



REPORTABLE

CASE NO: SA 118/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**DEPUTY-GOVERNOR OF BANK OF
NAMIBIA (MR E UANGUTA)**

First Appellan

BANK OF NAMIBIA

Second Appellant

and

VINCENT & TIFFANY CONSTRUCTION CC

First Respondent

MINISTER OF FINANCE OF THE REPUBLIC OF

NAMIBIA

Second Respondent

STANDARD BANK NAMIBIA LIMITED

Third Respondent

ATTORNEY-GENERAL OF THE REPUBLIC OF

NAMIBIA

Fourth Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ *et* SMUTS AJA

Heard: 31 March 2025

Delivered: 17 April 2025

Summary: This appeal concerns the decision of Bank of Namibia (BoN) to freeze the first respondent's customer foreign currency account (CFCA) at Standard Bank and forfeit USD115 000 under the exchange control regulations. The first respondent challenged the forfeiture in the High Court, which ruled in his favour, prompting this appeal.

The funds were flagged in 2016 when Mr Ke Wang, the first respondent's sole member, deposited USD115 000 as 'export proceeds' and attempted to transfer it to China on the same day. BoN intervened, citing suspected unauthorised foreign exchange dealings. Mr Wang faced criminal charges, including under the Anti-Corruption Act 8 of 2003, but was acquitted in 2021. Despite this, BoN proceeded with forfeiture under reg 22B.

The first respondent contested the forfeiture on two main grounds: (a) the exchange control regulations were either inapplicable to Namibia or unconstitutional for lacking judicial oversight, and (b) the Deputy-Governor lacked authority to issue the forfeiture order, as the regulations did not confer such power.

The High Court dismissed the constitutional challenge, leaving only the issue of the Deputy-Governor's authority. It found that the resolution, dated 28 May 2021, merely suggested the forfeiture but did not provide clear, binding instructions or delegation of authority to the Deputy-Governor. The court a quo found further that the respondents failed to demonstrate a proper delegation chain, leaving the Deputy-Governor's actions as unilateral and lacking statutory basis.

The appeal focused on challenging the court a quo's finding and resultant order that: (a) the BoN and the Deputy-Governor had not been delegated the power in terms of reg 22E to exercise the forfeiture power and that (b) the Deputy-Governor in any event did not have the power, competence or jurisdiction nor the duly delegated authority to issue the forfeiture order.

Held that, there is no suggestion in the founding papers that the blocking of the account was unlawful on the basis that it was done by an official who was not

authorised to do so in the manner suggested by counsel for the first respondent in oral argument.

Held further that, it was not open to the first respondent to seek the invalidation of the blocking order in the absence of a clear collateral challenge on the basis suggested by counsel in oral argument. That such basis was never the first respondent's case *quo* is evident from the fact that the notice of motion does not seek any relief in respect of the blocking order.

Held that, the choice of the words 'should be forfeited' is perfectly consistent with the scheme of the statute and is not precatory as suggested. Clearly, the notice in the *Gazette* could only have followed after a decision of the Board.

Held further that, both the Board's decision and the notice in the *Gazette* came against the backdrop of an investigation carried out after Standard Bank flagged the transaction.

Held that, the notice does not stand in isolation and must be interpreted in the 'context' of and the 'reason for which' it was created.

Held further that, the Deputy-Governor's action to publish the notice was not an independent exercise of a discretion but the implementation of a decision – as *nuntius* – already taken by the Board of which he was a member.

Held that, the fallacy in the first respondent's contention is the premise that the Deputy-Governor was exercising the power to forfeit. The facts do not support the contention. There was no further decision for the Deputy-Governor to take after the Board decision.

Held further that, the first respondent's assertion that the Deputy-Governor took the forfeiture decision has no merit. The contrary conclusion by the High Court is a misdirection.

Held that, the appeal succeeds with costs.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and SMUTS AJA concurring):

Introduction

[1] This appeal concerns a decision by Namibia's Central Bank, Bank of Namibia¹ (BoN) to freeze the first respondent's customer foreign currency account (CFCA) held by the third respondent (Standard Bank) and declaring its proceeds (USD115 000) forfeited to the State on the authority of regulations made under the Currency and Exchanges Act 9 of 1933.

[2] Aggrieved by the forfeiture, the first respondent approached the High Court and obtained an order from that court declaring BoN's actions unlawful. This appeal lies against that order.

[3] In terms of reg 22(A)(1)(a)(i) of the Foreign Exchange Control Regulations 1961 (the regulations), the Treasury (read 'Minister of Finance')² has the power to attach money which the Minister of Finance upon reasonable grounds suspects to be held or dealt with contrary to the regulations. Regulation 22B authorises the Minister of Finance to declare forfeited to the State any money held in contravention of the regulations.

[4] Regulation 22B reads:

'Forfeiture and disposal of money or goods attached or in respect of which orders have been issued or made

¹ Established by the Bank of Namibia Act 1 of 2020.

² *Bank of Namibia & another v NEMI Investments 104 CC & others* (SA 79/2024) [2025] NASC (31 January 2025) paras 10-12.

(1) Subject to the provisions of subregulation (3), the Treasury may issue an order in writing in which it forfeits to the State any money or goods referred to in paragraph (a), (b) or (c) of regulation 22A(1), including any money or goods accrued therefrom, and shall –

(a) in the case of money, deposit such money into the National Revenue Fund; and

(b) . . .

(2) . . .

(3) The Treasury shall not forfeit to the State any money or goods referred to in paragraph (a), (b) or (c) of regulation 22A(1), unless it –

(a) has published a notice in the Gazette in which –

- (i) notice is given of any decision to forfeit to the State money or goods specified in such notice;
- (ii) particulars are furnished of the manner in which such forfeited money or goods will be disposed of; and
- (iii) the date (which may be the date of the notice) on which the money or goods are forfeited is indicated; and

(b) has simultaneously with the publication of the notice aforesaid sent a like notice by registered post to the person who in the opinion of the Treasury is affected by that decision or, if his address is not known, to his last known address . . .’

[5] The above enforcement powers vested in the Minister of Finance have been lawfully delegated to BoN.^{3&4} In *Bank of Namibia & another v Nemi Investments* 104

³ Exchange Control Regulations, 1961 (as promulgated by Government Notice R 1112 of 1 December 1961 and amended up to Government Notice No. 126 in *Government Gazette* No. 4767 of 1 August 2022)

⁴ Delegation occurred by the Minister of Finance’s letter dated 20 March 1991 (pursuant to Regulation 22E and s 48(1) of the Bank of Namibia Act 8 of 1990; *Bank of Namibia & another v Nemi Investments* 104 CC & others (SA 79/2024) [2025] NASC (31 January 2025) paras 10-12.

CC (*Nemi*) this Court dealt with the question of who may exercise the powers under reg 22 delegated to BoN by the Minister of Finance.

[6] Writing for a unanimous Court, Frank AJA stated:

‘[25] When regard is had to the present matter, it is clear that the delegation is wide and covers a big portion of the administration of forex regulations that is inclusive of a discretionary power when it comes to the blocking of accounts. It is also clear from the extent of the mandate that BoN would have to take over as “the agent” of the Treasury and for this purpose a department at BoN known as the Department of Exchange Control and Legal Services needed to be established to give effect to the mandate from the Minister of Finance. The effect of the discretionary power granted to BoN relating to the blocking of accounts may have far reaching deleterious effects on persons whose accounts are subject to blocking orders. It thus seems from a practical day-to-day position that it was impractical for the Board of BoN to administer the powers and functions of the forex regulations and that it would be more expedient if this was done under the supervision and control of the Governor (ie the chief executive officer of the Bank). In view however of the discretion to block accounts and the potential deleterious effect of such blocking on the account holders, no delegation other than to the Governor can be implied in the delegation from the Minister to the Bank. In short, the delegation to BoN by the Minister of Finance in respect of the forex regulations, can only justify the exercise of such powers and functions by the Board or the Governor (the chief executive officer of BoN) and by no one else. Nothing would, of course, prevent the Governor from receiving reports from the Director: Exchange Control and Legal Services and even reports on inspections carried out by the department for his or her consideration, but the discretion to block an account must remain with the Board or the Governor. The delegation of the Minister of Finance to BoN can be dealt with practically and efficiently and without leaving the far-reaching discretion to block an account to the discretion of a person who reports on investigations into alleged non-compliances with the forex regulations. Because of the potential deleterious effect of a discretionary blocking order the court must interpret such delegation so as to maintain the “highest standard of propriety” in respect of such orders which normally implies the highest-ranking official which the circumstances dictate.’ (Emphasis supplied).

[7] It is clear then that to pass muster BoN's forfeiture order must have been approved by either the Board⁵ or the Governor.⁶

The trigger for BoN's decision-making

[8] On 21 January 2016, the first respondent represented by its sole member Mr Ke Wang, opened a Customer Foreign Currency Account (or CFCA) with Standard Bank. On 21 January 2016, Mr Wang deposited USD115 000 into the CFCA, declaring it as 'export proceeds', and attempted on the same day to transfer the entire amount to Nantong Lianju Textile Co in China. That triggered regulatory concerns on the part of Standard Bank, which flagged the transaction with BoN.

[9] Standard Bank made full disclosure to BoN concerning how and by whom the foreign currency was deposited and the explanation proffered by Mr Wang for the source of the money. Upon receiving that explanation from Standard Bank, BoN's Director of Foreign Exchange Control (Mr Bryan Eiseb) on 28 January 2016 sent an email to Standard Bank stating the following:

' . . . Exchange Control finds reasonable grounds to believe that the foreign currency amount of USD 115 000 was acquired in contravention of the relevant provisions of the Exchange Control Regulations 1961. . . and therefore directs Standard Bank Namibia to ensure that the amount in question is not withdrawn from the CFC Account, until further notice. It follows therefore that a senior representative of the Vincent and Tiffany Construction is required to make representation to the Exchange Control at our offices on a date convenient to all parties concerned and following such representation further directive shall be given on the way forward in the matter.'

⁵ Created by s 9 of the Bank of Namibia Act 1 of 2020.

⁶ An office created by Art 128(2) of the Namibian Constitution read with s 19 of the Bank of Namibia Act 1 of 2020.

[10] As I will demonstrate presently, it is the version of BoN that at the meeting arranged for the first respondent's representative to make representations, Mr Wang offered a bribe to Mr Eiseb and some altercation took place between the two men.

[11] The result was that criminal charges were filed against Mr Wang and he was subsequently prosecuted in the magistrate's court, including under the Anti-Corruption Act 8 of 2003. However, on 5 March 2021, Mr Wang was acquitted of all charges. As the High Court observed in its judgment (now the subject of appeal):

' . . . it is not clear if the charge of contravening reg 2(1) of the Exchange Control Regulations was ever put to Mr Wang as the charges that Mr Wang was acquitted on by and large relate to contraventions of the Anti-Corruption Act 8 of 2003.'

[12] Following Mr Wang's acquittal, the first respondent's legal practitioner, Mr Namandje, in April 2021 demanded the release of the frozen funds. On 13 April 2021, Mr Eiseb replied to Mr Namandje's letter in the following terms:

'Dear Sir,

RE: State vs Zhaung Caizhen and Ke Wang: ACC Case Number: ACC-HQO/16/001924

All previous correspondence exchanged with your office on this matter refer.

The Bank of Namibia ("Bank") duly notes the Court Order of 05 March 2021 under case number WHK-CRM-12694/201 held in the Magistrates' Court for the District of Windhoek. The Bank accepts the Court Order of 05 March 2021 as the final judgment in the matter.

As you are aware, your client's accounts ("funds") remain blocked in terms of Regulations 22A (1)(b) of the Exchange Control Regulations, 1961 ("the Regulations").

The Bank will in due course, give consideration to the forfeiture to the State of the funds in question. In this event, the process as envisaged in the provisions of Regulation 22B will be complied with. Your client is, nevertheless, also herewith afforded an opportunity to make written representations as to why the funds in question should not be forfeited to the State as envisaged by the said Regulations, and as to how the funds in question should be dealt with, given the circumstances of the matter. The written representations are expected by no later than close of business on 7 May 2021.'

[13] That was followed by the BoN Board meeting of 28 May 2021 to which I turn next.

BoN Board deliberations

[14] The minutes of the Board meeting of 28 May 2021 amongst others record the following:

'5.2. Forfeiture Foreign Exchange

5.2.1 Board Members were updated about a case of a certain Mr Ke Wang and others. They accepted foreign exchange without authorisation in the Oshikango area and/or from Chinese nationals planning to return to China. Mr Wang purported to be a foreign exchange dealer by accepting the US Dollar from these individuals with a promise to pay them in Yuan. He subsequently deposited the money (US\$ 115 000) in a CFC account which was authorised exclusively to institutions or individuals that are in the tourism sector. Mr Wang did not have any C12 authorisation from Standard Bank. When Standard Bank reported the matter, the Bank took regulatory action in Regulation 22(1)(b) of the Exchange Control Regulations, and the account was blocked.

5.2.2 Mr Wang and a colleague attempted to bribe the Director of Exchange Control and Legal Services and the Deputy Director of Protection Services. A sting operation was set up in conjunction with the ACC, and Mr Wang and his colleague were arrested. This matter was suspiciously heard before Court on 5 March 2021 without the

Director being subpoenaed. The bribery case was finalised, and the two accused were acquitted. This issue was raised with the Office of the Prosecutor-General and was being investigated. The Bank took the course to deal with this matter in terms of the Exchange Control Regulations 22(B), which allows the Bank to forfeit the money. An opportunity was provided to the accused's lawyer, Mr Namandje, to make representations as to why this money should not be forfeited to the State. Mr Namandje did not provide substantial or convincing reasons. The Board was requested to consider and deliberate the matter and the order of forfeiture of US\$115 000 held in the account (emphasis supplied).

Resolution 9:

The Board took note of the update and supported the activities by the exchange control and legal services to bring this matter to a conclusion. The Board further approved that the amount of US\$115 000 should be forfeited to the State Account.'

[15] The Board meeting was attended amongst others by the first appellant, the Deputy-Governor. Mr Eiseb, then BoN's Director of Exchange Control who authored the email of 28 January 2016 and the letter of 13 April 2021, was present to brief the Board on the matter concerning the attaching of the funds in the CFCA.

[16] On 5 July 2021, the first appellant in his capacity as Deputy-Governor issued a Notice and Order of Forfeiture, directing the transfer of the funds to the National Revenue Fund in terms of reg 22B and the Bank of Namibia Act 1 of 2020.

[17] The Notice and Order of Forfeiture reads:

'Notice of Forfeiture to the State in terms of the provisions of Regulation 22B of the Exchange Control Regulations (Government Notice 1112 of 1961), as amended ('the Regulations') made under Section 9 of the Currency and Exchanges Act, 1933 (No. 9 of 1933), as amended ('the Currency and Exchanges Act'), read with the Bank of Namibia Act, 2020 (Act 1 of 2020) in respect of the money of-

Vincent & Tiffany Construction Close Corporation, Registration No: CC 2011/4491 of Erf no. 1115, Katima Mulilo Shopping Center, Katima Mulilo and with the mailing address P. O. BOX 508, Ngweze, Katima Mulilo, Namibia.

Be pleased to take notice that:

1. The Bank of Namibia hereby gives notices of a decision to forfeit to the State all money (US\$ 115 000) held in the Standard Bank of Namibia Limited CFC Account number 60001405445 held in the name of Vincent & Tiffany Construction Close Corporation.
2. Standard Bank of Namibia Limited will be instructed to transfer the aforementioned money into the National Revenue Fund.
3. The aforementioned money is forfeited on the date of publication of this notice.
4. This notice also constitutes a written order, as contemplated in terms of Regulation 22B of the Regulations whereof the aforementioned money is hereby forfeited.

Signed at Windhoek on this 5th day of July 2021

E Uanguta (Deputy-Governor)

Bank of Namibia'

The challenge

[18] Dissatisfied by the turn of events, the first respondent challenged the forfeiture – including by way of a collateral challenge to regs 22A and 22B on the strength of which BoN exercised its enforcement powers in respect of the CFCA. The bases relied on for the collateral challenge were that these South African regulations being of pre-independence provenance, were either not applicable to Namibia or, if they were, were unconstitutional.

[19] According to the first respondent, the two regulations were not validly extended to Namibia because AG 7/1977⁷ removed South Africa's legislative power over Namibia. It was contended that in the event that the two regulations are found to be applicable to Namibia, they are unconstitutional as they allow forfeiture without judicial oversight, violating Art 16 (property rights) and Art 18 (administrative justice) of the Namibian Constitution.

[20] In the alternative, the first respondent maintained that the Deputy-Governor lacked the authority to issue the forfeiture order. The thrust of this objection is that the Currency and Exchanges Act and the regulations do not recognise the Deputy-Governor as a competent authority for forfeiture decisions. Even if it were accepted that⁸ BoN is competent to administer exchange control under s 54 of the Bank of Namibia Act (as an agent for administration of exchange control) that does not, without more, grant forfeiture powers to the Deputy-Governor.

[21] The collateral challenge to the regulations was dismissed by the High Court and there is no cross-appeal against the High Court's order in that respect.

[22] The only issues that remained were (a) whether there was valid delegation in terms of reg 22E to BoN and the Deputy-Governor of the power under reg 22B, and (b) whether the Deputy-Governor possessed the authority to execute the forfeiture order.

⁷ General Proclamation AG 7/1977.

⁸ Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977.

[23] As regards the Board resolution of 28 May 2021, the first respondent contended that the resolution merely expressed 'support' and stated that the amount 'should be forfeited,' using precatory rather than imperative language, without explicitly authorising the Deputy-Governor to act.

[24] According to the first respondent, forfeiture is a drastic and invasive remedy and must be based on clear statutory authority; and that the absence of such authority on the part of the Deputy-Governor rendered the resultant forfeiture unconstitutional under Art 16 of the Namibian Constitution (protection against arbitrary deprivation of property). Additionally, the forfeiture process violated Art 18, as it lacked procedural fairness and a rational connection to a lawful purpose.

The opposition

[25] The appellants asserted a properly delegated power in terms of reg 22E to BoN to exercise the forfeiture power under reg 22B. In opposition to the *vires* challenge to the Deputy-Governor's competence, the appellants relied on the 28 May 2021 Board resolution to justify the forfeiture. The appellants contended that the resolution demonstrated that the Board made the decision to forfeit the proceeds in the CFCA as required by reg 22B and that the Deputy-Governor as *nuntius* (messenger) merely executed the Board's decision.

[26] According to the appellants, the Exchange Control Regulations (including regs 22A and 22B) are essential for financial governance and have long been part of Namibian law. They maintained that the Deputy-Governor's actions were within the scope of these regulations. They also contended that the forfeiture was justified by

the first respondent's alleged contravention of reg 2(1) of dealing in foreign currency while not being an authorised dealer.

The High Court

[27] At para 80 of the cyclostyled judgment the learned judge a quo wrote:

'In any event, if one has regard to reg 22E the delegation of power from the Minister of Finance to the Treasury and the Treasury in the context of the Regulations is defined as follows: 'Treasury', in relation to any matter contemplated in these regulations, means the Minister of Finance or an officer in the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister of Finance. I fail to see the second respondent [the bank of Namibia] fit into this definition, much less the first respondent [the Deputy-Governor].'

[28] The court a quo found in favour of the first respondent on the alternative challenge based on the Deputy-Governor's alleged lack of authority. The court further found that the Deputy-Governor had no express statutory authority to issue the forfeiture order. According to the court a quo, although in terms of s 54 of the Bank of Namibia Act, BoN is an agent for exchange control, that did not empower the Deputy-Governor to exercise the forfeiture power under reg 22B. The court also held that the Deputy-Governor was not a designated decision-maker under the regulations and that without proper legal authorisation, the forfeiture process was irregular and invalid.

[29] In addition, the court a quo found that the Board resolution of 28 May 2021 stated that the funds 'should be forfeited' and did not explicitly authorise the Deputy-Governor to execute the forfeiture. The court a quo took the view that the resolution was vague, failed to meet legal delegation requirements, and was insufficient to

support the forfeiture order. It added that the resolution did not grant a clear mandate specifying who should execute the forfeiture, and that there was no evidence it was communicated as an instruction. Therefore, the court held, the Board's power or intent to delegate forfeiture authority remained unclear.

[30] According to the court a quo, in the absence of the Board's clear authority, the Deputy-Governor's order was a unilateral act without any demonstrable link to the resolution.

[31] The court a quo accordingly set aside the forfeiture of the funds in the CFCA. In relevant part, it ordered:

'2. Paragraphs (c) (sic) and (d) (sic) of the Notice of Motion dated 9 August 2021 are upheld in the following terms:

2.1 The Notice and Order of Forfeiture executed by the first respondent on 5 July 2021 in respect of the Applicant's funds in the amount of USD 115 000 is invalid and hereby set aside.

2.2 It is declared that the first respondent has no power, capacity, competence and jurisdiction to issue the Notice and Order he issued and made on 5 July 2021, and his decision, Notice and Order is hereby set aside.'

[32] The reference to paras '(c)' and '(d)' is an obvious error. The notice of motion referred to those paragraphs as '3' and '4'. I will henceforth refer to them the way they appear in the notice of motion.

[33] In view of its finding that the Deputy-Governor was incompetent to execute the forfeiture order, the court a quo made no determination as to whether the first

respondent's alter ego's conduct amounted to a violation of the Exchange Control Regulations.

The appeal

[34] In so far as it is relevant to the outcome of the appeal, the appellants' grounds of appeal can be briefly stated. They assert that the court a quo misdirected itself as regards the delegation of powers from the 'Treasury' to BoN and that the court a quo misdirected itself in concluding that there was no proper delegation to BoN in terms of reg 22E. Allied to that, they assert that the court a quo erred both in law and fact by finding that the first appellant lacked authority to issue the forfeiture notice and order concerning the first respondent's CFCA.

[35] The appellants contend that the court misinterpreted the evidence by finding that BoN's Board had not decided to forfeit the funds and that the notice had instead been issued by the Deputy-Governor without proper authority. They allege that on the contrary, the Board had resolved to forfeit the funds and that the Deputy-Governor acted lawfully by issuing the notice of forfeiture.

Issue for determination

[36] The first issue to be resolved is the court a quo's finding that there was no proper delegation of the powers under regs 22A and 22B to BoN in terms of reg 22E. The remaining crisp issue is whether the Board resolution of 28 May 2021 read

together with the notice issued by the Deputy-Governor, is a valid 'order in writing' as contemplated by reg 22B.

Submissions

Appellants

[37] The appellants emphasise the importance of exchange control regulations in ensuring the repatriation of foreign currency into the Namibian banking system and preventing the nation's loss of vital foreign currency resources. The appellants argue that the forfeiture decision was lawfully taken by the Board and merely executed by the Deputy-Governor.

[38] Counsel for the appellants submitted that BoN does not rely on a delegated authority to the Deputy-Governor but on a decision validly taken by the Board as contemplated by reg 22B. On behalf of the appellants, Mr Tötemeyer emphasised that reg 22B involves a two-stage process, both of which were complied with: first, the decision to forfeit and, second, implementation of the forfeiture decision. This, counsel submitted, was a result of what appeared to be a case of foreign exchange peddling engaged in by the first respondent.

[39] According to Mr Tötemeyer, the first respondent did not only fail to explain in the founding papers the source of the funds, but when the issue was raised squarely in the answering affidavit, it failed to do so.

[40] It was further submitted that the record demonstrates that the first respondent was granted *audi* to show that BoN's suspicion of foreign exchange peddling was

misplaced. That opportunity was not taken advantage of, resulting in the Board's resolution of 28 May 2021.

[41] According to Mr Tötemeyer, the Board's decision of 28 May 2021 was not provisional or a mere suggestion but an unequivocal decision to forfeit, followed by publication of the statutory notice as required by the relevant regulations. That process completed the 'order in writing' as required by the regulation.

[42] According to the appellants, the Board had the authority to issue the forfeiture order under reg 22B and it was a misdirection for the court a quo to hold that there was no definitive Board decision on forfeiture and that the notice was issued solely by the Deputy-Governor without Board authorisation.

[43] According to the appellants, on a contextual interpretation the resolution of the Board represents a valid exercise of its powers under reg 22B. They contend that the notice and order of forfeiture, although signed by the Deputy-Governor, reflect a decision duly taken by the Board, with the Deputy-Governor acting as a messenger.

Second respondent

[44] The second respondent makes common cause with the appellants in impugning the court a quo's order setting aside the forfeiture. This respondent's participation in the appeal is limited to the interpretation of the court a quo on the issue of delegation of powers by the 'Treasury' to BoN. The second respondent

disagrees with the court a quo's interpretation of reg 22E, to the effect that the first appellant does not fall within the definition of 'Treasury'.

[45] It is said that reg 22E allows the Minister of Finance to delegate any powers or functions to any person, including BoN and the Deputy-Governor, for the issuing of valid notices and orders of forfeiture. It is submitted that the wording of reg 22E is clear and should be interpreted in accordance with the cardinal rule of construction. The second respondent contends that the court a quo's interpretation is untenable and contrary to the intention of the legislature.

[46] In conclusion, the second respondent argues that BoN and the first appellant have delegated competence under reg 22E to enforce reg 22A and 22B.

First respondent

[47] The first respondent supports the reasoning and order made by the court a quo in respect of the forfeiture order. According to the first respondent, its CFCA was lawfully opened, and the lawfulness of the account was never challenged. It contends that it was not disputed by the appellants in the answering affidavit that it was the first appellant that executed the forfeiture purportedly in terms of reg 22B. The first respondent maintains that the blocking of its funds under reg 22A(1)(b) by the second appellant's officials was unlawful, and the subsequent forfeiture under reg 22B(1) was equally invalid.

[48] The first respondent emphasises that forfeiture under reg 22B(1) involves a two-stage process, with blocking being a prerequisite for forfeiture. It argues that the

blocking was not done by the Board or the Governor of BoN, rendering the forfeiture unlawful. The first respondent therefore agrees with the court a quo's findings that the Board did not make a definitive decision to forfeit the funds, and there was no indication that the Board authorised the first appellant to make the order.

[49] The first respondent submits further that the first appellant has no legal authority, competence, power, or jurisdiction to make a forfeiture order under reg 22B(1) and that the forfeiture order was unauthorised, unlawful, and that the appeal should be dismissed.

[50] In oral argument Mr Namandje for the first respondent made the point that the process under the Currency Exchanges Control Act is a two-stage one. It starts with the blocking of an account in terms of reg 22A(1)(a), (b) and (c) and ends with forfeiture of the blocked funds to the State Revenue Fund in terms of reg 22B. Mr Namandje was at pains to point out that each of the two stages must be executed by an unauthorised person or body – in this case either the Board or the Governor as laid down in *Nemi*.

[51] Against the backdrop of Mr Eiseb's email message of 28 January 2016, Mr Namandje argued that the content of the email proves that the decision to block the account (an essential first step for a valid forfeiture) was performed, not by the Board or the Governor, but by an unauthorised official. In other words, there existed no legal *nexus* between the blocking and the forfeiture.

Misdirection on delegation to BoN

[52] As I previously observed, this Court has now authoritatively settled the issue of delegation to BoN of the Minister of Finance's powers under the Exchange Control Regulations. Therefore, it is now trite that BoN or the Governor are competent to exercise those powers. It was a misdirection for the court a quo to hold otherwise.

Objection to blocking of CFCA does not avail first respondent

[53] It is true, of course, that in the founding affidavit the allegation was made by the first respondent that the blocking (or rather attaching) of the funds in the CFCA was unlawful. But that was in the context of the challenge to the *vires* of regs 22A and 22B, which the first respondent contended did not apply in Namibia or, in the alternative, were unconstitutional.

[54] The High Court rejected both the main and alternative bases on which the allegation of the alleged unlawfulness of reg 22A attachment was based. There is no suggestion in the founding papers that such attachment was unlawful on the basis that it was done by an official who was not authorised to do so in the manner suggested by Mr Namandje in oral argument on appeal.

[55] It was consequently not open to the first respondent to seek the invalidation of the reg 22A attachment in the absence of a clear collateral challenge on the basis suggested by Mr Namandje in oral argument. That such basis was never the first respondent's case a quo is evident from the fact that the notice of motion does not seek any relief in respect of the reg 22A attachment.

[56] I therefore do not propose to deal with the *vires* of the blocking order that led to the ultimate forfeiture.

Deputy-Governor's competence only issue now on appeal

[57] In his summation of the first respondent's opposition to the appeal, Mr Namandje argued that the appeal should fail for three reasons. First, the Deputy-Governor did not have a proper delegation either in fact or in law to execute the reg 22B forfeiture order. Second, if regard is had to the record, including in particular Mr Eiseb's email of 28 January 2016 and the report to the Board regarding first respondent's representations, the actual decision to order forfeiture was not made by the Board. Thirdly, there was no legal basis for the forfeiture absent proof (BoN bearing the onus) that there was a contravention of reg 2(1) by the first respondent.

Disposition

[58] The choice of the words 'should be forfeited' employed in the Board resolution of 28 May 2021 which the court a quo considered ambiguous is, in my respectful view, perfectly consistent with the scheme of reg 22B. It is not precatory as suggested on behalf of the first respondent. The words should not be viewed in isolation but against the backdrop of the history of the matter since the CFCA was first subjected to regulatory hold and the steps taken on behalf of BoN since the 28 May 2021 Board resolution was passed.

[59] Logically, the notice in the *Gazette* issued by the Deputy-Governor could only have followed after a decision of the Board. Both the Board decision and the notice in the *Gazette* came against the backdrop of an investigation carried out after Standard Bank flagged the transaction. The process included, first, the attachment of the

account; second, *audi* being extended to the first respondent; and third, the representations being considered unconvincing and the Director of Exchange Control forming the view that sufficient reason existed that forfeiture was justified. As the record demonstrates, the Board was updated on those prior steps and clearly applied its mind by recording that it ‘supports’ the prior steps already taken and then ‘approved’ forfeiture. The notice does not stand in isolation and must be interpreted in the ‘context’ of and the ‘reason for which’ it was created.⁹

[60] It is a specious contention that the decision by the Board ‘supporting’ the prior steps and ‘approving’ the forfeiture is not an ‘order in writing’ as contemplated by reg 22B. That contention could perhaps hold had the further step of the notice not occurred, which is a necessary condition for the valid exercise of the forfeiture power.

[61] As far as who should have implemented the decision to forfeit is concerned, the Deputy-Governor’s action to publish the notice was not an independent exercise of a discretion but the carrying out of a decision – as *nuntius* – already taken by the Board of which he was a member.

[62] The fallacy in the first respondent’s contention is the premise that the Deputy-Governor was exercising the power to forfeit. The record does not support that contention. There was no further decision for the Deputy-Governor to take after the Board’s decision. Had perhaps the Board reserved a decision until a later date and the Deputy-Governor in the meantime published the notice, the first respondent’s contention could have been seriously considered.

⁹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC).

[63] I am satisfied therefore that the first respondent's assertion that the Deputy-Governor took the forfeiture decision has no merit. The contrary conclusion by the High Court is a misdirection.

[64] In a rearguard defence of the court a quo's order declaring the forfeiture unlawful, Mr Namandje contended that there was in any event no legal basis for the forfeiture because BoN had not established a contravention of the Exchange Control regulations. That contention fails on *Plascon Evans*.¹⁰ Where in motion proceedings there are disputes of fact and there is no referral to oral evidence, the version of the respondent must be accepted unless it is far-fetched or so implausible that it can be rejected merely on the papers.

[65] As was correctly pointed out by Mr Tötemeyer on behalf of the appellants, the first respondent was granted ample opportunity to prove a legitimate source of the funds held in the CFCA.

[66] The following is stated in Mr Eiseb's answering affidavit on behalf of BoN:

'[32] During March 2016, the officials of the second respondent requested the applicant to make representations to it regarding the applicant's possession of cash funds USD 115 000.

[33] I met the applicant on 24 March 2016. Instead of taking the opportunity to make representations regarding the applicant's possession of cash funds USD 115 000, the applicant (the deponent to the applicant's founding affidavit) instead attempted to

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) applied in amongst others *Mostert v Minister of Justice* 2003 NR 11 (SC).

bribe me with the aim of having the CFC account unfrozen and the funds released on his instructions to the fourth respondent.

...

[39] . . . the applicant (and Mr Ke Wang) again failed to make representations (justifying the release of the cash funds USD 115 000) as to how they came into possession of cash funds USD 115 000.

...

[45] At no time, and not even in the founding papers, does the applicant/Mr. Ke Wang explain the source of funds USD 115 000.'

[67] Those allegations were not dealt with in reply in a manner that would throw doubt on BoN's answer so that it could be rejected on the papers. The first respondent replied as follows to the appellant's allegations:

'[21] Ad paragraph 33 to 51

21.1 I deny all the allegations of criminal wrongdoing against myself or the applicant. In any event these allegations are strangely being made even when I have been acquitted in accordance with the law.

21.2 The respondents continue relying on certain parts of Regulation 22 which are not applicable in Namibia and are not laws of Namibia. Legal submissions shall be made at the hearing in this respect.'

[68] Had it proceeded to deal with the question whether the transaction that caused regulatory concern contravened the Exchange Control regulations, the court a quo would have had to accept the version of the appellants that a contravention was established.

[69] Since there is no cross-appeal of the High Court's dismissal of prayers 1 and 2 in the first respondent's notice of motion, the only orders that are relevant in the

appeal are those granting prayers 3 and 4 of the notice of motion, including the partial costs order consequent upon the grant of those orders. Those orders fall to be set aside and the order the court a quo should have made was to dismiss the application in its entirety, with costs.

Order

- (a) The appeal succeeds and paragraphs 2 and 3 of the High Court's order are set aside and replaced by the following:

'2. Paragraphs 3 and 4 of the notice of motion dated 9 August 2021 are dismissed.

3. The applicant is liable for the costs of the respondents in opposing the application, including the costs of instructing and instructed legal practitioners where retained.'

- (b) The first respondent must pay the costs of the first and second appellants in the appeal, including the costs of one instructing legal practitioner and two instructed legal practitioners.

DAMASEB DCJ

SHIVUTE CJ

SMUTS AJA

APPEARANCES

APPELLANTS: R Tötemeyer (with him D Obbes)
Instructed by ENSAfrica | Namibia

FIRST RESPONDENT: S Namandje (with him S Kadhila)
Of Sisa Namandje & Co Inc

SECOND & FOURTH
RESPONDENTS: J Ncube (with him C T van der Smit)
Of Government Attorney