REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 9/2011

In the matter between:

1. **MARTIN SHALLI** **APPLICANT**

and

THE ATTORNEY-GENERAL **1ST RESPONDENT**

THE PROSECUTOR-GENERAL **2ND RESPONDENT**

Neutral Citation: *Shalli v The Attorney – General (POCA 9/2011) [2013] NAHCMD 5 (16 January 2013)*

Coram: SMUTS, J *et* GEIER, J

Heard: 19 October 2012

Delivered: 16 January 2012

JUDGMENT

SMUTS, J

[1] The issue raised in this application is the constitutionality of the Prevention of Organized Crime Act, 29 of 2004 ("POCA"). The applicant had in his notice of motion applied to set aside the entire Act as unconstitutional and invalid. In the alternative, sections 50-56 and 59-71 of POCA are sought to be set aside. In argument, the applicant's attack became confined to the alternative and thus to the constitutionality of chapter 6 of POCA. It is entitled "Forfeiture of property and related matters". Before referring to this chapter within the scheme of the Act, and the challenges made upon it, the facts which have given rise to this application are first referred to.

[2] The applicant is General Martin Shalli. He is the former Chief of the Namibian Defence Force ("NDF") and Namibia's former High Commissioner to Zambia. In his capacity as Chief of the NDF, he was responsible for the implementation of an agreement in terms of which the Government of Namibia had purchased military equipment from a Chinese State-owned company, Poly Technologies Inc. It is alleged that he had received bribes from that company of some U$700,000 which, so it is alleged, he placed in bank accounts in Zambia. It is alleged that this conduct is in contravention of ss 33, 36, 43 and 45 of the Anti Corruption Act, 8 of 2003 and of ss 4, 5 and 6 of POCA.

[3] This application was prepared in anticipation of a further *ex parte* application for a preservation order under chapter 6 of POCA. There had been a prior preservation order which was set aside for reasons which are not relevant for present purposes. On 2 May 2012, this court, per Van Niekerk J, granted a further preservation order in the form of a rule *nisi*. This application was then brought. By agreement between the applicant and respondents, the return date in the preservation order is to stand over until this constitutional challenge has been heard and finalized. In the preservation order, the applicant was called upon to show cause why an order should not be made in terms of s 51 of POCA for the preservation of the money in two of the bank accounts in Zambia.

[4] The founding affidavit, prepared as a matter of urgency in view of the imminent issuing of a further preservation order, is brief and lacking in specificity as to the foundation of the constitutional challenges upon POCA as a whole or

upon the sections which are identified in the notice of motion and referred to above in the alternative. The respondents take the point that the founding affidavit does not sufficiently identify the causes of action upon which the application is based or the provisions of POCA at which they are directed. The respondents however in their answering affidavit proceeded to identify three features of chapter 6 of POCA which they considered to be those which the applicant contended rendered the chapter 6 (and the Act) unconstitutional. In a more detailed reply, the applicant would appear to have accepted the identification of those three causes of action.

[5] Mr Trengrove SC who appeared for the respondents submitted that the applicant in heads of argument filed on his behalf had raised issues which were not pleaded or had not been pleaded with the required degree of precision and specificity. He submitted that the respondents had not had any or sufficient opportunity to address them and to plead to them and place evidence before court justifying the constitutional limitations contended for by the applicant. Mr Trengrove however proceeded to address argument on the causes of action identified and referred to in the answering affidavit and submitted that these did not establish a cause of action for the relief claimed in the notice of motion.

[6] This court has previously stressed that the rules of pleading apply to applications in which the constitutionality of statutory provisions is raised. It stressed the importance of precisely identifying the impugned provisions and that the attack upon them should be substantiated so that a respondent is fully apprised of the case to be met and evidence which might be relevant to it.[1]

[7] This application will be addressed on the basis of the causes of action as pleaded in the founding affidavit and the issues identified as constituting the challenge in the answering affidavit which were further dealt with in the replying affidavit.

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[1]Lameck v President of Namibia ("Lameck") 2012(1) NR 255 (HC) at par [58], p 271 and the authorities referred to in footnote 21

The overall purpose and statutory context of POCA

[8] Before referring to the provisions relating to asset forfeiture embodied in chapter 6 of POCA, it is apposite to refer to the overall purpose of POCA and its statutory context. This court in Lameck referred to the restrictions and prohibitions contained POCA and held that these were in the public interest and serve a legitimate object, taking into account the Act's overall purpose. In doing so this court embraced the way in which the purpose of similar legislation was set out by the South African Constitutional Court in the following terms:

"The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature . . .". [2]

[9] It was also pointed out by Mr Trengrove in argument that POCA also

[2]National Director of Public Prosecutions v Mohamed NO 2002(4) SA 843 (CC)

gave effect to the international obligations of the Namibian state under various international treaties. He referred to the United Nations Convention against Transnational Organised Crime [3] which obliges state parties to take wide-ranging measures to combat organised crime and specifically to adopt measures to enable the confiscation of the proceeds of crime and property or equipment or other instrumentalities used in or destined for use in the commission of crimes. Mr Trengrove also referred to the United Nations Convention against Corruption. [4] This obliges state parties to adopt measures to combat corruption including those which enable the confiscation of the proceeds of and instrumentalities of various forms of corruption by the freezing or seizure of items for the purpose of their eventual confiscation. Mr Trengrove also referred to the other provisions of POCA which give effect to these treaties by criminalising racketeering in chapter 2, criminalising various forms of money laundering in chapter 3, criminal gang activities in chapter 4, confiscating the benefits of crimes from criminals in chapter 5 and the forfeiture of instrumentalities or proceeds of crime wherever they may be found, whether in the hands of a criminal or not, as is set out in chapter 6.

Asset forfeiture under POCA

[10] Both counsel referred to the two fundamental forms of forfeiture provided for in chapters 5 and 6 respectively. Chapter 5, entitled "Confiscation of Benefits of Crime", essentially provides for confiscation orders made against a person convicted of an offence. This procedure is described in more detail by this court in Lameck. [5] This form of confiscation is often referred to as "criminal forfeiture". As is pointed out by Mr Trengrove, this is somewhat of a misnomer as the order is a confiscation order and is a civil judgment against the accused for the payment of an amount of money to the State after a preceding enquiry has been completed. Mr Gauntlett SC, who together with Mr F Pelser appeared for the applicant, also referred to this as criminal forfeiture although he also used the term of "forfeiture in *personam*" which may more accurately describe the

[3] Ratified by Namibia on 16 August 2002

[4] Ratified by Namibia on 3 August 2004

[5] *Supra* at para's 62 to 79, p 272-273

procedure. He differentiated this form of forfeiture from that contained in chapter 6 by reference to the latter as *in rem* forfeiture – or civil forfeiture as was also referred to by Mr Trengrove.

[11] Mr Gauntlett however submitted that both forms of forfeiture in POCA are constitutionally problematic in that they:

- violate the right to property in the sense that property is rendered liable to forfeiture despite the crime not having been proved in accordance with the standard applicable to crimes, being beyond reasonable doubt, and irrespective of whether the prosecution of the crime was continued after the institution of POCA proceedings;
- violate an accused's fair trial rights in the parallel criminal proceedings by requiring an accused to provide a defence or prove an exception to the preservation or forfeiture provisions; and
- violate an accused's right to a fair procedure in POCA proceedings by truncating the proper procedural safeguards applicable to civil proceedings in peremptory terms; and
- violate an accused's right to dignity by subjecting him or her to legal proceedings for the perceived greater public interest allegedly served by POCA.

Given the nature of the applicant's challenge only the asset forfeiture required in chapter 6 is directly addressed in this judgment.

Chapter 6 of POCA

[12] The nature of the remedy under chapter 6 is described in some detail in Lameck. [6] In short, the asset forfeiture regime under chapter 6 entails the forfeiture of two categories of property. These are the "instrumentalities" of crime as defined in s 1 and the proceeds of unlawful activities, also defined in s 1. The latter definition includes within its sweep "any property or any service, advantage, benefit or award that was derived, received or retained, directly or indirectly in Namibia or elsewhere at any time or after the commencement of this Act, in connection with or

[6]Para's 80-83 at p 276-277

as a result of any unlawful activity carried on by any person and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity."

[13] This court in Lameck, [7] in following the Supreme Court of Appeal in South Africa [8] referred to asset forfeiture under this chapter as having the following purposes:

"The interrelated purposes of Ch 6 include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime; (c) eliminating or incapacitating some of the means by which crime may be committed; and (d) advancing the ends of justice by depriving those involved in crime of the property concerned . . .".

[14] Section 50 describes the proceedings contained in chapter 6 as being civil proceedings and not criminal proceedings. Mr Gauntlett however submitted that the description by the legislature of the proceedings as civil could not insulate a provision – or the provisions of the chapter – from constitutional scrutiny. I agree. The substance of the process would need to be examined. This court in Lameck held that the nature of those proceedings are civil with reference to the substantive provisions contained in that chapter. [9] Chapter 6 proceedings are thus not merely civil by reason of the description of those proceedings contained in s 50(1). In reaching its conclusion, the court in Lameck stressed that those proceedings are not necessarily related to the prosecution of an accused and are open to the State to invoke whether or not there is a criminal prosecution. It is also apparent from the provisions contained in the chapter that even if there is a prosecution, the remedy would not be affected by its outcome. This court in Lameck also made it clear that the remedy in chapter

[7] *Supra* at par [81]

[8] In Prophet v National Director of Public Prosecutions 2006(1) SA 38 (SCA) at par [34] and subsequently followed by that court in National Director of Public Prosecutions RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnayaran 2004 (2) SACR 208 (SCA) par [18]. Approved in Mohunram and Another v National Director of Public Prosecutions and Another (Law review project as *amicus curiae*) 2007 (4) SA 222 (CC) at par [57]

[9] At par [82]

6 is directed at the proceeds and instrumentalities of crime and not at the person having possession of them. [10] Although the remedy may contain some unusual features, it is in essence and in substance civil in nature.

[15] Asset forfeiture under chapter 6, is dealt with by means of two forms of orders. There are firstly preservation orders dealt with in ss 51-58 and forfeiture orders in ss 59-68. In essence, preservation orders are given for the purpose of freezing the instrumentalities and proceeds of crime pending the final determination of an application for the forfeiture of those items. As is pointed out by Mr Trengrove, a regime of this nature is in furtherance of the Convention against Transnational Organised Crime and the Convention against Corruption. Both oblige state parties to take measures to enable the freezing or seizure of such items and for the purpose of their eventual confiscation.

[16] The power of a court to grant preservation orders is set out in s 51 which provides:

"(1) The Prosecutor-General may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is-

(a) an instrumentality of an offence referred to in Schedule 1; or

(b) the proceeds of unlawful activities,

and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.

(3) When the High Court makes a preservation of property order it must at the same

[10] *Supra* at paras 81-82

time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper fair and effective execution of the order.

(4) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court."

[17] In terms of this section, this court must make a preservation order if the application is supported by evidence which discloses reasonable grounds to believe that the property in question is an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities as defined.[11]

[18] Once an order has been made, s 52 requires the Prosecutor-General to publish an order in the Government Gazette, and to give notice to all persons known to have an interest in that property so as to provide them with the opportunity to apply for their interest in the property to be excluded and to oppose its forfeiture.

[19] Forfeiture orders referred to in ss 59 - 68, provide for the forfeiture to the State of property which is the subject of a preservation order. The Prosecutor-General is empowered to apply for forfeiture on notice to interested parties. This court may only grant a forfeiture order if it is found on a balance of probabilities that the property is an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities. The far reaching effect of these orders is ameliorated by certain provisions in chapter 6 directed at protecting affected parties, given the fact that these orders are directed at the instrumentalities or proceeds of crime themselves wherever found and are not necessarily directed against a convicted criminal who used or subsequently possesses those items which may be preserved or declared forfeited in the hands of third parties.

[20] The legislature in chapter 6 also provides for an innocent owner defence to a forfeiture order to a third party. In ss 63 and 65, third parties would need to establish on a balance of probabilities that their interest in the property had been

[11] See also generally the unreported judgment of this court: the Prosecutor – General v Kanime (POCA 3/2012) [2012] NAHCMD 111 (20 December 2012) at para [49]

acquired legally and for consideration at a time when they did not know and did not have reasonable grounds to suspect that the property constituted an instrumentality or the proceeds of a crime.

[21] I have already referred to the power of the court on application to exclude the operation of a preservation order upon an interest in the property being established by a person subject to that order.

[22] Reasonable living and legal expenses can, upon application, be sought by an affected party from the property subject to such an order. A court may also rescind or vary a preservation order if it deprives an applicant of the means to provide for reasonable living expenses and causes undue hardship outweighing the risk that the property may be destroyed, lost, damaged, concealed or transferred.

The applicant's challenges upon chapter 6

[23] It would appear from the applicant's founding affidavit that his challenge to chapter 6 is essentially threefold. Firstly the applicant contends that the civil forfeiture contemplated in chapter 6 is contrary to the constitutional presumption of innocence and in conflict with his right to a fair trial enshrined and protected by art 12 of the Constitution. Secondly, the applicant contends that the civil forfeiture regime in chapter 6 impinges upon his constitutional right to the protection of his property protected under art 16. Thirdly, there is the applicant's challenge that civil forfeiture under chapter 6 violates his right to dignity protected by art 8 of the Constitution.

Presumption of innocence and the right to a fair trial

[24] Mr Gauntlett contended that there was not the required connection which rendered need to exist between forfeiture under chapter 6 and its purpose which rendered the deprivation as being procedurally fair. He submitted that there is no rational connection between the means and end or should a connection be found to exist, that the connection justifies a higher standard than the ordinary

civil onus brought about by chapter 6 which results in the deprivation being procedurally unfair (and in conflict with art 12). Mr Gauntlett submitted that the constitutional presumption of innocence requires that it is for the prosecution to prove guilt of an accused and that proof must be beyond reasonable doubt. He submitted that in order to pass constitutional muster, the standard of proof in confiscation under chapter 6 should be proof beyond reasonable doubt or a civil standard of proof which for all practical purposes is indistinguishable from the criminal standard. In support of this contention he referred to certain authority emanating from the European Court of Human Rights. [12] He further submitted that it also offended the constitutional presumption of innocence for POCA to impose a presumption of guilt in the sense of presupposing that a crime has been committed.

[25] Mr Trengrove on the other hand contended that civil forfeiture under chapter 6 is directed at property and the proceeds and instrumentalities of crime and not against wrongdoers. He relied upon what was stated by [13] this court in Lameck as well as by the South African Supreme Court of Appeal [14] and the Supreme Court of Canada in support of this contention. [15]

[26] Mr Trengrove submitted that a defendant in forfeiture proceedings under chapter 6 is not charged with an offence and that the presumption of innocence in art 12(1) (d) would not apply. Mr Trengrove further pointed out that art 12(1) (d) is identical in material respects to art 6(2) of the European Convention, and that significantly, the European Court of Human Rights, the Privy Council and the House of Lords and more recently the Supreme Court (in England) have consistently held that asset forfeiture generally and civil forfeiture in particular are not subject to the criminal standard of proof in terms of art 6(2) (of the European Convention). Mr Trengrove referred to Phillips v The United Kingdom [16] where the European Court held that civil proceedings are not subject to the

[12]Y v Norway [2003] ECHR 80 at par [46]

[13]Lameck *supra* at par [81]-[82] referred to in par [14] above

[14]National Director of Public Prosecutions v Cook [2004] 2 All SA 491 (SCA) par [20]

[15]Chatterjee v Ontario (Attorney General) [2009] 1 SCR 624 at par [4], [43] and [46]

[16][2001] ECHR 437 pars 31-35

presumption of innocence in art 6(2). [17] That court held that the proceedings for civil recovery of proceeds under the Proceeds of Crime Act of 2002 (of England and Wales) are civil proceedings and not proceedings where a person is charged with a criminal offence within the meaning of art 6(2) of the European Convention.

[27] Mr Trengrove further referred to a decision of the Privy Council [18] and the approach of the House of Lords in R v Rezvi [19] that criminal forfeiture proceedings are civil proceedings which are not subject to the presumption of innocence in art 6(2). He further referred to a recent decision of the Supreme Court (of England and Wales) in Gale [20] which came to the same conclusion that civil forfeiture proceedings under Part V (of the English) Proceeds of Crime Act 2002 are not subject to the presumption of innocence. In the leading judgment of that court, Lord Phillips distinguished the decisions of the European Court including the case of Y v Norway, relied upon by the applicant, and concluded by stating:

"The commission by the appellants in the present case of criminal conduct from which the property that they held was derived, had to be established according to the civil and not the criminal standard of proof. For reasons that I have given, that remains my conclusion. It is a conclusion which, prior to Geerings, appeared to be firmly founded on the decision of the Privy Council in McIntosh. ….. In my view that foundation is unshaken." [21]

[28] Mr Gauntlett referred to certain decisions of the United States Supreme Court. He referred to Austin v United States[22] where that court rejected the argument that civil forfeiture is justified on the basis of removing the instruments

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[17]Walch v United Kingdom [2006] ECHR 1154

[18]McIntosh v Lord Advocates [2003] 1 AC 1078 at par 14 and 25

[19][2002] UKHL 1 par 10-13

[20] Serious Organized Crime Agency v Gale [2011] 1 WLR 2760 pars 2-5 and 13-54 (Lord Phillips), pars 56-57 (Lord Clerke), pars 114 (Lord Brown) and para 123 (Lord Dyson)

[21]Gale *supra* par 18-53

[22] 509 US 602 (1993) at 622

of crime. Mr Gauntlett also referred to Halper v United States.[23] Mr Trengrove submitted that the American cases relied upon by the applicant are however not helpful by reason of the fact that different legal issues were raised by them such as a violation of the double jeopardy clause of the Fifth Amendment and the question whether criminal forfeiture violated the excessive fines clause of the Eighth Amendment.

[29] I have already referred to the finding of the full court in Lameck that asset forfeiture proceedings are civil in nature. I can find no reason why that finding (that civil forfeiture under chapter 6 is a civil remedy unrelated to a criminal prosecution and punishment of offenders) should not be followed. As civil proceedings and given their nature, they do not engage art 12(1) (d) of the Constitution. The presumption of innocence would not in my view arise. This approach is also consonant with the applicable foreign authority referred to above raised within a similar context.

[30] I accordingly conclude that asset forfeiture proceedings in chapter 6 of POCA do not violate the presumption of innocence applicable to criminal proceedings embodied in art 12(1) (d) as that subtitle is not applicable to such proceedings.

[31] It was also contended on behalf of the applicant that s 51(2) infringes upon the right of a fair hearing by requiring in peremptory terms that a preservation order is to be sought and granted without notice to the owner of the property. This sub-section makes it clear that a court hearing such an application must make a preservation order without requiring notice of the application to be given to any person affected by it once the application discloses reasonable grounds for a belief that the property concerned is an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities.

[32] Mr Gauntlett referred to the similar provision in legislation in South Africa. It is in strikingly similar terms. Yet instead of stating that a court "may" grant an order, (as in the South African legislation), the Namibian legislature chose to

[23] 490 US 435 (1989)

employ the term "must" instead. He submitted that the use of the term "must" in those circumstances would indicate a clear intention on the part of the Namibian legislature to require that such orders must be granted without notice, with "must" being given its ordinary peremptory meaning. He submitted that the peremptory and compulsory requirement of making a determination of this nature on an *ex parte* basis offends against the right to a fair trial protected by art 12(1) (a) of the Constitution.

[33] Mr Trengrove however countered that the "reasonable grounds to believe" standard for the granting of a preservation order sought *ex parte* is the same standard employed by ss 20 and 21 of the Criminal Procedure Act, 51 of 1977 for the grant of a search warrant where an application for that warrant is also made *ex parte*. He further submitted that the purpose of such an order is to preserve the property pending the determination of the forfeiture application and that there would be inherently high risks in giving notice to those with an interest in the instrumentalities and proceeds of crimes who could dispose of them, encumber them or even destroy them if notice were to be given. He referred to the approach of the High Court in Phillips which referred to the technological advances made with regard to the transfer of funds at great speed to any locations in the world and the reason why the procedure for issuing a restraining order should be as expedient as possible.

[34] Whilst I accept that in applications of this nature compelling circumstances may frequently be raised to justify dispensing with notice to a party given the nature of such applications, the legislature has instead of vesting a court with a discretion to determine matters on that basis, made it peremptory for a court to grant such applications without notice and without the need for the prosecuting authorities to raise exceptional or compelling circumstances why notice should not be given. I would have thought that it should have been left to a court to deal with an application like this on the latter basis, requiring prosecuting authorities to justify dispensing with prior notice of such applications. It is not at all clear to me why the legislative decided otherwise instead. It would clearly have been better legislative policy and better accord with fundamental principles governing the fairness of proceedings to have

vested that discretion in the court in each case so that the prosecuting authorities would be required to justify the use of proceedings without notice to parties affected by those proceedings. That would plainly have been the preferable course and one which the legislature should in my view have adopted.

[35] But would the failure to have done so and to require the court to grant orders once the reasonable belief is established on the papers violate an affected person's (such as the applicant) constitutional right to a fair trial? Mr Trengrove submitted that the court may, as it had done in this instance, grant a rule *nisi* which he contends would comply with art 12 inasmuch as the requirements of the *audi alteram partem* rule would be met, given the inherent flexibility of that rule. The court would be granting a temporary order which an affected person could answer upon at a return date and in fact may even anticipate that return date beforehand. He further referred to the approach of a Full Court which had endorsed the approach of South African Courts that "an order granted *ex parte* is by its nature provisional irrespective of the form it takes." [24]

[36] Whilst the formulation of s 51(2) and the use of the term "must" in that sub-section can with some justification be criticised, it is not clear to me that the use of that term and the peremptory requirement of an *ex parte* application is in violation of art 12 and the rights of a fair trial of a person affected by such an application. A court hearing such an application should, as occurred in this instance, even if satisfied that the requisites for the granting of an order are to established, do so by way of a rule *nisi* which would afford a person affected the opportunity to be heard by the order. The interim operation of the order would achieve its purpose whilst a rule *nisi* would afford the person affected by the order the opportunity to be heard in due course or as a matter of urgency if that person would want to anticipate the order. By approaching the section in this way, as Van Niekerk, J did in this matter, would in my view meet the requirements of a fair trial protected by art 12(1). The applicant's right to a fair trial in this matter were in my view not infringed by s 51 (2). But even in the

[24] Prosecutor-General v Lameck 2010(1) NR 156 (HC) par [4] and the authority referred to in that paragraph

absence of a rule *nisi*, as the Full Court has in my view, with respect, correctly held, an order granted *ex parte* is in any event provisional and subject to being set aside on application by a party affected by it.

[37] It follows that whilst being unfortunately formulated, the provisions of s 51(2) do not in my view violate the right of a fair trial protected by art 12(1) nor the applicant's right to a fair trial in this matter.

The right to property

[38] Mr Gauntlett contended that the civil forfeiture regime in chapter 6 impinges upon the constitutional protection of property rights. He submitted that it was no answer to this challenge for the respondents to contend that property procured through crime is not protected by art 16. He submitted that such an approach would beg the underlying constitutional question as to whether civil forfeiture under chapter 6 is compatible with the Constitution, despite the justification for the deprivation of property (i.e. the fact that a crime must be found to have been perpetrated) not being required to be established. He further submitted that the respondents' approach amounted to a "guilty property fiction" which would not provide a constitutionally competent justification. In support of this argument, he drew support from an article by Prof van der Walt. [25]

[39] Mr Trengrove argued that if the money in the applicant's Zambian banking accounts are the proceeds of bribes received from Poly Technologies Inc, then the applicant would not be able to credibly argue that art 16 protected him against forfeiture of those ill-gotten gains. He further contended that the applicant's ownership of bribe money would not be constitutionally protected at all or even if it were to be, then the forfeiture of the money pursuant to the purposes of chapter 6 which would be a reasonable measure of general application in pursuit of the legitimate objectives in the public interest and thus

[25] Van der Walt "Civil Forfeiture of Instrumentalities and Proceeds of Crime in the Constitutional Property Clause" 2000 SAJHR 1 at 9 and at 36 – 37 where the learned author criticised the application of the "guilty property fiction" which Mr Gauntlett submitted was at the root of the respondents' constitutional justification for the provisions.

meet the test for constraints upon the right to property laid down by the Supreme Court in Grape Growers.[26]

[40] I agree with both of those submissions. That would also accord with what was decided in Lameck and the approach of the Supreme Court in Grape Growers referred to by the court in Lameck. [27]

[41] This court however held in Lameck that the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available. [28] This court in that matter further held [29] that the protection of property under art 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose as had been made clear by the Supreme Court in Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others [30] where the following was stated:

"If it is then accepted, as I do, that art 16 protects ownership in property subject to its constraints as they existed prior to independence, and that art 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it seems to me that legislative constraints placed on the ownership of property which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution . . .".

[42] Mr Trengrove also referred to the approach of the South African High Court [31] where the Court held that by depriving a criminal of the spoils of crime gives expression to the common law principle that no one should be allowed to

[26]Cited below in par [41]

[27]Lameck *supra* par [52]

[28]*Supra* at par [50]

[29]*Supra* at par [51]

[30]2004 NR 194 (SC) at 212 E-F

[31]National Director of Public Prosecutions v Phillips 2002(4) SA 60 (W) at par [43]

benefit from his own wrongdoing. [32] Mr Trengrove also referred to the approach of the Supreme Court of Appeal in the Cook Properties matter [33] where the Court held that it is constitutionally permissible for the State to employ the remedy of civil forfeiture to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime.[34]

[43] Mr Trengrove also referred to the concluding portion of Prof van der Walt's article where the latter stated:

"In principle, it seems acceptable to treat both criminal and civil forfeiture of property as regulatory deprivations that are justified by the State's police power to regulate and control the use of property in the public interest (in this case, for the legitimate public purpose of effective policing, prosecution and conviction of criminals involved in serious, organised and socially harmful criminal activities). Therefore, even if a civil forfeiture causes loss of property or other serious financial disadvantage, it could in principle still be justifiable, without compensation, provided that there is a rational connection between the public purpose served, the means adopted and the individual effects --- there is nothing really new or different about this notion or the adjudicative processes involved in it, the courts in most jurisdictions are willing and well-suited to apply them fairly and reasonably."

[44] Mr Trengrove also referred to the approach of the European Court as well as the House of Lords in Rezvi [35] where Lord Steyn concluded that asset forfeiture "is a proportionate response to the problem which it addresses". I respectfully agree with that approach as well as with the South African High Court in Phillips and the South African Supreme Court of Appeal in the Cook Properties matter.

[45] I accordingly conclude that chapter 6 does not violate the right to property under article 16 of the Constitution because art 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the

[32] National Director of Public Prosecutions *supra* at par [43] the principle was also adopted by this court in Pinto v First National Bank of Namibia Ltd (A 98/2011) [2012] NAHCMD 43 (31 October 2012) at par [97] reported at http://www.saflii.org/na/cases/NAHC/2012/285.html

[33] Cook Properties *supra* at par [28]

[34] Pinto v First national Bank of Namibia Ltd at par [97]

[35] *Supra* at par [17]

approach of the court in Lameck that even if chapter 6 were to infringe upon art 16, then it would in my view be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose.

The right to dignity

[46] The challenge on this ground is not fully specified in the founding papers. It was however contended by Mr Gauntlett on the applicant's behalf that the scapegoating of individuals in order to deter crime by making examples of them, is a violation of human dignity as it treats an individual as a means to an end (of dis-incentivising of criminal conduct) without proving that the individual concerned is guilty of the underlying criminal act. He further submitted that the humiliation which accompanies civil forfeiture by requiring an individual to disclose all their private financial affairs to the police and then in public and on trial, would amount to humiliation and be in violation of art 8.

[47] Mr Trengrove however on the other hand submitted that even though proceedings for the forfeiture of instrumentalities or the proceeds of crime would result in indignity, this would be inherent in proceedings of that kind. But because the proceedings themselves are constitutionally permissible, he argued that the indignity inherent in them would thus be constitutionally sanctioned and would not violate art 8(1). I agree with that submission. Once the proceedings themselves are found not to violate the Constitution in other respects, the inherent indignity which would accompany them would thus not in my view violate art 8 of the Constitution.[36]

Conclusion

[48] It would follow that the applicant has not in this application established

[36]This is akin to the constitutional permissibility of the exposure to such indignity as suffered by all persons subjected to lawful criminal proceedings for instance.

that the provisions of chapter 6 of POCA violate his constitutional rights in the respects contended for in the application.

[49] The application is accordingly dismissed with costs. Those costs include the cost of one instructed and one instructing counsel.

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DF SMUTS

Judge

I agree

_____

H GEIER

Judge

APPEARANCES

APPLICANT: JJ Gauntlett SC and F Pelser

Instructed by LorentzAngula Inc

RESPONDENTS: W Trengrove SC

Instructed by Government Attorney