REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 2/2013

In the matter between:

JOHANNES MANDUME SHAULULU **APPLICANT**

And

THE PROSECUTOR-GENERAL **FIRST RESPONDENT**
THE ATTORNEY-GENERAL **SECOND RESPONDENT**
THE GOVERNMENT OF NAMIBIA **THIRD RESPONDENT**

Neutral citation: *Shaululu v The Prosecutor-General* (POCA 2/2013) [2014] NAHCMD 222 (24 July 2014)

Coram: PARKER AJ
Heard: **18 June 2014**
Delivered: **24 July 2014**

Flynote: Practice – Applications and motions – Application for condonation in terms of Prevention of Organized Crime Act 29 of 2004 (POCA) – Applicant failing to bring application to condone failure to give notice in terms of s 52(3) of POCA – Applicant applying to court to condone applicant's failure to bring an application to condone applicant's failure to give the notice within the time limit – Court concluded that an application to condone in terms of s 60(1) of POCA cannot be considered by court after expiration of the time limit to bring such application – What the court is entitled to condone in terms of s 60(1) is the applicant's failure to give notice in terms of s 52 of the Act and not the applicant's failure to launch a condonation application

under s 60(1) – Court held that the court has no power under s 60(1) to condone a failure to apply to court to condone a failure to give notice under s 52 – Consequently court dismissed the condonation application.

Summary: Practice – Applications and motions – Application for condonation in terms of Prevention of Organized Crime Act 29 of 2004 (POCA) – Applicant failing to bring application to condone failure to give notice in terms of s 52(3) of POCA – Applicant applying to court to condone applicant's failure to bring an application to condone applicant's failure to give the notice within the time limit – Applicant failed to give notice in terms of s 52 of POCA and applicant failed to bring application under s 60(1) to condone applicant's failure to give such notice – Court held that the court has no power to condone applicant's failure to bring application for condonation in terms of s 60(1) of POCA – Court gave reasons for not accepting the applicant's reasons for not giving the notice under s 52 and not bringing application to condone the failure to give the notice under s 52 of POCA.

Flynote: Practice – Judgments and orders – Rescission of order – Application in terms of s 58(3) of Prevention of Organized Crime Act 29 of 2004 (POCA) – Preservation of property order granted *ex parte* in absence of applicant – When to be granted – Where relief of no final nature sought – Relief constitutes only a preliminary step in the proceeding which contemplates the bringing of application for forfeiture of the preserved property within a stipulated time in terms of s 53(1) of POCA – Court held that the Prosecutor General only need to make a *prima facie* case where the court is satisfied that there is evidence which if accepted will establish the Prosecutor-General's belief based on reasonable grounds within the meaning of s 51(2) of POCA that the property sought to be preserved is an instrumentality of an offence under Schedule 1 of POCA or proceeds of unlawful activities – In instant case the Prosecutor General had made out a *prima facie* case – The test to be applied in deciding whether or not a *prima facie* case has been made is that the court should be satisfied that there is evidence, if accepted, will establish the belief of the Prosecutor General based on reasonable grounds that the property in question is an instrumentality of an offence under Schedule 1 of POCA or proceeds of unlawful activities – Court held that the mere fact that such evidence

could be contradicted cannot disentitle the Prosecutor General to the grant of a preservation of property order.

Summary: Practice – Judgments and orders – Rescission of order – Application in terms of s 58(3) of Prevention of Organized Crime Act 29 of 2004 (POCA) – Preservation of property order granted *ex parte* in absence of applicant – When to be granted – Where relief of no final nature sought – Relief constitutes only a preliminary step in the proceeding which contemplates the bringing of application for forfeiture of the preserved property within a stipulated time in terms of s 53(1) of POCA – Court held that the Prosecutor General only need to make a *prima facie* case where the court is satisfied that there is evidence which if accepted will establish the Prosecutor-General's belief based on reasonable grounds within the meaning of s 51(2) of POCA that the property sought to be preserved is an instrumentality of an offence under Schedule 1 of POCA or proceeds of unlawful activities – Court found that the evidence placed before the court that granted the preservation of property order established to the satisfaction of that court that the Prosecutor General's belief was based on reasonable grounds that the property is an instrumentality of an offence under Schedule 1 of POCA or proceeds of unlawful activities – The Prosecutor General's belief was not groundless or frivolous and so the court was inclined to grant the preservation of property order – The court concluded that applicant has not established that the preservation of property order was erroneously sought or erroneously made or that it was made as a result of a mistake common to the Prosecutor General and Shaululu – Consequently, the court rejected the relief for rescission of the preservation of property order.

ORDER

That the application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] This is an application brought on notice of motion in which the applicant, Mr Shaululu, seeks relief in terms set out in the notice of motion as follows:

(a) Declaring section 51(2) of the Prevention of Organised Crime Act, Act 29 of 2004 to be unconstitutional, null and void and of no force or effect.

(b) Rescinding and setting aside the preservation order granting on 10 May 2013 in the main application.

(c) In the alternative to prayer 2 above: Condoning the late filing of the Applicant's notice of opposition and granting leave to the Applicant to file his answering affidavits in the main application within five (5) days of an order in terms hereof.

(d) Directing that the First Respondent, together with such further Respondents electing to oppose this application, to pay the costs of this application.

(e) Granting the Applicant such further and or alternative relief as the above honourable court may deem fit.

[2] For good reason which will become apparent in due course, I should, in the nature of the application, consider the relief set out in paras (a) and (c) of the notice of motion at the threshold; para (a), because it raises a constitutional challenge, and para (c), because if I refuse to grant Shaululu's application for condonation, that will be the end of the matter because Shaululu would then not be entitled to participate in the proceedings concerning an application for a forfeiture order as provided in s 52(6)*(b)* of the Prevention of Organized Crime Act 29 of 2004 ('POCA').

Para (a): Declaring section 51(2) of the Prevention of Organised Crime Act, Act 29 of 2004 to be unconstitutional, null and void and of no force or effect

[3] I note that a selfsame constitutional attack on s 51(2) of POCA was rejected by a bench of three judges in *Shali v Attorney-General* [2013] NAHCMD 5 (16 January 2013). Shaululu sought to distinguish the *Shali* case from the present case on the basis that, according to Shaululu, the property in question in that case was in a foreign bank 'which can with ease be dissipated' but in the instant case the property involved was at all material times in the custody and under the control of officials of the Namibian Police (NAMPOL).

[4] It is worth noting, in this regard, the following. The property in question was seized in virtue of NAMPOL's power exercised during investigations of a crime allegedly committed by Shaululu and not in execution of an order of the court (or any other competent court). It follows irrefragably and reasonably that the NAMPOL officials can, in the exercise of their power, return the property to Shaululu at any time. In that event nobody, including the Prosecutor General (the second respondent), can tell when the NAMPOL officials will return the property to Shaululu; neither has anybody, including the Prosecutor General, the power to stop the NAMPOL officials from returning the property to Shaululu. And Shaululu, upon receiving the property would be at liberty to dissipate it in any way he likes. I therefore, find that it is of no moment in practice where the property in the *Shali* case was and where the property in the present case is.

[5] It is in such situation as I have sketched previously lies the rational basis for a preservation order applied for and granted *ex parte*. As the Prosecutor General states in her answering papers, 'There was at all times the risk that the investigating officer might have to release the Toyota motor vehicle and the cash in terms of s 31 or s 34 of the Criminal Procedure Act 51 of 1977 if it was decided not to proceed with the criminal prosecution or if the criminal (trial) court refused a further postponement, compelling the prosecution to withdraw the charges. I could never be sure that, if Mr Shaululu were given notice of the application for a preservation order, the goods

might not be released to him and *the purpose of the (preservation of property) application defeated before it was heard*. (Emphasis added)

[6] The Prosecutor General's statement resonate in the words of Maritz J in *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 at 51A-B which are instructive because they capture succinctly the essence of the purpose of an *ex parte* application in our rule of practice. There, Maritz J stated that '[U]nless it would defeat the object of the application or … it is … unreasonable, an applicant should effect service of an urgent application as soon as reasonable possible on a respondent …' In other words, where the service of an application brought on urgent basis and *ex parte* will defeat the object of the application or it is unreasonable to serve it on the respondent, the applicant can dispense with service of the application on the respondent. Besides, '[A]n applicant may', stated Teek JP, 'employ the *ex parte* procedure when no relief of a final nature is sought against an interested party'. (*Bourgwell Ltd v Shepavolov and Others* 1999 NR 410 at 422I) Teek JP continued: 'The existence of a particular practice such as the one in question renders it unnecessary or improper to require that due notice be given to the other party in accordance with the provision of Rule 6(5) of the Rules, especially when the relief sought by such an application only constitutes a preliminary step in the proceedings, which proceedings like *in casu* contemplate the bringing of a legal suit within a stipulated time.…' Thus, both on Maritz J's and Teek JP's propositions of law and on the facts, and in the circumstances, of the instant case, I have no good reason to find fault with the Prosecutor General's employing of the *ex parte* procedure in this matter.

[7] Based on the reasoning and conclusions put forth previously in response to Shaululu's statement that the *Shali's* case is distinguishable, it is my view that any argument that the *Shali* case is distinguishable on the facts of the present case as respects the interpretation and application of s 51(2) of POCA is, with respect, fallacious and self-serving. In any case, whether or not a statutory provision is Constitution compliant does not depend upon the facts of a particular case, as stated by the respondents.

[8] I have no good reason, therefore, not to accept and adopt the *Shali* case: the *Shali* case is good law. It follows that I should, and I do, reject the relief sought in para (a) of the notice of motion. I should note that the essence and relevance of the reasoning and conclusions respecting the determination of the relief in para (a) find a home in the consideration of the relief in para (b), too, which I now proceed to consider.

Para (b): Rescinding and setting aside the preservation order granting on 10 May 2013 in the main application.

[9] The first sign post to read in the enquiry respecting para (b) of the notice of motion is this: as the respondent's state in their papers, a preservation of property order is a necessary precursor to an application for forfeiture of the property in question provided in s 59(1) of POCA. In other words; the order sought in the preservation of property application only constitutes a preliminary step in the proceedings, which proceedings contemplate the bringing of an application for forfeiture of the preserved property within a stipulated period in terms of s 53(1) of POCA. See *Bourgwells Ltd v Shepavolov and Others* at 422I-423A. For these reasons, the burden of the court determining a preservation of property application is, in terms of s 51(2) of POCA, as Mr Trengove submitted, that the court should be satisfied that the information available to the Prosecutor General shows on the face of it, that is, to a *prima facie* extent, that there are reasonable grounds to believe that the property sought to be preserved is an instrumentality of an offence referred to in Schedule 1 of POCA or the proceeds of unlawful activities.

[10] Thus, the second sign post is whether sufficient facts were placed before the court, which granted the preservation application, that established 'on the face of it', ie to a *prima facie* extent, that the property sought to be preserved is an instrumentality of an offence referred in Schedule 1 of POCA on the proceeds of unlawful activities.

[11] On the papers placed before the court in the preservation of property application the court, which granted the preservation order, the court accepted that

the Prosecutor General had sufficient grounds to believe that the property sought to be preserved is an instrumentality of an offence under Schedule 1 of POCA or proceeds of unlawful activities. The test to be applied in deciding whether or not a *prima facie* case has been made in relation to a preservation of property order is that the court should be satisfied that there is evidence, which if accepted, will establish the Prosecutor General's belief based on reasonable grounds within the meaning of s 51(2) of POCA. The mere fact that such evidence could be contradicted, as Mr Tjombe submitted, would not disentitle the Prosecutor General to the grant of a preservation of property order. It is only when it is quite clear that the Prosecutor General's belief is groundless or frivolous will the court be disposed to refusing the preservation application. (See *Bourgwells Ltd v Shepavolov and Others* at 418A-419F where the court approved South African and English cases on the point under consideration.) In the instant matter the Prosecutor General's belief was not found to be groundless or frivolous.

[12] In a proceeding like the present where diverse facts justify the drawing of different inferences – some of which could establish the Prosecutor General's case – the court should not pause to consider the weight and persuasiveness of each possible inference that can be drawn, but rather the court should confine its enquiry to the question whether one of the possible inferences to be drawn is in favour of the Prosecutor General in order for the court to determine whether a *prima facie* case has been established. See *Bourgwells Ltd v Shepavolov and Others*.

[13] Having applied the aforegoing principles to the facts that were accepted by the court in the preservation application as established I conclude that the Prosecutor General made a *prima facie* case required for the granting of a preservation of property order in terms of the relevant provisions of POCA. Doubtless, those accepted facts constitute *prima facie* proof that the property in question is an instrumentality of an offence under Schedule 1 of POCA or the proceeds of unlawful activities.

[14] Based on the aforegoing reasoning and conclusions, I do not find that the preservation of property order was erroneously sought or erroneously made or that

the order was made as a result of a mistake common to both the Prosecutor General and Shaululu within the meaning of s 58(3) of POCA. Consequently, I refuse to exercise my discretion to make an order rescinding the preservation of property order granted on 10 May 2013. The relief sought in para (b), therefore, also fails; and it is rejected.

[15] In the notice of motion, the applicant has moved the court to consider para (c) of the notice of motion as alternative to para (b) and also if the court refused to grant the relief in para (a) of the notice of motion. I have refused to grant the relief in para (a) and (b) of the notice of motion, and so I proceed to consider para (c) of the notice of motion.

Para (c): In the alternative to prayer 2 above: Condoning the late filing of the Applicant's notice of opposition and granting leave to the Applicant to file his answering affidavits in the main application within five (5) days of an order in terms hereof.

[16] Section 52(3) of POCA provides:

'Any person who has an interest in the property which is subject to the preservation of property order may give written notice of his or her intention to oppose the making of a forfeiture order or apply, in writing, for an order excluding his or her interest in the property concerned from the operation of the preservation of property order.'

And what is more and significant, paras 5 to 7 of the preservation of property order put Shaululu on notice of these relevant provisions of POCA. Furthermore, on the papers, I accept that the 10 May 2013 order was served on Shaululu personally on 29 May 2013 by the deputy sheriff, and the deputy sheriff at the same moment did explain to Shaululu the contents of that order. It needs hardly saying that the order is comprehensive and expansive in its content. For instance, the order instructs in clear terms what Shaululu, a person who has interest in the property in question, must do; for example, if he desired to apply for reconsideration of the preservation of the property order made.

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[17] Additionally, s 60(1) of POCA provides:

'Any person who, for any reason, failed to give notice in terms of section 52(3), within the period specified in section 52(4) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.'

Thus, s 60(1) gives an interested person who had failed to give notice in terms of s 52 a second bite at the cherry, so to speak. The provision gives such a person the opportunity to apply for condonation, as aforesaid, to enable him or her to oppose a forfeiture application. But – it must be stressed – the enjoyment of this statutory largesse is subject to a time limit. In terms of s 60(1) the interested person who had failed to give notice in compliance with s 52 must launch his or her application for condonation of that failure and leave to give a notice accompanied by the required information. Having sought and found the intention of the Legislature clearly expressed in the words of the statutory provision and the purpose of POCA, as set out in the long title of POCA, I hold that the provisions on the time limits are peremptory. See *Compania Romana de Pescuit (SA) v Rosteve Fishing* 2002 NR 297 at 301H-I. The court is, therefore, not entitled to disregard or extend those time limits.

[18] It follows indubitably and reasonably that an application for condonation in terms of s 60(1) cannot be considered by the court after the expiration of the time limit. The reason is simple. As a matter of law and logic, if a condonation application has not been launched within the 14 days' time limit, there is no condonation application that has been placed before the court for the court to adjudicate. Thus, it is only when a condonation application has been brought in terms of s 60(1) and within the statutory time limit that the court is entitled to hear such application; and in that event, the court would have to be satisfied, on good cause shown, that the applicant was unaware of the preservation order or that it was impossible for him or her to give the required notice in accordance with s 52 of the Act.

[19] In this regard, it must be remembered that what the court is entitled to condone in terms of s 60(1) is an applicant's failure to give notice in terms of s 52

and not the applicant's failure to launch a condonation application under s 60(1). Put simply the court has no power under s 60 to condone a failure to apply for condonation. At all events, the court's inherent power does not include acting contrary to express provisions of an Act. (See *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A).)

[20] Based on these reasoning and conclusions, it is with firm confidence that I conclude that POCA has not vested the court with the power to condone the failure of a person to bring a condonation application in terms of 60(1) of POCA.

[21] I should say that I do not accept Shaululu's statement that with his humble education he did not comprehend what the papers that the deputy sheriff had served on him meant, and so he did know what to do. Shaululu does not contradict the deputy sheriff's affidavit of service statement that he explained to Shaululu the contents of these papers when he served the papers on him. Shaululu does say he informed the deputy sheriff that he did not understand the explanation the deputy sheriff had given. Shaululu does not say that he asked the deputy sheriff whether the papers he had served on him came from the 'Oranjemund Magistrates Court' in connection with Shaululu's criminal case in Oranjemund. Accordingly, I find that Shaululu knew what the papers that the deputy sheriff had served on him were and he understood the explanation given to him by the deputy sheriff, but Shaululu decided to wait until he could 'by chance' at some time in the future show 'the document to a family member in Ondobe village', who has remained anonymous.

[22] Based on these reasons the relief sought in para (a) of the notice of motion also fails, and it is rejected. Shaululu is denied leave to file an answering affidavit in the main application, that is, the forfeiture application.

[23] In the result, I make the following order. Shaululu's application is dismissed with costs.

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C Parker

Acting Judge

APPEARANCES

APPLICANT: N Tjombe
Of Tjombe-Elago Law Firm Inc., Windhoek

RESPONDENTS: W Trengove SC (assisted by M Boonzaier)
Instructed by Government Attorneys, Windhoek