IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 8752/22D

In the matter between:

SHAUN GADIAH **FIRST APPLICANT**

REMANAH GADIAH **SECOND APPLICANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

In re: EX PARTE

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPLICANT**

And

In the matter between:

KEVIN RAMLALL **FIRST APPLICANT**

SARIKA RAMNARAIN **SECOND APPLICANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

In re: EX PARTE

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPLICANT**

And

EVASHNI SINGH **APPLICANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

In re: EX PARTE

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPLICANT**

Coram: Davis AJ
Heard: 12 June 2024
Delivered:23 September 2024

ORDER

The following order shall issue:

1. Condonation for the late filing of the variation application is granted.
2. The application for variation of the forfeiture order granted on 17 March 2023 in all three applications is dismissed.
3. There is no order as to costs.

JUDGMENT

Davis AJ

Introduction

[1] The Supreme Court of Appeal in *S v Prinsloo and Others* wrote:[1]

> 'In 1919 Italian immigrant Charles Ponzi of Boston, Massachusetts, United States of America (US), devised a scheme by which he enticed some 11 000 Bostonians to invest approximately USD20 million with him, promising exceptionally high rates of return within a short period of time by purchasing international reply coupons from other countries and then redeeming them in the US for postage stamps. Initially he was able to pay these exorbitant returns to previous investors by simply drawing from the capital investments received from subsequent investors. However, seeing that the scheme was not based upon any viable underlying economic enterprise, it eventually had to collapse when no more investors could be persuaded to make further investments. Hence, schemes of this nature have, down the years, become known as Ponzi schemes.'

[2] The three sets of applicants in this consolidated application[2] are either "victims or participants"[3] in an unlawful multiplication scheme that was led by Mfundo Manci (Manci) utilizing his entity Crypto Mzansi Group. He was assisted by one Prenisha Perumal (Perumal). Manci was the sole director of the Crypto Mzansi Group and he ran, as the National Director of Public Prosecutions (respondent) correctly submits, a classic Ponzi scheme operating mainly in the greater Durban area. Business was solicited in the main through social media platforms that encouraged investments by promising abnormally large returns on these investments, often in excess of 1 000 percent. Manci appears to be the alter ego of the enterprise.

[3] The applicants were lured into the investments by social media showcasing that, with Manci as a highly successful broker at the Crypto Mzansi Group, he was capable of achieving returns on their investments that were extremely attractive, actually unparalleled and in hindsight obviously unattainable. In Manci's solicitation to the public the following returns were inter alia promised:

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[1] *S v Prinsloo and Others* [2015] ZASCA 207; 2016 (2) SACR 25 (SCA) para 1.
[2] Consolidation was consented to by all the parties to the application. The applications were pending on other dates before other courts but by consent they were argued together as three separate applications.
[3] This, with respect, is the true nature of the *lis* between the parties.

(a) A short-term investment of the following amounts made by 15 March 2021, with the listed return payable on 31 April 2021[4] being:[5]

'(i) R 1000.00 gets you R3000.00

(ii) R 3000.00 gets you R6000.00

(iii) R5000.00 gets you R10 000.00

(iv) R10 000.00 gets you R20 000.00.'

This would equate to a 100 percent return on an investment in six weeks whereas the repo rate at the time was a mere 3.5 percent.

[4] A so-called long-term investment of nine months promised to transform an investment of R10 000 to R300 000, a return of approximately 3 000 percent. The amounts promised on return on investments were extremely lucrative.

[5] As is often the case in schemes of this nature the promises were not fulfilled. Manci disappeared, the various investors including the three sets of applicants in this matter lost their investments and laid charges at the SAPS. Millions of rands that were invested were lost and dockets were opened at the Phoenix Police Station. Manci fled and remains to this day a fugitive from justice.

[6] On 30 August 2022 Nkosi J granted an application by the respondent preserving various accounts of Manci and the accounts of Crypto Mzansi Group. The total amount preserved was R4 547 820.47.

[7] After compliance with the service and publishing pre-requisites of s 39 of the Prevention of Organised Crime Act (POCA),[6] the respondent sought and obtained an order in terms of s 53 of the POCA to have the preserved property forfeited to the State. On 17 March 2023 Hiralall AJ ordered the funds in three preserved bank accounts be forfeited to the State.[7] It was ordered that the funds be transferred to the Criminal Asset Recovery Account held with the South African Reserve Bank.

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[4] There are only 30 days in April.
[5] Page 104 of the indexed bundle to the section 38 preservation application dated 30 August 2022.
[6] Prevention of Organised Crime Act 121 of 1998.
[7] Some accounts that were sought to be preserved had been completely depleted by Manci at the time of preservation.

[8] The applicants then brought on notice of motion an application seeking to vary the forfeiture order of Hiralall AJ granted on 17 March 2023. They sought an order excluding the amounts that they had paid to Manci's entity from the forfeiture order.

[9] In the papers filed initially a number of disputes arose, these included whether or not the variation application was non-suited and that this application should have been instituted as a rescission application. The applications were filed out of time. Condonation was required and initially condonation was opposed by the respondent. Both of these issues have now become settled, condonation was granted unopposed and at the time that the matter was argued, the main issue to be determined was whether or not the applicants were entitled to have their payments to Manci's entity excluded from the forfeiture order.

Forfeiture: the law

[10] Schippers AJA, succinctly set out the present state of the law regarding forfeiture of property under the POCA.[8] I can do no better than borrow almost verbatim from his explanation when he outlined the process as:

The process starts when the NDPP applies for a preservation of property order in terms of s 38 of POCA. Section 38(2) provides inter alia that a High Court shall make such an order–

> 'If there are reasonable grounds to believe that the property concerned –
>
> *(a)* is an instrumentality of an offence referred to in Schedule 1; or
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> *(b)* is the proceeds of unlawful activities; . . .'
>
> 'Section 48(1) of the POCA provides that if a preservation of property order is in force the NDPP may apply for an order forfeiting to the State the property that is subject to a preservation order. Forfeiture proceedings under the POCA are proceedings *in rem*. It is the property which is proceeded against and by resort to legal fiction, held guilty and condemned as though it were conscious instead of inanimate. The focus is not on the wrongdoer but on the property used to commit an offence, or property which constitutes the proceeds of crime. Forfeiture proceedings are not conviction-based: they may be instituted even when there is no prosecution.'[9]

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[8] *Brooks and Another v National Director of Public Prosecutions* [2017] ZASCA 42; 2017 (1) SACR 701 (SCA). [10-[19].

[9] *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (2) SACR 196 (CC) (2002 (4) SA 843; 2002 (9) BCLR 970; [2002] ZACC 9) paras 16-17.

[11] Where a forfeiture order is sought, the court undertakes a two-stage enquiry. The first is whether the property in issue was an instrumentality of an offence, more specifically, whether there is a functional relation between the property and the crime. At this stage, the focus is on the role the property plays in the commission of the crime, not the state of mind of the owner. The second stage arises after finding that the property was an instrumentality of the offence, in which the court considers whether certain interests should be excluded from forfeiture. At this stage the owner's state of mind comes into play.[10]

[12] In terms of s 50(1) and (2) of the POCA, and subject to s 52 (which deals with the exclusion of interests in property), a high court is obliged to make a forfeiture order if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities. POCA defines "instrumentality of an offence" as meaning *inter alia*, "any property which is concerned in the commission or suspected commission of an offence". But that definition must be restrictively construed. Not every material object or immovable property concerned in an offence is liable to forfeiture as that would cast the net too wide. There must be a reasonably direct link between the property and its criminal use. Put differently, the property must facilitate or make possible the commission of the offence in a real and substantial way. It must be instrumental in, and not merely incidental to, the commission of the offence.[11] Providing a location is not enough: the property, in its character or in the way it is used, must itself in some way make the offence possible or easier.[12] Each case, obviously, must be decided on its own facts.[13]

[13] Before granting a forfeiture order under POCA, a court must enquire as to whether such an order would amount to an arbitrary deprivation of property in

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[10] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) (2004 (8) BCLR 844; [2004] 2 All SA 491; [2004] ZASCA 37) para 21.
[11] *Cook Properties* above paras 31-32.
[12] *National Director of Public Prosecutions v Parker* 2006 (1) SACR 284 (SCA) (2006 (3) SA 198; [2006] 1 All SA 317) para 30.
[13] *Cook Properties* above para 32.

violation of s 25(1) of the Constitution.[14] The proportionality rule was tersely stated by Nugent JA in *Van Staden*:[15]

> 'To avoid an order for forfeiture . . . being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination, the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function.'[16]

[14] The Constitutional Court likewise has held that the standard of proportionality under the POCA amounts to no more than that forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by s 12(1)(e) of the Constitution.'[17]

General submissions of the applicants

[15] Although the circumstances under which the applicants "invested" with Manci are different there are many common submissions made by all three counsel in respect of why their property, being money they invested, should have been excluded from the forfeiture order.

[16] The applicants' submissions are:

(a) The property is of lawful origin and reflects the personal savings and money of the applicants and/or money legally obtained.

(b) The applicants are not criminals, there are no charges pending against them.

(c) They allege that in their founding papers their statements which were made as complainants was used by the respondent in support of the application to preserve the property.

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[14] *Van Der Burg and Another v National Director of Public Prosecutions and Another* 2012 (2) SACR 331 (CC) ([2012] ZACC 12) para 25. Section 25(1) of the Constitution reads: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[15] *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) ([2007] 2 All SA 1; [2006] ZASCA 107).

[16] *Van Staden* para 8; *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC) (2007 (4) SA 222; 2007 (6) BCLR 575; [2007] ZACC 4) para 74 per Van Heerden AJ, para 121 per Moseneke DCJ.

[17] *Van Der Burg* above para 25. Section 12(1)*(e)* of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.

(d) The applicants are the victims of the crime committed by Manci and not akin to co-perpetrators.

(e) The POCA was not designed to benefit the respondent unjustifiably, by not returning the property to the complainants the respondent will benefit unjustifiably.

(f) The applicants had no reasonable grounds to suspect that they were investing and thereby participating in an illegal multiplication scheme run by Manci.

General submissions of the respondent

[17] It is correct that the respondent in the original preservation application utilised the affidavits made by the applicants' and ten other complainants when opening their various criminal cases at the SAPS. Sergeant Hlubi[18] of the Directorate for Priority Crime Investigation in his supporting affidavit to the original section 38 preservation application summarises the affidavits made by the 13 complainants', including the applicants, and at no stage refers to them as suspects or complainants but as investors.[19]

[18] In the founding affidavit to the application the averment is made by Advocate Samuel,[20] that the investors by depositing money in the scheme, contravened s 43(2)(a) of the Consumer Protection Act (CPA).[21] Participation in such a scheme is punishable by law in terms of s 111(1)(b) of the CPA. At the commencement of the applications the respondent gave notice to the investors that they were not being regarded as innocent or bona fide investors but akin to co-perpetrators.

[19] The respondent argues that in law, it is of no consequence that the investors have never been charged by the State for their complicity in the multiplication scheme.

[20] The respondent's argument is that multiplication or Ponzi schemes of this ilk are unlawful, and the applicants in all likelihood knew or ought to have known that

[18] Page 29-71 of Indexed and paginated Bundle 1 of the section 38 application.
[19] Page 13 of indexed and paginated bundle 1 of the section 38 application.
[20] Founding Affidavit of *Mr* Kenneth Samuel to the s 38 preservation application at page 15 of the indexed bundle.
[21] Consumer Protection Act 68 of 2008.

this was an illegal multiplication scheme, considering the return of investment promised, of the most transparent kind. A 1 000 percent return on investment was promised and that kind of return is impossible to attain lawfully. At the very least the applicants ought to have reasonably known that the scheme was prohibited by s 43(2) of the CPA.

[21] The second issue raised by the respondent is that the applicants in all three matters have failed to show, as required, that the amounts invested were in fact acquired legally.

Knowledge of the unlawfulness of the scheme

[22] The answer to this disputed issue is the key to the success or otherwise of this application, the answer to this question is pivotal to the outcome of these applications. In *Crots v Pretorius*[22] the Supreme Court of Appeal (SCA) approved the test for knowledge of unlawfulness as set out in *Frankel Pollak Vinderine Inc v Stanton NO*[23] where Wunsh J,[24] after a comprehensive account of cases dealing with constructive or imputed knowledge in a variety of different contexts, said:

> 'In all the examples I have given, where knowledge is essential, there is a common thread. What is required is actual knowledge. Where a person has a real suspicion and deliberately refrains from making inquiries to determine whether it is groundless, where he or she sees red (or perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against. In the absence of direct evidence, a court has to determine the existence of knowledge as an inference from the established facts and circumstances. If a person's professed ignorance is so unreasonable that it cannot be accepted that he or she laboured under it, evidence of the ignorance will not be believed in the absence of some acceptable explanation. But this amounts to a finding of actual, subjective knowledge made when a person willfully precludes himself or herself from acquiring it.
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> We are, here, in the field of *dolus eventualis*…'

[22] *Crots v Pretorius* [2010] ZASCA 107; 2010 (6) SA 512 (SCA) para 9.
[23] *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (W).
[24] Ibid at 438B-D.

[23] *Dolus eventualis* would be present, Wunsh J said, where a person 'deliberately ignored the risk ie shut its eyes to it or reconciled itself to and took the risk'.[25]

[24] Lewis JA noted on the oft quoted passage:[26]

> 'One must be careful to distinguish between an inference of actual knowledge from the established facts, on the one hand, and the attribution of knowledge because of the application of the "shut-eyes" doctrine on the other. It appears to me that the learned Judge, in the passage quoted, conflated these concepts. Actual knowledge may be proved in a number of different ways. It may be inferred from the facts proven: the facts and circumstances may be such that the only reasonable inference to be drawn is that the person whose conduct is in issue had actual knowledge of a matter – in this case of the existence of the cession. That is quite different from finding that there has been a "sedulous avoidance of all possible avenues to the truth".[27] In the case where a person has deliberately avoided establishing the truth, despite the flashing of warning lights, it cannot be said that he or she has actual knowledge. In such a case, a court will impute knowledge to him or her – constructive knowledge. The consequences are generally the same, however.'

[25] In the social media promotions the applicants were advised that on a short-term investment the return would be 1000 percent, the period of investment was six weeks, on an investment over a period of nine months the promised return on investment was some 3 000 percent. These are ordinarily simply unrealistic returns.

[26] Section 43(3) of the CPA provides:

> 'A multiplication scheme exists when a person offers, promises or guarantees to any consumer, investor or participant an effective annual interest rate, as calculated in the prescribed manner, that is at least 20 per cent above the REPO Rate determined by the South African Reserve Bank as at the date of investment or commencement of participation, irrespective of whether the consumer, investor or participant becomes a member of the lending party.'

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[25] Ibid at 438E-F.
[26] *Stannic v Samib Underwriting Managers (Pty) Ltd* [2003] ZASCA 61; [2003] 3 All SA 257 (SCA) para 17.
[27] *Halsbury* 2 ed vol 23 (1936) para 59, referred to by Greenberg JA in *R v Myers* 1948 (1) SA 375 (A).

It is a criminal offence to participate in a multiplication scheme, punishable to a fine or imprisonment not exceeding 12 months.[28]

The applicants' response

[27] The commonality in the ripostes of the three sets of applicants is that they acted bona-fide, and subjectively believed that the investment was above board and lawful. The other commonality in their papers is that they, unfortunately at no stage engage with the interest rates on offer. It is necessary to briefly detail each set of applicants' responses to the replying affidavits of the respondent.

The Three Applications

Shaun and Remanah Gadiah (first application)

[28] The applicants are husband and wife, with the key aspects of their belief that the scheme was legitimate is as follows:

(a) As a result of social media they became interested and met Manci who advised them to invest a small amount and observe how the money grew.

(b) They invested R1 100 in August 2020 and in December 2020 they received R12 000.

(c) Now convinced, and after meeting with Manci in early 2021, they invested R130 000 into Manci's scheme. The money was paid into three different bank accounts, on 14 March 2021 the applicants paid R10 000 into Manci's Capitec account. This application only pertains to that transaction.[29]

(d) They submit that when they invested their money with Manci they honestly believed it was a legitimate investment scheme.

[29] The State's reply is to point out that the applicants participated in an illegal multiplication scheme and point out that the successful investment of R1 100 realised a return on investment of 1 000 percent. The applicants are, in the respondent's view akin to co-perpetrators or participants in a multiplication scheme.

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[28] Section 43(2) of the CPA read with the penalty provision contained in s 111(1)*(b)* thereof.

[29] By the time the forfeiture order was made the funds in the other accounts were depleted, variation orders in all cases are only sought in respect of the Nedbank and Capitec bank accounts.

There is no replying affidavit and in the heads of argument other than the stated belief that that believed Manci the applicants do not engage with the interest rate realised or the interest rates promised. They are, in fact, astronomical returns

Kevin Ramlall and Sarika Ramnarain (the second application)

[30] The facts are not dissimilar; to the first application, the applicants are also husband and wife. Kevin Ramlall in his founding affidavit stated:

(a) They were introduced to Manci's business by their friend Perumal.

(b) In two transactions on 15 March 2021 they invested R90 000 into a Nedbank account owned by Manci.

(c) In a replying affidavit to the opposing affidavit of the respondent Sarika Ramnarain confirmed that prior to this date, she had on 15 January 2021 invested R5 000 with Manci, from such investment, six weeks later she received a return of R15 000.

(d) It was shortly after she received this pay-out that she and her husband invested two amounts totalling the R90 000 on 15 March 2021.

(e) They state that when they invested their money with Manci they honestly believed it was a legitimate investment scheme.

[31] The respondent maintains that the applicants knowingly participated in a multiplication scheme, which is a criminal offence and that they therefore have no legal interest in the monies they deposited. Their non-disclosure of the initial investment is evidence of that.

Evashni Singh (the third application)

[32] The applicant's contention is that the money she invested was derived from a personal injury pay-out in respect of her child. Further:[30]

(a) She met and discussed investing with Perumal who was an assistant to Manci.

(b) Despite the returns available she believed it was legitimate, she was assured of this by both Perumal and Manci.

[30] Exhibit "ES", payment of R1 829 596.40 made on 17 December 2020.

(c) She did an initial investment of R20 000 on 4 February 2021 receiving R30 000 as a return six weeks later.
(d) Convinced of the legitimacy she invested R100 000 with Manci on 8 March 2021 by paying this into Manci's Capitec account.
(e) One week later on 15 March 2021 she paid another R40 000 into a Standard Bank account belonging to Manci (this falls outside the scope of this application as these funds are depleted).
(f) The promised pay-outs of R200 000 by the end of April and R1,2 million by the end of December 2021 never materialised.
(g) She then approached the SAPS.

[33] The respondent's response is identical to that furnished to the other applicants that the applicant was a participant in a multiplication scheme, even if not charged that has no effect on the forfeiture, she knowingly participated in a criminal multiplication scheme and that allowed for the lawful forfeiture to the State of the property (money) that she invested.

Analysis

[34] A key thrust of the argument of the applicants is that the statements they made to the police as victims or complainants are the same affidavits used as the underpinning factual matrix in the preservation and forfeiture orders granted to the respondent. It is unfair that they as victims should be prejudiced in this way. At first blush, in equity it seems to be an attractive argument.

[35] I pause to remind that in respect of forfeiture the POCA provides that where a forfeiture order is sought, the court must undertake a two-stage enquiry. The first is whether the property in issue was an instrumentality of an offence, more specifically, whether there is a functional relation between the property and the crime. At this stage, the focus is on the role the property plays in the commission of the crime, not the state of mind of the owner. In casu the property is the monetary amounts paid over to Manci.

[36] The second stage arises after finding that the property was an instrumentality of the offence, in which the court considers whether certain interests should be excluded from forfeiture. At this stage the owner's state of mind comes into play.[31]

[37] There is no issue with the first part, Manci ran an illegal Ponzi scheme, it is not in issue that it was a multiplication scheme with promised returns of investment well above the 20 percent interest threshold thereby constituting an offence. It is further not in dispute that participation in those schemes is illegal and subject to criminal sanction. It is an offence merely to participate and it is not in issue that the applicants participated. The property or money the applicants invested was self evidently an instrumentality of the offence by Manci.

[38] The key area where all applicants and respondent's join issue is the knowledge of unlawfulness, that is did the applicants know that the scheme was unlawful. They aver in their affidavits that they did not, they were victims but unfortunately none of them deal with the interest rates on offer which are in the realm of 1 000 percent. The failure to do this and the "test participation" by the applicants causes the respondent to argue that the applicants knew or at least ought to have known that this was an illegal multiplication scheme or Ponzi scheme. A proper reading of the founding affidavits filed on record unequivocally place the knowledge of the offence as a fact in dispute.

[39] A consideration of the probabilities might support one side but motion proceedings are ill equipped to deal with probabilities. It is generally accepted that a dispute concerning the knowledge of unlawfulness by a party to litigation constitutes a dispute of fact. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[32] it was stated that:[33]

> '…it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva

[31] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 21.
[32] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).
[33] Ibid at 1162.

voce evidence, and the tendency of resorting to affidavits is deprecated inter alia by TINDALL, J., in *Saperstein v Venter's Assignee* (1929 TPD 14, P.H. A. 71). But where no real dispute of fact exists, there is no reason for the incurrence of the delay and expense involved in a trial action and motion proceedings are generally recognised as permissible.'

[40] Harms DP in *National Director of Public Prosecutions v Zuma* said:[34]

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers…' (Footnote omitted.)

[41] This was amplified by the SCA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[35] when Heher JA set out the approach in determining whether there exists a real, genuine and bona fide dispute of fact. The court said the following:

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers…

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way

[34] *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) para 26.
[35] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

> open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision…’

Conclusion

[42] There is a clear dispute of fact as to the knowledge that the applicants had in respect of the unlawful nature of the scheme. Such dispute cannot be resolved on the papers, if resolved on the undisputed or common cause facts as contained in the founding affidavit of the applicants and the opposing affidavit filed by Mr Lal for the respondent then the application must fail as a case for variation has not been made out on the common cause facts.

[43] Uniform rule 6(5)*(g)* provides:

> 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[44] Neither party sought to refer the matter for oral evidence at any stage. In the heads of argument and practice directives filed in this application all parties refer to this factual dispute. The applicants were aware that the opposition to their variation applications were grounded on the basis that the applicants were akin to co-perpetrators. This was, in fact, set out in the founding affidavit of the respondent in

the preservation and forfeiture applications. Accordingly, the factual dispute was perfectly apparent from the original exchange of affidavits between the parties.

[45] The applicants elected to proceed by way of motion proceedings when it ought to have been clear to them and their legal representatives that a dispute of fact was bound to emerge, which a court would not be able to decide in their favour merely on the papers. A reading of the founding and opposing affidavits in the three matters set out a dispute between the litigants in regard to the knowledge of unlawfulness on the part of all the applicants. This dispute could not be resolved on the papers. The applicants chose to proceed on motion proceedings and must, in the exercise of my discretion, endure the consequences of that decision.

[46] It was not necessary that the applicants be criminally charged. Forfeiture is not founded on the basis of a conviction or even of a charge being preferred in a criminal trial, it suffices that the funds were an instrumentality of the crime. There are no considerations in this matter that warrant a variation of the order. On the papers the order of forfeiture in the circumstances was neither disproportionate nor arbitrary. A clear crime has been committed. The applicants got involved in a scheme with quite astronomical rates of interest promised. The common cause facts do not suggest that they were unaware that the scheme was illegal.

[47] The respondent, has not sought a costs order and I will therefore decline to make one.

Order

[48] I make the following order:

1. Condonation for the late filing of the variation application is granted.
2. The application for variation of the forfeiture order granted on 17 March 2023 in all three applications is dismissed.
3. There is no order as to costs.

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DAVIS AJ

APPEARANCES

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Date of hearing:	12 June 2024
Date of Judgment:	23 September 2024