CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/06
[2007] ZACC 16

GARY WALTER VAN DER MERWE	First applicant
ZONNEKUS MANSION (PTY) LTD	Second applicant
versus	
INSPECTOR TAYLOR	First respondent
THE MINISTER OF SAFETY AND SECURITY	Second respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS	Third respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Fourth respondent

Heard on : 21 November 2006

Decided on : 14 September 2007

JUDGMENT

MOKGORO J:

Introduction

[1] This case concerns the right to claim the return of property, in the light of the Constitution, following its seizure by the State. Specifically, the case is about the seizure of a large sum of foreign currency by State officials and a claim for its return.

It is an application for leave to appeal against the decision of the full court in the Cape High Court.[1]

The parties

[2] The application is brought by Mr Gary Walter van der Merwe (the first applicant), together with Zonnekus Mansion (Pty) Ltd (the second applicant), a company owned by a family trust of which the first applicant is a trustee and sole director. Inspector Taylor,[2] an officer in the South African Police Service (the SAPS) is the first respondent; the Minister of Safety and Security (the Minister) is the second respondent; the Director of Public Prosecutions (the DPP) is the third respondent; and the Commissioner for the South African Revenue Service (the Commissioner or SARS) is the fourth respondent.

Background

[3] On 13 July 2004 Mr van der Merwe was set to depart from Cape Town International Airport to travel to Las Palmas via London intending as he said, to join his family and friends for an extended yachting vacation in Europe. After he had passed through the security checkpoint at the airport and before passing through passport control, a customs official requested him to complete a customs declaration form.[3] Once he had done so, his hand luggage was searched with his consent and an

[1] *Van der Merwe and Another v Nel and Others* [2006] 4 All SA 96 (C); 2006 (2) SACR 487 (C).

[2] Inspector Nel, who was the initial investigating officer, was cited as the first respondent in the court of first instance. Inspector Taylor is now investigating the case.

[3] Section 15(1) of the Customs and Excise Act 91 of 1964 reads as follows:

amount of €130 000 and US$21 249 which, according to the exchange rate at the time,[4] together amounted to approximately R1,2 million, was found in his possession.

[4] Not certain which law Mr van der Merwe had contravened, the customs officials let him proceed to the aircraft. They let him board the plane. Before his departure, however, coming to believe that Regulation 3(1)(a)[5] was being contravened, the SAPS removed him from the aircraft and arrested him. The foreign currency was confiscated. They, however, called the SAPS advising them of Mr van der Merwe's imminent departure with a substantial amount of foreign currency. The

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"Any person entering or leaving the Republic shall, in such a manner as the Commissioner may determine, unreservedly declare—

(a) at the time of such entering, all goods (including goods of another person) upon his person or in his possession which he brought with him into the Republic which—

(i) were purchased or otherwise acquired abroad or on any ship, vehicle or in any shop selling goods on which duty has not been paid;

(ii) were remodelled, processed or repaired abroad;

(iii) are prohibited, restricted or controlled under any law; or

(iv) were required to be declared before leaving the Republic as contemplated in paragraph (b).

(b) before leaving, all goods which he proposes taking with him beyond the borders of the Republic,

and shall furnish an officer with full particulars thereof, answer fully and truthfully all questions put to him by such officer and, if required by such officer to do so, produce and open such goods for inspection by the said officer, and shall pay the duty assessed by such officer, if any, to the Controller."

[4] A calculation of the Euros reflected in applicants' bank receipts gives a total amount of €130 285, however during oral submissions before Court and on papers filed on record, both applicants and respondents refer to the amount of €130 000. The exchange rate of one Euro to one Rand as at 9 July 2004 (the day he bought the foreign currency) was one € per R7,5696401850 while that between US Dollars and the Rand was one US$ per R6,1091921223.

[5] Regulation 3(1) in relevant part, reads:

"Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose—

(a) take or send out of the Republic any bank-notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere . . ."

customs officials handed the matter over to the SAPS. Mr van der Merwe's explanation, on inquiry, was that the foreign currency was the total allowance permissible for a group of people,[6] consisting of eight adults and four children who, except for himself, had already left for Las Palmas two days earlier. According to him, he was carrying the foreign currency on their behalf and his personal travel allowance was included. The €130 000 he was carrying, he explained, included €20 865 issued to him as his own allowance which he had purchased on his credit card account held at Nedbank. For each of his two minor daughters, he had bought an amount of €7 800 per child. The money had been sourced from: funds acquired from the sale of immovable property owned by the second applicant,[7] gambling winnings, redemption at a casino, first applicant's children's savings account, and the available amount on his credit card. The US Dollars, he said, belonged to a friend, Mr Allison.

[5] The matter was thereafter referred to the commercial branch of the SAPS who detained Mr van der Merwe overnight at the Bellville Police Station, releasing him on

[6] Regulation 2 of the Exchange Control Regulations made in terms of section 9 of the Currency and Exchanges Act 9 of 1933, under GN R1111 of December 1961, as amended from time to time (the Exchange Control Regulations), provides that no person, other than an authorised dealer, shall buy or borrow or sell any foreign currency or gold except with Treasury permission and in accordance with Treasury imposed conditions. According to the Exchange Control Manual issued by the South African Reserve Bank, the legal framework is, therefore, one of total prohibition on dealing in foreign exchange except with the permission of, and on the conditions imposed by, the Treasury. The economic policy underlying exchange control is intended to achieve several goals, including the prevention of the loss of foreign currency reserves. As regards the travel allowances, authorised dealers are required, prior to making foreign exchange available to travellers, to record the mode of transport, the reference number issued, the date of departure as well as the destination. Prospective travellers are required to provide a written undertaking to the relevant dealer that the travel will commence within 60 days from the date of the request to be accorded foreign exchange; that foreign exchange will not be purchased from the dealers in excess of the applicable limits (R160 000 and R50 000 for adults and children under 12 years respectively); and that the foreign currency will be resold to an authorised dealer within 30 days in the event of the travel arrangement being cancelled. See South African Reserve Bank *Exchange Control Manual* http://www.sarb.co.za, accessed on 31 March 2007; Joubert et al (eds) *The Law of South Africa* (reissue) vol 2 at 413-415.

[7] The second applicant is a company owned by a family trust of which the first applicant is a trustee and sole director.

bail the following day.[8] The currency was recorded in the SAPS register, placed in a bag, and tagged.

[6] On the day of Mr van der Merwe's release, SARS issued Inspector Taylor with a notice under section 99[9] of the Income Tax Act[10] (the section 99 notice). Section 99 permits the Commissioner to appoint someone as agent for a person with tax obligations to SARS to ensure those obligations are met. The section 99 notice appointed Inspector Taylor, the investigating officer in the case, as agent of Mr van der Merwe and a company referred to only as Wellness International Network (Pty) Ltd (Wellness). Neither Mr van der Merwe nor Wellness had any outstanding tax obligations established on the record. On 19 July 2004 Inspector Taylor handed over the currency to SARS in terms of the section 99 notice.

[7] During oral argument before this Court we were told that SARS had since handed over the currency to the South African Reserve Bank (the SARB)[11] for it to hold, pending Mr van der Merwe's criminal trial. The transfer apparently followed the High Court ruling that SARS had no legal claim to the currency. However, this

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[8] 14 July 2004.

[9] Section 99 provides that:

> "The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be."

[10] Act 58 of 1962.

[11] SARB initially applied to this Court for admission as intervening party and to be joined as fifth respondent. Later, however, it withdrew the application on realising that neither the applicants nor the respondents requested this Court to interpret or pronounce upon the constitutionality of Regulations 3(3) and 3(5) of the Exchange Control Regulations.

transfer occurred without Mr van der Merwe's knowledge as no notice was given to him. It was never formally mentioned in the affidavits and Mr van der Merwe never had an opportunity to respond to that transfer. Mr Snyman of SARS who had received the currency from Inspector Taylor at the police station indemnified the SAPS with regard to the holding of the foreign currency and issued Inspector Taylor with a receipt. The indemnity purported to be issued in respect of property referred to in section 31(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA),[12] giving reasonable indication that the CPA was being invoked as the basis for the seizure of the foreign currency.

[8] Shortly after his release, the applicants instituted action on an urgent basis in the High Court for the return of the foreign currency. The application was dismissed with costs. An appeal to the full court was similarly dismissed.

Proceedings in the Cape High Court

[9] The applicants originally sought to spoliate the seized currency as well as an order granting Mr van der Merwe permission to leave South Africa with the foreign currency.[13] They argued that the amount seized was within the total permissible allowance for foreign travel for members of the group. At the hearing, however, they claimed the return of the currency under the *rei vindicatio* on the basis that Mr van der

[12] Section 31(1)(a) of the CPA reads:

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

[13] *Van der Merwe and Another v Nel and Others* case no 5902/04, unreported 12 January 2005 at para 6.

Merwe was the owner. Unable to prove ownership of the US Dollars, Mr van der Merwe sought only the return of the €130 000 for which he had tendered documentary proof.[14] He conceded that he was carrying the US Dollars on behalf of Mr Allison.[15]

[10] The High Court was confronted with the question whether SARS acted lawfully by appointing Inspector Taylor as agent under section 99 of the Income Tax Act without proving or even alleging the existence of tax obligations on the part of Mr van der Merwe or any of his companies.

[11] The court dismissed the application, although it held that SARS had not established any legal entitlement to hold the currency under section 99, it concluded that the currency had nevertheless been legitimately forfeited to the National Revenue Fund under Regulation 3(5)[16] and that accordingly the respondents had shown a statutory right to hold the money.[17]

Before the full court of the High Court

[12] On appeal to the full court, Mr van der Merwe argued that he was the owner of the €130 000, that it remained his property and for those reasons he was entitled to

[14] Id.

[15] Id.

[16] Regulation 3(5) of the Exchange Control Regulations provides:

> "All bank-notes, gold, securities and foreign currency seized under sub-regulation (3) or (4) shall be forfeited for the benefit of the Consolidated Revenue Fund: Provided that Treasury may, in its discretion, direct that any bank-notes, gold, securities or foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized."

[17] Above n 13 at paras 38-40.

its return.[18] The court held that Mr van der Merwe had failed to establish ownership and could therefore not succeed in his vindicatory action. The court declined to decide on what legal basis the State held the currency.

In this Court

[13] Under the impression that the currency was still in the possession of SARS, the applicants contend that the only real issue for determination by this Court was whether SARS was legally entitled to hold the foreign currency. In their submission, respondents had relied solely on section 99 of the Income Tax Act as the basis for the holding of the currency. The applicants contended that should the Court not accept that section 99 formed a legal basis for the respondents to hold the currency, the appeal must succeed. The applicants argue that the respondents were not entitled to hold the currency under section 99. The applicants submit to respondents' oral argument before Court that the currency was seized under section 20 of the CPA,[19] making Regulation 3(5) inapplicable. In the alternative they submit, if the Court finds that section 20 is not applicable and the currency had been seized under Regulation 3(5), that regulation is unconstitutional because it permits the automatic forfeiture of

[18] Above n 1 at para 13.

[19] Section 20 provides:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—
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> (a) which is concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
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> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

property, thereby violating Mr van der Merwe's property rights under section 25(1) of the Constitution. The applicants further submit that Regulation 3(5) also violates section 34 of the Constitution.

[14] The applicants attack Regulation 3(5) on the basis that it affords Treasury the discretion to forfeit without any guidelines. This, they submit, is unconstitutional. They also contend that even if the money was seized under section 20 of the CPA it is no longer held under that provision. Contending that once SARS returned the money to the SAPS, the defence advanced by the respondents in the High Court, namely, that the foreign currency had been paid over to SARS pursuant to the section 99 notice, can no longer hold. In those circumstances, the money should have been returned to them as the lawful owners.

[15] The respondents' conduct as organs of State, the applicants further submit, conflicts with their duties under the Constitution, in particular sections 1 and 195. They have acted contrary to the basic values governing public administration contained in section 195 of the Constitution. These provisions require, among others things, a high standard of professional and ethical conduct and accountability with

which the respondents have failed to comply.[20] The State, they submit, did not lead by example.[21]

[16] The respondents argued that the criminal trial has not yet been concluded and a possibility still exists that an acquittal might lead to a refund of the currency. For this reason, they contend, the SAPS could not return the currency at this stage. In order to succeed in a claim for the return of the currency under the *rei vindicatio*, Mr van der Merwe, they further contend, *must* establish that he is the owner of the foreign currency. If he cannot, no further enquiry is necessary. The full court dismissed the applicants' claim on the basis that they had failed to prove ownership of the currency. That, the respondents assert, is independently decisive of the appeal. Besides, they further contend, the question of applicants' ownership is not a constitutional matter nor is it an issue connected with a constitutional matter. Additionally, there exists no reasonable prospect that this Court would come to a conclusion different from that reached by the full court. Consequently, they argue that the application should be dismissed.

Legal basis for seizure and holding of the foreign currency

[20] The applicants rely on the following cases: *President of the Republic of South Africa v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 133-134; *Reuters Group PLC v Viljoen NO and Others* 2001 (2) SACR 519 (C); 2001 (12) BCLR 1265 (C) at paras 2-4 and 33-35; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 74; *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 (4) SA 477 (T) at 506B; [2003] 2 All SA 710 (T) at 736b.

[21] In this regard, they rely on *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) at para 68; 2001 (2) SACR 66 (CC) at para 69.

[17] Before assessing the merits of the parties' arguments, it is necessary to summarise the respondents' vacillating position in respect of the legal basis for the seizure and continued holding of the foreign currency.

[18] From the moment of Mr van der Merwe's arrest to the appearance of the parties before this Court there was no certainty as to the legal basis for the seizure and holding of the foreign currency. It is notable that before the High Court, reliance was placed only on section 99 of the Income Tax Act by first, second and third respondents as the legal basis for holding the currency. However, in oral argument before this Court, respondents shifted their basis from section 99 and Regulation 3(5) to section 20 of the CPA. This constant vacillation on the part of the respondents created much doubt and caused inconvenience to the applicants. It was also not helpful to this Court.

Application for leave to appeal to this Court

[19] Leave will be granted only if the applicants raise a constitutional matter or an issue connected with a decision on a constitutional matter and when it is in the interests of justice to grant leave.[22]

[22] Section 167(3)(b) of the Constitution provides:

> "The Constitutional Court may decide only constitutional matters, and issues connected with decisions on constitutional matters".

See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 26. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-12; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30; *Radio Pretoria v Chairperson Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19. See also section 167(6) of the Constitution.

[20] Once the State seizes private property as it did in this case, and the legal basis for the seizure and holding is in dispute, the question of arbitrary deprivation of property under section 25(1) of the Constitution is clearly implicated, making the matter intrinsically a constitutional one. In that context, the High Court decisions regarding the legal basis on which the respondents seized and are holding the foreign currency, as well as the question whether applicants have proven ownership of the currency, are issues connected with a decision on a constitutional matter. It is not in all cases that this Court will consider a constitutional matter once it is raised.[23] The interests of justice in the circumstances of a case will determine whether a constitutional matter raised in an application will be heard. In the circumstances of this case, in particular against the background of the conflicting decisions of the High Court[24] and the vacillation of the respondents regarding the legal basis for the seizure and holding of the currency, it is in the interests of justice that the matter be heard. The application for leave to appeal is granted.

Whether Mr van der Merwe is owner of the foreign currency

[21] The total amount of foreign currency seized by the respondents was in two denominations – €130 000 and US$21 249. Applicants claim the return of the

[23] *S v Basson* 2005 (1) SA 171 (CC) at para 71; *Municipality of Plettenberg Bay v Van Dyk and Co Inc* 2004 (2) BCLR 113 (CC) at paras 1-6; *Swartbooi and Others v Brink and Another* 2006 (1) SA 203 (CC); 2003 (5) BCLR 497 (CC) at para 6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21.

[24] The High Court followed the line adopted in *Action Engineering and Fencing (Pty) Ltd v Moyses NO and Others* 2004 (5) SA 399 (T); [2003] 3 All SA 263 (T) at paras 4-15, that the foreign currency that had been seized was forfeited to the State immediately. The full court at para 15, disagreeing with the reasoning of the High Court in *Action Engineering,* held that although Regulation 3(8) provided, as does Regulation 3(5), that foreign currency which has been seized "shall" be forfeited to the NRF, the forfeiture is subject to the Treasury's discretion to return or refund the currency "so seized".

€130 000 on the basis that Mr van der Merwe is the owner. From the outset, Mr van der Merwe had stated that the US$21 249 found in his possession belonged not to him but to Mr Allison, on whose behalf he was carrying it. His action, based on the *rei vindicatio,* is therefore confined to the return of the €130 000. He does not claim the return of the US$21 249. That is common cause between the parties.

[22] An action based on the *rei vindicatio* is available to an owner[25] who has been deprived of his or her property without consent and who wishes to recover it from the one who retains possession.[26] In order to succeed with any vindicatory action, generally in addition to ownership, the applicant also has to prove that the property was in possession of the respondent at the beginning of the proceedings, that the property in question is still in existence and is clearly identifiable.[27]

[23] In this Court, the key questions are whether Mr van der Merwe is the owner of the foreign currency he claims must be returned to him under the *rei vindicatio*, and if so, whether the State is entitled to hold it pending the trial. The full court found that he had failed to prove ownership of the €130 000 and was therefore, not entitled to its return. It is against that finding that the applicants appeal.

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[25] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 81-82.

[26] See *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 995I-996D; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 297E; *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (C) at 639G and 641B.

[27] Id.

[24] Mr van der Merwe does not claim that the seizure of his foreign currency constituted arbitrary deprivation of property in terms of section 25(1) of the Constitution. On the contrary, he concedes that the seizure, pursuant to section 20 of the CPA, was lawful. He comes to this Court claiming the return under the *rei vindicatio* of the €130 000 seized in terms of section 20 of the CPA on the basis that he is the owner and that the State has no authority to hold the currency. Further, he does not question the constitutionality of section 20.

[25] It is necessary to approach these two key questions in the light of section 25(1) of the Constitution, which also protects the right of ownership. Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Under this provision no one, including those accused of contraventions of the law as in this case, may be deprived of property except in terms of a law of general application. That law, however, may not permit the deprivation of property in an arbitrary manner. Section 25(1) generally protects all rights held in relation to property, including ownership.[28]

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[28] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at paras 57-58, Ackermann J observed that—

> "[t]he term 'deprive' or 'deprivation' is . . . somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact 'the term "deprivation" is distinguished very clearly from the narrower term "expropriation" in constitutional jurisprudence worldwide.' In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned . . . . Viewed from

[26] Ownership potentially confers upon the owner the most complete or comprehensive right in or control over a thing.[29] In *Gien v Gien*,[30] ownership was defined as—

> ". . . the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law . . . ."[31]

The most comprehensive control over the property does not imply unfettered freedom to do with the thing as one pleases. However comprehensive, and although protected against arbitrary deprivation under section 25(1), ownership like any other right, is not absolute.

[27] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*) this Court held:

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this perspective section 25(1) deals with all 'property' and all deprivations (including expropriations)." (Footnote omitted.)

[29] See Badenhorst et al *Silberberg and Schoeman's: The Law of Property* 4 ed (LexisNexis Butterworths, Durban 2003) 93.

[30] 1979 (2) SA 1113 (T).

[31] Id at 1120C–D per Spoelstra AJ, translation by Neethling et al *Law of Delict* 4 ed (LexisNexis Butterworths, Durban 2001) 114. The original Afrikaans version reads:

> "Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die die perke wat die reg daarop plaas . . . . "

> "In its context 'arbitrary', as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is 'reasonableness' and 'justifiability', whilst the standard set in section 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections."[32]

[28] The deprivation, the Court held further, will be arbitrary within the meaning of section 25 where the law does not provide sufficient reason for the deprivation in question or if it is procedurally unfair.[33] This dictum was followed and the principle further established in *Mkontwana*.[34]

[29] Before the full court, applicants sought the return of the foreign currency on the basis of the *rei vindicatio*. Waglay J however, found that Mr van der Merwe had failed to show ownership. He held:

> "In any event, before the appellant can succeed with the *rei vindicatio* he needs to satisfy the court that he is in fact the owner of the foreign currency seized . . . [t]his founding affidavit does not support first appellant's contention that he is in fact the owner of the 130 000 Euros seized. The first appellant, under oath, states that the foreign currency belongs to Zonnekus and himself . . . . He then states that he was merely carrying the foreign currency for others in the group . . . and adds that he was

[32] Above n 28 at para 65.

[33] Id at para 100.

[34] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* (*KwaZulu-Natal Law Society and Msunduzi Municipality as* Amici Curiae) 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at paras 34-35.

> doing so for reasons of safety . . . . Counsel for the appellants was at pains to explain that although the appellants claim that the South African monies utilised to purchase the foreign currency did not only belong to the first appellant, the fact that those monies were deposited into the first appellant's banking account made him the owner of the South African monies. This may be true but once the first appellant obtained the foreign currency and did not regard this as his own but recognised that it was owned by others as reflected in his affidavit, it cannot be said that he is the owner of it, notwithstanding that he may have purchased the foreign currency from his own funds."[35]

[30] The €130 000 found in Mr van der Merwe's possession at the airport included €20 865 which he had bought for himself. As the record shows, the currency had been issued to him personally on 7 July 2004, as his own travel allowance. This fact was not disputed. On the contrary, it was indirectly acknowledged by Mr Wright[36] who made it the basis of a denial that Mr van der Merwe was entitled to purchase any further foreign currency as he had exhausted his permissible annual travel allowance for the calendar year. Mr van der Merwe submitted that the source of the funds included the proceeds of the sale of property owned by Zonnekus Mansions, which in turn is wholly owned by the family trust named Eagles Trust of which he is a trustee and his children sole beneficiaries, entitling him to claim under the *rei vindicatio*.[37] This too was not in dispute. Applicants asserted in the alternative that at the very least, Mr van der Merwe was the owner of the €20 865 issued to him personally.

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[35] Above n 1 at paras 30-32.

[36] Mr Wright is/was the Investigator stationed with the Directorate Special Operations, Cape Town.

[37] Mr van der Merwe being the sole director of the second applicant, Zonnekus Mansion, has standing to claim the return of the foreign currency, on the basis of the *rei vindicatio*. See *Goolam v Krishnadu* 1957 (3) SA 215 (O). See also, *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA); [2002] 3 All SA 1 (SCA) at paras 3, 4, 7 and 10 respectively where it held Rule 54 to be dealing with procedure for purposes of achieving a fair hearing of a matter and therefore providing for a party to an action to sue or be sued in a name other than the party's own name and therefore if such a party is a partner of a firm, then that party can be sued in the name of the firm instead of creating the partnership or firm into a separate juristic person. Consequently, the owner of a sole proprietorship can sue and be sued on behalf of the proprietorship.

None of the respondents disputed this assertion. Under these circumstances it could not be gainsaid that Mr van der Merwe is indeed the owner of the €20 865.[38] The full court overlooked this important distinction, which formed the basis of the applicants' alternative argument in that court. It therefore erred in its finding that Mr van der Merwe did not prove ownership of the foreign currency.

[31] Based on the evidence on record, the applicants have clearly shown that Mr van der Merwe is the owner of at least €20 865. I therefore make a finding to that effect. The finding of the full court, that he did not prove ownership of the foreign currency, is therefore incorrect and must be overturned.

[32] The question is whether Mr van der Merwe also owned the balance of the Euros, amounting to €109 135 which he purchased as travel allowance, in the names of eight members of the travelling group which included himself, his wife, his children and his mother.[39]

[33] Before the full court, applicants argued that all the funds utilised for the purchase of the foreign currency, including the proceeds from the sale of properties which belonged to second applicant and which were deposited into his credit card account made him owner thereof. Assuming that that may be true, Waglay J however

[38] Following the principle laid down in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635; *Rail Commuters Action Group and Others* above n 20 at paras 53-56.

[39] According to the record, he bought €20 865 for himself and in the names of the following other persons: Monique van der Merwe (€20 850), Fern van der Merwe (€20 860), Cristin van der Merwe (€7800), Candice van der Merwe (€7800), Simone Raubenheimer (€20 850), Heidi Marie Rohr (€20 860) and Erenche Leonard (€10 400).

concluded, that once Mr van der Merwe had purchased the foreign currency and did not regard it as his own but recognised that it was owned by others as reflected in his affidavit, it cannot be said that he is the owner, notwithstanding that he may have purchased it from his own funds.[40]

[34] In this Court, the applicants fiercely contended that the money with which the foreign currency had been purchased, which included proceeds from the sale of second applicant's property, belonged to Mr van der Merwe. The money was paid into his Nedbank credit card account they argued,[41] and the account was debited with the amount of €130 000, obtained by using the permissible travel allowance of foreign currency[42] for those members of his entourage, including himself.

[35] According to his submissions, Mr van der Merwe had arranged to obtain that large amount of Euros because cash, as opposed to traveller's cheques or a bank draft, was preferred. The idea, he further contended, was to facilitate payment to the crew in cash, given the absence of efficient banking facilities during the voyage. Respondents did not refute these contentions.

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[40] See above para [29].

[41] This method of acquiring ownership, called *commixtio*, occurs when there is a mixing of things belonging to different owners to form a single unit. The things mixed and forming the single unit must however be indistinguishable for purposes of separation. Typical is the mixing of wine or the same grain. The rights of the different owners to share in the ownership of the mixture do not result in a wilful act by the different owners, but arises from the circumstances in which the thing forms part of the single unit. An exception, however, is money, which is said not to be ordinary property not subject to the reallocation of rights in terms of the general principles of *commixtio*. In the case of money, ownership of the mixture of unidentifiable notes or coins passes to the acquirer. Money in foreign currency (not legal tender) would however be subjected to the ordinary legal rules of property. See Miller *The Acquisition and Protection of Ownership* (Juta, Cape Town 1986) 48.

[42] See above n 6 for the permissible annual travel allowance.

[36] The method used to obtain the maximum amount of foreign currency from the bank enabled him to service the financial needs of the voyage, for which he was solely responsible, and to provide sufficient finance to sustain the European holiday, he submitted. In this context therefore, the purchase of the foreign currency in the names of members of his group, with his own money, was only nominal. Having obtained the foreign currency in their names, he was carrying it as their travel allowance.

[37] Mr van der Merwe bought the Euros from Nedbank which is authorised to dispense foreign currency. In that regard, the purchase of the Euros was authorised and not illegal. However, the method he used to obtain the maximum amount of Euros in cash, purchasing most of it by utilising the foreign currency travel allowance of members of his group and exceeding his own foreign currency travelling allowance, may have been unlawful; a trial in that regard is still pending. Even if his actions were unlawful, that by itself, outside of the forfeiture process, should not divest him of ownership of his foreign currency.

[38] Under the *rei vindicatio*, once a claimant establishes ownership in the thing in issue, where the respondent is in possession at the commencement of the action, the thing shall be immediately returnable, unless the respondent can show cause why the property shall not revert to the owner.[43] Mr van der Merwe based his action for the return of the foreign currency on the *rei vindicatio*. It was the contention of the respondents that once he failed to establish ownership, as the full court found, it was

[43] See above n 26. In particular see *Unimark* above n 26 at 1000B-1001I.

correct to hold that the foreign currency should not revert to him. Accordingly, if Mr van der Merwe is able to establish in this Court that he remained the owner of the foreign currency, it stands to reason that the currency must be returned to him.

[39] The question whether the money utilised to purchase the foreign currency belonged to Mr van der Merwe is not in dispute before this Court, the full court having made an assumption to that effect. I will therefore proceed on the basis of that assumption. What is in issue, however, is whether the foreign currency purchased by Mr van der Merwe with that money,[44] and obtained by him utilising the permissible travel allowance of individual members of the travelling group and purchased in their names, and which remained in Mr van der Merwe's possession, belongs to him or not.

Transfer of ownership

[40] At common law, ownership of property passes from one person to another when the following general requirements, amongst others, are met. First, the transferor must be capable of transferring ownership.[45] Second, the transferee must be capable of acquiring ownership.[46] Third, the transferor must have the intention to

[44] His credit card was debited with €130 000.

[45] This is in accordance with the maxim *nemo plus iuris ad alium transfere potest, quam ipse haberet*, which means a non-owner is not capable of transferring ownership. See in this regard *Kleudgen & Co v Trustees in Insolvent Estate of Rabie* (1880) Foord 63; *Beyers v McKenzie* (1880) Foord 125; *Mvusi v Mvusi NO and Others* 1995 (4) SA 994 (Tk) at 999I-J. Also see Badenhorst et al above n 29 at 80.

[46] For example, as infants and the mentally infirm are legally incapable of having the intention to hold as owner, they cannot acquire ownership in movables and immovables save with the assistance of their legal guardians. See *Miller* above n 42 at 119.

transfer ownership and the transferee the intention to receive ownership.[47] Fourth, with regard to movables, transfer of ownership is completed by delivery of the thing.[48]

[41] The third requirement is the focus of the dispute between the parties. Important is the question whether having bought the currency in the names of those members, as he did, and carrying it as foreign exchange allowance Mr van der Merwe intended to transfer ownership from himself to those members.

[42] In *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO*,[49] it was held that in terms of common law, ownership of movable property passes when the owner delivers it to another person, with the *intention* of transferring ownership, and the other takes the thing with the *intention* of acquiring ownership. As a result, in the absence of a clear *intention* between parties, it being a state of mind which must manifest itself from an express agreement between the parties or an agreement inferred from their conduct, ownership does not pass.

[43] In *Bank Windhoek Bpk v Rajie en 'n Ander*[50] transfer of ownership was held to require an agreement which clearly manifested a change of *intention* on the part of the transferor. The court found that where the agreed method of delivery is ineffective

[47] *Mvusi* above n 45 at 999D-E and 1000J-1001A; *Bank Windhoek Bpk v Rajie en 'n Ander* 1994 (1) SA 115 (SCA) at 141C-D; *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) at 933B-H; *Klerck NO v Van Zyl and Maritz NNO and Another and Related Cases* 1989 (4) SA 263 (SE) at 273I-274A; *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301H-302A; *Ex parte Smith* 1956 (1) SA 252 (SR) at 254A-F.

[48] See above n 41 with regard to the acquisition of ownership in the case of money and foreign currency.

[49] See above n 47.

[50] See above n 47. Here the court dealt with the transfer of ownership under *constitutum possessorium*, where the transferor passes ownership of the thing to another but still keeps possession of the thing.

and inappropriate and absent an agreement in practical terms as to delivery, the question was whether the remaining evidence was capable of sustaining an inference that *constitutum possessorium* had been orally or tacitly agreed upon. The court further held that, on the evidence before it, the *intention* of the transferor had never changed and that the transferor had throughout held goods in his possession as owner. The transfer of ownership, the court concluded, was not proved.

[44] The requirement of intention as the mental element which must be established by evidence derived from the circumstances of each case was succinctly articulated by Van der Westhuizen AJ in *Unimark*[51] although there, the case was concerned with the acquisition of ownership by *accessio.*[52] After examining the nature of the thing annexed and the manner of its annexation Van der Westhuizen AJ concluded that these factors were not independent of intention.[53] He held further that:

> "It would still seem as if cases are to be decided on their own facts and that common sense and reasonableness play a prominent role. If someone builds on a piece of land or annexes something to some immovable property, there is ownership of the annexed thing or material involved, as well as conscious human conduct. . . . The owner of the material or thing, or the person who annexes it, is likely to have something in mind, also with regard to ownership. The intention of this person cannot be irrelevant or of little importance . . . the intention has to be determined and judged within the context of all the relevant facts. . . . In other words, one of the factors to be taken into account when an intention as to the annexation of items is formed, or later

[51] Above n 26. In *Chong Sun Wood Products Pte Ltd v K and T Trading Ltd and Another* 2001 (2) SA 651 (D) at 656I-J the court held that the passing of ownership is ultimately determined by intention of the parties.

[52] Where the acquisition of ownership is constituted by a unilateral act as the title of the acquirer is not derived from any predecessor and where the intention of the latter is irrelevant, unlike in the present case where the acquisition of ownership on the other hand will require a bilateral act as it will require the cooperation and intention of Mr van der Merwe who would be the predecessor in title.

[53] *Unimark* above n 26 at 998H-999A. See also *MacDonald, Ltd v Radin, NO and The Potchefstroom Dairies and Industries CO, Ltd* 1915 AD at 467.

> determined, is how other people are likely to interpret the situation on the basis of factual evidence. An intention which is totally insulated from and devoid of reality cannot be recognised and given effect to in law."[54]

[45] In the circumstances of this case there is no evidence that Mr van der Merwe had formed an intention to transfer ownership of the relevant amount of foreign currency to those members of his travelling group. There is also no evidence from which that intention can be inferred nor is there evidence that those members considered themselves owners. Indeed, as counsel for applicants emphasised during oral argument, none of the members of the travelling group could have taken legal steps compelling the applicants to hand over the currency to them.

[46] In my view, Mr van der Merwe at no stage lost ownership of his money. He bought the €130 000 with his money and his credit card account was debited with that amount.[55] Having the currency issued in the names of members of his group was therefore only nominal. In view of the importance of the protection of the right to ownership in our Constitution and in the circumstances of this case, it would require more than a nominal purchase for him to relinquish ownership. Without an intention to pass ownership to members of his group and their corresponding intention to accept ownership, Mr van der Merwe retains ownership of his money.

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[54] *Unimark* above n 26 at 1000B-1001H.

[55] Although it was submitted that Mr van der Merwe's credit card account had been debited with €130 000, there is no information whether or not he owned a CFC account. The submission was however not refuted. It is common practice in banking law that a traveller's bank account may be debited with foreign currency if it is a Customer Foreign Currency (CFC) account. Such an account is opened with approval from the Reserve Bank, where the customer is in the import and export business. See the South African Reserve Bank (SARB) *Quarterly Bulletin* vol 1 at 212.

[47] Consequently Mr van der Merwe is also the owner of the €109 135 he purchased in the names of the specified members of his group. In that regard the finding of the full court must also be set aside.

[48] I have already found that Mr van der Merwe is the owner of the €20 865 which he bought for himself as his own travel allowance.[56] I have also found that he is the owner of the €109 135 he bought with his money in the names of specified members of his group. He has therefore shown ownership of a total of €130 000. That is the amount of Euros found in his possession at the time of seizure.

Whether the State is entitled to hold the foreign currency

[49] Based on Mr van der Merwe's arrest under Regulation 3(1)(a),[57] the respondents contended before trial court and the full court that the seizure of the foreign currency had been effected under Regulation 3(3).[58] Before the full court,

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[56] See above paras [30]-[31].

[57] See above n 5.

[58] Regulation 3(3) provides:

> "Every person who is about to leave the Republic, and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall—
>
> (a) declare whether or not he has with him any bank-notes, gold, securities or foreign currency; and
>
> (b) produce any bank-notes, gold, securities or foreign currency which he has with him;
>
> and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any bank-notes, gold, securities or foreign currency, and may seize any bank-notes, gold, securities or foreign currency produced or found upon such examination or search unless either—
>
> (i) the appropriate officer is satisfied that such person is, in respect of any bank-notes, gold, securities or foreign currency which he has with him, exempt from the prohibition imposed by sub-regulation (1); or

following the finding of the trial court, the respondents contended that money seized under Regulation 3(3) is automatically forfeited to the NRF in terms of Regulation 3(5). On appeal the full court did not determine this question and noted that seizure of articles following an arrest under Regulation 3(1)(a) as had occurred in this case does not necessarily have to be in terms of Regulation 3(3) but may also be under section 20(a) of the CPA. Waglay J concluded:

> "In so far as it may be necessary to determine whether or not the foreign currency seized from the first appellant was seized in terms of reg 3(3) or s 20(a) of the CPA, I believe, having regard to the fact that the monies were paid over to SARS after a notice in terms of s 99 of the Income Tax Act was issued points more to the foreign currency being seized in terms of s 20 of the CPA rather than reg 3(3)."[59]

[50] In this Court, respondents acknowledged that the currency had been seized and was being held under section 20 of the CPA. As pointed out earlier, Mr Snyman of SARS, to whom Inspector Taylor handed the currency on 19 July 2004, signed a SAPS 136 form entitled "indemnity by person", which stated that the money was received as "seized property" as contemplated by section 31(1)(a) of the CPA.

[51] Section 31(1)(a) adverts to section 30(c) of the CPA. Section 30(c) in turn makes reference to articles seized by a police officer under section 20, or to a police

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(ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any bank-notes, gold, securities or foreign currency, which he has with him does not involve a contravention of that sub-regulation.

No female shall be searched in pursuance of this sub-regulation except by a female."

[59] Above n 1 at para 26.

officer to whom a seized article has been delivered under the provisions of the relevant chapter. Section 31(1)(a) of the CPA provides:

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

Section 31(1)(a) thus operates where no criminal proceedings are instituted or where criminal proceedings are instituted but it appears that the seized article would not be required at the trial for purposes of evidence or for purposes of an order of court the article shall be returned to the person from whom it was seized.[60] Section 31(1)(a) therefore provides two grounds upon which an applicant may claim the return of an article seized under section 20. The party making an allegation that the article will not be needed or may be needed for purposes of a subsequent trial shall on a balance of probabilities give evidence to sustain such a claim.[61] If the article is not returnable, it shall be retained in identifiable form and made available at subsequent criminal proceedings.[62]

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[60] Although the bulk of the relevant case law dealt with the return of the article on the ground that no criminal proceedings have been instituted, the same principle should also apply to cases where the return of the article is sought on the ground that it will not be required for purposes of evidence or an order of court. In *Heavy Transport and Plant Hire (Pty) Ltd and Others v Minister of Transport Affairs and Others; South North Haulage (Pty) Ltd and Another v South African Transport Services* 1985 (2) SA 597 (W) at 604I-605H, a case which concerned the return of the article seized under section 36(1) of the Road Transportation Act 74 of 1977, the court remarked that:

> "I am inclined to agree . . . that, having regard to the purpose of having [the article] at court, it suffices if this takes place in time for it being required at the trial for evidential purposes or for a forfeiture order . . . ."

[61] *Dookie v Minister of Law and Order and Others* 1991 (2) SACR 153 (D) at 936A.

[62] See section 33 of the CPA.

[52] Section 30 of the CPA reads:

> "A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered—
>
> (a) may, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require; or
>
> (b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or
>
> (c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require."

[53] Section 20 provides as follows:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—
>
> (a) which is concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[54] Section 20 authorises the seizure of "anything" concerned with the commission or suspected commission of an offence. In the circumstances of this case,

the contravention of the regulations is an offence with which the foreign currency "is concerned" and constitutes, as the full court held, "anything which is concerned or believed to be concerned in the commission or suspected commission of an offence."[63] There is therefore no legal impediment to unauthorised foreign currency being seized under section 20 of the CPA. I therefore conclude that the currency was seized under this provision.

[55] In circumstances where a criminal trial is pending, an application for the return of the article may be premature as it may be required for purposes of the trial.[64] In this case, the applicants applied for the return of the foreign currency while the trial relating to the currency seized under section 20 is pending. In view of the pending trial the State may however be entitled to hold it subject to the requirements of section 31(1)(a) of the CPA and/or any other justification.[65]

[56] Applicants argued that when the respondents handed the currency over to SARS in terms of the section 99 notice, in aid of a purported settlement of tax obligations they could not have envisaged that they were to use the currency as evidence or for purposes of a court order, as required under section 31(1)(a) of the CPA, suggesting that respondents did not intend to do so. Respondents did not refute

[63] Above n 1 at para 25.

[64] In *Heavy Transport* above n 60 at 604I, the court confirmed that—

> "In any event, on the authority of the principle referred to in *Seccombe and Others v Attorney-General and Others* 1919 TPD 270, applicants' remedy would have been a mandamus that the Police's statutory duty be carried out, not that the vehicles be given back."

[65] Given the broader scope of the *rei vindicatio*, justifications which respondents may be required to give in order to keep possession of the currency pending the trial include, but are not limited to, satisfying the requirements of section 31(1)(a) of the CPA. See above para [51] for grounds of justification to hold an article under section 31(1)(a) pending the trial.

this argument. Besides, there is merit in applicants' contention because the inference drawn by applicants is a reasonable one. It was only after the trial court had found that SARS had no entitlement to the currency that it was returned to the SAPS.[66] On its return the SAPS transferred it to the SARB. Doing so they said, was for reasons of security having been hesitant to keep that large amount of currency in their custody.

[57] Even if an assumption may be drawn in favour of the respondents, that holding the currency as they did was for purposes of evidence when the trial resumes, in view of the trial which has been pending since 13 July 2004, where there is no information on record as to progress made in that regard and there is no justification by respondents for the long delay in finalising the trial, it is an assumption which can barely hold.

[58] The return of an article under section 31(1)(a) prior to the completion of criminal proceedings may, as indicated earlier, be prejudicial to the trial. For that reason the burden is on applicants who seek its return to show on a balance of probabilities that the requirements of section 31(1)(a) have not been met and the State is therefore not entitled to hold the article.[67]

[59] However, in this case Mr van der Merwe claims the return of his Euros in terms of the *rei vindicatio* and not under section 31(1)(a) of the CPA. Once Mr van der Merwe proves ownership the burden, unlike in section 31(1)(a), is on respondents

[66] Above n 13 at para 32.

[67] *Dookie* above n 61 at 157A.

to show why the currency should not be returned forthwith. The respondents have not met this burden. They have failed to show that the currency would be used as evidence or for purposes of a court order as required by section 31(1)(a). If they had done so the burden of proof under the *rei vindicatio* might have been met. Further, considering the broader scope of the *rei vindicatio*, they have not shown any other justification and I do not find any. Consequently, respondents are not entitled to hold the currency pending the trial.

Whether Mr van der Merwe may legally possess the foreign currency

[60] Once an article is seized from a person under section 20 of the CPA and it is not to be used for the purposes required by section 31(1)(a),[68] the article shall be returned to the person from whom it was seized, but only if she or he can have lawful possession.[69] Simply, if the person cannot have lawful possession of the article when returned, the article shall not revert to her or him.[70] Section 31(1)(a) does not require ownership to be proved for the article to be returned. All it requires is that the person to whom the article is to be returned (who is usually the person from whom the article was seized) shall have lawful possession.

[61] Where the person from whom the article had been seized cannot possess it lawfully on its return, it shall be placed in the possession of another person who can possess it lawfully. Should this alternative not be feasible in that no person who may

[68] Above para [51].

[69] *Dookie* above n 61 at 156I-157H.

[70] Id.

possess the article lawfully can reasonably be found, then and only then, shall the article be forfeited to the State.[71]

[62] In this matter, seizure of the foreign currency was based on the contravention of Regulation 3(3). The contravention itself was based on Mr van der Merwe's possession of an amount of foreign currency for purposes of travel outside of South Africa at the time.

[63] According to the Exchange Control Manual,[72] the main purpose of exchange control in general, is to ensure that there is timeous repatriation of certain foreign currency obtained by South African residents into the banking system. This is the case whether the currency had been obtained through transactions of a current or capital nature. It is also to prevent the loss of foreign currency resources through the transfer abroad of real or financial capital assets which are held in the country. Importantly, as the Exchange Control Manual provides, the purpose is to control the balance of the country's foreign exchange reserves which are mainly utilised for the payment of goods and services imported into the country and for servicing South Africa's foreign debt. These foreign exchange reserves, it says, are necessary for any country. As the manual states, a lack thereof prevents international trade for effective economic development. The relevant part of the manual reads:

[71] Section 20 above n 19 read with section 31(1)(a) above n 12. See also *Ntoyakhe v Minister of Safety and Security and Others* 2000 (1) SA 257 (E) at 263E-F; 1999 (2) SACR 349 (E) at 354I-355A, where the court held that where an article is stolen and the police are unable to identify the true owner or even a bona fide possessor, the article is forfeited to the State.

[72] See above n 6.

> "Exchange control, therefore, constitutes an effective system of control to these ends by monitoring the movements of financial and real assets (money and goods) into and out of South Africa, while at the same time avoiding interference with efficient operation of the commercial, industrial and financial systems of the country."[73]

[64] More specifically, the purpose of Regulation 3(3)[74] in the context of the general purpose of exchange control is to prohibit people from leaving the country with unauthorised foreign currency. As a result, a customs official may request any person about to leave the country to declare and produce currency in their possession. It is travelling outside of the country with unauthorised foreign currency which will therefore be unlawful.

[65] Once Mr van der Merwe no longer requires the foreign currency for purposes of travel outside of the country and the currency is authorised to be returned to him by an order of this Court, it would be expedient if not legally required, to return to him the equivalent of the Rand value of the €109 135. To return the Euros may not be practical and legally permissible under the Regulations.[75] If the Rand value of the seized Euros is returned to Mr van der Merwe, the likelihood of unlawful possession is avoided.

[73] Id.

[74] See above n 58. See also Joubert (et al) above n 6 at para 417.

[75] When a person is in possession of foreign currency and he or she will not use it for the purpose for which it was issued it must be returned immediately or sold to the Treasury or an authorised dealer. See Exchange Control Manual above n 6.

[66] Besides, under the *rei vindicatio,* if the actual thing is not returnable to the owner who successfully vindicates it, the equivalent value shall be returned.[76] The equivalent value of the Rand must be determined at the Rand to Euro exchange rate applicable as at the date of the seizure of the Euros. That is the value of the currency seized from him and that is what must be returned to him.

Applicants' alternative argument: infringement of section 25(1)

[67] The full court decided that there had been no automatic forfeiture. However, applicants proceeded to argue that if this Court should find that the foreign currency was seized under Regulation 3(5) and not under section 20 of the CPA, they would contend that Regulation 3(5) infringes section 25(1) of the Constitution. The basis of their argument would be that because the regulation permits automatic forfeiture following seizure under Regulation 3(5),[77] it results in arbitrary deprivation of property in violation of section 25(1) of the Constitution.

[68] I have found that the seizure of the currency was effected under section 20 of the CPA. I have also found that the State holds the currency under section 20. Following this finding, I have further held that the disposal of the foreign currency must be determined, not under Regulation 3(5) but in terms of the provisions of the CPA, in particular section 31(1)(a) which regulates the disposal of articles seized

[76] See *Unimark* above n 26 at 996E. See also Badenhorst et al above n 29 at 228; *Mlombo v Fourie* 1964 (3) SA 350 (T) at 358B-D; *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) at 741C-F; *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 429F.

[77] *Michael Hermann Armbruster and Another v The Minister of Finance and Others* case no 6325/2005, unreported 10 May 2006 at para 50.

under section 20 of the CPA.[78] Regulation 3(5) for this reason has no relevance for the disposal of the currency. Applicants' alternative claim based on the unconstitutionality of Regulation 3(5) has therefore become unnecessary to decide. I refrain from doing so.

[69] Next to be determined is whether respondents as organs of State, by failing to provide Mr van der Merwe with the necessary information and certainty as regards the legal basis for the seizure and holding of the foreign currency, as described earlier in this judgment,[79] acted in conflict with their public service duties under the Constitution, in particular sections 1 and 195.

Whether respondents have acted contrary to sections 1 and 195 of the Constitution

[70] Although the seizure of the foreign currency was lawful and was a justified basis for Mr van der Merwe's arrest, the conduct of the respondents, described earlier in this judgment,[80] created circumstances of grave legal uncertainty with regard to the seizure of a large amount of his money which compelled Mr van der Merwe to seek answers from the courts. Further, respondents' constant vacillation with regard to the legal basis for the seizure and holding of a substantial amount of foreign currency, made it difficult for applicants to formulate their case before the courts with the necessary precision.

[78] Other sections include 32, 34 and 35 of the CPA which deal with the disposal of an article seized under section 20 in circumstances not relevant for present purposes.

[79] Above para [15].

[80] Above paras [17]-[18].

[71] Section 1 of the Constitution, read with section 195, indeed sets high standards of professional public service as applicants submit. It requires ethical, open and accountable conduct towards the public by all organs of State.[81] These are basic values for achieving a public service envisaged by our Constitution, which requires the State to lead by example.[82] In this case, the State has failed to do so.

[72] The remissness on the part of the respondents should not be countenanced. Correctly so, none of the respondents attempted to defend it. In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values.[83] Section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the Constitution and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past.[84] Section 195 envisions that a public service reminiscent of that era has no place in our constitutional democracy. The remissness on the part of

[81] The democratic approach to public service accountability is broadly based in comparison with the past. Read together with section 195(1) of the Constitution, the public service policy of *Batho Pele* requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the Constitution. In the past accountability was focused on the reporting by State parties to Parliament and not to the public. In those days even if the public was to approach courts for relief, the courts' hands were tied by the principle that they could not interfere with executive action unless gross unreasonableness was alleged. See Cloete and Mokgoro (eds) *Policies for Public Service Transformation* (Juta, Kenwyn 1995) 7-8, where they write that "[t]he classical approach" "[was] inward looking and constricted" as it "require[d] only that rules, regulations, orders and instructions be adhered to [and] [p]ublic servants [had] therefore been considered accountable only to the extent to which they [were] legally required to answer for their actions." See also Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) 490-494 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 28-31.

[82] See *Mohamed* above n 21.

[83] Id.

[84] See above n 81.

the respondents is not conducive to the current efforts of public service transformation.[85] It must certainly be discouraged. In that context the conduct of the respondents is indeed contrary to sections 1 and 195 of the Constitution, as the applicants submit.[86] Although the applicants submitted that the respondents' conduct was inconsistent with sections 1 and 195 of the Constitution, they did not claim that it constitutes a basis for a self-standing cause of action. I will therefore not determine that question.

[73] In my view, despite the difficulties created by the respondents, Mr van der Merwe has been successful in proving his ownership of the foreign currency. I would accordingly order that the application for leave to appeal be granted and costs should follow the result. In the result I would set aside the order of the full court in the Cape High Court and replace it with the following order:

(a) the respondents return to Mr van der Merwe forthwith the foreign currency in the amount of €130 000 seized from him following his arrest on 13 July 2004;

(b) the foreign currency be converted to the equivalent of South African Rands according to the Rand to Euro exchange rate at 13 July 2004;

(c) the respondents be ordered jointly and severally to pay the applicants' costs of suit in the application for leave to appeal to this Court;

(d) the respondents be ordered jointly and severally to pay applicants' costs in the trial court; and

[85] Id.

[86] Above para [15].

(e) the respondents pay the applicants' costs jointly and severally in the application for leave to appeal to the full court and the application for special leave to appeal to the Supreme Court of Appeal.

SACHS J:

[74] I agree with the judgment of Mokgoro J in part, and with the majority judgment in part.

[75] The reality of the situation, in my view, is that Mr van der Merwe used his own funds to get all the foreign exchange allocations. He bumped up the amounts considerably by getting foreign currency based on allocations that could legitimately be attributed to other members of the group with whom he proposed travelling. The evidence points to the fact that he always intended to control the funds, dishing them out as and when he pleased. Yet he cannot have his cake and eat it. He purported to carry the foreign exchange on behalf of the others, and could not lawfully backtrack on that. Accordingly, I agree with the majority that he cannot get these extra allocations back.

[76] As far as his own quota is concerned, however, I agree with O'Regan J that the issue of the date to which the *rei vindicatio* action would apply where section 20

of the Criminal Procedure Act[1] (the CPA) is involved, was not well-ventilated on the papers. It was not considered in the High Court. Nor was it argued before us. The onus was on the defendant, in this case the State, to make its reliance on section 20 of the CPA clear in its pleadings. If it had done so, the applicant would have been in a position to consider amending his claim to bring it under section 31(1)(a) of the CPA.[2]

[77] In these circumstances I do not think it appropriate for this Court to subject the matter to a procedural re-run. What we know for certain is that the money was seized but not forfeited. Years have passed, and there is nothing before us to suggest that the money is needed for purposes of the prosecution. In my view, Mr Van der Merwe should get his own quota back. To this extent I agree with the judgment of Mokgoro J, and support the order she would make.

O'REGAN J:

[78] I have had the opportunity of reading the judgments prepared in this matter by Mokgoro J, Moseneke DCJ and Nkabinde J, as well as Sachs J. I am unable to agree

[1] Act 51 of 1977.

[2] Section 31(1)(a) of the CPA reads:

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

with the orders proposed in all these judgments as, in my view the application for leave to appeal should be dismissed because it is not in the interests of justice to hear it.

[79] The applicants seek to vindicate an amount of €130 000 in foreign bank notes (the currency) from the respondents. The currency was seized from the first applicant at the Cape Town International Airport on 13 July 2004. In addition to the €130 000, an amount of US$21 249 was also seized. The applicants have abandoned their claim for the US Dollars and that claim needs no further consideration.

[80] The first issue is whether the case raises a constitutional matter. The case concerns a claim by the applicants for the return of the currency seized by the state. Although the applicants no longer dispute the lawfulness of the original seizure, they assert that as owners of the currency they are now entitled to its return. For the purposes of this question, I shall assume, but not finally decide, that the applicants have established that they are owners of at least a portion of the currency. To the extent that the applicants have established ownership of all or a portion of the currency, they have established that they have been deprived of the currency by the state. The question of whether that deprivation is arbitrary or not raises a constitutional issue. The next question that arises is whether it is in the interests of justice for this Court to hear the appeal.

[81] In written argument counsel for the applicants point to three reasons why they assert that it is in the interests of justice for this Court to grant the application for leave to appeal. The first relates to the differing interpretations of the exchange control regulations[1] adopted by the Pretoria High Court in *Action Engineering and Fencing (Pty) Ltd v Moyses NO and Others*[2] and the full court of the Cape High Court in this case.[3] The second relates to the conduct of the respondents and, in particular, the conflicting arguments that the respondents have raised in opposing the relief sought by the applicants. The applicants argue that this is in conflict with the respondents' constitutional duties in terms of section 195[4] and section 1[5] of the Constitution. The third is the applicants' prospects of success.

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[1] Exchange control regulations made in terms of section 9 of the Currency and Exchanges Act 9 of 1933, under GN R1111 of December 1961, as amended from time to time.

[2] 2004 (5) SA 399 (T); [2003] 3 All SA 263 (T).

[3] It should be noted that Allie J in the Cape High Court adopted the same approach as the Pretoria High Court in the *Action Engineering and Fencing* matter. See fuller discussion below at paras [5]–[6].

[4] Section 195 of the Constitution provides—

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
>
> (2) The above principles apply to—
>
> (a) administration in every sphere of government;

[82] I turn now to consider the first reason. Throughout the litigation, there has been some doubt as to the legal basis upon which the currency was seized by the police. It is clear that the first applicant was arrested on the ground that he was suspected to have committed an offence in terms of regulation 3(1)(a) of the exchange control regulations.[6] At first instance, Allie J held that the currency was seized in terms of regulation 3(3) of the exchange control regulations[7] and then automatically forfeited

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(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

[5] Section 1(c) of the Constitution provides that—

"The Republic of South Africa is one, sovereign, democratic state founded on . . . [s]upremacy of the constitution and the rule of law."

[6] Regulation 3(1)(a) provides—

"Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose take or send out of the Republic any bank-notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere . . . ."

[7] Regulation 3(3) provides—

"Every person who is about to leave the Republic and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall—

(a) declare whether or not he has with him any bank-notes, gold, securities or foreign currency; and

(b) produce any bank-notes, gold, securities or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any bank-notes, gold, securities or foreign currency, and

in terms of regulation 3(5) of the same regulations.[8] She accordingly held that the applicants were not entitled to the return of the currency.

[83] The full court, however, disagreed with Allie J that regulation 3(5) permits an automatic forfeiture of currency seized in terms of regulation 3(5). It therefore disagreed with the judgment of the Pretoria High Court in *Action Engineering and Fencing*[9] as to whether forfeiture of currency follows automatically upon seizure. The full court also disagreed with Allie J that where a person is arrested in terms of regulation 3(1)(a), any seizure of currency which accompanies the arrest must take place in terms of regulation 3(3). The full court held that a seizure accompanying such an arrest could take place in terms of either regulation 3(3) or section 20 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). The full court did not finally need to decide the question, however, as it held that the applicants had not established ownership of the currency and the vindicatory relief sought by the applicants was refused on that basis.

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may seize any bank-notes, gold, securities or foreign currency produced or found upon such examination or search unless either –

> (i) the appropriate officer is satisfied that such person is, in respect of any bank-notes, gold, securities or foreign currency which he has with him, exempt from the prohibition imposed by sub-regulation (1); or
>
> (ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any bank-notes, gold, securities or foreign currency, which he has with him does not involve a contravention of that sub-regulation.

No female shall be searched in pursuance of this sub regulation except by a female."

[8] Regulation 3(5) provides—

> "All bank-notes, gold, securities and foreign currency seized under sub-regulation (3) or (4) shall be forfeited for the benefit of the Consolidated Revenue Fund: Provided that Treasury may, in its discretion, direct that any bank-notes, gold, securities or foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized."

[9] Above n 2.

[84] It is clear therefore that there is a difference of opinion between the full court of the Cape High Court and the Pretoria High Court as to the proper interpretation and effect of regulation 3(5) of the exchange control regulations. The proper interpretation of regulation 3(5) does raise a constitutional matter. Indeed, its interpretation was raised in the case of *Armbruster and Another v Minister of Finance and Others,*[10] a case heard on the same day as the present case, in which judgment is to be delivered shortly. However, it became clear during oral argument in the present case, that neither party was contending that the currency was seized in terms of regulation 3(3) of the exchange control regulations. Both parties accepted that the seizure took place in terms of section 20 of the Criminal Procedure Act.

[85] Accordingly, given the acceptance by both parties that the exchange control regulations are not in issue in this case, the difference of opinion between the full court of the Cape High Court and the Pretoria High Court in relation to the proper interpretation of those regulations no longer arises for consideration in this case. It is a matter which arises for decision in *Armbruster*. It accordingly cannot render it in the interests of justice for the Court to consider this application for leave to appeal.

[86] The second reason advanced by the applicants' counsel is based on section 195 of the Constitution which sets out the basic values and principles that govern public administration. The applicants argue that the conduct of the respondents, first in

[10] CCT 59/06.

transferring the currency to the Commissioner of the South African Revenue Service (SARS) on 19 July 2004, without informing the applicants thereof; and secondly, in the transfer of the currency by SARS to the Reserve Bank on 1 March 2005, is disquieting. They argue that it showed an intention by the respondents to hold onto the funds "at all costs".

[87] It is clear that the respondents have been uncertain as to the legal basis upon which they continue to hold the currency. Of equal importance, however, is the fact that it is common cause between the parties that the currency was lawfully seized by the respondents on 13 July 2004; and that it is undisputed that when Mr van der Merwe applied for foreign currency in July 2004, he had already exceeded his foreign currency limit for 2004.

[88] There can be no doubt that section 195 of the Constitution is a provision of profound importance in our constitutional order. Public administration must be ethical, accountable and fair. What is less clear is whether section 195 gives rise to an independent cause of action or only informs other causes of action. Although during the litigation the respondents were less than clear as to the basis upon which they continued to hold the foreign currency, their attitude at all times was that Mr van der Merwe was arrested at the airport on grounds of having committed an offence in terms of the exchange control regulations and that the money was lawfully seized on that basis. Moreover, as has been set out above, Mr van der Merwe does not dispute in these proceedings that when he applied for the currency, he had already exhausted his

foreign exchange allowance for the year. In my view, whatever cause of action may arise from section 195, it cannot be said that in the circumstances of this case, section 195 would independently result in an order by this Court requiring the respondents to return the currency to Mr van der Merwe which appears to be the only relief, save for a special costs order, which the applicants seek in respect of section 195. In the circumstances, therefore, I am not persuaded that this is an appropriate case to explore the full implications of section 195. Accordingly, it contributes no weight to the determination of whether it is in the interests of justice that the application for leave to appeal be granted.

[89] The third factor to which the applicants refer, in seeking to establish that it is in the interests of justice to grant the application for leave to appeal, is their prospects of success on appeal. As it happens, the majority of the Court has dismissed the appeal, but in my view, even if that result is left out of account, there are other considerations which weigh against this Court granting leave to appeal.

[90] The application was launched as a matter of urgency in the Cape High Court on the basis of the *mandament van spolie.* The applicants sought the return of the currency on the basis that the currency in Mr van der Merwe's possession was within his lawful allowance, and that his arrest and the seizure of the currency were unlawful. The applicants abandoned this argument when the matter was heard by the Cape High Court. There they accepted that the seizure had been lawful. Instead they based their claim for the return of the currency on the *rei vindicatio*. It should be recorded at this

stage that the applicants chose not to lodge replying affidavits in response to the answering affidavits lodged by the respondents.

[91] As set out above,[11] Allie J dismissed the applicants' claim on the basis that the currency had been seized and automatically forfeited to the state in terms of the exchange control regulations. Upon appeal to the full court, it was held that the applicants had not established that they were owners of the currency and the court dismissed the application.

[92] The key issues that arise for determination by this Court, should it grant leave to appeal, are whether the applicants have established that they are owners of the currency; and if so, whether the respondents are entitled to continue to hold the currency despite the applicants' ownership.

[93] Moseneke DCJ and Nkabinde J conclude that the applicants have established that Mr van der Merwe is the owner of €20 865 of the foreign currency.[12] The result of their conclusion is that they have to consider whether the respondents are entitled to hold that portion of the currency, despite the fact that Mr van der Merwe has established that he owns it.

[94] In their answering affidavits in the High Court, the respondents alleged that the currency was being held by SARS pursuant to a notice issued in terms of section 99 of

[11] See above para [82].

[12] Para [119] below.

the Income Tax Act 58 of 1962.[13] However, as Allie J held in the High Court, the respondents did not establish that the section 99 notice was properly issued, there being no evidence that either the first applicant or the other corporation in respect of whom the notice was issued had any outstanding tax liabilities. In the circumstances, Allie J correctly held that section 99 could not constitute a basis for defeating the claims of the owner of the currency. She held instead that the currency had been forfeited to the state in terms of the exchange control regulations, as has been set out above.

[95] In this Court, the respondents emphasised that the currency had not yet been forfeited to the state. For the respondents' right to continue to hold the currency, they relied on the fact that a criminal trial was pending against the applicants and they argued that once that trial is concluded the fate of the currency will be determined.

[96] The question whether the respondents are entitled to continue to hold the currency thus arises for consideration for the first time in this Court. It was not dealt with by either the full court or Allie J. The full court determined the case on the basis that the applicants had not established ownership of the property, and Allie J determined the case on the exchange control regulations. The question raises complex questions of law, many of which were not aired in either oral or written argument.

[13] Section 99 of the Income Tax Act provides that—

> "The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any monies, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be."

Moseneke DCJ and Nkabinde J find that the relevant date for determining whether the respondents are legally entitled to continue to hold the currency is 15 July 2004, the date that the application was launched. They conclude that on that date there is no evidence to suggest that the currency would not be needed as evidence in the criminal proceedings to be launched against Mr van der Merwe and hold accordingly that because the respondents were entitled to continue to hold the currency on that date, the vindicatory action should fail now.

[97] Before turning to the legal rule which underlies this conclusion, it should perhaps be mentioned in passing that the absence of any evidence to suggest that the respondents did not need the currency for the purposes of the pending criminal trial, may well not be sufficient in itself to discharge the onus borne by the respondents to establish an entitlement to hold the currency, especially in the light of the events of 19 July 2004. On that date, the South African Police Service signed a notice in terms of section 31(1)(a) of the Criminal Procedure Act[14] which stated that the currency was not required for the pending criminal proceedings. This complex factual issue is one which, in my view, we should avoid deciding as it was not adequately canvassed on the record or in argument.

[98] The legal principle upon which the conclusion is based is that a defence to the vindicatory action must be established at the date the vindicatory proceedings are launched, and that it will constitute a defence to vindication even if the defence no

[14] The text of section 31(1)(a) is set out in n 23 below.

longer exists at the time the matter is adjudicated. Two cases are cited as authority for this principle. The first, *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours*,[15] concerned a vindicatory action in which the court held that the plaintiff bore the onus of establishing that the defendant had possessed the relevant property at the time the proceedings were instituted. In that case, the Appellate Division held that the plaintiff's pleadings did not allege that the defendant was in possession of the relevant property at the time proceedings were launched and accordingly held the declaration to be excipiable.[16] This question relates to what a plaintiff in a vindicatory action must prove in order to succeed, not to the question as to what defences may be raised to a vindicatory action once the plaintiff has established all the requirements of the cause of action. It is this latter question with which we are now concerned.

[99] The second case referred to by Moseneke DCJ and Nkabinde J is *Mehlape v Minister of Safety and Security*[17] which concerned the question whether the provisions of section 17(2) of the South African Police Service Rationalisation Proclamation R5 of 1995 applied to a vindicatory action. Section 17 provided that one month's written notice had to be given to a defendant before legal proceedings were instituted against the state in respect of any alleged act performed in terms of this proclamation.[18] No

[15] 1958 (3) SA 285 (A) at 289.

[16] Id at 289F.

[17] 1996 (4) SA 133 (W).

[18] Section 17(1) and (2) of the proclamation provides—

> "(1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act performed in terms of this proclamation, or an alleged failure to do anything which should have been done in terms of this proclamation, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the

notice had been given in the case in which the applicant sought the return of a motor vehicle. It was in these circumstances that the court held that the *rei vindicatio* is a remedy instituted "in respect of a factual situation pertaining at the time of the institution of the legal proceedings."[19] The court accordingly held that the proceedings had not been instituted in respect of an act performed in terms of the proclamation and that in the result section 17(2) did not apply to the proceedings.[20] This case too does not sharply deal with the question as to what defences may be raised in vindicatory proceedings once the plaintiff has established all the elements of the *rei vindicatio*.

[100] I should make clear that I do not conclude that the legal principle relied upon by the majority is incorrect. My concern is that it is not a legal issue that ordinarily should be determined at first instance by this Court without careful and thorough argument. It relates to an important remedy of the common law, which should ordinarily be determined first by the Supreme Court of Appeal.[21] There are, too, other legal issues which might well be relevant to the case at hand upon which we have not

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claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earliest date.

(2) No such legal proceedings shall be instituted before the expiry of at least one calendar month after written notification of the intention to institute such proceedings has been served on the defendant, wherein particulars of the alleged act or omission are contained."

[19] Above n 17 at 136B–C and see judgment of Moseneke DCJ and Nkabinde J above at para [134].

[20] Above n 17 at 136D–E.

[21] This is a principle asserted by this Court on many occasions. See for example *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 14; *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at para 23 and *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 53-5.

had the benefit of argument. One is the maxim *ex turpi causa, non oritur actio.*[22] This maxim may have application in the present case given that first applicant appears on the papers before us prima facie to be in breach of exchange control regulations. Is he in these circumstances permitted to institute vindicatory proceedings to recover the seized currency?

[101] A further important and difficult question, not raised in argument, is whether the scheme of chapter 2 of the Criminal Procedure Act, and in particular sections 30 to 36 of that Act which carefully provide for the disposal of articles which have been lawfully seized in terms of section 20 of the Act, contemplate that a vindicatory action outside of the statutory scheme may be launched for the return of such articles. This issue was also not raised in argument before us.

[102] In my view, these complex and difficult legal issues upon which neither we, nor the courts below, have had the benefit of argument indicate that it is not in the interests of justice for this Court to entertain this appeal. One consideration only militates against that conclusion – whether, were this Court to refuse to grant leave to appeal, the applicants would be deprived of the ability to seek to recover the currency. Section 31(1)(a) of the Criminal Procedure Act[23] requires that property seized in terms

[22] See Miller *The Acquisition and Protection of Ownership* (Juta & Co Ltd, Kenwyn 1986) 278 in which there is a suggestion that the principle may have application to vindicatory proceedings.

[23] Section 31(1)(a) of the Criminal Procedure Act provides—

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

of section 20 of that Act be returned to an owner where no criminal proceedings are instituted or, if proceedings have been instituted, where the seized article is not required as evidence in the trial, if the owner may lawfully possess it. It is clear therefore that if the applicants wish to recover the currency, and if they can show that the requirements of section 31(1) are met, they may launch proceedings in the appropriate court in terms of section 31(1)(a) of the Criminal Procedure Act and would not be non-suited by an order refusing leave to appeal in these proceedings.

[103] Accordingly, I would refuse to grant leave to appeal. In summary, I would emphasise that it is undesirable for this Court to decide important and complex issues of the common law as a court of first and final instance, and especially in circumstances where the issues have not been properly ventilated on the pleadings or in argument. The litigation in this case has been unsatisfactory from the start – it was commenced urgently as spoliation proceedings. Once the respondents had lodged their affidavits which made it plain that the seizure of the currency had been lawful, the applicants proceeded on the basis of a vindicatory action, without lodging any replying affidavits. The factual material before the Court is therefore incomplete and the legal submissions failed to traverse many of the difficult issues which, in my view, needed consideration. These circumstances, coupled with the fact that refusing leave to appeal would not finally non-suit the applicants, render it inappropriate for us to grant leave to appeal. I would therefore, for these reasons, refuse leave to appeal.

[104] One last issue needs to be considered and that is the issue of costs. As indicated above, the litigation has been beset by difficulties from the start. The fault for this does not lie with only one side. In my view, it would be appropriate in these circumstances to make no order as to costs.

Van Heerden AJ concurs in the judgment of O'Regan J

MOSENEKE DCJ and NKABINDE J:

Introduction

[105] We have had the opportunity to read the judgment of Mokgoro J. We are content to concur with her findings and conclusions regarding the first applicant's ownership of €20 865, but we are unable to concur with the findings and conclusions on whether the applicants have established ownership of €109 135 and whether the respondents are entitled to hold the foreign currency.

[106] The facts are dealt with by Mokgoro J. It suffices to set out the facts sufficiently pertinent to the conclusions we reach regarding the ownership of the Euros seized from the first applicant and whether the respondents are entitled to continue holding them. Mokgoro J holds that a dispute about the legal basis for the

State to seize and hold foreign currency found in possession of the first applicant concerns arbitrary deprivation of property and therefore raises a constitutional matter. While that approach is indeed attractive, it may have far-ranging implications which we are not called to decide. For that reason, we prefer not to express an opinion on the question whether this case raises a constitutional matter but will assume, without deciding, that the matter does raise a constitutional issue.

Background

[107] On 13 July 2004 the first applicant was, upon leaving the country on an international flight to the United Kingdom, arrested at the Cape Town International Airport and allegedly charged for the contravention of the provisions of Regulation 3(1)(a)[1] of the Exchange Control Regulations[2] in that he possessed US $21 249 and €130 000 without the necessary authorisation. All of the foreign currency was seized by the South African Police Service (SAPS). The foreign currency which is the subject matter of these proceedings amounted to €130 000. This amount was purchased on 9 July 2004 by the first applicant in preparation for the trip to Las Palma

[1] Regulation 3(1) reads:

> "Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose—
>
> (a) take or send out of the Republic any bank-notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere . . . ."

[2] GN R1111 GG 123, 1 December 1961 (as amended), promulgated in terms of section 9 of the Currency and Exchanges Act 9 of 1933.

out of funds standing to the credit of his bank account.[3] Of that amount, €20 865[4] was purchased by the first applicant for himself through his Nedbank credit card.

[108] Subsequent to the seizure the applicants launched urgent motion proceedings in the Cape High Court seeking to spoliate the foreign currency seized by the members of the SAPS and an order granting the first applicant permission to travel overseas with that currency.[5] The first applicant claimed that all the money seized belonged to him and the second applicant. It however emerged that the first applicant had held the US $21 249[6] on behalf of a friend, Mr Allison. The order was sought on the basis that the seized foreign currency was below the total allowable amount that the first applicant was legally entitled to possess and take out of the country.[7] The claims were denied by the respondents who stated that the first applicant's own version that he was carrying the foreign currency for other persons rendered him liable to criminal prosecution in terms of Regulation 3(1)(a).[8]

[3] The transaction report of the South African Reserve Bank's Exchange Control Department reveals that the first applicant had, on 6 April 2004, also purchased $17 538 equal to R110 294, 57 resulting in him exceeding his annual travel allowance for the year 2004 in contravention of the Regulations.

[4] The equivalent of the sum of R159 971,95. The permissible travel allowance per adult per calendar years was, in terms of the Exchange Control Rulings D.381/February 2003, R160 000.

[5] On 16 July 2004 the matter was postponed by agreement between the parties to 9 December 2004. The respondents' were ordered to file their answering affidavits on 10 August 2004 and the applicants were to file their replying affidavits by no later than 27 August 2004. It is remarkable that the applicants elected not to file any reply to the respondents' answering affidavits.

[6] This amount does not form part of the amount which is the subject matter of the vindicatory claim.

[7] It being alleged that the amount found on his person was some R80 000 below the permissible total limit of approximately R1.2 million for the party.

[8] Above n 1.

[109] At the hearing the applicants sought to vindicate their rights and sought the return of the foreign currency.[9] Counsel for the respondents argued that the Court would lend itself to an illegality if it were to order the return of the foreign currency. To counter that argument, it was argued for the applicants that the foreign currency should be deposited into the second applicant's bank account.[10] The High Court (per Allie J) dismissed the application with costs. The applicants lodged an application for leave to appeal against the judgment of Allie J on 2 February 2005. Leave to appeal to the full court of the Cape High Court was granted on 12 April 2005.

[110] Before the full court the applicants maintained that they owned the €130 000 and were thus entitled to its return. In the alternative, they claimed that the first applicant was, at the very least, entitled to the €20 865. The respondents argued that the applicants could not claim ownership of the €130 000. The full court (per Waglay J), in the judgment delivered on 24 February 2006,[11] found that the foreign currency had not been forfeited. It held that even though the money utilised to purchase the foreign currency had been deposited into the first applicant's bank account – that did not make him its owner. The full court held that ownership had not been established and that "the seizure was neither wrongful nor unlawful."[12] The applicants unsuccessfully petitioned the Supreme Court of Appeal.[13]

[9] We do not need to decide whether it was appropriate for the applicants to change the basis of their case at the initial hearing in the High Court.

[10] *Van der Merwe and Another v Nel and Others* 5902/04, unreported 12 January 2006 at para 13.

[11] *Van der Merwe and Another v Nel and Others* [2006] 4 All SA 96 (C); 2006 (2) SACR 487 (C).

[12] Id at para 27.

[13] The Supreme Court of Appeal dismissed the application for leave to appeal with costs on 19 June 2006.

In this Court

[111] In this Court, although the applicants claimed that they owned the Euros and the US Dollars seized, they sought to vindicate their rights which they allege had been violated by the respondents and claimed the total amount of the Euros. The first applicant had, at all material times, held himself out to having held the foreign currency on behalf of the members of the travelling group. He explained to the members of the SAPS that the currency was "destined for a group of persons". He stated that of the €130 000, an amount of R159 971, 95 was his personal foreign exchange travel allowance purchased in his name.

[112] Counsel for the applicants contended that the €130 000 belonged to the applicants because: first, it was purchased with funds standing to the credit of the first applicant's Nedbank account;[14] second, the first applicant succeeded in establishing ownership of the foreign currency; and third, the first applicant did not relinquish ownership of the €130 000 simply because he used the exchange control allowances available to each individual member of the family and others in the group. The court a quo, counsel contended, failed to deal with the alternative argument that at the very least the first applicant was the owner of the €20 865 which he had purchased in his own name and represented his personal foreign exchange allowance.[15] As will appear

[14] The various amounts paid into the first applicant's Nedbank credit card account were said to originate from the sale of Flat No 10 Woodbridge Island, allegedly belonging to the second applicant in the sum of R563 718, 83; the balance of the sale of Flat 10 Woodbridge Island, amounting to R129 030; a cash withdrawal of R195 000 allegedly made from ABSA being part of the proceeds of sale of Flat 8 Woodbridge Island; and an amount of R145 000 allegedly proved by the winnings and redemption at Grand West Casino.

[15] This is borne by the customer receipt issued in his name by Nedbank.

later, the failure by the full court to consider the first applicant's alternative claim makes it necessary for us to consider it.

Cause of action

[113] When litigants choose to rely on ownership to recover possession of property, they are bound by that choice. In that event, the incidence of the onus becomes important.

[114] At common law, applicants dispossessed of property may seek to recover it with the *rei vindicatio*.[16] In that event the cause of action is premised on ownership coupled with the fact that possession is held by the respondent.[17] There are three requirements necessary for success in vindication action proceedings: (i) ownership or co-ownership of the thing; (ii) the thing must still be in existence and be clearly identifiable;[18] and (iii) that the defendant has possession or detention of the thing at the moment the action is instituted.[19] From these requirements it is clear that proof of ownership proper is required of the person instituting the action.[20] The applicants

[16] Extracted from the maxim *ubi rem meam invenio ibi vindico* – literally meaning "wherever I am finding my property I assert my claim to it". See in this regard Badenhorst et al *Silberberg & Schoeman's The Law of Property* 4 ed (LexisNexis Butterworths, Durban 2003) 225.

[17] The principle was enunciated in the well-known case of *Graham v Ridley* 1931 TPD 476. See also *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at 382F-H; *Myaka v Havemann and Another* 1948 (3) SA 457 (A) at 465; and *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T) at 336B-E.

[18] *SA Hyde (Pty) Ltd v Neumann N.O. and Another* 1970 (4) SA 55 (O) at 61. The view was expressed that money, "provided it is identifiable with or ear-marked as a particular fund to which the applicant is entitled", can be recovered with a quasi-vindicatory claim. See also *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 996C–D and 1011A–B.

[19] *Mehlape v Minister of Safety and Security* 1996 (4) SA 133 (W) at 136G in which it was made clear that legal proceedings based on the *rei vindicatio* always have to relate to physical control being exercised by the respondent over the object in question at time of institution of proceedings.

[20] *Motloung v Rokhoeane* 1991 (1) SA 708 (W) at 716G–H.

needed therefore to do no more than allege and prove that they are the owners and that the respondents are holding the property concerned.[21]

[115] The first applicant eventually elected to base his cause of action on the civil remedy of the *rei vindicatio* and not through the mechanism of utilising section 31(1)(a)[22] of the Criminal Procedure Act (CPA)[23] as was the case in the matter of *Booi v Minister of Safety and Security and Another*.[24] The choice of action and the discharge of the burden of proof are fundamental to the outcome and the extent to which the applicants can obtain the relief they seek. Although this matter involves seizure of foreign currency with the intent of instituting criminal proceedings, the application before this Court is civil in nature.

[116] It needs to be said that the *rei vindicatio* can raise difficulties when dealing with the return of money, unless it concerns individual and identifiable currency with some form of intrinsic value. It has been observed that the lack of correlation between the practically valueless paper and the value it represents renders difficult the

[21] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para 46, quoting *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A where the Court remarked that if the owner goes beyond alleging merely his ownership and the defendant being in possession, other considerations come into play.

[22] Section 31(1)(a) provides:

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

[23] Act 51 of 1977.

[24] 1995 (2) SACR 465 (O). In this case, the applicant's claim for the return of the vehicle was based upon the provisions of section 31(1)(a) of the CPA, the issue being whether the matter was one in which no criminal proceedings were later instituted against the applicant.

vindication of paper currency.[25] Difficulties in respect of the application of the *rei vindicatio* to money have been recognised in Roman law. Of relevance is the concept *commixtio* which means that the money is mixed with other money, so that it cannot be separated. In that event the money will belong to the person who receives it.[26] It was contended on behalf of the applicants in oral argument that the foreign currency was mixed with other money so much that the original currency could no longer be identified.

Proof of ownership

[117] Proving ownership of property requires both the physical and mental elements of ownership to be established. This entails a question of both fact and law. As indicated above, the incidence of the onus is important. It is consequently necessary to consider what the first applicant himself has set out and what the evidence reveals about his ownership.

[118] In the founding affidavit the first applicant alleged that the foreign currency belonged to the second applicant and him, and went on to state that:

> ". . . I who was the only adult male to accompany the group and who was responsible for the provision of all the financial support of the whole group, as well as the crew of the ship, *decided that it would be safer for me to take the foreign currency with me as it would be risky to place such large amount in their possession. It was therefore decided that I would take all the foreign currency except for 300 Euros on behalf of*

[25] Badenhorst et al above n 16 at 239-240.

[26] See *Khan v Volschenk* 1986 (3) SA 84 (A) at 88E, quoting Digest 46.3.78 (Scott's translation).

> *all the members of our group when I depart on the 13th of July 2004.* The other members of the group as a result left without any currency except for 300 Euros . . . .
>
> . . . .
>
> [T]he customs official enquired as to why I was carrying such an unusually large amount of currency. I . . . explained that, due to my delay and the balance of my party having departed the Sunday two days earlier, *I was carrying the entire group's currency.* He advised me that . . . *I would be compelled to depart only with my individual permissible allowance of R160 000.00* . . . ." (Emphasis added.)

Ownership of the €20 865

[119] It is common cause that the amount of €20 865 was purchased by the first applicant for himself through his Nedbank credit card. The customer receipt provided by Nedbank shows that that amount was for the first applicant's travel allowance. That amount is in accord with the permissible travel allowance for an adult per calendar year.[27] We therefore agree with Mokgoro J's finding that the first applicant had established the ownership of the €20 865. It follows that the full court erred in finding that ownership of this money was not established.

Ownership of the €109 135

[120] However, the difficulty arises with regard to the ownership of the balance of the €109 135. Nedbank effectively delivered €130 000 to the first applicant on 9 July 2004. The first applicant deposed to the founding affidavit on 15 July 2004 and made statements referred to in paragraph 89 above, in effect disavowing ownership of the balance of the foreign currency.

[27] Although Mr van der Merwe claimed that this particular foreign currency accorded with his permissible travel allowance for the calendar year, the respondents stated that he had in fact already exceeded the allowance.

[121] The first applicant argues that he can hardly be said to have relinquished ownership of the currency by virtue of his having utilised the exchange control allowances available to each individual member of the family and others in the group. The first applicant not only used up the exchange control allowance available to individual members of the group but, evident from his deposition, also disavowed ownership of the balance of €109 135. Documentary evidence in the form of customer receipts[28] provided by Nedbank is clearly in accord with the first applicant's averments. We read the statements in no other way than as a clear and unequivocal admission that the first applicant did not, save for his "individual permissible allowance of R160 000.00", own the balance of €109 135. The first applicant, in his statements to the members of the SAPS and on affidavit, seems to have been of the same intention.

[122] If the statements had intended to convey that the first applicant owned large sums of foreign currency, that is the €109 135, and merely utilised the exchange control allowance available to each member of the party, he could and should have told the customs official that in no uncertain terms. Indeed, if that is what was intended one wonders why he did not say so when asked why he possessed such an "unusually large amount of currency". The admission rendered it unnecessary for the respondents to attempt to disprove the admitted facts. It is therefore improper to attempt to contradict the first applicant's statements by referring to matters not

[28] The customer receipts were issued in the names of each member of the party, namely: Simone Raubenheimer, Erencha Leonard, Candice van der Merwe, Fern van der Merwe, Cristin van der Merwe, Heidi Marie Rohr and Monique van der Merwe. The additional customer receipt was issued in the first applicant's name for the sum of €20 865.

foreshadowed or contradicting the averments in the founding affidavit. The applicants must stand or fall by the factual averments in their affidavits which are intended to support the cause of action on which the relief sought is based.

[123] It was also argued on behalf of the applicants that the Euros belonged to the first applicant because the ownership of the foreign currency changed when the currency was purchased with funds standing to the credit of his Nedbank account and taken into his possession. The fact that the Euros were purchased with the funds standing to the credit of the first applicant's account and that he was in possession thereof does not entail that he is the owner of the currency. It implies only that he had a personal right against the bank for payment of an amount of money. The original owner of the currency was Nedbank and the relevant question is to whom Nedbank transferred the currency, not who funded the purchase of the currency. The first applicant, on his own showing, was a mere custodian of the balance of the Euros, not the owner thereof.

[124] The remarks by Lord de Villiers in *Vosloo v Myburgh*,[29] quoted with approval by Van der Heever JA in *Gleneagles Farm Dairy v Schoombee*[30] are apposite in this case. He said:

> "It would be a dangerous precedent if any court were to hold now that a person, who has allowed another to appear as the ostensible owner, should, upon that person

[29] 14 CTR 1001.

[30] 1949 (1) SA 830 (A).

> getting into difficulties, be allowed to say: 'Although he appeared to be the owner, the property is really mine'."[31]

[125] A presumption of law that goods belong to anyone in whose possession they are found is proper. However, the presumption should be considered in view of the circumstances of each particular case because it can be upset by evidence.[32] As was also pointed out in *Commissioner of Customs and Excise v Randles, Brothers & Hudson, Ltd,*[33] "the legal transaction preceding the *traditio* may be evidence of an intention to pass and acquire ownership."[34] In this case the legal transaction that preceded the delivery is evidenced by the customer receipts provided by Nedbank which show that the foreign currency was intended for the person identified in each of the receipts. The receipts show the amounts in Euros and Rands for each member of the party, as well as their denominations and quantities.

[126] Nedbank was appointed and authorised by the Treasury[35] to buy and sell foreign currency only under the conditions and within the limits prescribed. Given the conduct of the transacting parties, namely the first applicant and Nedbank, and the circumstances under which the invoices were issued and of the case as a whole, it cannot, on the evidence, be said that Nedbank, as transferor of the foreign currency,

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[31] Id at 837.

[32] Id at 838.

[33] 1941 369 AD.

[34] Id per Centlivres JA at 411.

[35] In accordance with Regulation 3(1) above n 1.

intended to transfer the ownership[36] of the currency to the first applicant, the transferee, upon its delivery.[37] It would make no sense for the bank to provide customer receipts in the names of other persons in the first place instead of issuing one invoice in the name of the first applicant. It is beyond doubt, regard being had to the prescribed travel allowance limits, that Nedbank would have declined to sell the large amounts of foreign currency to the first applicant if it had been aware that the first applicant purchased the foreign currency for himself but did so in order to deliberately evade the law.

[127] Even on the assumption that ownership passed to the first applicant when Nedbank handed the money to him on 9 July 2004, no explanation is advanced for the first applicant's subsequent contradictory statements disavowing ownership of the Euros he held on behalf of his travelling party.

[128] Regarding the argument of *commixtio*, it was essential, in our view, for the applicants to have alleged the admixture and that separation would have been

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[36] See "Sale of Goods" in Simonds (ed) *Halsbury's The Law of England* vol 34 (Butterworth & Co (Publishers) Ltd, London 1960) at para 98, regarding the question of intention when transferring property from seller to buyer.

[37] Regarding the requirements for the valid passing of ownership of movables see *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301H-302A and *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) at 933A-D. Mackeldey in *Roman Law* at para 281 (Dropsie's translation), quoted in *Commissioner of Customs and Excise* above n 33 at 410-411, says—

> "Delivery (*traditio*) as a mode of acquiring property rests on the principle that when the owner of a thing relinquishes the possession of it to another for the purpose of vesting in him the ownership of it the latter acquires such ownership when he so intends."

In para 283 he says that—

> "[T]he tradition of a thing by the owner does not make it the transferee's property, excepting when it is in consequence of an intention to transfer (*justa causa*); that is, it must either be preceded by a legal transaction which gives the transferee a right to claim the ownership of the thing or by some other fact expressive of the transferor's intention to transfer the ownership of the thing to the transferee."

impractical, or to have alleged at least some facts having the effect of making that legal conclusion applicable.[38]

[129] The founding affidavits fall short of establishing the mixing of the foreign currency. They do not explain how the currency was arranged in the bag. It is possible that the money was in a single bundle, but it is equally plausible that it was in separate bundles and labelled with the respective owners' names. There are a number of other possibilities. There is no allegation either way and the *commixtio* argument cannot succeed. The argument regarding admixture would, in any event, be at odds with the explanation the first applicant advanced at various stages in an effort to exculpate himself when asked to explain the large amounts of foreign currency in his possession. It would also be at variance with the detailed particularity in the customer receipts provided by the bank in respect of the foreign currency for each member of the travelling group. It cannot therefore be said that the foreign currency was mixed and unidentifiable and could not be separated for practical purposes. Besides, the point was not raised in the courts below. The respondents had also not been afforded an opportunity to respond to that argument.

[130] On the application of the rule in *Plascon-Evans Paints v Van Riebeeck Paints*,[39] the applicants cannot be said to have established transfer of ownership to the first applicant and *commixtio* of the Euros.

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[38] See Goulding *Odgers on Civil Court Actions* 24 ed (Sweet & Maxwell, London 1996) at 154, which states that—

> "Whenever the same legal result can be attained in several different ways it is not sufficient to aver merely that the result has been arrived at, but the facts must be stated showing how and by what means it was attained."

[131] After a careful consideration of the evidence we conclude that the applicants have not established ownership of the €109 135. As Voet[40] points out—

> "[T]he proof of ownership lies before everything on the plaintiff. If he has been unable to fulfil it the possessor is to be absolved . . . ."[41] (Footnote omitted.)

Accordingly, the respondents need not establish the right to retain possession.[42] It follows that it is inappropriate to sanction restoration of the €109 135 to the applicants. The question however remains whether the respondents are entitled to continue holding the foreign currency (€20 865) belonging to the first applicant.

Should the respondents continue holding the €20 865?

[132] Once ownership is established, the respondents must prove the basis on which they claim to retain possession of that amount as against the first applicant, the owner.[43] The respondents cannot in law withhold the foreign currency unless they have a right of retention.

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[39] 1984 (3) SA 623 at 634E-I. According to this rule a court in motion proceedings, in determining whether a case is made out, must examine the undisputed averments of the applicant together with the averments of the respondent."

[40] *Commentary on the Pandects* 6.1.24.

[41] Gane *The Selective Voet Being the Commentary on the Pandects* Translation vol. 2 (Butterworth and Co (Africa) Ltd, Durban 1955) 237. The view was adopted in *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 742H-743A.

[42] See *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA); [2006] 3 All SA 219 (SCA) at para 4, where the Court remarked that—

> "This principle was recognised in *Voet* 6.1.24 and has been consistently applied by our Courts, at least since *Kemp v Roper NO* (1886) 2 Buch AC 141 (at 143) which was decided in 1886. (See also *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 744; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; Van der Merwe *Sakereg* 2 ed at 347 *et seq*; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman The Law of Propery* 4 ed at 255 *et seq*.)"

[43] *Krugersdorp Town Council* above n 17 at 336A–337B; *Khuzwayo v Dludla* [2000] 4 All SA 329 (LCC) at 334E. See also *Unimark Distributors* above n 18 at 996C–D.

[133] In this Court the parties made common cause and we assume in favour of the applicants that the seizure was effected in terms of section 20 of the CPA.[44] There is no legal impediment to seize unauthorised foreign currency under that section. However, lawful seizure under section 20 does not mean that continued possession of the currency will forever be lawful. Section 31(1)(a)[45] makes it plain that the currency can only be possessed if criminal proceedings are instituted and the currency is required in those proceedings. If the currency is not required, section 31(1)(a) states that it "shall" be returned to a person who may lawfully possess it.

[134] Mokgoro J seems to rely on this provision for the conclusion that the currency be returned to the applicant. This however fails to take account of the fact that the success of the *rei vindicatio* must be determined on the basis of the facts that existed at the time the action was instituted.[46] What happens subsequent thereto cannot affect the success of the action. In *Mehlape*[47] the Court put the position as follows:

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[44] Section 20 of the CPA provides:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[45] Above n 22.

[46] See, for example, *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 289 and *Mehlape* above n 19 at 136B-E. See also *Unimark Distributors* above n 18 at 1011A-B.

[47] *Mehlape* above n 19.

> "The *rei vindicatio* is not instituted in respect of an act that has been performed; it is instituted in respect of a factual situation pertaining at the time of the institution of the legal proceedings."[48]

[135] The applicant instituted the action on 15 July 2004, only two days after the currency was seized. It was only on 19 July 2004 that the currency was handed over to SARS and the note approving removal under section 31(1)(a) signed. It may be correct, as Mokgoro J argues, that on 19 July 2004 it was apparent that the currency was not needed for the criminal proceedings and further detention under section 20 was unjustified. However, on the facts that existed at the time when the action was instituted, that is 15 July 2004, there is no evidence that the respondents would not require the currency in future criminal proceedings. It is unlikely that the respondents would, at that stage, have known whether criminal proceedings would be instituted at all, let alone whether the currency would be required. The respondents have therefore demonstrated that, at the time the proceedings were instituted, their possession of the currency was justified under section 20 of the CPA.

[136] As demonstrated earlier in this judgment, the applicants have ceaselessly litigated up to this Court. There is no evidence justifying any blame for the delay to be laid at the door of the respondents. We therefore refrain from drawing any inference in that regard.

Costs

[48] Id at 136B-C.

[137] The applicants have succeeded in part in their vindicatory claim. That part relates to our finding that they have established ownership of the €20 865. However, the applicants have not shown that they are the owners of the €109 135 and, what is more, they have not shown that the respondents are not entitled to hold the amount seized pending an order of disposal at the end of the criminal trial. In these circumstances, a just and equitable outcome relating to costs is, in our view, not to burden the applicants with costs. We would rather make no order as to costs.

Order

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

1. The application for leave to appeal is granted.

2. The appeal is dismissed with no order as to costs.

Langa CJ, Kondile AJ, Madala J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke DCJ and Nkabinde J.

For the Applicant:	Advocate P Hodes SC and Advocate A Katz instructed by Miskey Incoporated.
For the First, Second and Third Respondents:	Advocate A de V La Grange SC instructed by the State Attorney, Cape Town.