REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 4/2012

In the matter between:

THE PROSECUTOR GENERAL **APPLICANT**

and

GERSON UUYUNI **RESPONDENT**

Neutral citation: *The Prosecutor General v Uuyuni* (POCA 4/2012) [2013] NAHCMD 67 (12 March 2013)

Coram: GEIER J
Heard: **23 November 2012**
Delivered: **12 March 2013**

Flynote: Application for confirmation of a provisional preservation order granted in terms of Section 51(2) of The Prevention of Organized Crime Act 2004 – Provisional order granted *ex parte* and *in camera* –

On return date respondent contending that applicant had not made out a case for matter to be heard *in camera*, alternatively that no case had been made out for the

matter to be heard *in camera* on the grounds as provided for in Article 12(1)(a) of the Namibian Constitution – Rule nisi submitted to be a nullity –

Applicant arguing that an *ex parte* and *in camera* hearing was expressly authorised by section 98(1) of POCA - that the Constitution authorised *in camera* hearings in specific circumstances and that the National Assembly had determined through the enactment of Section 98(1) of POCA that *ex parte* proceedings under the Act were one of those circumstances and that it was not open to the respondent to challenge the validity of Section 98(1) on various grounds and that applicant had ultimately acted within the parameters provided for by Section 98(1) of POCA.

After interpreting Section 98 of POCA – Court holding that the section permissively and only in directory terms required that ' … all ex parte hearings, contemplated in POCA, 'may' be held behind closed doors – if the requirements for the exclusion of the public – set by sub-section (2) *(and by the Constitution)* have been met, … ' whereas all other proceedings, contemplated in POCA, ' … 'must' be held open to the public … '. Court accordingly not upholding submissions made on behalf of applicant -

The further questions whether or not the applicant had - on the facts - acted within the parameters provided for by Section 98 of POCA and the Constitution and whether or not the court which had granted the rule nisi in this instance had correctly allowed the hearing before it to take place behind closed doors to be determined with reference to the test formulated in the South African case of *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 698 as adopted by this court in *Prosecutor General v Lameck and Others* and as recently approved in *Prosecutor General v Kanime* –

Held: Applicant had not met the requirements set by section 98(2)(a) as the bringing of the application, without notice to the respondent, had already satisfied the interests of justice, which, in this instance, did not also require the exclusion of the public on the facts of this case -

Held: As nothing was shown on the papers which warranted the extra-ordinary departure from the general rule as to the exclusion of the public at the initial hearing *for reasons also of morals, the public order or national security as is necessary in a democratic society* it had to be concluded that also the requirements of Article 12(1)(a) of the Constitution were not met.

Held: That in the circumstances of this case the *in camera* hearing in this matter was never warranted and should never have occurred.

Held: That where a court finds on an afresh re-consideration of all the facts on a return day of a rule nisi that a fundamental requirement of the law has been breached that this would also warrant the discharge of any interim order granted in breach thereof.

Held: Amongst the factors which a court will be entitled to take into account in the exercise of its discretion will be the extent to which a fundamental rule and basic requirement of our system of justice has been breached.

Held: Having already found that no case been made out for the departure from the overall requirements set by section 98 – but also that, *in casu,* the particular requirements set by Section 98(2) had not been met and that the rule nisi in this instance had been granted in violation of the fundamental requirements set by the Constitution - court considering itself not bound - on an afresh consideration of the overall position - by a rule nisi granted in violation of one of the most fundamental requirements, deeply embedded in the law, that justice must be seen to be done.-

Held: Court finding that the exclusion of the public at the initial hearing of this matter, inclined it to refuse to exercise its discretion in favour of confirming the interim order granted in this instance.

Held: The rule nisi is accordingly discharged.

Summary: see flynote above

ORDER

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1. The rule nisi granted on 11 April 2012 is hereby discharged with costs.

JUDGMENT

GEIER J:

[1] On 11 April 2012 the applicant in this matter was granted a provisional preservation order in terms of Section 51 of the Prevention of Organised Crime Act 2004, Act No. 29 of 2004, (hereinafter referred to as POCA).

[2] This order was granted on an *ex parte* basis and *in camera*.

[3] In terms of the order the respondent's credit balances in his Sanlam Unit Trust Account, two banking accounts held with First National Bank, Oranjemund, as well as a Toyoka Hilux bakkie and a BMW motor vehicle were provisionally preserved on the basis that they constituted the proceeds of unlawful activities.

[4] The matter was opposed on various grounds.

[5] The question before the court is whether or not the said provisional preservation order should now be made final.

THE BACKGROUND HISTORY

[6] Two preservation orders were granted against the respondent. The first preservation order was granted on 5 August 2011 under case no. POCA 7/2011. This first preservation order was preceded by the arrest of the respondent and his appearance in the magistrate's court on 28 July 2011. It is alleged that the prosecutor, who appeared in the lower court, apparently intimated to the respondent's legal practitioner that the Prosecutor General was preparing a certain application in terms of POCA. Accordingly, the respondent's legal practitioner requested that notice of any such proceedings should be given to him. The respondent was however not given such notice, but nevertheless at a later stage opposed the first application.

[7] In that application the issue relating to the appearance on behalf of the Prosecutor General, by the member of her staff, who was not an admitted legal practitioner in Namibia, was raised. In the opposing papers the respondent raised also certain other issues of procedure and substance. In addition the respondent also counter- applied for an order declaring the preservation order to be a nullity.

[8] The applicant in turn brought an interlocutory application for the amendment of first preservation order in certain respects, which application was also opposed.

[9] A status hearing was called for these applications for the 12th of April 2012 in order to establish the way forward and if necessary to set them down for hearing.

[10] On the 10th of April 2012 the applicant however, on an *ex parte* basis and *in camera*, notwithstanding the above background, filed the present application which was set down for hearing on 11 April 2012.

[11] The second application was granted and the abovementioned rule nisi was issued. The second provisional order was granted under case no. POCA 4/2012.

[12] At the same time, and on 10 April 2012, the first application - which had been launched under case no. POCA 7/2011 - was withdrawn by notice and subsequently

such application was also formally removed from the roll, the court noting that such application had been withdrawn and that the Applicant had tendered and was required to pay the respondent's costs occasioned by such withdrawal.

THE IN LIMINE ISSUES RELATING TO THE *EX PARTE* AND *IN CAMERA* HEARING

[13] I have already alluded above to the fact that the respondent, also in the second application, has raised a number of *in limine* issues in defence of this application as well as defences on the merits.

[14] These *in limine* issues as well as all the other issues were canvassed thoroughly by counsel in their heads of argument and during oral argument at the hearing of this matter.

[15] However, and in view of the stance that I will adopt in deciding this matter it will not become necessary to deal with all these other issues raised and ventilated between the parties.

[16] Amongst all these defences the respondent also took issue with the fact that the applicant had approached the court on an *in camera* and *ex parte* basis.

AD THE EX PARTE HEARING

[17] At this juncture it should merely be mentioned and noted that the constitutionality of section 51(2) – and with it the peremptory requirement that preservation orders could permissibly be applied for - and be granted on an *ex parte* basis and thus without notice - was recently considered by this court in the as yet unreported judgment of *Martin Shalli v The Attorney General and Others* as delivered on 16 January 2013[1].

[1]See *Shalli v Attorney General* (POCA 9/2011) [2013] NMHCMD 5 (16 January 2013)

[18] Although the court considered Section 51(2) as being 'unfortunately formulated', it nevertheless held, for the reasons set out in the judgment[2], that the provisions of section 51(2) do not violate the right to a fair trial protected by Article 12(1)(a) of the Namibian Constitution.

[19] Before one would however get to a fuller consideration of the *ex parte* point also with reference to the facts of this matter, the consideration and impact, if any, of the respondent's further attack, directed against the applicant's approach of the court behind closed doors, should conveniently occur in view of the fundamental issues that arise in the context of that point.

AD THE IN CAMERA HEARNG : THE RESPONDENT'S ARGUMENTS

[20] It was in the main contended that the applicant had brought the second POCA application and procured its hearing on an *ex parte* and on an *in camera* basis without making out a case in this regard.

[21] It was submitted in the alternative that should it be found that the applicant had made out such a case on the papers that she did not make out a case for the matter to be heard *in camera* on the grounds as provided for in Article 12(1)(a) of the Namibian Constitution.[3]

[22] It was pointed out that the relevant portions of Article 12(1)(a) should be read with Section 13 of the High Court Act, Act No. 16 of 1990, which provides that:

'Save as otherwise provided in Article 12(a) and (b) of the Namibian Constitution all proceedings in the High Court shall be carried on in open court'

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[2]See *Shalli v Attorney General* at paragraphs [31] – [37] thereof

[3]Article 12 (1)(a) 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society'.

[23] In support of these general arguments Mr Namandje, who appeared on behalf of the respondent, argued that the court should have been alive to the fact that the 'open- court' system is an essential part of the administration of justice for it enhances the public's confidence in the working of the judiciary, that this was a fundamental principle respected by all democratic nations of the world and that this was also the reason why the Namibian Constitution had made the right to a public trial an integral and important element of the Namibian trial system.

[24] Reliance was placed in this regard on a Supreme Court of Canada decision made in the case of *Named Person v Vancouver Sun* [2007] S.C.R. 253, 2007 SCC 43, a judgment delivered on 11 October 2007 in which the 'open- court' principle and the rationale for it was formulated as follows:

'81. The open court principle is now well established in Canadian Law. This Court has on numerous occasions confirmed the fundamental importance and constitutional nature of this principle (see *Toronto Star Newspapers Ltd. V Ontario* [2005] 2 S.C.R. 188, 2005 SCC 43; *Vancouver Sun (Re)* [2004] 2 S.C.R 332, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522, 2002 SCC 41; *R. v Mentuck* [2001] 3 S.C.R. 442, 2001 SCC 76; R. v O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1996] 3 S.C.R 480; *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835; *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 1326; *Canadian Newspapers Co. v Canada (Attorney General)* [1998] 2 S.C.R. 122). In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as witness, under a pseudonym.

82. For centuries, the importance of the open court principle has been recognised at common law. Various justifications have been given for it. The oldest of these is probably the connection made between openness and the pursuit of truth. For example, Blackstone made the following comment in his *Commentaries on the Laws of England* (1768), vol. III, c. 23, at p. 373:

‘This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk …’

In a similar vein, Wigmore made the following comment on the effect openness has on the quality of testimony:

‘Its operation in tending to improve the quality of testimony is two-fold. Subjectively, it produces in the witness’ mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties possess any information”. (*Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), § 1834, at pp. 435-36 (emphasis in original)

83. Another frequently proposed justification for the principle is that openness fosters the integrity of judicial proceedings (see in particular Edmonton Journal, at p. 1360 (per Wilson J) Thus, it has been argued that all participants in judicial proceedings will be further induced to conduct themselves properly if they know that they are under the watchful eye of the public. This is what led Bentham to state that “[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity” (J.H. Burton, ed. Benthamania; or, Select Extracts from the Works of Jeremy Bentham (1843), at p. 115.4).

Openness ensures both that justice is done and what it is seen to be done. For justice to be seen to be done is necessary to preserve public confidence in the administration of justice. Bentham is often quoted in support of this argument, too:

“The effects of publicity are at their maximum of importance when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments. (J. Bentham, Treatise on Judicial Evidence (1825), at p. 69 (emphasis in original)This Court adopted a similar argument in Vancouver Sun:

‘Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public’s understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts. [para. 25]

85. More recently, stress has been laid on the relationship between open courts and the promotion of democracy. (In my view, this is the justification that is most relevant in the case

at bar.) The courts play a key role in a democracy, not only because they are where disputes between citizens can be resolved peacefully, but also – and perhaps most importantly – because they are where citizens' disputes with the state are decided. Furthermore, there is no denying that the importance of the courts' role is accentuated by the constantly increasing complexity of contemporary societies. It is therefore essential that what the courts do be open to public scrutiny in order both to improve the operation of the courts and to maintain public confidence in them (see Edmonton Journal, at p. 1337 (per Cory J.)).

86. Similarly, the "educational" aspect of an open court process has been noted in, for example, the following passage from the reasons of Wilson J. in Edmonton Journal:

"It provides an opportunity for the members of the community to acquire understanding of how the courts work and how what goes on there affects them. Bentham recognised the importance of publicity in fostering public discussion of judicial matters, Treatise on Judicial Evidence, op. cit., at p. 68, and Wigmore pointed out in Evidence, op. cit., §1834, at p. 438, hat "[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy". [pp. 1360-61]"

[25] It was against the backdrop of these fundamental principles thus submitted that the applicant was under an obligation to set out in her founding affidavits such facts that would have been sufficient to convince the court – within the confines of Art 12(1)(a) - that a hearing *in camera* was warranted.

AD THE IN CAMERA HEARING : THE APPLICANT'S ARGUMENTS

[26] On behalf of the applicant Mr Budlender SC placed reliance on section 98(1) of POCA which, in his submission, expressly authorised the bringing of the application on an *ex parte* basis and *in camera*.

[27] He also relied on the fact that also the Constitution authorised *in camera* hearings in specific circumstances and that it was the National Assembly that had determined, through the enactment of Section 98(1) of POCA, that *ex parte* proceedings, under the Act, are one of those circumstances.

[28] It was pointed out further that the respondent had not challenged the validity of Section 98(1). That being so, it could not be asserted that the holding of an *ex parte* hearing *in camera* was inconsistent with the Constitution and that the applicant had thus, ultimately, acted within the parameters provided for by Section 98(1) of POCA.

THE RESPONDENT'S REPLY

[29] In response Mr Namandje submitted that it would appear that the applicant was contending that the section somehow - as a matter of right – had given the applicant *carte blanche* to have the matter heard *in camera*, without notice and on an *ex parte* basis. It was suggested that this approach was wrong.

[30] It was submitted further that the court should adopt an interpretation in line with the constitution and in tune with the open administration of justice in accordance with the principle formulated in the judgment of the South African Constitutional Court delivered in *S v Dzukuda and Others*; *S v Tshilo*[4] were the court had stated:

'[37] Before dealing with the High Court judgment in this regard, it is important to refer to certain principles laid down by this Court in De Lange v Smuts NO and Others[5], Bernstein and Others v Bester and Others NNO[6], Nel v Le Roux NO and Others[7] and Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others[8], which principles may be summarised as follows:

(a) The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in

[4]2000(4) SA 1078 CC at paragraph 37(A)
[5] 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) at para [85]
[6] 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) at paras [46] and [60]
[7] 1996 (3) SA 562 (CC) (1996 (4) BCLR 592) at paras [6] and [18]
[8] 2000 (2) SACR 349 at paras [22] - [23]

issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'

[31] It was thus contended that Section 98(1) of POCA did not require a constitutional declaration of invalidity as it was possible to construe the section in such a way that it would be compatible with the Constitution particularly in view of the fact that the High Court Act, as a statute, also provided that all trials should be held in public, except if the grounds mentioned in Article 12(1)(a) and (b) of the Namibian Constitution were present.

[32] With reference to *Seagull's Cry CC v Council of the Municipality of Swakopmund and Others*[9] and *The Council of the Municipality of Swakopmund v Vantrimar Properties*[10] decisions he argued that should a hearing - that was required to be held public – be conducted in camera - without alleging and having the jurisdictional grounds required present for the exclusion of the public - any resultant decision would be a nullity.

[33] In any event, so the argument ran further, because of the importance of the requirement to have trials in open and in public, courts have always been hesitant to hear matters in camera unless there would be good and justifiable grounds as necessary in a democratic society to do otherwise. He finally underlined his argument with reference to what was said in this regard in *Young and Another v Minister of Safety and Security and Others*[11]:

> '[13] The legal basis upon which they seek the closing of the doors of the court is s 16 of the Supreme Court Act 59 of 1959. It provides:
>
> "Save as is otherwise provided in any law, all proceedings in any court of a division shall, except insofar as any such court may in special cases otherwise direct, be carried on in open court."
>
> [14] This provision must be interpreted and applied against the backdrop of two constitutional provisions. They are s 1(d) of the Constitution which entrenches as a

[9] 2009(2) NR 769 (HC) at 775
[10] Unreported judgment, Case Number P(A) 245/2006, p 29 par 29
[11] 2005 (2) SACR 437 (E)

founding value accountability, responsiveness and openness in democratic governance, and s 34 which entrenches a fundamental right of access to court. In so doing, this section states that '(e) everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum' (emphasis added).

[15] The plain meaning of the words of s 16 is in accord with these constitutional provisions: proceedings in courts are to be held in public – in open court – unless there are weighty reasons why the doors of the court should be closed to the public in particular, exceptional, cases.

[16] The cases dealing with s 16 all bear out that this is the correct approach to its application. In *Botha v Minister van Wet en Orde en Andere*[12] Kriegler J spoke of the principles underpinning the requirement that courts hold public hearings as follows:

"Ten eerste, die beginselbenadering. 'n Bevel dat hofverrigtinge in camera geskied slaan nie bloot op prosedure nie maar sanksioneer 'n fundamentele afwyking van 'n diepgewortelde tradisie wat one regspleging deel met oop gemeenskappe. Die wortels dateer, wat die moderne tydvak betref, sedert 1813 toe die destydse Goeverneur in die Kaap by proklamasie gelas het dat alle geregtelike verrigtinge in die openbaar geskied met die oog op "essential utility as well as the dignity of the administration of justice". Die onderliggende doel was om by die burgery in te prent "the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner". (Kyk *Financial Mail (Pty)Ltd v Registrar of Insurance and Others* 1966 (2) 219 (W) te 220E – G.)'

[17] The learned Judge continued to say:

'Die voorbehoud in die inleidende sinsnede slaan op besondere wetgewing, byvoorbeeld die agtereenvolgende wette met betrekking tot kinders en wette met betrekking tot landsgeheime, wat spesifiek voorsiening maak vir eiesoortige private en openbare belange wat vertroulikheid verg. Andersins word die algemene beleid herbevestig, dat Hofverrigtinge ten aanskoue van die publiek plaasvind en word die bevoegdheid om daarvan af te wyk beperk tot spesiale gevalle.

Teen die voormelde gemeenregtelike en wetteregtelike agtergrond moet enige aansoek om die deure vir die publiek te sluit gevolglik behoudend benader word. Die beoordeling van so 'n aansoek staan ook nie los van die demokratiese wêreldbeskouing wat ons hier te lande bely nie. 'n Geregshof is 'n Staatsorgaan wat

[12] 1990 (3) SA 937 (W)

die publiek dien. Die behoud van openbare vertroue in die regspleging verg dat Howe, sover moontlik, so funksioneer dat iedereen kan oordeel of die Regbank sy ewewigtigheidstaak na behore vervul. Nie alleen die bevordering van die Regbank se beeld van diensvaardige betroubaarheid verg dat hy ten aanskoue van die volk daar buite funsioneer nie.'

[18] The issue was approached in much the same way by Van Dijkhorst J in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another*[13]. He held that at the centre of the enquiry was the question whether the proper administration of justice required the closing of the court's doors but that, in exercising the discretion vested in him or her by s 16, a Judge should work from the default position that all cases should be heard in public and that this rule should not be departed from lightly.

[19] I was referred by Ms Mey for the applicants to the matter of W v W, a matter in which the privacy concerns of the plaintiff were to have outweighed the public interest. That case is so unusual, and its facts so different from the present matter, that it is distinguishable. It involved intensely private information about the sexual history of the plaintiff in a divorce action, unlike the present case which, when all is said and done, may be said to involve the legality of the business undertakings of the applicants – business undertakings that are carried out more or less openly, from what I can gather from the papers, and with members of the public. The judgment in W v W is in accordance with the approach that has been set out above and is simply an example of a special case in which the protection of private interests was held to be of sufficient weight to trump the broader public interest in court proceedings being held in public.

[20] In the application of the principles set out in the cases to which I have referred, I am of the view that a case has not been made out for the court's doors to be closed to the public. What is at stake, on the one hand, are questions of the legality of the actions of the respondents and their accountability for the exercise of their public powers, as well as my accountability as an unelected wielder of public, judicial, power for the exercise of that power and, on the other, certain private and commercial concerns of the applicants. I do not believe that those private concerns are of sufficient weight to justify a departure from the norm of open adjudication. Put differently, the public interest does not, in this case, demand that those private interests be accorded more weight than the interests of the public to hear and to read

[13] 1984 (4) SA 149 (T)

about this matter. The application for the matter to be heard in camera and for the ancillary relief sought by the applicants consequently cannot succeed.'

[34] Although I believe that the respondent's point *in limine* can actually be determined with reference to the correct interpretation of Section 98 of POCA and the facts of this case – I nevertheless considered it important to quote at length from the authorities cited in the respondent's heads of argument – as the referred to dicta underline - and serve to remind one - of the fundamental principle and its rationale – which underlies the determination of the point i*n limine* as raised by the respondent herein.

THE INTERPRETATION OF THE APPLICABLE STATUTORY FRAMEWORK

[35] The applicable provision of the Namibian Constitution and Section 13 of the High Court Act 1990 have already been quoted above.

[36] It will have been noted that whereas the High Court Act requires all proceedings to be conducted in open court – except as provided for in Articles 12(1)(a) and (b) of the Constitution – that the Constitution itself requires that a *court can only exclude the press or the public from all or any part of the trial for reasons of morals, the public order or national security as is necessary in a democratic society.*

[37] Section 98(1) of POCA seemingly conflicts with this general position as far as *ex parte* applications are concerned. The entire Section 98 reads:

'98 **Hearings of court to be open to public**

(1) Subject to this section, the hearings of the court contemplated in this Act, except for ex parte applications, must be open to the public.

(2) If the court, in any proceedings before it, is satisfied that-

(a) it would be in the interest of justice; or

(b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,

it may direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them.

(3) An application for proceedings to be held behind closed doors may be brought by the Prosecutor-General, the curator bonis referred to in section 29 or 55 and any other person referred to in subsection (2)(b), and that application must be heard behind closed doors.

(4) The court may at any time review its decision with regard to the question whether or not the proceedings must be held behind closed doors.

(5) Where the court under subsection (2) on any grounds referred to in that subsection directs that the public must not be present at any proceedings or part of them, the court may-

(a) direct that information relating to the proceedings, or any part of them, held behind closed doors, must not be made public in any manner;

(b) direct that a person must not, in any manner, make public any information which may reveal the identity of any witness in the proceedings;

(c) give any directions in respect of the record of proceedings which may be necessary to protect the identity of any witness,

but the court may authorise the publication of so much information as it considers would be just and equitable.

(6) Any person who discloses any information in contravention of subsection (5) commits an offence and is liable to a fine not exceeding N$8 000, or to imprisonment for a period not exceeding two years.'

[38] At first glance it seems indeed so, as contended for by applicant, that Section 98 of POCA does lay down, as a general rule, that all proceedings in terms of the act are to be held in open court, save for *ex parte* applications.

[39] The question that arises, given counsels conflicting submissions on this score, is whether or not such interpretation can prevail?

[40] A court will usually begin its interpretation of a statute by applying the so-called 'literal rule'[14]. As in this instance a literal interpretation of Section 98(1) – seems to suggest an exception to the general rule, as far as *ex parte* applications under the Act are concerned – and whereas Section 98(2) – on the other hand - seems to be of application to 'all' proceedings - as the use of the phrase 'any proceedings' would seem to suggest - which would thus also be inclusive of *ex*

[14]See for instance generally *'The Interpretation of Statutes'* by GM Cockram at p19 and Innes CJ in *Venter v R* at 913

parte proceedings - the 'literal rule' appears to be inadequate to arrive at an interpretation which accords with parliament's intention. Resort should thus, as a next step, be had to the so called 'golden rule' of interpretation[15].

[41] The Namibian Supreme Court has cited with approval and applied in *S v Strowitzki*[16] the dictum of Park B in *Becke v Smith* (1836) 2 M & W 191 at 195, whose formulation it considered as the *locus classicus* of the 'golden rule'[17] of construction of deeds and statutes which the learned judge expounded as follows -

> 'The rule (ie the golden rule) is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.'

[42] The question thus arises what construction should, against the backdrop of the golden rule, be put on the provisions of s 98 of POCA? Does it indeed mean that all proceedings brought on an *ex parte* basis must also at the same time always be heard *in camera*?

[43] It has already been noted that the Constitution, in peremptory language, provides that the press or the public can only be excluded from all or any part of a hearing for reasons of morals, the public order or national security as would be necessary in a democratic society.

[44] It would also appear that the legislature was acutely aware of the fundamental requirement to hold trials in public, subject to the constitutionally permissible

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[15]See also generally Cockram : *'The Interpretation of Statutes'* at p24 were the learned author cites what Denning LJ stated in *Francis Jackson Developments Ltd v Hall : 'If the literal interpretation of a statute leads to a result which Parliament can never have intended, the courts must reject that interpretation and seek fro some other interpretation which does give effect to the intention of Parliament.'*

[16]2003 NR145 (SC) at 152 which it utilized in interpreting Section 6 of the Supreme Court Act 1990

[17]See for instance also : *Francis Jackson Developments Ltd v Hall* [1951] 2 KB 488, *Venter v R* 1907 TS 910 at 914 -915, *Principal Immigration Officer v Hawabu* 1936 AD 26 at 30 -31

exceptions – this appears not only from the heading of section 98[18] - but this awareness, in my view, weaves itself also like a golden thread through the entire contents of Section 98[19] -

[45] Should one therefore come to the conclusion that just because the legislature has seemingly created an exception to this fundamental requirement in sub-section 98(1) that the section was actually intended to create an absolute entitlement for the applicant to always approach the court *in camera*, regardless of the circumstances and without motivation?

[46] In my view such interpretation would be absurd and would lead to an obvious conflict not only with the provisions of Section 13 of the High Court Act[20], but more importantly also with the prevailing requirements set by the 'supreme law'[21] in Article 21(1)(a). Such interpretation would also be in conflict with the remainder of section 98 of POCA which gives the court, in 'any' proceedings before it, the discretion, on the additional grounds, as listed in sub-section 2 (a) and (b), to direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them, and to review such decision at any time in terms of sub-section (3).

[47] In addition it is clear that the section also, as a whole, does not only have to be read in context[22] but also in conformity with the common law and the Constitution.

[48] These further aids of statutory interpretation thus become of application.

[49] O'Linn J formulated the latter interpretational aid in *Du Toit v Office of the Prime Minister* [23]as follows:

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[18]'Hearings of court to be open to public'
[19]See sub-sections 89(2) – (5)
[20] Which also, as a general rule, requires that all proceedings in the High Court shall be carried on in open court'
[21]Article 1(6) 'This Constitution shall be the Supreme Law of Namibia.'
[22] See for instance Wessels AJA in *Stellenbosch Farmer's Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (AD) at 476
[23]1996 NR 52 (LC)

‘There is further the related presumption which should be kept in mind namely that the Legislature does not intend to change the common law or the existing statute law more than necessary. See: Cockram Interpretation of Statutes (supra at 98-9); Steyn Uitleg van Wette (supra); Du Plessis Interpretation of Statutes at 69 - 73.

The intention of the Legislature must appear from the words used in the statute, read as a whole and where provisions of the Namibian Constitution are relevant, then also in the context and in accordance with the letter and spirit of the said provisions of the Namibian Constitution. Where the provisions of international conventions are relevant, then the provisions of such conventions should also serve as an aid to establish the intention of the Legislature. …’.[24]

WHAT IS THE APPLICABLE COMMON LAW?

[50] Kriegler J (as he then was) has traced the Southern African origin of the rule to conduct trials in public back to a Proclamation issued in 1813 by the Governor of the Cape Colony:

'Ten eerste, die beginselbenadering. 'n Bevel dat hofverrigtinge in camera geskied slaan nie bloot op prosedure nie maar sanksioneer 'n fundamentele afwyking van 'n diepgewortelde tradisie wat ons regspleging deel met oop gemeenskappe. Die wortels dateer, wat die moderne tydvak betref, sedert 1813 toe die destydse Goewerneur in die Kaap by proklamasie gelas het dat alle geregtelike verrigtinge in die openbaar geskied met die oog op "essential utility as well as the dignity of the administration of justice". Die onderliggende doel was om by die burgery in te prent "the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner".'[25]

[51] With the advent of South African rule of the former German colony South West Africa after 1915, which brought with it the need to create a new legal system for the administration of the territory, the ‘Administration of Justice Proclamation’, 1919, was enacted, which provided that the common law of South West Africa shall be the Roman-Dutch law, as existing and applied, in the Province of the Cape of

[24] at 74 B-C
[25] *Botha v Minister van Wet en Orde en Andere* op cit at 940D-F

Good Hope. In *Tittel v The Master of The High Court* 1921 SWA 58, Gutsche J found that the words 'existing and applied' meant that any legislation enacted in the Cape of Good Hope immediately before 1 January 1920 (ie the date the proclamation became applicable) formed part of the common law of South West Africa. It would therefore seem that the said 1813 Cape of Good Hope Proclamation was transplanted by way of the 1919 Administration of Justice Proclamation into the common law of the then South West Africa.[26]

[52] Article 66 (1) of the Constitution – regulating this aspect, in turn, for purposes of Namibia's transition from South West Africa to a sovereign state during 1990 - provided that the common law of Namibia in force on the date of Independence would remain valid to the extent to which such common law does not conflict with the Constitution or any other statutory law.

THE EXISTING STATUTORY AND CONSTITUTIONAL LAW

[53] At the same time Article 12(1)(a) of the Constitution from 1990 onwards expressly required all trials to be conducted in public, subject to the set out exceptions.

[54] At this juncture it is also relevant to note that - in any event – and prior to the advent of the Constitution - Section 16[27] - of the repealed Supreme Court Act no 59 of 1959 - already required the then Supreme Court of South West Africa to carry on all proceedings in open court.

[55] Almost immediately after Independence the Namibian legislature enacted the aforesaid Section 13 of the High Court Act 1990 – again encapsulating the 'open-court' principle – which was enacted - in almost identical terms - also for the Supreme Court.[28]

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[26]This requirement also seems to have been embodied in Section 32 of the *Cape Charter of Justice* : see : '*Uniform Rules of Court*', 3rd Ed by Nathan Barnett & Brink at p 10

[27] '16. Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any court may in special cases otherwise direct, be carried on in open court.'

[28]See : Section 6 of Act 15 of 1990 - Proceedings of Supreme Court to be carried on in open court – 'Save as is otherwise provided in Article 12(1)(a) and (b) of the Namibian Constitution, all proceedings

[56] From this history it must be concluded that the so-called 'deep- rooted fundamental principle'- to conduct trials in public- as contained in the common law of South West Africa continues to exist side by side and in conformity with statutory law and the Constitutional maxim.

[57] In addition it will by now have been noted that the 'open-court' principle – 'fundamental to all democratic societies', as also rooted in Namibia's common law and in the said statutory enactments and its Constitution - has always catered for exceptions[29].

[58] At the same time it will have become clear that 'closed-door' proceedings are always the exception rather than the norm.

THE IMPACT OF THE COMMON LAW- STATUTORY LAW- AND CONSTITUTIONAL LAW PROVISIONS ON THE INTERPRETATION OF SECTION 98

[59] In such circumstances the question arises why would the legislature then have intended a departure from the entrenched norm in sub-section 98(1), recognizing it at the same time in sub-sections 98(2) to (5)? It should also be asked why would parliament have wanted to violate the important fundamental rule applied in all democratic societies by creating an automatic exception thereto? It can immediately be stated that it is highly unlikely that Parliament would have intended such a departure from such a deep-rooted fundamental principle given also that Namibia is a constitutional democracy.

[60] Also the unqualified use by the legislature of the phrase '… in any proceedings before it …' in sub-section 98(2) – which phrase is wide enough to

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in the Supreme Court shall be carried on in open court.'

[29]See for instance also some of the earlier South African decisions : *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W) at 220E-222D; *Du Preez v Du Preez: Standard Bank of SA Intervening* 1976 (1) SA 87 (W) at 88A-F; *Cerebos Food Corporation Limited v Diverse Foods SA (Pty) Ltd and Another* (supra at 158A-I): *S v Leepile and Others* (1) 1986 (2) SA 333 (W); *S v Leepile and Others* (4) 1986 (3) SA 661 (W); *Botha v Minister van Wet en Orde en Andere* 1990 (3) SA 937 (W) at 940D-942I

encapsulate *ex parte* proceedings - suggests that sub-section (2) was intended to govern the decision whether or not 'any proceedings' – inclusive of ex parte proceedings under POCA - should be conducted *in camera* or not. Such a conclusion would not only be in line with the context of the section but would also accord with the said general common law and statutory principles.

[61] A further important indicator – if not the most conclusive one - supporting an interpretation along these lines - is found in the legislature's choice of the introductory words to sub-section (1) ' … Subject to this section … ' obviously meaning ' … subordinate to what is contained in the remainder of section 98 .. ' intimating that section 98(1) must be read, subject, to the remainder of the section.

[62] It surely would have been an easy matter for Parliament to have decreed - in clear and unambiguous language - for instance – if that is what was really intended – that all proceedings, instituted in terms of POCA, if brought on an *ex parte* basis, must be heard in camera. This intention was however not unambiguously expressed

[63] All these indices then drive me to the conclusion that the section then permissively and only in directory terms was intended to mean that ' ... all ex parte hearings, contemplated in POCA, 'may' be held behind closed doors – if the requirements for the exclusion of the public – set by sub-section (2) *(and by the Constitution)* have been met, … ' whereas all other proceedings, contemplated in POCA, ' … 'must' be held open to the public … '. This is decreed in peremptory terms.

[64] Ultimately such interpretation would, in my view, not only give recognition to the common law, but would also be one in conformity with the High Court Act, and more importantly, would also accord with the letter and spirit of the relevant provisions of the Namibian Constitution and the 'fundamental principle' accepted in democratic societies.

[65] This finding then means that Mr Budlender's first argument - that the applicant was simply, because of the fact that the court was approached on an *ex parte* basis, also entitled, per se, to an *in camera* hearing - cannot be upheld. This finding would also mean that Mr Budlender's second argument to the effect that it was the National Assembly that had determined in Section 98(1) of POCA that *ex parte* proceedings under the Act automatically constitute one of the constitutionally permissible circumstances to conduct a hearing or trial behind closed doors also cannot be upheld.

[66] Although the point was well taken by Mr Budlender – that a constitutional declaration of invalidity of Section 98 of POCA could not be validly made in these proceedings - in view of the formulation of the issues on the papers, and in the absence of an express constitutional attack on the section - the point *in limine* raised on behalf of respondent can, in my view, and as contended for by Mr Namandje, nevertheless, be validly determined on an afresh consideration of the facts against the backdrop of the interpretation of Section 98 as made above.

[67] This leads to the final question which has to be determined namely, whether or not the applicant had thus, on the facts, ultimately, acted within the parameters provided for by Section 98 of POCA and the Constitution and whether the court, which granted the rule nisi, in this instance, therefore correctly allowed the hearing before it to take place behind closed doors.

[68] This question must also be answered with reference to the applicable approach the court is to take when faced with the question of whether or not to confirm a rule nisi.

THE APPROACH ADOPTED ON THE RETURN DATE

[69] The approach that the court is to take on the return date has recently again been set out by the court in the case of *Prosecutor General v Kanime*[30] in which the

[30] At para's [53] – [54] of the judgment reported on the *Saflii* website at http://www.saflii.org/na/cases/NAHC/2012/335.html

court applied the test formulated in the South African judgment of *Gomeshi-Bozorg v Yousefi*[31], as adopted by this court in *Prosecutor General v Lameck and Others*[32]

[70] It appears from these authorities that the court is essentially tasked to consider the matter 'afresh' on the return date - that is on the merits - in the light of all the information which has by then been placed before the court – 'as if the order was first being applied for'[33].

THE APPLICANT'S CASE ON THE PAPERS

[71] The applicant initially sought to justify the '*ex parte*', '*in camera*' hearing in the founding papers filed of record, as follows:

'EX PARTE AND IN CAMERA

I respectfully submit that section 51(2) of the Act, read with section 98 thereof, entitles me to approach this Honourable Court on an ex parte basis.

I respectfully submit that the express provision made for ex parte proceedings under section 51(2) of the Act is based on the recognition by the Legislature that there is an inherent need to proceed without notice in applications for preservation orders. Further, that the structure of Chapter 6 of the Act as a whole is geared towards allowing in general for an initial ex parte order to secure assets that may disposed of, with any opposition thereto being dealt with after this initial objective has been met.

Proceeding on notice to anyone with an interest in the property will lead to a delay of many months. During that time the state's interest in the property will be under someone else's control, and unprotected.

The parties interested in property of this kind inevitably have a powerful incentive to dissipate their property if they get notice of a pending application for its preservation and seizure.

That risk exists whether the property is movable or immovable. Once released, there is an inherent danger of it being dissipated immediately. In matters of this kind there is accordingly an inherent need to proceed on the basis of an initial ex parte application.

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[31]1998 (1) SA 692 (W) as approved in *Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA) at 404B

[32]2010 (1) NR 156 (HC) at page 159 para [4]

[33]*Gomeshi-Bozorg v Yousefi* op cit at 696

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After the preservation order dated 5 August 2011 under POCA 7/2011 was granted, Gerson Uuyuni Uuyuni ("Mr Gerson"), a person who was known to me to have an interest in the properties, filed a notice to oppose the making of a forfeiture order in terms of section 52 of the Act.

I respectfully submit that due to what transpired in respect of the proceedings under POCA07/2011, it will in this circumstance be appropriate to require only an interim preservation order coupled with a rule nisi, calling upon Mr Gerson to advance reasons why the preservation order should not be made final, instead of a final preservation order.

There is still a risk of dissipation of the properties especially relating to the movable properties. For this reason I respectfully submit that it would be in the interest of justice for the hearing to be held in camera. Once the interim order is granted and the properties are under the protection of the interim preservation order the application and all the documents become public documents.

I submit that, notwithstanding the ex parte nature of the present application, the provisions of the Act and of the order that is sought from this Honourable Court sufficiently safeguard the principle of audi alteram partem.'

[72] The respondent reacted thereto in the answering papers by raising a point *in limine* formulated thus:

'AD POINT IN LIMINE: HEARING OF THE MATTER IN CAMERA

I raise the following point in limine:

i) the applicant caused the matter to be heard in camera without making out a case in that respect. I have been advised, which advice I verily believe to be correct, that the fact that the matter is to be heard on an ex parte basis does not necessarily mean that it should be heard in camera. A case has to be properly and fully made out for a matter to be heard both on an ex parte basis and in camera.

ii) in terms of Article 12(a) of the Namibian Constitution it is provided that *'in the determination of their civil rights and obligations or any criminal charges against them all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court and the court can only exclude the Press or the public from all or any part of the trial for reasons of morals, the public order or national security as is necessary in a democratic society'*.

I therefore submit, that the applicant having not made out a case for the existence grounds provided for under Article 12(a) as necessary in a democratic society, a material irregularity to wit hearing of the matter on 11 April 2012 in camera occurred. That irregularity, I submit, vitiates the whole proceedings and the provisional order should be discharged with costs simply on that basis.'

[73] The applicant defended her position in reply by stating:

'Third point in limine (in camera proceedings):

The Respondent implicitly admits that there may be grounds on which an ex parte application may also be brought in camera. The Act explicitly authorizes an ex parte application. I submit that the very purpose of authorizing ex parte proceedings, and of obtaining a preservation order, would be defeated if the application was not heard in camera. At the very heart of the preservation order, and particularly at the stage of the rule nisi, is the prevention of the dissipation of property reasonably believed to be the proceeds of unlawful activity or the instrumentality of crime. In order to ensure that the court order issued in this respect is effective, the proceedings must remain confidential until the court order has been both issued and served on the various persons who must be given notice. This is why the initial court order ought to be in the form of a rule nisi, in order to do justice between the parties.

Section 98(1) of the Act creates a general rule that hearings contemplated in the Act must be open to the public. It explicitly excludes ex parte applications from that general rule.

The Constitution authorizes in camera hearings in certain exceptional circumstances. The National Assembly has determined, in section 98(1) of the Act, that ex parte proceedings under the Act are one of those exceptional circumstances. The Respondent has not challenged the validity of section 98(1). That being so he cannot assert that holding an ex parte hearing in camera is inconsistent with the Constitution. It is authorized by section 98(1) of the Act.' *(my underlining)*

[74] From the founding papers - with reference to which an applicant will in any event have 'to stand or fall'[34] – it emerges that the applicant's initial and only justification for having the matter heard behind closed doors was the fear that: *'…*

[34]See for instance *Titty's Bar and Bottle Store Pty Ltd v ABC Garage Pty Ltd* 1974 (4) SA 363 (T) at 368H – 369B and generally : Erasmus Superior Court Practice at pages B1- 39 and 45 (Service 40,2012 and 37,2011)

there is still a risk of dissipation of properties, especially movable property and that the exclusion of the public was sought to ensure that any court order issued would be effective … '.

[75] On a comparison of the grounds on which the *ex parte* and *in camera* hearing was sought it also appears that the applicant's entire motivation - as found in the founding papers - mainly focuses on the justification for not giving notice to the respondent of the application.

[76] The grounds advanced for approaching the court on an *ex parte* basis were essentially –

a) that section 51(2) of the Act, read with section 98 thereof, entitles the applicant to approach the Court on an *ex parte* basis; and

b) That the provision made for *ex parte* proceedings in section 51(2) of the Act amounts to the recognition by the Legislature that there is an inherent need to proceed without notice in applications for preservation orders; and

c) that the structure of Chapter 6 of POCA, as a whole, is geared towards allowing generally an initial *ex parte* order to secure assets that may disposed of, with any opposition thereto being dealt with after this initial objective has been met; and

d) ' … that the proceeding on notice to anyone with an interest in the property will lead to a delay of many months during which time the state's interest in the property will be under someone else's control, and be unprotected - parties interested in property of this kind inevitably have a powerful incentive to dissipate their property if they get notice of a pending application for its preservation and seizure - that risk exists whether the property is movable or immovable - once released, there is an inherent danger of it being dissipated immediately - matters of this kind accordingly have an inherent need to proceed on the basis of an initial ex parte application … '. *(emphasis added)*

[77] The said comparison then reveals that at the core of the applicant's motivation lies the fear that the very purpose of obtaining preservation orders would be defeated if notice of the intended proceedings were to be given to a respondent. It is then simply added – as if by some afterthought - that - for the same reasons - it would also be in the interest of justice for the hearing to be held behind closed doors.

[78] While it is immediately clear, on the one hand, that it may, in certain instances definitely also be in the interests of justice that such cases be heard behind closed doors, the fear of the dissipation of assets, intended to be preserved, would, on the other, in most cases, not on its own and without more, justify a hearing behind closed doors, as the intended objective would already be achieved by the bringing of the application without notice.

[79] The point is conveniently illustrated with reference to the commentary on *ex parte* applications found in some of the leading text books on civil procedure:

a) The learned authors Van Winsen, Cilliers & Loots in *'Herbstein & Van Winsen - The Civil Practice of the Supreme Court of South Africa*' , for instance, state:

'An *ex parte* application is used:
(1) …
(2) …
(3) when, though other persons may be affected by the court's order, immediate relief (even though it be temporary in nature) is essential because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall, for example an application for an interdict or an arrest *tamquam suspectus de fuga* under the common law.'[35]

b) Similar commentary is found in *'Erasmus - Superior Court Practice'* by Farlam, Fichardt & van Loggerenberg :

'An ex parte application is used:

(i) …
(ii) …
(iii) were the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, eg an Anton Piller-type order;

[35] 5th Ed, Vol 1, at p290

(iv) where immediate relief, even though it may be temporary in nature, is essential because harm is imminent. In such cases the applicant will often seek a rule nisi, the application then being in the nature of an ex parte application in terms of this subrule;
(v) where certain kinds of applications are customarily brought ex parte … '.[36]

[80] It emerges therefore that the applicant's concerns could have been addressed - meaningfully - just like in the *suspectus de fuga* cases or in applications for Anton Piller orders - though the bringing of an *ex parte* application, which the applicant was in any event entitled to do, in terms of Section 51(2) of POCA, and which was also done in this instance.

[81] If one then - for purposes of the afresh consideration of all the evidence before the court - considers on what further grounds the initial reasons advanced were amplified in the replying papers nothing really new emerges :

a) it is in reply firstly reiterated that 'the very purpose of authorizing *ex parte* proceedings, and of obtaining preservation orders, would be defeated if such applications would not be heard in camera and that, in order to ensure that any court order issued in this respect would be effective, the proceedings must remain confidential until the court order has been both issued and served on the various persons who must be given notice' –
(this justification does not break new ground and is covered by what has been said above in respect of the motivation for excusing an applicant from not having to give notice to a respondent in certain cases); and
b) secondly, the argument was now made that 'although Section 98(1) of POCA creates a general rule that hearings contemplated in the Act must be open to the public it explicitly excludes ex parte applications from that general rule'; and
c) thirdly, it is stated that 'because the Constitution authorizes *in camera* hearings in certain exceptional circumstances the National Assembly has determined, in section 98(1) of the Act, that ex parte proceedings under the Act are one of those exceptional circumstances'; and

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[36] At page B1 – 41 (service 40, 2012)

d) finally the point was made that 'as the respondent had not challenged the validity of section 98(1) he could not assert that an *ex parte* hearing in camera was inconsistent with the Constitution and that in any event section 98(1) of the Act authorized the utilization of such procedure' –

(all these grounds have already been held not to be in accord with the correct interpretation to be given to section 98 above).

[82] This then leads to the consideration the central question whether or not the applicant has met the requirements set by section 98 (2) of POCA and the Constitution?

[83] In this regard it is firstly of relevance that it is without question that section 98(2)(b) is not of application.

[84] Secondly I consider that the requirements set by section 98(2)(a) were also not met as the bringing of this application, without notice to the respondent, already satisfied the interests of justice, which, in this instance, did not also require the exclusion of the public on the facts of this case.

[85] In this regard it must also be kept in mind that the respondent was forewarned during the proceedings before the lower court on 28 July 2011 that an application for the preservation of his assets would be brought or at least was contemplated and that if he had wanted to dissipate his assets he could have done so by the time that the first preservation order was applied for on 5 August 2011.

[86] As also nothing was shown on the papers which warranted the extra-ordinary departure from the general rule as to the exclusion of the public *for reasons also of morals, the public order or national security as is necessary in a democratic society* it must be concluded further that also the requirements of Article 12(1)(a) of the Constitution were not met.

[87] In such circumstances I therefore ultimately also find on the facts of this case that the *in camera* hearing in this matter was never warranted and should never have occurred.

WHAT RELIEF SHOULD BE GRANTED

[88] At this stage it should be mentioned that Mr Budlender[37] also properly referred the court to the requirement of 'good faith' in *ex parte* applications which would entitle a court – should any material facts not have been disclosed - whether or not suppressed deliberately or negligently - on that ground alone - to dismiss an application originally brought without notice.[38] From the applicable principles it appears also that the court – on a return date - will not hold itself bound by any order obtained under a consequent misapprehension of the true position.[39]

[89] Although the present matter does not entail a re-consideration of the rule nisi on the basis of the enquiry whether or not the applicant has breached the requirement of 'good faith', I have no doubt that where a court finds, on an afresh re-consideration of all the facts, on a return day of a rule nisi, that a fundamental requirement of the law has been breached that this would also warrant the discharge of any interim order granted in breach thereof.

[90] Amongst the factors which a court surely will be entitled to take into account in the exercise of its discretion will be the extent to which a fundamental rule and basic requirement of our system of justice has been breached. I have already found that not only had no case been made out for the departure from the overall requirements set by section 98 – (that in general all hearings in term of POCA have to be open to the public) - but that, *in casu,* also the particular requirements set by Section 98(2) had not been met. Ultimately - and what should even weigh even more heavily - is

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[37]He made this submission in the context of submitting what the correct approach of the court should be on a return date of a rule nisi,

[38]*Knouwds NO v Josea & Another* 2007 (2) NR 792 (HC) see also *Doeseb & Others v Kheibeb & Others* 2006 (2) NR 702 (SC)

[39]See for instance : *Erasmus Superior Court Practice* op cit at p B1 – 42 (Service 40,2012)

that also the fundamental requirement - to hold trials in public - as decreed by the Supreme law - was violated in this case.

[91] I have no doubt that if the court, which granted the rule nisi in this instance, would have had the benefit of argument on this fundamental issue, it would have been influenced in its willingness to have accommodated the hearing of this matter behind closed doors.

[92] In similar vein therefore I do not consider myself bound by the rule nisi granted herein in violation of one of the most fundamental requirements, deeply embedded in our law, that justice must be seen to be done.

[93] Therefore, and on an afresh consideration of this matter, on all the material before the court, as if the order was first being applied for, I find that the exclusion of the public, at the initial hearing of this matter, inclines me to refuse to exercise my discretion in favour of confirming the interim order granted in this instance.

[94] The rule nisi granted on 11 April 2012 is accordingly discharged with costs

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H GEIER

Judge

APPEARANCES

APPLICANT:	G M Budlender, SC Instructed by Government Attorney, Windhoek.
RESPONDENT:	S Namandje Sisa Namandje & Co. Inc.,Windhoek