



CASE NO.: POCA 2/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE PROSECUTOR GENERAL

APPLICANT

and

NALISA FREDRICKS SITUMBEKO

FIRST DEFENDANT

SCRATCH A MILLION ENTERPRISE CC

SECOND DEFENDANT

MACHADO ANDRE PINTO

THIRD DEFENDANT

KENEILWE LANGA

FOURTH DEFENDANT

FLORENCE SITUMBEKO

RESPONDENT

**IN RE AN APPLICATION IN TERMS OF SECTION 25 OF THE PREVENTION
OF ORGANISED CRIME ACT, NO.29 OF 2004 ("The Act")**

CORAM: TOMMASI J

Heard on: 22 & 25 February 2010; 6 May 2010; 16-18 August 2010;
01 & 6 September 2010
Delivered on: 07 September 2010

JUDGMENT

TOMMASI J: [1] This is an application for the granting of a restraint order in terms of section 25 of the Prevention of Organised Crime Act, 2008 (Act 10 of 2008). The application was brought on an *ex parte* application and a *rule nisi* was issued calling upon the Defendants and the Respondent to show cause. if any, on 22 January 2010, why a final restraint order should not be granted.

[2] On 22 January 2010 the *rule nisi* was extended to 22 February 2010, allowing the Defendants and the Respondent additional time to file Answering Affidavits as well as affording the Applicant time to reply thereto.

[3] On the extended date the Defendants and the Respondent applied for condonation for non-compliance for the late filing of the answering affidavits and for the court to grant leave for the 3rd Defendant to lead oral evidence. The

Applicant brought a similar application for the late filing of the replying affidavit. The affidavits filed in support of these applications have shown good cause and condonation was therefore granted.

[4] Counsel for the Applicant, Mr Nduna, informed the court that the applicant will not proceed against 4th Defendant and the *rule nisi* against 4th Defendant was discharged.

[5] The 3rd Defendant represented by Mr Narib, brought an application for oral evidence to be led in respect of obtaining supporting documentation for 3rd Defendant. The application to lead oral evidence became obsolete as the point in dispute was conceded by the Applicant.

[6] The Defendant's and Respondent in their heads of argument indicated that they will bring an application to strike certain paragraphs from the Applicant's replying affidavit as it introduced new facts in the replying affidavit. Mr Narib made verbal submission that the Replying Affidavit of the Applicant was replete with new matter alternatively that a dispute of fact arose and that the Defendants be allowed to lead further affidavits/lead oral evidence. The Court dismissed the oral application to strike. No application as envisaged by the Rules of this Court was brought by the Defendants. The Court however is

mindful that the Applicant who secured the provisional order is not better positioned on this extended return date insofar as the facts that were placed before the court when the provisional order was obtained.

[7] The matter was referred for oral evidence to be led in respect of the dispute that arose on a cardinal issue i.e the existence of a third invoice book of the 2nd Defendant. The *rule nisi* was for this purpose extended to 6 May 2010.

[8] On 6 May 2010 the Applicant applied for the rule to be further extended as the investigating officer was hospitalized and not in a position to testify in response to oral evidence to be led by the Defendants and the Respondent. The Defendants and Respondent opposed this application as they were having difficulty securing the attendance of the witnesses. This Court granted an extension of the *rule nisi* and ordered that that further affidavits be filed by both parties to prevent a further delay in the finalization of the application.

[9] The further affidavits were subsequently filed and the matter fully argued before this court on 16 and 17 August 2010.

[10] The Court, having granted a provisional restraint order on an *ex parte* Application, heard on 22 December 2009, is now called upon to reconsider its position having the benefit of having heard the other side.

APPLICANTS CASE ON THE FOUNDING PAPERS

[11] The founding papers filed by the Applicant consisted of the founding affidavit of the Applicant supported by the affidavit of the investigating officer, the late Detective Sergeant (D/Sgt) Florence Muzani (the court was informed that she had passed away) and annexures thereto.

[12] The facts placed before the Court in the founding papers can be summarized as follows: the 1st Defendant, married out of community of property to the Respondent, registered 2nd Defendant during March 2009. The supporting documentation reflects that 1st Defendant was the sole member of 2nd Defendant. The principle business of the 2nd Defendant was to sell scratch cards to the general public and to business/vendors. The idea was to operate a benevolent lottery.

[13] On or about 24 August 2009 the 1st Defendant, on behalf of 2nd

Defendant entered into a merchant agreement with Standard Bank Namibia in terms whereof the 2nd Defendant was given a Point of Sale Terminal. The salient terms of this agreement obligated the 2nd Defendant to always obtain the signature of the user of the card on the merchant receipt/voucher, printed by the Point of Sale Terminal, and to ensure that the signature that appears on the back of the card is the same as the person signing the merchant receipt.

[14] Fifty two (52) visa/credit card/debit card transactions dated from the 17 October 2009 to 7 November 2009 were done on the terminal. All of these transactions involved the transfer of funds from foreign accounts holders and the cards or card numbers were issued by foreign banks. A total amount of N\$736 109.50 was deposited into the account of 2nd Defendant in this manner.

[15] Confirmation was received by Standard Bank that at least transactions totaling N\$544 000.00 were fraudulent transactions and some of the declarations made by the foreign card holders were attached. The card holders declared that their accounts were used without their authorization or consent. These transactions took place within minutes of each other and the merchant receipts reflected that sometimes one person's signature appeared on two or three merchant receipts whilst different card or card numbers were printed thereon. The signatures on the merchant receipts also differed from the signatures appearing on the declarations made by the foreign card holders.

[16] It was submitted by the applicant in its founding papers that the 3rd Defendant on 23 October 2009 used a foreign card at the Point of Sale Terminal of the 2nd Defendant to transfer funds in the sum of N\$2000.00. On 2 November 2009, he was given a cheque in the sum of N\$250 000.00 drawn on the account of 2nd Defendant and signed by 1st and 4th Defendant on behalf of the 2nd Defendant. A promotional cheque was found in the possession of 2nd Defendant deposited the cheque into his account.

[17] On 7 November 2009 3rd Defendant wanted to withdraw N\$80 000.00 from this account at First National Bank. The withdrawal of this amount was questioned and the Police were called to question 3rd Defendant. The explanation given by the 3rd Defendant was that the cheque belonged to someone known as “Kaka”. A cellphone was found on 3rd Defendant’s person and seized. The Cell phone messages revealed that he was receiving and sending messages to someone regarding the withdrawal. The identity of this person was not revealed by the Applicant. It further appeared that 3rd Defendant was concealing the fact that he had the cell phone in his possession.

[18] 3rd Defendant was not arrested at that time but this prompted an investigation that revealed that 2nd Defendant was operating a lottery without a

license or authorization from the Ministry of Environment and Tourism. The 1st Defendant, on behalf of 2nd Defendant approached the Ministry of Environment and Tourism to obtain permission to operate a benevolent Lottery. 1st Defendant was informed that the regulations of the Lottery Act, 2002 (Act 15 of 2002) were not yet in place. The failure of the 1st and 2nd Defendant to obtain authority to operate a lottery was, according to the Applicant, in contravention of the Lottery Act. It was submitted that the Defendants may be convicted of conducting a benevolent lottery without the authorization in contravention of the Lotteries Act, 2002 (Act 15 of 2002). These charges could only be applicable to 1st, 2nd and 4th defendants. It was subsequently argued by the Respondents, that this Act has not yet been promulgated. At the time, the Court, given the urgency of the matter, accepted the submission of the Applicant that the Act was in force.

[19] Standard Bank and First National Bank suspected that the cheque of N\$250 000.00, deposited into the account of 3rd Defendant and drawn on the account of 2nd Defendant was a fraudulent cheque.

[20] This resulted in the arrest of 1st Defendant on 12 November 2009. On the same day a search was conducted and certain items were seized from the premises of the 2nd Defendant with his consent.

[21] 3rd Defendant made a statement in support of the bail application of the 1st Defendant and same was attached or annexed. In the statement 3rd Defendant indicated that he bought tickets to “*try his luck of winning*”. He won the N\$250 000.00 in a batch of scratch card that he purchased for N\$2000.00. He indicated that he wanted to buy solar panels to resell same in Angola. This contradicted his earlier explanation.

[22] Numerous cash cheques and withdrawals were made from the account of 2nd Defendant where the proceeds of the funds obtained from the foreign credit cards holders were paid into. On 16 December 2009 1st Defendant made a withdrawal of N\$100 000.00 reducing the credit balance on the 2nd Defendant’s account to N\$385 239.96.

[23] The 3rd Defendant was arrested on 21 December 2009 and 4th Defendant was to be arrested within four weeks.

[24] The applicant submitted that the parties acted in concert by using foreign credit cards at the Point of Sale Terminal, pretending to sell scratch cards whereas in fact they were merely using the Point of Sale Terminal to use

the credit cards of foreign card holders without their authorization. 3rd Defendant was paid an amount of N\$250 000.00 to clear the funds from the 2nd Defendant's account under the pretext that it was monies that he had won in the normal course of business of the 2nd Defendant. 4th Defendant co-signed the cheque and that signaled his involvement.

[25] Based on these facts the Applicant have charged and submitted that she may still charged the Defendants with multiple offences relating to; the contravention of the Lotteries Act, 2002 (Act 15 of 2002); contravention the Prevention of Organized Crime Act, 2004 (Act 29 of 2004); fraud and theft.

[26] The withdrawal of large amounts from the account of 2nd Defendant and the fact that the bank balance of 2nd Defendant would not be sufficient to cover a confiscation order, prompted the applicant to bring an urgent application.

[27] On the face of the above information it appeared that:

1. 2nd Defendant was contravening the Lotteries Act.
2. Credit Cards in the sum of N\$736 109.05 were used at a Point of Sale Terminal issued to 2nd Defendant and a portion thereof, according to declarations filed, was confirmed to be fraudulent.

3. 3rd Defendant, using a foreign credit card, received N\$250 000.00 from 2nd Defendant's. 3rd Defendant gave conflicting explanations for his withdrawal of the N\$80 000.00 and in respect of who the money belonged to.
4. A discrepancy existed in the signature of 11 foreign card holders who made declarations, and the signatures appearing on the merchant receipts.
5. The signatures on some of the merchant receipts appear to be identical for different credit cards and these transactions took place within minutes of each other.
6. Monies were withdrawn from the account of 2nd Defendant by 1st Defendant and 4th Defendant by way of cash cheques eg N\$100 000.00 on 16 December 2009.

1st DEFENDANT'S ANSWER

[28] The essence of the 1st Defendant's answer to the applicant's affidavit was that he was running a legitimate business. He was not required by law to obtain authorization from the Ministry of Environment and Tourism as the Lottery Act, 2002 (Act 15 of 2002) was not in force. He referred to the Project Summary attached to Applicant's Affidavit wherein the full nature of his business was set out. He submitted the cards were not serialized but this was

not intentional. His business offered the scratch card for N\$20.00 to the public and N\$10.00 to vendors. His business was initially slow but picked up quite rapidly and this came as no surprise as he advertised extensively and vendors started buying in bulk.

[29] He had no knowledge that the cards were foreign cards as the cards presented to him were cards of Namibian banks. He at all times recorded the details of the persons purchasing scratch cards with credit or debit cards in a receipt book in the possession of the applicant and he satisfied himself as to the identity of these persons. He was also not alerted by bank to the fact that the cards used in the transactions were fraudulent. He however deny that the declarations are valid and submits that it is possible that the Applicant is mistaken in respect of the foreign origin of the cards as one mistake in respect of 3rd Defendant was already made.

[30] He did not know the 3rd Defendant and only got to know him after he claimed his prize in the sum of N\$250 000.00. According to him this was a legitimate payment in terms of the business of 2nd Defendant. He denies having formed common purpose with 3rd Defendant to clear the illegitimate proceeds from 2nd Defendant's account.

[31] He submitted that the only benefit he received was his salary.

[32] He was unable to respond to the allegations that the same signature was present on different credit card sales as he could not make out the numbering of the individual merchant receipts referred to by the Applicant. No answer was advanced for the rapid succession of transactions.

3RD DEFENDANT'S ANSWER

[33] The 3rd Defendant's maintained that he purchased scratched cards in the sum of N\$3000.00 from 2nd Defendant on 17 and 23 October 2009 using his own debit card to pay 2nd Defendant. He enclosed his bank account statement supporting the purchase. One of the scratch cards revealed that he had won a prize of N\$250 000.00.

[34] He did not know the 1st Defendant before he went to claim his prize. He submits that he is entitled to this prize money as he legitimately won it by purchasing scratch cards.

[35] He denies the allegation that he informed the Police that the cheque belonged to "Kaka" on 7 November 2009 when he wanted to withdraw N\$80 000.00. He stated that his name appeared on the cheque and that would have

been absurd for him to deny that the cheque belonged to someone else. No answer was given in respect of the cell phone messages.

APPLICANT 'S REPLY

[36] The Applicant in reply conceded that the Lottery Act was not in force at the time when the Application was made. The Applicant submitted that this was a genuine mistake.

[37] The Applicant further conceded that the credit card used by 3rd Defendant was his own and the funds that were transferred to the account of 2nd Defendant was from his own account.

[38] The Applicant denied the existence of an invoice book wherein the 1st Defendant made entries recording the details of the persons who transacted with those credit cards and attached copies of the two invoice books reflecting mostly cash sales. This caused a dispute of fact.

THE THIRD INVOICE BOOK -

[39] The further affidavits filed by the 1st Defendant disclosed evidence of at

least three(3) persons who purchased scratch cards and who were issued invoices which fall outside the two invoice books furnished to the court.

[40] One of the 3 persons was 3rd Defendant. A close look at the invoice reveals that 3rd Defendant purchased 100 scratch cards on 17 October 2009 for N\$10.00 for resale. The second invoice dated 23 October 2009, indicated that 3rd Defendant purchased 200 scratch cards at N\$10.00 for resale. Both transactions were recorded by “B Vries” and were cash sales.

[41] A further affidavit was an erstwhile employee of 2nd Defendant, Mr Moses M Sikaneta, who confirmed the existence of a third invoice book and indicated that he last handled the book on 12 November 2009 when he was requested by Mr Pumba Muundjua of Standard Bank to make photocopies of the merchant receipts that were attached to the invoices. He left the invoice book on the table and the Police later arrived and requested him to leave.

[42] The applicant averred that the version of Mr Sikaneta was false and filed a number of affidavits to indicate what transpired during the search by the Police and photocopying of the merchant receipts. The deponents submit that the photocopying took place on 10 November 2009 and not 12 November 2009. The deponents further submit that no one was present when the search and

seizure took place as the offices were locked and it was opened by the Respondent.

[43] It is common cause that the 2nd Defendant was a close corporation trading as Scratch a million and that 1st Defendant was the sole member. The Applicant conceded that the Lotteries Act, 2002 (Act 15 of 2002) was not in force at the time this application was brought to court and submitted that it was a genuine mistake. Mr Narib submitted that this was a material non-disclosure by the Applicant and that the *rule nisi* should be discharged on this ground alone.

[44] The application was brought after hours on an *ex parte* basis. Admittedly the Court leaned heavily on the Applicant, being the prosecutorial authority, to place the correct legal position in their founding papers.

[45] It is trite law that where an order is sought *ex parte*, that the utmost good faith must be observed and that all material facts must be disclosed which might influence a court in coming to its decision.

[46] Mr Narib referred this court to *THE PROSECUTOR GENERAL VS TECKLA LAMECK & OTHERS CASE NO. POCA1/2009* an unreported judgment delivered

on 22 January 2010 in support of submission hereof. In this matter Damaseb JP juxtaposed two opposing views express in *SCHLESINGER V SCHLESINGER* 1979 (4) SA 342 and *TRAKMAN NO V LIVSHITZ AND OTHERS* 1995 (1) SA 282(A) and comes to the following conclusion:

“Trakman was decided in 1995 and is authority emanating from a high source, but it is not binding on this Court. In any case, it certainly does not address the critical issue why motion proceedings are or ought to be treated differently. I prefer the dictum of Le Roux J in Schlesinger supra which was made in the context of ex parte motion proceedings. The rule about material non-disclosure seems in my view to have greater applicability in motion proceedings, and, a fortiori in ex parte motion proceedings, in view of the fact that such matters are ordinarily decided solely on the papers without the benefit of cross-examination, and what is more, without the benefit of hearing the other party, which in itself offends the fair trial provisions of Article 12 of the Namibian Constitution. That makes the Schlesinger proposition more in tune with the Court’s sense of justice.”

[47] Damaseb JP in the *TECKLA LAMECK* matter (*supra*) quotes the from the dictum of Le Roux J in *Schlesinger v Schlesinger* (*supra*) as follows:

*“(1) in ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;
(2) the non- disclosure or suppression of facts need not be willful or mala fide to incur the penalty of rescission; and
(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it”.*

[48] I am in full agreement with the above conclusion reached. The question would be whether this was the only fact that influenced the court to come to its decision and the answer to this must be, that although it was material

information, this court would not have come to a different conclusion since the applicant submitted evidence in support of charges in respect of theft and fraud and contravention of the Prevention of Organised Crime Act.

[49] Mr Narib also submitted that there was non-disclosure in respect of the search that was carried out. A short answer to this would be that this information was disclosed by D/Sgnt Muzani and my understanding in any event was that the search was conducted in terms of the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[50] The situation is however different when considering the incorrect information furnished in respect of the card used by 3rd Defendant. D/Sgnt Muzani responded to the averment by 3rd Respondent that he used his own credit card and not a foreign card:

“It is admitted that an error was made when I informed the Applicant that all account number details were for foreign based account holders. 3rd Defendant’s debit card account number is not a foreign based account. This was pointed out to me by Mr Muundjua, after the interim order had been obtained, in early January 2010 after perusing the relevant documents. However the error, which is regrettable, is not prejudicial to any party, and more particularly, the 3rd Defendant, as clearly illustrated through the affidavit of my Colleague, Constable Anghuwo, there is evidence of his clear involvement in this scam.”

[51] D/Sgnt Muzani deduced that all the credit cards were foreign cards.

This impression was created in the affidavit of the Forensic Investigator of Standard Bank but a simple calculation of the difference (N\$3 890.95) between the total of the 52 merchant receipts (N\$740 000.00) and the total amount from foreign card holders is N\$736 109.05 clearly indicate that such an inference is incorrect. Given the statement of 3rd Defendant attached to the founding affidavit that he purchased scratch cards in the sum of N\$3000.00 it would make it decidedly plausible that 3rd Defendant's card was not a foreign card.

[52] The submission that, despite the error, there is clear evidence of 3rd Defendant's involvement is without merit. The fact that 3rd Defendant used a foreign credit card together with the other facts, supported a finding by the court that there may have been common purpose with 1st Defendant to use 2nd Defendant's account to clear funds illegally obtained and that a conviction may follow.

[53] The weight attached to the other facts deposed to by Constable Anghuwo is considerably reduced. The fact that 3rd Defendant's actions on 7 November 2009 appears to be suspicious cannot, on a balance of probability, infer that he was acting in concert with the other defendants especially in view that the identity of the person with whom he was communicating, was not disclosed by the Applicant. The documentary evidence adduced supports the 3rd Defendant's

version that he transacted with his own card at the Point of Sale Terminal of 2nd Defendant as payment for scratch cards and that he won N\$250 000.00 as a prize.

[54] It was correctly argued by Mr Narib that indeed this fact was a material fact that influenced this court to grant the provisional order in respect of 3rd Defendant. It does not matter that this was a genuine mistake.

[55] On the ground of material non-disclosure the rule against 3rd Defendant should be discharged.

[56] Since this court found that that there is no evidence which may support a conviction that the 3rd Defendant acted with common purpose with 1st Defendant and 2nd Defendant to clear funds from 2nd Defendant's account, the remaining issue to determine is whether the 1st Defendant used the Point of Sale Terminal allocated to 2nd Defendant to commit fraud alternatively theft or contravened the provisions of the Prevention of Organized Crime Act.

[57] Mr Narib submitted that there was no admissible evidence that foreign card holders were defrauded. His submission was that the declarations do not

comply with Rule 63 of the Court and should be disregarded. Even if I am to disregard the declaration for want of non-compliance with the Rules the additional information provided by the Pumba Muundjua, the Forensic Investigator at Standard Bank, adequately informs the Court that at least 36 of the 52 credit cards used at the Point of Sale Terminal of 2nd Defendant, were issued by Foreign Banks. 1st Defendant stated in his answering affidavit that *“All the cards that were used at the 2nd defendant for purpose of purchase of the scratch cards were local Namibian cards issued by local banks.”* The only inference to be drawn was that if persons presented cards issued by local banks with card numbers issued by foreign banks then it follows that whoever used the cards were falsely misrepresenting that the card numbers were locally issued whereas in fact it was issued by foreign banks.

[58] The 1st Defendant denies that he knew that these were foreign cards or clones.

[59] The 1st Defendant indicated that he would always make sure of the identity of the person using the debit or credit card by requesting and looking at the identity of such a person. He further intimated that he recorded all the details of the persons that transacted with these cards in what turned out to be a disputed invoice book.

[60] Despite the contention by the applicant that the third invoice book was an afterthought or even concocted, I am satisfied that a third invoice book existed given the fact that the 1st Defendant managed to produce what appears to be some of the original invoices from this book by independent persons.

[61] This does however not mean that the Court finds that the Applicant is in possession of the said invoice book and that same was withheld. The applicant provided the Court with credible evidence indicating that the making of photocopies of the merchant receipts took place on 10 November 2009 and not on 12 November 2009. Applicant also provided the court with credible evidence that only two invoice books were seized and the 1st Defendant did not dispute this fact in his answering affidavit.

[62] The applicant in her founding affidavit stipulated that the merchant receipts revealed that transactions on the Point of Sale Terminal took place minutes of each other and that the signatures that appear on the merchant receipts appear to be similar even when different cards were used. The 1st Defendant indicated that he was unable to follow the numbering in order to respond to the latter allegation. This however was not needed as this can be observed *ex facie* the merchant receipts forming part of the founding

documents. No answer was given as to the proximity of the transactions by the 1st Defendant.

[63] I have carefully considered these allegations to ascertain whether the 1st Respondent did know or should have known that the transactions were not regular transactions. I have compiled the information in table form to understand exactly what the Applicant meant with these allegations. The table is set out separately and attached hereto to support the conclusions reached. (The table is not devised to prove the veracity or otherwise of the evidence but merely compiled to assist this Court to clarify some of the allegations made.

[64] I have extracted from this information the following: On **17 October 2009** two transactions amounting to N\$15 000.00 were made after the 3rd Defendant made the first transaction of N\$1000.00. These two transactions were made nine minutes apart. On **20 October 2009** two transactions amounting to N\$25 000.00 were made two minutes apart. On **21 October 2009** two transactions amounting to N\$20 000.00 were made four minutes apart and a further two amounting to N\$30 000.00 were made three minutes apart. On **23 October 2009** the 3rd Defendant was the only debit card transaction for the day.

[65] On **25 October 2009** eleven transactions were done in a space of one hour with eleven different cards totaling N\$129 000.00. The same person appeared to have signed the first three transactions totaling N\$25 000.00 although the card numbers are different. Two minutes after this transaction was recorded another transaction took place. At 11H36 a person presented a card and the same person appear to have returned within 11 minutes to use a different card. These two transactions totaled N\$25 000.00. Two transactions followed 1 minute apart and the signature appears to be the same signature with different card numbers.

[66] On **26 October 2009** seven transactions totaling N\$60 000.00 were done in a space of 15 minutes and it appear that at least 2 of the transactions have been signed by the same person with two different cards.

[67] On **27 October 2009** a total number of 13 transactions took place totaling N\$250 000.00. Four of those transactions took place within half an hour. The first two transactions amounting to N\$40 000.00 are 1 minute apart and the same applies to two following transactions. The remaining 9 transactions took place later the same day also within a space of half an hour. The first of these persons appears to have transacted within two minutes with two different cards. The second person appears to have transacted 1 minute after the first and within the same minute transacted with a different card.

[68] These allegations made by the Applicant in her founding affidavits was met with little or inadequate response by the 1st Defendant. The number of transactions; the amounts involved and the manner in which it was done, ought to have alerted any business owner that something was amiss. Section 9 (1) of the Prevention of Organised Crime requires of

“any person who carries on a business undertaking or who is employed by a business undertaking and who suspect or ought reasonably to have suspected that:

(a) any property which comes into his or her possession or the possession of the business undertaking, is, or forms part of, the proceeds of unlawful activities

(b) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of of the proceeds of unlawful activities; or

(c) ...

must report his or her suspicion and provide all available information concerning the grounds on which it rests, without unreasonable delay to the Bank and must take all reasonable steps to discharge that obligation.

[69] The 1st Defendant’s silence in respect of these allegations does not auger well for his case that he did not know that these were illegal transactions. At the very least the above may support a conviction of failure to comply with the

obligation as contained in section 9 (1) of the Prevention of Organised Crime Act. This provision clearly only require negligence as a form of intent and not *mens rea*.

[70] In terms of the provisions of section 24 and 25 of the Prevention of Organized Crime Act. 2004 (Act 29 of 2004) the Court may grant a restraint order when:

(a) (i) a prosecution for an offence has been initiated against the Defendant concerned

(ii)

(b) (i) the court is satisfied that a person is to be charged with an offence; and

(ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person a prosecution for an offence has been instituted against the defendant concerned;

[71] The only jurisdictional fact in dispute between the parties is the latter part i.e whether there are reasonable grounds for believing that a confiscation order may be made against the Defendants.

[72] In terms of section 32 a confiscation order may be granted if the defendant is convicted of an offence and has received a benefit which he /she has derived from that offence or; any other offence of which the defendant has been convicted of at the same trial; or of any criminal activity which the court finds to be sufficiently related to the mentioned offences.

[73] In terms of 17 (3) a person has benefitted from the commission of an offence or related criminal activity if he or she at any time, whether before or after the commencement of this Act, received or retained any proceeds of an offence or related criminal activity, whether or not that person is still in possession of those proceeds of an offence or related criminal activity subsequent to having received or retained those proceeds.

[74] In other words this court must be satisfied on the face of the facts placed before court that the defendants may be convicted and that the trial court may find that the defendants benefited from the offence or any other relevant

offences as described. In *THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS vs MULLER CONRAD RAUTENBAGH* Nugent JA stated the following:

“It is plain from the language of the act that the court is not required to satisfy itself that

the Defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court, on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that Assessment, must be apprised of at least the nature and tenor on the available evidence, and cannot rely merely upon the appellant's opinion (National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 19) it is nevertheless not called upon to decide upon the veracity of the evidence. I need ask only whether there is evidence that might reasonably support a conviction and a subsequent confiscation order (even if all the evidence is not placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied on is manifestly false or unreliable"

[75] The evidence adduced against 1st and 2nd Defendant might reasonably support a conviction and a subsequent confiscation order and having concluded thus it is the order of this court that:

1. Condonation for the late filing is granted.
2. The *Rule Nisi* is confirmed against 1st and 2nd Defendants and the Respondent.
3. The *Rule Nisi* against the 3rd Defendant and 4th Defendant is discharged.
4. The Applicant is to pay the costs of the 3rd and 4th Defendants.
5. The 1st and 2nd Defendants are to pay the costs of the Applicant.

TOMMASI J

Appearance for the parties:

For the Applicant:

Mr S. Nduna

Office of the Prosecutor-General

For Defendants and Respondent:

Adv. G. Narib

Isaacks & Benz Inc.