



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-POCA-2018/00140

In the matter between:

MARTIN NANDE SHILENGUDWA

1ST APPLICANT

HILMA DALONDOKA SHILENGUDWA

2ND APPLICANT

and

THE PROSECUTOR-GENERAL

1ST RESPONDENT

BUSINESS AND INTELLECTUAL

PROPERTY AUTHORITY

2ND RESPONDENT

Neutral citation: *Shilengudwa v The Prosecutor-General* (HC-MD-CIV-MOT-POCA-2018/00140) [2019] NAHCMD 263 (25 July 2019)

Coram: CLAASEN, AJ

Heard: 28 February 2019

Delivered: 25 July 2019

Flynote: Civil recovery of property in organised crime – Chapter 6 of Prevention of Organised Crime Act 29 of 2004 – Preservation order – Ex parte order obtained on urgent basis – preservation order issued not on rule nisi basis – Applicants seek to anticipate the hearing of the preservation order on the basis of rule 72(7) of this court's rules – Prosecutor – General counter application to set aside the notice to anticipate as irregular.

In the Namibian context, the rule that deals with urgent applications is rule 73, and rule 73 does not have a subparagraph that is equivalent to rule 6(12)(c) of the South African Uniform Court Rules which provide for reconsideration of an order that was granted – Notwithstanding, an order granted *ex parte* remains provisional and is subject to being set aside on application.

Variation of rescission of preservation order – Application under s 58(1)(a) of Prevention of Organised Crime Act – Jurisdictional requirements of s 58(1)(a) – Court may vary or rescind preservation order if satisfied that the order will (i) deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and (ii) that the hardship which the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

Section 58 (4) of Prevention of organized crime Act – Only the Prosecutor – General or a person affected by the preservation order who has given notice in terms of s 52(3) accompanied by an affidavit in terms of s 52(5) may apply for rescission under subsec (1) or subsec (3).

Summary: The applicants launched two applications namely, seeking to anticipate the hearing of the preservation order and an application under s 58(1)(a) of the Prevention of Organised Crime Act for the rescission, alternatively variation of the preservation order granted on 03 May 2018. The Prosecutor-General, opposed both applications and, in response to the notice to anticipate instituted an application in terms

of rule 61 of the Rules of this court, seeking an order setting aside the anticipation application as an irregular proceeding.

Held – that the notice to anticipate the hearing of the preservation order is irregular.

Held further – on the aspect of the rescission of the preservation order, the onus was on the applicants to satisfy the court that the order will deprive them of reasonable living expenses and cause undue hardship. Court not satisfied, on the facts of this matter, that the preservation order will deprive the applicants of their reasonable living expenses and, in consequence, cause undue hardship.

ORDER

- a. The applicant's notice to anticipate the hearing of the preservation order is irregular and that application is dismissed.
- b. The application for rescission, alternatively variation under s 58(1) of the Prevention of Organized Crime Act 29 of 2004 is refused.
- c. The applicants are ordered to pay the costs of the first respondent, jointly and severally, the one paying the other to be absolved, such costs not limited by rule 32(11).

JUDGMENT

CLAASEN, AJ:

Introduction

[1] This court is confronted with three interrelated applications arising from a preservation of property order granted on 03 May 2018 by Masuku, J in favour of the Prosecutor-General. There was no rule nisi accompanying the order. The preservation order is in respect of the positive balance in Capricorn Asset Management Investment Entity number 13849639, and the positive balance in the Bank Windhoek account number NDP-1014291703 held in the name of Martin Nande Shilengudwa. I will, in this judgment, refer to this order as 'the preservation order'.

[2] The applicants launched the first application seeking to anticipate the hearing of the preservation order. I will, in this judgment, refer to this application as 'the anticipation application'. The Prosecutor-General, did not only oppose the anticipation but also instituted an application, which I regard as the second application, in terms of rule 61, seeking an order setting aside the anticipation application as an irregular proceeding. The third application relates to the application instituted by the applicants, under s 58 of the Prevention of Organised Crime Act, 2004¹ for the rescission, alternatively variation of the preservation order granted on 03 May 2018.

Background

[3] Mr. Martin Nande Shilengudwa and Mrs. Hilma Dalondoka Shilengudwa were the joint registered owners of an immovable property known and described as Erf No 2780, Wanaheda, Extension No 2, measuring 1,214 square meters in extent (I will for ease of reference refer to this Erf as the 'property' and to Mr. and Mrs. Shilengudwa as the applicants).

[4] On 06 July 2017, the applicants sold the property to an entity known as the Business and Intellectual Property Authority, registration number 21/2011/0482 (I will for the sake of convenience refer to this entity as the 'Authority') for an amount of N\$ 18 000 000. On 30 August 2017, the Authority, by Deed of Transfer No. T 5710/2017 obtained registration of the property into its name.

¹ Prevention of Organised Crime Act No. 29 of 2004. I will for ease of reference refer to it as the Act, in this judgment.

[5] I find it appropriate to divert from the background and to set out the changing status of the Authority. From the documentation that was presented to me, it appears that the Authority was initially registered and operated as a section 21 company, that is, an association incorporated not for gain. On 16 January 2017 the Business and Intellectual Property Authority Act, 2016,² came into operation. It established the Business and Intellectual Property Authority as a statutory body. On 14 June 2017, the Authority's Board of Directors resolved to dissolve the section 21 company, and further resolved to, as a result of the creation of a statutory body, transfer all its staff and property to the statutory body. On 30 August 2017, the section 21 company was, pursuant to the 14 June 2017 resolution, deregistered.

[6] I now return to the brief background. During October 2017, the Anti-Corruption Commission received a complaint relating to alleged irregularities pertaining to the sale and purchase of the property. After investigating the complaints, the Director of the Anti-Corruption Commission reported the matter to the Prosecutor-General who, on an urgent and *ex parte* basis, approached this court seeking a preservation of property order.

[7] When the Prosecutor-General approached this court seeking a preservation of property order, she premised the application on the grounds that there are reasonable grounds to believe that the properties sought to be preserved are the proceeds of unlawful activities, namely: fraud; contravention of the provisions of the Public Procurement Act 2015,³ a contravention of the provisions of the Business and Intellectual Property Authority, 2016; contravention of the provisions of the State Finance Act, 1993,⁴ offences in terms of the Anti-Corruption Act, 2003,⁵ and money laundering offences in contravention of s 6 of the Prevention of Organized Crime Act, 2004.

[8] The court on 03 May 2019 granted a preservation of property order. On 08 May 2018, the Prosecutor-General caused preservation of property order to be served on the applicants. On 29 May 2018 the applicants, acting under s 52(3) of the Act, gave

² *Business and Intellectual Property Authority Act 8 of 2016.*

³ *Public Procurement Act 15 of 2015.*

⁴ *State Finance Act 31 of 1991.*

⁵ *Anti-Corruption Act 8 of 2003.*

notice that they intend to oppose the granting of a forfeiture order. They also filed their affidavit as contemplated in s 52(5) of the Act.

[9] On 11 June 2018, the applicants applied to the court for condonation of the late filing of their s 52(3) notice. The Prosecutor-General, pursuant to s 59(1), on 12 September 2018, applied to this court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order. The s 59(1) application, i.e. the forfeiture of property application, was set down for hearing on Thursday, 4 October 2018. On the date that the s 59(1) application was set down for hearing, the applicants indicated to this court that they intend to, in terms of rule 61 of this court's rules, bring an application to set aside the founding affidavit in support of the forfeiture of property application as an irregular step.

[10] On 16 October 2018, the court made an order regulating the further conduct of the interlocutory proceedings referred to and allocated a hearing date, being 24 June 2019, to hear arguments on the applicants' rule 61 application. On 11 December 2018, applicants filed the anticipation application setting the matter down for hearing on 11 January 2019. On 14 December 2018, the applicants filed a further application in terms of s 58 (1) (a) of the Act in which application the applicants sought an order to rescind or vary the preservation order, which application was opposed by the Prosecutor-General.

[11] The Prosecutor-General not only opposed the anticipation application, but she also launched, on 18 December 2018, an application under rule 61 to declare the anticipation application as an irregular step. All three applications were set down for hearing on 11 January 2019 but by consent between the parties, the hearing of the applications was postponed to 28 February 2019. I will first deal with the notice to anticipate the hearing of the preservation of property order and the rule 61 application.

The 'anticipation application' and the 'Rule 61 application'

[12] The applicants framed their notice to anticipate the hearing in respect of the preservation of property order as follows:

'TAKE NOTICE THAT the 1st respondent hereby anticipates the hearing of the *ex parte* (interim) preservation order granted in case number HC-MD-CIV-MOT-POCA- 2018/00140 on 3 May 2018 (as varied under case number HC-MD-CIV-MOT-EXP- 2018/00143 on 4 May 2018), to **FRIDAY 11 JANUARY 2019 at 09:00** (or as soon thereafter as the matter can be called), and applies for an order:

1. That the interim preservation order granted in case number HC-MD-CIV- MOT-POCA- 2018/00140 on 3 May 2018 (as varied under case number HC-MD-CIV- MOT-EXP- 2018/00143 on 4 May 2018) be set aside.

TAKE NOTICE FURTHER THAT the matter will be anticipated:

(a) in the manner approved by the Supreme Court in ***GOVERNMENT OF THE REPUBLIC OF NAMIBIA v SIKUNDA*** 2002 NR 203 (SC), on a *Stipp-basis* as was done in ***PROSECUTOR-GENERAL v LAMECK & OTHERS*** 2009 (2) (HC) –i.e. by considering only the Prosecutor-General's founding papers filed on 2 May 2018 in the preservation proceedings;

and only if still required thereafter;

(b) in the manner done in ***PROSECUTOR-GENERAL v LAMECK & OTHERS*** 2010 (1), 185 (HC) — i.e. by also considering the 1st respondent's opposing papers filed on 29 May 2018 (late but condoned) in the preservation proceedings.

and in either event:

(c) the affidavits on which the matter will be argued have already been filed and are before Court and no further affidavits are necessary or permitted'.

[13] As I have indicated earlier in this judgment, the Prosecutor-General opposes the 'anticipation application' and has instituted an application under rule 61 to have the application to anticipate the hearing declared an irregular proceeding. The Prosecutor-General is resisting the anticipation application on the strength of the arguments that:

- (a) a preservation of property order is not an *ex parte* order of the kind contemplated in rule 72 of this court's rules and thus the procedural right contemplated in rule 72(7) to anticipate the return day does not find application in a s 51 POCA application;
- (b) only a court order accompanied by a return date (*rule nisi*) can be anticipated, and that no return date was issued when the order of 03 May 2018 was made;
- (c) Rule 72(7) of this court's rules does not find application where a party has actively taken part in the second stage of the forfeiture proceedings;
- (d) The notice to anticipate was not accompanied with an application in terms of s 58 of the Act.

Does the 'anticipation application' amount to an irregular proceeding?

[14] Mr. Heathcote who appeared for the applicants, argued that the applicants are entitled to anticipate the preservation order on the basis of rule 72(7) of this court's rules. He argued that this position was confirmed by this court in the matter of *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General*⁶ where the court per Angula DJP said:

'[30] It is common cause that the preservation order which forms the subject matter of that application was granted *ex parte*. The Full Court in the matter of the *Prosecutor General v Lameck* (POCA 1/2009) [2010] NAHC 2 (delivered on 22 January 2010) had held that an order granted *ex parte* is by its very nature provisional, irrespective of the form it takes, subject to it being set aside on application at the instance of a party affected by it. That view was further reinforced by the Full Bench of this court in the *Shalli v Attorney General* POCA 9/2011 [2013] NAHCMD 5 (16 January 2013) matter where the court held at par 36 that '*even in the absence of a rule nisi an order granted ex parte is provisional subject to being set aside by the person affected by it.*'

⁶ *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 255 (delivered on 6 September 2017).

[31] A case in point for the support of the proposition that the applicants in this matter are entitled to anticipate a preservation order is the South African case of *National Director of Public Prosecution (NDPP) v Braun & Another* 2007 (1) SA 189 where a similar point *in limine* was raised by the NDPP in the context of Rule 6(12) and section 38 of South African POCA. Counsel for NDPP relied on the decisions of the *National Director of Public Prosecutions and Others* and *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (2006) 91 SACR 78 2006 BCLR 274). The court, in rejecting the NDPP's contention, pointed out that in the *Phillips* matter, the South African Supreme Court of Appeal held that interlocutory orders may be varied or rescinded by the court that granted them.

[32] The court held further that the powers granted in the POCA Act did not in any way limit a court's jurisdiction to invoke the provisions of Rule 6(12)(c) which are equivalent to Rule 72(7) of our rules of court. Furthermore, that to hold otherwise would open the door to abuse of the right to approach the court *ex parte* and would undermine the *uberrima fides* rule – the utmost good faith. The court therefore held that the right to anticipate an *ex parte* order applies to POCA orders. I consider the exposition of the legal position by the SCA with regard to the status of the preservation order as persuasive and as giving recognition to the *audi* principle. Applying the principle to the facts of this matter, I reject the contention advanced on behalf of the PG that the applicants in this matter do not have the right to anticipate the preservation order and hold that the applicants are entitled to anticipate the preservation order granted by this court on 26 May 2017 under case number POCA 8/2017.'

[15] Mr. Heathcote furthermore submitted that a preservation order can even be anticipated after the Prosecutor-General has brought a forfeiture application. In support of this proposition, he referred this court to the South African case of *National Director of Public Prosecutions v Daniels and Others*.⁷ In that case the court at para 29 said:

'In anticipation of the return date of the second preservation order, the respondents deemed it correct in law to enroll the relevant application on 3 July 2010. The applicant, taking a point *in limine*, contended that the respondents' anticipation of the return date was irregular in that it is not provided for in the Rules of Court nor in terms of the provisions of POCA. The respondents, however, persisted with their argument that Rule

⁷ Case No: 54183/2008 [2010] ZAGPPHC 156 (delivered on 12 October 2010).

6(8) of the Rules of Court entitles them to anticipate the trial date of the forfeiture order.

I have considered both arguments in depth. To my mind Rule 6(8) of the Rules of Court, as submitted by the respondents, indeed make provision for the anticipation of a trial date as *in casu*. I am of the opinion that section 47 of POCA also entitles the respondents to bring such an application. The provisions of POCA is draconic. To some extent it limits the rights of any citizen. Section 47 of POCA to my mind therefore should be regarded as a remedy to a respondent to alleviate his/her situation.

Mr Dodson's argument that the issue at this point in time turns upon the forfeiture order and not the preservation order any more, is to my mind without substance. The forfeiture order, at this point in time is still subject to the lawful existence of the preservation order, as submitted by Mr Roux SC, appearing for the respondents. I agree. Therefore the respondents are entitled to lodge the "anticipation" application directed at the preservation order.'

[16] Mr. Heathcote relying on the case of *Stipp and Another v Shade Centre and Others*⁸ furthermore submitted that in deciding whether or not it must grant a preservation of property order, the court should only look at the founding affidavit of the appellant (in this case the founding affidavit of the Prosecutor-General in the preservation application) and if the allegations set out therein did not sustain a proper cause of action, then that would be the end of the matter. He continued and argued that considering the founding papers of the Prosecutor-General, the preservation of property order should never have been granted. I pause to mention that that this court is neither faced with a s 58 (3) application wherein the preservation is to be rescinded on account of being erroneously sought or made, nor a s 91(4) (b) order wherein a rule nisi was issued.

[17] Mr. Boonzaier who appeared on behalf of the Prosecutor-General argued that a preservation of property order is not an *ex parte* order of the kind contemplated in rule 72 of this court's rules and thus the procedural right contemplated in rule 72(7) to anticipate the return day does not find application in a s 51 POCA application. He

⁸ *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

argued that rule 72 deals with common law *ex parte* applications. It prescribes the procedure for dealing with such applications. Rule 72(7) provides that any person against whom an order is granted *ex parte* may anticipate the return day on delivery of not less than 24 hours' notice.

[18] Mr Boonzaier proceeded and argued that the *ex parte* applications governed by rule 72 differ from POCA s 51 applications in four fundamental respects, namely that:

(a) An applicant in a rule 72 *ex parte* application has no right to have the application heard and decided on an *ex parte* basis. He or she must persuade the court that proceeding *ex parte* is justified in the circumstances. By contrast, the applicant in a POCA s 51 application has the statutory right to proceed on an *ex parte* basis.

(b) In a rule 72 *ex parte* application, rules 72(4) and 72(5) prescribes that a person who has an interest which may be affected by the decision has the right to apply for leave to oppose and to file an affidavit in that regard, and that the court may grant or dismiss that application, and may adjourn the hearing on terms as to the filing of further affidavits. By contrast, in a POCA s 51 application, the Act prescribes that the court must make an order without the adducing evidence by any person other than the applicant. This is the clearest possible indication that rule 72 does not apply to a POCA s 51 application.

(c) In a rule 72 *ex parte* application, the court makes a provisional order in the form of a *rule nisi*, which will be revisited on the return day. The order is provisional, pending the decision on the return day. On the return day, the respondent may raise his defences. The court may confirm or set aside and discharge the provisional order. In a s 51 application, the preservation order is interim, but it is not in any sense provisional. It is an order made to preserve the status *quo*, and remains in force until the second stage, when the forfeiture application is decided. That is when the respondent may raise his defences. If a forfeiture order is not made, the preservation order is not set aside or discharged. It lapses, having served its purpose of preserving the status *quo* until the forfeiture application is decided.

(d) The difference is further illustrated by the fact that on the return day of a rule nisi, the court considers the matter afresh on the merits, as if the order was first being applied for. By contrast, at the second stage of a POCA forfeiture case, the court considers a different question from that which was considered by the court at preservation stage. At preservation stage, the test is whether there are reasonable grounds for believing that the property is an instrumentality of an offence or the proceeds of unlawful activities. At forfeiture stage (the second stage, where a hearing is given) the test is whether on a balance of probabilities the property is an instrumentality of an offence or the proceeds of unlawful activities.

[19] These contentions by the parties call for an analysis of the relevant provisions of the rules of this court, the authorities cited by them and the application and notices filed.

[20] Rule 72 of this court's rules deals with common law *ex parte* applications. It amongst others provides that an application brought *ex parte* on notice to the registrar supported by an affidavit as stated in rule 65(1) must be filed with the Registrar and must set out the form of the order sought, accompanied by the affidavit filed in support of the order sought. Any person having an interest which may be affected by a decision on an application brought *ex parte* may deliver notice of an application by him or her for leave to oppose, supported by an affidavit setting out the nature of that interest and the grounds on which he or she desires to be heard, after which the Registrar must docket-allocate the matter to a managing judge who must set it down for hearing.

[21] Rule 72(5) provides that at the hearing, the court may grant or dismiss either or both applications as the case may require or may adjourn the hearing on such terms as to the filing of further affidavits by either applicant or otherwise as the court considers suitable or proper. The court may refuse to make an order in an *ex parte* application, but may grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case or the court may require. Rule 72(7) provides that any person against whom an order is granted *ex parte* may anticipate the return day on delivery of not less than 24 hours' notice.

[22] The applications in terms of the Act are dealt with in rule 79, which makes the rule applicable to applications brought in terms of s 25, 43, 51, 59 and 64 of the Act and that the application must comply with rule 65(1) and (3) as well as the provisions that apply to the specific applications referred to in the relevant s of the Act. The Registrar may not set down an application in terms of Act as urgent, unless the Prosecutor-General informs the Registrar that an application brought in terms of s 25 or 51 of the Act is urgent. If the application is urgent and the Registrar has been so informed, the applicant must comply with rule 73.

[23] Section 51(2) in terms of which a property preservation order is applied for provides:

'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 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;
- (b) the proceeds of unlawful activities,

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

[24] In the case of *Prosecutor-General v Uuyuni*⁹ the Supreme Court remarked as to the structure of the Act as follows:

'[29] The Namibian POCA is a *replica* of the South African Act. Chapters 5 and 6 above, are incidentally also chs 5 and 6 of the Namibian POCA. Section 38 is the Namibia's s 51 and s 38(2) is s 51(2), and s 39(1) is the Namibia's POCA s 52(1). In Namibia a person affected by the order who wishes to oppose the grant of the final order must deliver the notice of his intention within 21 days after service of the notice on

⁹ 2015 (3) NR 886 (SC) para 31.

him/her. Any other person 21 days after the notice of the order is *gazetted*. The preservation of property order generally expires 120 days after the date on which notice of the making of the order is published in the Gazette. Section 57(1) makes provision for living expenses where necessary and s 58(1) provides for variation or rescission. The Namibian POCA like its South African counterpart also allows for a two-stage procedure of proceedings, the *ex parte* stage which in my opinion makes no provision for a *rule nisi* contrary to the practice that has developed in the High Court where applications in terms of s 51 are granted accompanied by a *rule nisi*. The High Court has read in s 51 a *rule nisi* which is not provided for by that section. Section 52(3) makes it very clear that any person who has an interest in the property subjected to the preservation of property order 'may give written notice of his or her intention to oppose the making of a forfeiture order. . . .' That first stage of the proceedings is consistent with the purpose of the Act to preserve the property from being dissipated and allow the interested party to raise a defence at the forfeiture stage. In the first stage of the proceedings the court need only be satisfied that the information contained in the affidavit that the property concerned is an instrumentality of an offence or proceeds of unlawful activities shows on the face of it that there are reasonable grounds for that belief. The balance of probabilities test only arises at the second stage, the application for forfeiture order. See s 61(1). An *ex parte* application is one brought for the benefit of one party to a proceeding in the absence of the other or without the adverse party having had notice of its application. By its nature an *ex parte* application only the one party would be in court and the adverse party is only served with the application and the court order thereafter. The balance of probabilities test only arises at the second stage, the application for forfeiture order. See s 61(1). An *ex parte* application is one brought for the benefit of one party to a proceeding in the absence of the other or without the adverse party having had notice of its application. By its nature an *ex parte* application only the one party would be in court and the adverse party is only served with the application and the court order thereafter. '

[25] The Supreme Court furthermore confirmed that an application for a property preservation order is *ex parte* and thus requires no notice to be given to any person nor to receive any evidence from any person as it lacks a responding party.¹⁰

¹⁰ At paragraph [31].

[26] In this matter, the applicants have given notice to ‘anticipate the hearing of the *ex parte* (interim) preservation order granted in case number HC-MD-CIV-MOT-POCA-2018/00140 on 3 May 2018 (as varied under case number HC-MD-CIV-MOT-EXP-2018/00143 on 4 May 2018), to **FRIDAY 11 JANUARY 2019 at 09:00** (or as soon thereafter as the matter can be called), and applied for an order that the interim preservation order granted in case number HC-MD-CIV- MOT-POCA-2018/00140 on 3 May 2018 (as varied under case number HC-MD-CIV- MOT-EXP-2018/00143 on 4 May 2018) be set aside.’

[27] The procedures that must be followed by the Prosecutor-General having instituted an application for the preservation of property, was usefully set out in the recent judgment of the Supreme Court in *Prosecutor-General v Kamunguma and Another*,¹¹ which must be quoted at length from para 11 in order to provide context, as follows -

‘The South African Constitutional Court points out in *National Director of Public Prosecutions v Mohamed NO & others* 2002 (4) SA 843 (CC) in relation to Chapter 6 of that country’s POCA - whose provisions are identical to those of Chapter 6 of our POCA - that the two stages are complex and tightly intertwined, both as a matter of process and substance.

Section 51(2) of POCA requires of the PG to prove that the property sought to be preserved is either the proceeds of unlawful activities or an instrumentality of an offence specified in schedule 1 to POCA. The High Court must grant the order if it is satisfied that there are ‘reasonable grounds’ for the making of the order. After a preservation of property order has been granted, the PG must serve it on any party known to her or him to have an interest in the preserved property and publish the notice of the order in the *Government Gazette*.

Section 52(3) of POCA requires of any person who has an interest in the preserved property to give notice of his or her intention to oppose the making of a forfeiture order. This must be done within 21 days after the notice of the preservation order has been

¹¹ *Prosecutor-General v Kamunguma and Another* Case No. SA 62/2017 delivered on 12 June 2019.

given to the person concerned¹² or 21 days after the notice has been published in the *Government Gazette*.

If the person referred to above has not given a notice in terms of s 52(3), or the notice is not accompanied by an affidavit as required by s 52(5), then such person is not entitled to receive notice of the application for a forfeiture of property order in terms of s 59(2) and is not entitled to participate in the forfeiture proceedings.

It is thus evident that the process leading to a forfeiture order commences at the preservation of property stage, where the application is brought *ex parte*. After the granting of the preservation of property order, a person who wishes to participate in the proceedings relating to the forfeiture of property application (the second stage) must give his or her notice to do so even before the PG elects to proceed with the second stage.

Section 52(5) requires that the notice in terms of s 52(3) must be accompanied by an affidavit. The requirement of an affidavit with the notice of the intention to oppose appears to be unique to application proceedings. In the affidavit, the person must set out, amongst other things, the nature and extent of his or her interest in the property concerned; whether he or she admits or denies that the preserved property is an instrumentality or proceeds of unlawful activities; the facts on which he or she intends to rely in opposing the making of a forfeiture order, and the basis on which he or she admits or denies that the property is an instrumentality or the proceeds of unlawful activities. There is no forfeiture application before court at this stage, but the notice in terms of s 52(3) and the affidavit in terms of s 52(5) are part of the two stage forfeiture proceedings.

It would appear that a practice has evolved in terms of which the case number allocated to the application for a preservation of property order is also used in the forfeiture order application, which again demonstrates the close relationship between the two proceedings.

The purpose of the s 52(5) affidavit appears, amongst other things, to establish the standing of the person who wishes to participate in the proceedings. This is so, because an interested party is required to set out the nature and extent of his or her interest in the preserved property; to notify the PG of the relief the interested party intends to seek at

¹² Section 52(4)(a).

the second stage of the proceedings prior to the start of such proceedings, and to define the issues in dispute between the PG and the interested party.

A preservation order is only valid for 120 days, unless there is a pending forfeiture of property application. The purpose of the 120 days - period referred to in s 53 would be, amongst other things, to enable the PG to decide whether or not to proceed with the second stage of the proceedings in light of the information disclosed in the s 52(5) affidavit; to afford the PG an opportunity to investigate any allegations made by the person in the s 52(5) affidavit; to afford the PG time to gather more evidence to satisfy the burden of proof, and to give the PG an opportunity to verify the grounds upon which the person intends to rely in the application, in terms of s 63, for the exclusion of the interests in the property subject to the forfeiture order.

Subsections (3) and (5) of s 52, therefore, interlink the preservation of property application with the forfeiture of property application preservation of property order is in force, the Prosecutor- General may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to the preservation order ... It follows from [s 59(1)] that except in an instance of a forfeiture of property order arising from a criminal conviction, there can be no forfeiture application without there being a preservation of property order in place. This again reinforces the intimate connection between the preservation application and the forfeiture of property application.'

[28] I am therefore of the view that Mr. Heathcote's reliance on the case *National Director of Public Prosecutions, v Daniels and Others* does not assist the argument that, in this matter, the applicants are entitled to anticipate the preservation order. In that matter the court dealt with a point *in limine* pertaining to anticipation of a rule nisi on the return date. That is not the case before me.

[29] In *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General*,¹³ the question of the permissibility of anticipating an *ex parte* preservation order was raised as a point *in limine* and that point was rejected. I respectfully hold a different position than the one

¹³ *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 255 (delivered on 6 September 2017).

adopted in the dictum in para 32 of that judgment wherein it is stated that our rule 72(7) is equivalent to rule 6(12)(c) of the Uniform Rules of Court.

Rule 6 (12) of the South African Uniform Rules of Court provide as follows:

'(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[30] In the Namibian context, the rule that deals with urgent applications is rule 73 and rule 73 does not have a subparagraph that is equivalent to rule 6(12)(c) of the South African Uniform Court Rules. The rule that is equivalent to our rule 72 (7) is rule 6 (8) and both these rules (i.e. rule 72 (7) of this court's rules and rule 6(8) of the Uniform Rules of Court) read as follows:

'Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours' notice.'

[31] The *Lameck* matter¹⁴ is in my view equally not helpful in determining whether or not the applicants can anticipate the hearing of the preservation order because in the *Lameck* matter. The court heard arguments on the return date of a *rule nisi* whereas the preservation order before me is not framed in the form of a rule nisi.

¹⁴ *Prosecutor-General v Lameck and Others* 2010 (1) NR 156 (HC).

[32] The *Sikunda*¹⁵ matter is on its facts distinguishable from the present matter. In that matter, an urgent application was initiated on less than two hours' notice to the government to restrain the government from deporting Sikunda Snr from Namibia. The legal practitioner appearing on behalf of the government appeared, unprepared, at the hearing, but a *rule nisi* was nonetheless issued interdicting the government from deporting Mr Sikunda Snr. The government then anticipated the return date. Counsel for Sikunda argued that it was not open to the government to anticipate the hearing because a government representative was present when the *rule nisi* was issued because the rule only allows such a proceeding when the original relief was granted *ex parte* and the appearance of government representative in court, meant that the order granted was not granted 'ex parte'.

[33] The High Court upheld the argument advanced on behalf of Sikunda but on appeal by the government, the Supreme Court held that that approach was not correct. It said at para H:¹⁶

'The rule aforesaid regarding anticipation of the return date was intended to avoid and/or mitigate the prejudice to a litigant who is faced with an interim order, which may be in the form of an interim interdict, even in the form of a mandatory injunction as in this case, without having had a reasonable hearing. To give the attorney for such litigant telephonic advance notice of an urgent application an hour or two later, without the application being properly served on the respondent and then expecting the respondent and/or his attorney to make a proper and sufficient response, is an abrogation of the *audi alteram partem* principle, which in my view, underlies Rule 6(8)¹⁷ of the Rules of the High Court and which principle has been described by the Appellate Division of the South African Supreme Court as 'sacred'.

[34] It appears that the rationale behind rule 72 (7) is to guard against the abrogation of the *audi alteram partem principle*. In *Prosecutor-General v Taapopi*,¹⁸ the Supreme Court said that the concern that the hearing of an application for the preservation of property on an *ex parte* basis would undermine a respondent's fair trial rights protected under common law and in article 12 of the Namibian Constitution was not necessary at

¹⁵ *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC).

¹⁶ *Sikunda* at pg. 208.

¹⁷ Rule 6(8) of the repealed rules of the High Court of Namibia is the equivalent of the present rule 72(7).

¹⁸ *Prosecutor-General v Taapopi* 2017 (3) NR 627 (SC).

the preservation stage processes created by the Act. This position was already set out in *Shalli v Attorney-General and Another*¹⁹ wherein it was held that the fair trial rights of the affected party are not intended to be disposed of in a s 51(2) application.

[35] Mr. Heathcote challenged the Prosecutor-General's entitlement to have obtained the preservation order, and referenced arguments relating to, amongst others, matters such as the wide scope of the order, the innocent buyer defense, flawed averments in some of the statutory contraventions relied upon, and that the Prosecutor-General failed to allege and or establish the causal links. It is unnecessary for a determination of this application, if not inapt, to make any finding in respect thereof at this stage.

[36] I have therefore come to the conclusion that in the circumstances of this matter, the applicants' notice/application to anticipate the hearing of the preservation order is irregular and that application is dismissed.

The rescission application

[37] As stated earlier, the applicants also filed an application in terms of s 58(1)(a)(i) – (ii) of the Act in respect of the preservation order issued on 03 May 2018 and subsequently varied on 04 May 2018 to have it rescinded, alternatively varied to delete paragraph 2.2. The Prosecutor-General opposed the application and the application was argued together with the anticipation and rule 61 applications.

The variation and rescission provisions in terms of s 58 of the Act

[38] Variation or rescission of a preservation order in terms of s 58 of the Act is restricted to the grounds as stipulated in s 58(1) and s 58(3). That is apparent from s 58(6) which provides that a preservation order may not be varied or rescinded on any grounds other than those provided for in this section.

[39] The applicants have not sought relief in terms of s 58(3) which provides:

¹⁹ *Shalli v Attorney-General and Another* 2013 (3) NR 613 (HC).

'When the court has made a preservation of property order it may rescind that order if it was –

(a) erroneously sought or erroneously made in the absence of the person applying for its rescission; or

(b) made as a result of a common mistake of both the Prosecutor-General and the person affected by that order.'

[40] The applicants approached the court on the basis of s 58(1)(a)(i) – (ii) which provides:

'When the High Court has made a preservation of property order it may vary or rescind the order if it is satisfied that –

(a) the order concerned –

(i) will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.'

[41] I deviate for a moment to another provision in the Act which can be employed to ameliorate the effect of a preservation order as respect of reasonable living expenses and or legal expenses. Section 57 of the Act avails relief to an affected person to apply for the payment of reasonable living expenses as well as the reasonable legal expenses for that person in connection with legal proceedings in terms of Chapter 6 of the Act. Relief under s 57 of the Act, is however subject to a stringent requirement that an applicant and the persons(s) he or she is liable to support has tendered a sworn and full statement of all their assets and liabilities. The applicants have not approached the court under s 57 of the Act.

[42] I proceed to the evidence tendered in support of the application.

The factual background in respect of the rescission application

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[43] In aid of the relief sought, the first applicant deposed to an affidavit, supported by bank statements of the applicants, deposit slips received from the legal practitioners, a personal balance sheet of the applicants' as at June 2018, and a medical practitioner's note relating to the second applicant. In addition, confirmatory affidavits were filed by a legal practitioner and the son of the applicants, who prepared a personal balance sheet for his parents. I turn to summarize the applicant's salient points as contained in these affidavits.

[44] The first applicant's preserved bank accounts are a Bank Windhoek Capricorn investment account with a positive balance of N\$ 13 661 351.83 and a Bank Windhoek cheque account with a credit balance of N\$ 6 000 556.92.

[45] In addition to the abovementioned bank accounts, the first applicant has the following positive balances; Bank Windhoek savings account which at 20 November 2018 stood at N\$ 95 911.78, and First National Bank account which at 24 July 2018 stood at N\$ 2 839.44. As a retired business man and farmer, he stated that his only fixed income is a monthly pension in the amount of N\$ 1 250.

[46] The first applicant further stated that, consequent upon the drought, he had to sell 12 heads of cattle and, as a result of the preservation order, he cannot and have not bought any animals. His periodic income from his farming has, so he stated, been almost nullified by reason of the continuing drought in the country. Lastly, in respect of his farming, he stated that his monthly expenses average N\$ 55 800.

[47] Regarding the finances of the second applicant, the first applicant stated that her finances are irrelevant to a determination of this application as they keep their financial affairs separate. He nonetheless proceeded to explain that money that she gives him

comes in the form of a repayable loan. He furthermore stated that she earns a monthly pension of N\$ 1 250 ; a N\$ 300,000 pension reinvestment with FNB on which she receives monthly payments in an undisclosed amount; Bank Windhoek cheque account with closing balance of N\$ 73 144.43 as at 04 August 2018; FNB cheque account with closing balance of N\$ 9 284.74 as at 03 May 2018; Standard Bank cheque account with closing balance of N\$ 94 133.73 as at 04 August 2018. He stated that these are the funds his wife uses for her daily expenses.

[48] As far as monthly expenses are concerned, the first applicant stated: N\$ 9 000 per month in respect of rates and taxes; N\$ 22 000 per month in respect of medical aid and insurance; N\$ 35 000 per month in respect of the second applicant's day-to-day living expenses; N\$ 25 000 per month in respect of his own day-to-day living expenses.

[49] As regards to their assets, the first applicant stated that their joint fixed assets are worth approximately N\$ 14 000 000 and have long term liabilities of N\$ 153 790.

[50] In respect of legal expenses, the first applicant averred that an amount of N\$ 250 000 was deposited, which he loaned from his children and a new invoice awaited him in the amount of N\$ 295 343-18. He furthermore stated that though his legal practitioners requested a deposit of N\$ 250 000, the counsel has agreed to delay the sending of invoices until after the outcome of this application.

[51] The first applicant furthermore stated that the growth on the preserved Capricorn investment account is what was used by the applicants to defray their day to day expenses.

[52] In opposition to the applicant's rescission application, the Prosecutor-General in her answering papers attacked the applicants' averments on various scores, amongst others, a dispute about the veracity of the applicant's balance sheet; variations in valuation figures of immoveable properties; absence of documentary proof to support the claimed values; failure to fully disclose all bank accounts and other earning interests; an omission to provide a register in respect of the cattle or the value of the

cattle, inconsistencies between monthly withdrawals prior to preservation with those claimed to be monthly expenses in these proceedings; failure to disclose a N\$ 2 900 000 investment at Point Break; that applicants business 'Club Vaganza' is still operational and that the second applicant was admitted to and discharged from hospital prior to the preservation order obtained and not as deposed in the applicant's founding affidavit, shortly after the grant of the preservation order.

[53] The applicants in reply contended it was bare denials that the Prosecutor-General raised. Applicants however specifically refuted the suspicions that the applicant's business 'Club Vaganza', was still operational after the sale of the property. The first applicant explained that the name 'Vaganza' is used by their family in other instances also. He referred to two more accounts that contain the name 'Vaganza' namely the account of 'Club Vaganza CC' wherein their four children are the members, as well as 'Vaganza Investment CC' which was established by two of the applicants' children. The first applicant also referred to the existence of an arrangement whereby their children pay the rates and taxes of the applicant's properties in Kariba Street and Academia, for which they then reimburse the money into the account of 'Club Vaganza CC'.²⁰

[54] In addition, the first applicant gave an explanation with regard to the N\$ 2 900 000 allegation of an investment with Point Break during 2017. The explanation given was that it was a loan to the Chief Executive Officer of Point Break, who is the adopted child of the applicants and who used the funds to buy shares in Point Break and for a property development project in northern Namibia. The applicant has not given any further details regarding this loan, for example the terms or dates of repayment.

[55] I turn to the question in the rescission or variation in terms of s 58 of the Act on whether, in looking at the conglomerate of facts, the applicants satisfied the court that the order deprives their household from the means to provide for reasonable living expenses and causes undue hardship as well as that the hardship outweighs the risk that the property may be dissipated.

²⁰ Para 47 – 51 of Prosecutor-General's answering affidavit, para 58 of applicant replying affidavit.

Has the applicant satisfied the requirements under s 58(1)(a)(i) – (ii)?

[56] It is prudent to state that the applicants are by virtue of their compliance with s 58(4)(b) of the Act, entitled to seek the rescission, alternatively the variation of the preservation order. Section 58 (4) of the Act provides that only the Prosecutor General or a person affected by the preservation order who has given notice in terms of s 52(3) accompanied by an affidavit in terms of s 52(5) may apply for an order under subsection (1) or subsection (3) of s 58 of the Act.

[57] I have considered the detailed facts set as out by the first applicant in the s 58(1) application, with specific reference to their stated current assets and claimed liabilities.

[58] The personal balance sheet that the applicants' son prepared, though they pay a bookkeeper,²¹ raises more questions than answers. Though the first applicant deposes that the balance sheet is an accurate depiction of applicants' financial position,²² a mere two paragraphs further on the opposite is apparent as the first applicant stated that 'the third FNB cheque account was erroneously added to our balance sheet ...'.²³

[59] Furthermore, the first applicant has not disclosed a single supporting document in relation to reasonable living expenses, the farming operation's expenses and/or value of the cattle, and valuations of their immovable properties. An applicant who seeks variation or rescission on the basis of not being able to meet reasonable living expenses and then does not make a full and bona fide disclosure of his or her reasonable living expenses and finances, does so at own risk.

[60] The onus was on the applicants to satisfy the court that the order will deprive them of reasonable living expenses and causes undue hardship and that the hardship outweighs the risk that the property may be dissipated. Cumulatively considered, on the facts of this case, I am not persuaded that the breath of the order will deprive the

²¹ Para 30.3 of applicant's founding affidavit.

²² Para 44 of applicant's replying affidavit.

²³ Para 48 of applicant's replying affidavit.

applicants of reasonable living expenses and cause undue hardship. In this premises, s 58(1)(a)(ii) does not even arise for consideration.

[61] In the result I make the following order:

- a. The applicant's notice to anticipate the hearing of the preservation order is irregular and that application is dismissed.
- b. The application for rescission, alternatively variation under section 58(1) of the Prevention of Organized Crime Act 29 of 2004 is refused.
- c. The applicants are ordered to pay the costs of the first respondent, jointly and severally, the one paying the other to be absolved, such costs not limited by rule 32(11).

C CLAASEN, AJ

APPEARANCES:

APPLICANTS: R Heathcote SC (with him J Jacobs)
Instructed by Van der Merwe-Greeff Andima Inc.,
Windhoek

RESPONDENT: M G Boonzaier
Instructed by Government Attorney, Windhoek