient reason to reconsider the second preservation order.

[61] Mr Cassim relied on American authority as well as certain *dicta* by Jordaan J in the aforesaid judgment for the submission that Baroda's Nedbank account could be preserved insofar as tainted or stolen money or the proceeds of unlawful activities were deposited in that account. Jordaan J dealt with the principle of *commixtio* and stated that it would be unacceptable to expect of the NDPP to prove that such tainted money (which would have lost its identity and become part of the totality of funds in the specific account) still exists and is located in that account. I agree that a preservation order can be made once it has been proven that the receiver has received funds in the particular account which are the proceeds of unlawful activities. This must be clear, but it is a totally different scenario when a bank's account is to be preserved. If this could be done in respect of Baroda's Nedbank account, then the funds of Standard Bank and the other commercial banks involved with Estina could have been preserved as well. Such unfair and oppressive results are too ghastly to contemplate.

[62] I accept that, as clearly stated in the case law referred to *supra*, the focus in these proceedings is on property and not the owner or possessor thereof, but I am satisfied that there was no *"property"* to be preserved. The NDPP made it clear in paragraph 9 of its replying affidavit that it did not have any "desire to preserve monies rightfully belonging to customers of BoB (Baroda)" However, it is a necessary consequence of the order sought and obtained. Estina did not have any substantial credit balance in any account with Baroda at the time the order was made and the logical conclusion is that funds to which innocent customers have personal rights were preserved.

XI **CONCLUSION**

[63] In conclusion I am of the view that no facts were proven giving rise to reasonable grounds for believing that any of the funds deposited in Baroda's Nedbank account on 14 October 2013 were the proceeds of unlawful activities.

[64] Even if am wrong in coming to the aforesaid conclusion, the age-old principles applicable to the bank/customer relationship should be applied, the effect being that Estina does not hold any account with a substantial credit balance in the books of Baroda. In any event, the NDPP did not apply for a preservation order in respect of Estina's personal right in such account, but Baroda's Nedbank account.

[65] Furthermore, and even if it could be proven (which is not the case) that the proceeds of unlawful activities were deposited in Baroda's Nedbank account, that as a result of book entries Estina's account was credited and thereafter debited to settled Vasram's debt with Baroda, the NDPP cannot claim such amount from Baroda based on the principle laid down in *Lombard supra.* Mr Cassim pointed out quite correctly that the court in *Lombard* dealt with common law principles. I do not agree with his submission that *Lombard* is not authority as far as the application of POCA is concerned. I accept that this issue might have been a bone of contention during a possible future forfeiture application, but there is no reason why this court should not at this stage deal with the legal issue and grant relief as requested by Baroda.

[66] Although Baroda sought a reconsideration of Naidoo J's order, it elected not to argue the matter on the NDPP's founding affidavit and annexures, but responded with a fully-fledged answering affidavit to which the NDPP replied. As mentioned I even allowed further sets of affidavits. Having considered the evidence, the arguments and the authorities, I am satisfied that the order of 27 March 2018 should be set aside partially as requested.

[67] Baroda seeks the costs of two counsel. This is not an unfair request bearing in mind the number of counsel representing the NDPP and the voluminous papers that had to be studied.

XII <u>ORDERS</u>

[68] The following orders are issued:

1) Paragraph 2.1 of the preservation order granted by Naidoo J on 27 March 2018 under case no 1540/2018 is set aside;

2) Paragraphs 3, 4, 5 and 6 of the aforesaid preservation order, insofar as they relate to the amount of R33 205 871.86 held by Bank of Baroda in Nedbank account no [....], are set aside;

3) Applicant, the National Director of Public Prosecutions, shall pay the costs of the application, such costs to include the fees and expenses of two counsel.

____

J. P. DAFFUE, J

On behalf of applicant: Adv N A CASSIM SC and ADV A NTIMUTSE and ADV R NAIDOO and ADV S FREESE
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of aggrieved party: Adv A BHAM SC
and Adv L M SPILLER
Instructed by:

Mervyn Taback Inc
BLOEMFONTEIN