REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 3/2013

In the matter between:

IGNATIUS HAUFIKU MWASHEKELE **APPLICANT**

And

THE PROSECUTOR GENERAL **RESPONDENT**

Neutral citation: *Mwashekele v The Prosecutor General* (POCA 3/2013) [2014] NAHCMD 349 (20 November 2014)

Coram: PARKER AJ
Heard: **8 October 2014**
Delivered: **20 November 2014**

Flynote: Practice – Applications and motions – Application to condone non-compliance with relevant provisions of the Prevention of Organized Crime Act 29 of 2004 ('POCA') – Applicant failed or refused to bring application in terms of s 60(1) to condone applicant's failure to give notice in terms of s 52(3) of POCA – Court found that the court has no power to condone the applicant's failure to bring application in terms of 60(1) – Court rejected counsel's argument that the court should invoke its inherent power and grant a condonation over and above s 60(1) – Court held on authority that court cannot have an inherent power which would entitle the court to act contrary to an express provision of an Act – Court held further that to use the terms 'inherent power' at large and loosely, without reference to a specific aspect of

a particular law, makes the term empty, meaningless and otiose – Court held that the inherent power of the court to fill in the gaps in the interpretation of legislation flow logically, ie inherently, from the doctrine of *casus omissus* in the interpretation of legislation – Upon the correct interpretation of the relevant provisions of POCA and upon the application of those provisions, the court rejected applicant's counsel's arguments and the application and dismissed the application with costs.

Summary: Practice – Applications and motions – Application to condone non-compliance with relevant provisions of the Prevention of Organized Crime Act 29 of 2004 ('POCA') – Applicant failed or refused to bring application in terms of s 60(1) to condone applicant's failure to give notice in terms of s 52(3) of POCA – Court found that the court has no power to condone the applicant's failure to bring application in terms of 60(1) – Court rejected counsel's argument that the court should invoke its inherent power and grant a condonation over and above s 60(1) – Court found that having failed or refused to take advantage of s 60(1) in terms of which he could bring an application to condone, applicant cannot bring an application to condone his failure or refusal to bring a condonation application under s 60(1) – Court found that there is one power in terms of s 60 to condone such application and there can be only one application to condone under s 60 of POCA – Court found further that it is not entitled to entertain applicant's application because as a matter of law and logic there is no application to condone properly before the court for the court to determine – In the result the application was dismissed with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] In this matter the applicant Mr Mwashekele has brought an application by notice of motion in which he seeks the relief set out in the notice of motion. The cover sheet of the notice of motion indicates that it is an application in terms of s 60 of the Prevention of Organized Crime Act 29 of 2004 ('POCA'). The respondent has moved to reject the application. The facts at play in the matter are not in dispute. Briefly, they are as follows. On May 2013 the court granted a preservation order in terms of s 51 of POCA for the preservation of an amount of R207 000 in cash and a Toyota motor vehicle. The preservation order was duly served on 3 June 2013 on the applicant, who was identified as a person who has an interest in the properties, and published in the Government Gazette on 31 May 2013.

[2] The applicant did not give the requisite notice in terms of subsec (3), read with subsec (4), of s 52 of POCA within the time limit prescribed therein. On 25 July 2013 the applicant launched the present application.

[3] I should say at the outset that the determination of the application turns primarily on the interpretation and application of the relevant provisions of ss 52 and 60 of POCA. And so, it is to the interpretation and application of those provisions that I now direct the enquiry. But before I proceed on this route I think it is necessary, in order to appreciate fully the meaning and purpose of those provisions and their impact, to set out those provisions.

[4] Section 52 enacts in relevant parts that -

> '**52. Notice of preservation of property order**
>
> (1) If the High Court makes a preservation of property order, the Prosecutor-General must, as soon as practicable after the making of the order-
>
> (a) give notice of the order to all persons known to the Prosecutor-General to have an interest in the property which is subject to the order; and

(b) publish a notice of the order in the Gazette.

(2) A notice under subsection (1)(a) must be served in the manner in which a summons whereby civil proceedings in the High Court are commenced is served or in any manner prescribed by the Minister.

(3) 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.

(4) An notice under subsection (3) must be delivered to the Prosecutor-General within, in the case of-

(a) a person on whom a notice has been served under subsection (1)(a), 21 days after the service; or

(b) any other person, 21 days after the date on which a notice under subsection (1)(b) was published in the *Gazette*.

(5) A notice under subsection (3) must contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by an affidavit stating-

(a) full particulars of the identity of the person giving notice;

(b) the nature and the extent of his or her interest in the property concerned;

(c) whether he or she intends to-

(i) oppose the making of the order; or

(ii) apply for an order –

(aa) excluding his or her interest in that property from the operation of the order; or

(bb) varying the operation of the order in respect of that property;

(d) whether he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities; and

(e) the –

(i) facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in subparagraph (c)(ii); and

(ii) basis on which he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities.

(6) A person who does not give notice in terms of subsection (3), accompanied by an affidavit in terms of subsection (5), within the period referred to in subsection (4) is not entitled-

(a) to receive, from the Prosecutor-General, notice of an application for a forfeiture order in terms of section 59(2); or

(b) subject to section 60, to participate in proceedings concerning an application for a forfeiture order.'

And section 60 provides in relevant parts thus:

'**60. Failure to give notice**

(1) 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.

(2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 59(1), but must be made before judgment is given in respect of the application for a forfeiture order.

(3) The High Court may condone the failure and grant the leave as contemplated in subsection (1), if the court is satisfied on good cause shown that the applicant-

(a) was unaware of the preservation of property order or that it was impossible for him or her to give notice in terms of section 52(3); and

(b) has an interest in the property which is subject to the preservation of property order.

(4) When the High Court grants an applicant leave to give notice as referred to in subsection (3), the Court-

(a) must make an appropriate order as to costs against the applicant; and

(b) may make an appropriate order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order.

(5) A notice given after leave has been obtained under this section must contain full particulars of the chosen address of the person who gives the notice for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by the affidavit referred to in section 52(5).'

[5] Ms Boonzaier, counsel for the respondent, referred the court to *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2013 (2) NR 390 (HC) where at para 45 a full court put forth the justification for imposing time limits and the danger of the court's failure to apply the rules and the law.

[6] On the peremptoriness of the time limits prescribed in the aforegoing provisions, I had this to say in *Shaululu v The Prosecutor General* (POCA 2/2013 [2014] NAHCMD 222 (24 July 2014), para 17:

> '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.'

[7] Keeping these principles in my mind's eye I now proceed to undertake an interpretation and application of the aforementioned relevant provisions of POCA.

[8] The basic proposition in Mr Khama's argument boils down to this, and it may be put in laconic terms thus. Under POCA, so says Mr Khama, the court has two separate and distinct powers to condone not only the failure of a person X, to give the requisite notice where X has, for any reason under the sun, failed to give that notice in terms of s 52(3) within the time limit prescribed by s 52(4) ('first failure'), but also X's failure ('second failure') to apply to the court to condone X's first failure in terms of s 60(1). And, according to Mr Khama, the first power to condone X's first failure is given the court by subsec 1 of s 60, and so, that section is the basis of the first power. This is the court's statutory power. According to Mr Khama, the second power is the court's inherent power. Thus, Mr Khama's argument is that in virtue of the court's inherent power, the court is entitled to invoke its inherent power and condone X's second failure.

[9] The burden of the court is, therefore, to bring Mr Khama's argument under judicial scrutiny to see if it will pass muster. If it does not, the application fails, and the reasoning and conclusions and holding in *Shaululu v The Prosecutor General*, which Ms Boonzaier agrees with, would be vindicated as correct and *Shaululu* would be vindicated as good law. The *ratio* in *Shaululu* in words of one syllable is that the court has only one power and it is given by s 60(1) of POCA, that is, the power to condone X's first failure: it has no second or other power to condone X's second failure.

[10] Mr Khama argued strenuously that even if the applicant did not take advantage of the statutory largesse offered to him by s 60(1) to apply to the court to condone his first failure, the court is entitled to invoke its inherent power (the second power) to condone the applicant's second failure. Naturally, Mr Khama does not see *Shaululu* as good law. In this regard we are reminded by the high authority of Rabie ACJ in *Sefatsa and Others v Attorney-General, Transvaal and Another* 1989 (1) SA 821 (A) that the court cannot have an inherent power which would entitle the court to act contrary to an express provision of an Act of Parliament. But then Mr Khama argued further that POCA has not taken away the court's inherent power. I agree. I did not hear Ms Boonzaier to submit that it has. In any case to use the term 'inherent power' at large and loosely, without reference to a specific aspect of a particular law, as Mr Khama does, makes the term empty, meaningless and otiose. See *Haidongo Shikwetepo v Khomas Regional Council and Others* Case No. A 364/2008 (Unreported) where upon authorities the meaning and essence of the term are explained. It must be remembered that Mr Khama referred boldly and persistently to the term 'inherent power' without explaining the meaning of the term, and he did not give one iota of reason why the term should apply in the instant proceeding.

[11] In this regard, I should say that in statute law in the interpretation and application of a provision of a statute the court may exercise its inherent power in order to fill in the gaps in the statute, if, indeed, there are gaps to fill in, so as to bring meaning and purpose to the provision whose interpretation and application appear to offer some difficulty. Thus, there is the inherent power of the court to fill in the gaps in the construction of statutes, and that power flows logically, ie inherently, from the

doctrine of *casus omissus* in the interpretation of legislation. In the instant case the precise words of the relevant provisions of s 52 and s 60 are clear and unambiguous and their interpretation and application offer no difficulty – none at all – in getting the meaning and purpose of those provisions. There are no gaps to fill in. No casus omissus exists in those provisions that would necessitate calling in aid the inherent power of the court. The court has, therefore, no business, so to speak, to invoke its inherent power in the interpretation and application of the relevant provisions of POCA without amending POCA, an exercise which would not be Constitution compliant.

[12] In its wisdom the Legislature has seen it fit to set time limits in terms of subsec (3), read with subsec (4), of s 52. Furthermore, also in its wisdom, the Legislature has seen it fit to give the court the power, ie the discretionary power, to condone X's first failure. But – and this is important – the court's power to condone X's first failure is a guided discretionary power in the sense that the court may exercise its discretionary power under s 60(1) upon a consideration of the requisites prescribed in the chapeu and paras (a) and (b) of subsec (3) of s 60, and, further, if the application to condone is launched within the statutorily prescribed time limit. Thus, the court may, for instance, exercise its discretion in favour of granting condonation of the 'first failure' only (a) where, without any allowance, an application to condone has been launched within the statutorily prescribed time limit in terms of s 60(1), and (b) if the applicant satisfies the statutorily prescribed requisites in s 60(3); otherwise, as a matter of law and rudimentary logic there is no application properly before the court calling on the court to determine. See *Shaululu v The Prosecutor General*.

[13] It is clear, therefore, that – to use a pedestrian language – the court has not been left to its own devices when it comes to considering applications to condone in terms of the POCA provisions. The court has not got a free rein in the exercise of its discretion under subsec (1), read with subsecs (2) and (3), of s 60. The court's discretion under subsec (1) must be exercised in strict accordance with the guidance prescribed by subsecs (1), (2) and (3) of s 60.

[14] Thus, as I say, in the instant matter, the Legislature has given the court the power to act, but act, only where good cause is shown and where certain prescribed requisites exist. In such event it would, with respect, be sheer idle submission for counsel to argue that the court's inherent power entitles the court to act outwit the clear, unambiguous and peremptory provisions of the Act in question by invoking some unexplained and amorphous inherent power of the court. As I have said previously, to use the term 'inherent power' at large without reference to a specific aspect of a particular law, as Mr Khama does, is meaningless, empty and otiose. Such approach would set at naught '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. (*Shaululu v The Prosecutor General*, para 17) If it was the intention of the Legislature to give the court the 'second power' to condone a 'second failure', nothing would have prevented the Legislature from making such of its intention known by express words, as it has done in s 60(1) with regard to a first failure.

[15] I should add that the interpretation and application of the relevant provisions of POCA undertaken in *Shaululu* apply with equal force to the present application. And I do not think anything has happened which could remotely lead to the conclusion that between the dates on which judgment in *Shaululu* was delivered and date of the hearing of the instant application the relevant applicable law of POCA and its interpretation and application have undergone a change.

[16] This conclusion leads me to a consideration of the other submission by Mr Khama, namely, that subsec (2) of s 60 also gives the court a second power to condone the applicant's second failure. And what is counsel's argument. It is this. According to Mr Khama 'a person who failed to give notice in terms of section 52(3) may apply for condonation before or after an application for forfeiture has been made'.

[17] With the greatest deference to Mr Khama, Mr Khama misreads s 60. It is trite that words of a statute (and, of course, any other legal instrument) ought to be considered intertextually and as a whole when one is interpreting and applying

provisions of the statute. That much Mr Khama agrees because counsel referred to that approach in his submission. Upon the intertextuality approach I should say that it is abundantly clear that, as I have said previously, the phrase 'that failure' in the penultimate line of subsec (1) of s 60 refers to a person's failure to give notice in terms of s 52(3) ('first failure') which the court may condone in terms of s 60(1). And the phrase 'the failure' in the first line of subsec (3) of s 60 is formulated as 'that failure' in the penultimate line in subsec (1), ie the 'first failure'. It follows irrefragably that subsec (1) and subsec (2) refer to a single failure, ie the first failure. Furthermore, upon the intertextuality approach, it is unmistakable that the clause 'apply to the High Court' in lines 3 and 4 of subsec (1) of s 60 is what is formulated in line 1 of subsec (2) as the phrase 'An application'. Both subsections are talking about one application. Thus, pace Mr Khama, only one application, ie application to condone, is provided in s 60 of POCA. No further application or applications are contemplated.

[18] A person who has failed to give the requisite notice under s 52(3), read with s 52(4), 'may', if he so desires, take advantage of s 60(1). It need hardly saying that the word 'may', contrary to Mr Khama's submission, is an enabling verb, 'expressing a wish' (*Concise Oxford English Dictionary*, 11 ed). Looking at the syntax of the sentence in which 'may' occurs in s 60(2) (and, indeed, in s 60(1)), the word 'may' is not used to connote an antithesis of the verb 'must'. And the use of 'may' does not detract from the fact that if a person fails or refuses to take advantage of the allowance in s 60(1), there is no second cherry for such a person to bite, so to speak.

[19] As I have said more than once, s 60 provides for only one condonation application and that is the application which the court may grant in terms of subsec 1, read with subsec (3) and (4), of POCA. (*Shaululu*) All that subsec 2 of s 60 says is that such application, ie the application to condone, may be made before or after the date on which an application for a forfeiture order is made under s 59(1), but, in any case, the application must be made before judgment is given in respect of the application for a forfeiture order. Section 60(2) does not by any legal imagination

whittle away the time limit prescribed in s 60(1); neither does it enact a provision, providing for a second condonation application, as Mr Khama argued.

[20] Based on these reasoning and conclusions, the application is dismissed with costs.

C Parker

Acting Judge

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APPEARANCES

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