

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO: POCA 01/2016

In the matter between:

THE PROSECUTOR GENERAL

APPLICANT

And

MOSES PASANA UANJANDA KAMUNGUMA  
MCKUMA AND LENGA TRADING CC

FIRST RESPONDENT  
SECOND RESPONDENT

**Neutral citation:** *The Prosecutor-General v Kamunguma* (POCA 01/2016)  
[2017] NAHCMD 302 (20 October 2017)

**Coram:** UEITELE, J

**Heard:** 04 July 2017

**Delivered on:** 20 October 2017

**Flynote:** *Prevention of Organized Crime Act, 2004* - Forfeiture of property- Instrumentality of money laundering-application made in terms of s 59 read with s 61 of POCA - Property subject to order-'Proceeds of unlawful activity' defined as property derived, received or retained, directly or indirectly, in connection with or as result of unlawful activity - Applicant for order to show link between unlawful activity and property- reliance on evidence not supported by affidavit in motion proceedings.

**Prevention of Organized Crime Act, 2004** - Forfeiture order - Application in terms of s 59 of Prevention of Organised Crime Act, 2004 - Whether failure to comply with statutory provisions regarding notice and service of application is fatal.

**Practice** - Applications and motions - Affidavits - Founding affidavit - Applicant bearing *onus* to prove case - Founding affidavit must lay basis for case - Court will rely primarily on founding affidavit - Applicant cannot rely on other affidavits and other documents not forming part of founding affidavit.

**Summary:** On 16 June 2014 the First National Bank of Namibia received an instruction from a corresponding Bank that is based in Germany to, on behalf of its Chinese corresponding Bank, pay an amount equivalent to EUR 192 518-60 into an account held in the name of Moses Pasana Uanjanda Kamunguma who is the first respondent in this application

On receipt of the instructions, First National Bank of Namibia requested Mr Kamunguma to complete a declaration form in terms of which he was required to declare the reasons for the receipt of the funds. Mr Kamunguma completed the declaration form and in that form indicated that the funds were from China North Industries Corporation in respect of 'construction'.

On 18 June 2014 First National Bank deposited an amount of N\$ 2 788 054 - 37 into Mr Kamunguma's cheque account held at First National Bank of Namibia. The reference for that deposit was indicated as 'commission'. Between 18 June 2014 and 18 March 2015 an amount of N\$ 2 730 000 was moved between Mr Kamunguma's cheque account and his 32 Days investment account and large amounts of cash were also withdrawn from those accounts. These activities were brought to the attention of the Anti-Corruption Commission. Based on their investigations and findings the Prosecutor-General, on 19 February 2016, obtained from this Court a preservation of property order.

Pursuant to the preservation order granted by this Court the Prosecutor-General brought a forfeiture application for the preserved property to be forfeited to the State. The applicants opposed the forfeiture application. In their opposition the

respondents raised the point *in limine* that the Prosecutor-General did not serve the forfeiture application on the address nominated by the respondents and that the forfeiture application was not served by the Deputy Sherriff or a Police Officer as prescribed.

The respondents further opposed the application on the basis that the Prosecutor-General did not present admissible evidence to Court that the property sought to be forfeited was an instrumentality of a scheduled offence or the proceeds of unlawful activities.

*Held* that the fundamental purpose of service, is after all, to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met and the point *in limine* thus failed.

*Held further* that the court is bound by the discipline of motion proceedings. Affidavits must contain all the averments necessary to sustain a cause of action or a defence and the court is not entitled to rely on grounds not raised in the founding affidavit.

*Held further that* where reliance is placed on material contained in annexures, the affidavit must clearly state what portions in the accompanying annexures are relied on. What is required is the identification of the portions in the annexures on which reliance is placed and an indication of the case which is sought to be made out on the strength of those identified portions. It does not suffice to simply 'incorporate' annexures as part of one's case and it is particularly fatal if the annexures are not attached or annexed to the founding affidavit.

*Held furthermore* the words 'concerned in the commission of an offence', used in the definition of 'instrumentality of an offence' in s 1, must be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this is meant that the property must play a reasonably direct role in the commission of the offence.

*Held furthermore that* the entire evidence of the Prosecutor-General is based on the information she obtained from persons whose evidence is not before court. It therefore follows that there is no admissible evidence that Mr Kamunguma or Mr Olenga made any misrepresentations to First National Bank and thus committed fraud on FNB. The application for the forfeiture of property to the State was thus dismissed with costs.

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### ORDER

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1. The application is hereby dismissed.
2. The Prosecutor General must pay the respondents' costs of the application.

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### JUDGMENT

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**UEITELE, J :**

Introduction

[1] On 16 June 2014 the First National Bank of Namibia received an instruction from a corresponding Bank that is based in Germany to, on behalf of its Chinese corresponding Bank, pay an amount equivalent to EUR 192 518-60 into an account held in the name of Moses Pasana Uanjanda Kamunguma who is the first respondent<sup>1</sup> in this application.

[2] On receipt of the instructions First National Bank of Namibia requested Mr Kamunguma to complete a declaration form in terms of which he was required to declare the reasons for the receipt of the funds. Mr Kamunguma completed the declaration form and in that form indicated that the funds were from China North Industries Corporation in respect of 'construction'.

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<sup>1</sup> I will, in this judgment, for ease of reference refer to the first respondent as Mr Kamunguma.

[3] On 18 June 2014 First National Bank deposited an amount of N\$ 2 788 054-37 into Mr Kamunguma's cheque account held at that Bank. The reference for that deposit was indicated as 'commission'. Mr Kamunguma on, 2 July 2014 transferred an amount of N\$ 2 730 000 from his cheque account to a 32 days investment account he holds at First National Bank. Between 18 June 2014 and an 18 March 2015 the amount of N\$ 2 730 000 was moved between Mr Kamunguma's cheque account and his 32 days investment account.

[4] Large amounts of cash were also withdrawn from those accounts, as an example on 2 July 2014 an amount of N\$ 12 500 was withdrawn from Mr Kamunguma's cheque account, on 14 August 2014 a cash amount of N\$ 54 000 was withdrawn from Mr Kamunguma's cheque account and on 24 November 2014 a cash amount of N\$ 85 000 was withdrawn from Mr Kamunguma's cheque account.

[5] The transactions that I have mentioned above in paragraphs three and four were reported to the Anti-Corruption Commission which conducted an investigation on the accounts of Mr Kamunguma. The Anti-Corruption Commission's investigations confirmed the movement of the funds between the accounts held by Mr Kamunguma at First National Bank and also revealed that:

- (a) On 24 November 2014, Mr Kamunguma withdrew a cash amount of N\$ 85 000 from his FNB cheque account and on the same date purchased a Volkswagen Polo Vivo motor vehicle with registration number N 58897 W.
- (b) On 16 December 2014 Mr Kamunguma transferred an amount of N\$ 183 880-97 to an account which is held at Nedbank Namibia in his name. The amount of N\$ 183 880-97 which he so transferred was used to pay off a motor vehicle financing loan at Nedbank in respect of a Mazda 3.0 DIT 4 x 2 SLE with registration number N 78991 W, and
- (c) On 23 February 2015 Mr Kamunguma transferred an amount of N\$ 2 000 000 from the cheque account to an investment account (Account number 712537xxxxx) held at First National Bank of Namibia in the name of Mr Kamunguma, the maturity date of the investment was 23 February 2016.

[6] An officer of the Anti-Corruption Commission interviewed Mr Kamunguma with a view to establish the source of the N\$ 2 788 054 - 37 which was paid into Mr Kamunguma's cheque account. Mr Kamunguma informed the officer that the money was sent from a certain General Tete Olenga who is an administrator in the office of the President of the Democratic Republic of the Congo. The purpose of the money was for the two, that is, General Olenga and Mr Kamunguma to form a close corporation which will venture into the hospitality, construction, textile, investment, fishing, consultancy, mining, transport, waste management, debushing, supply and distribution of medical and agricultural equipment.

[7] On 26 June 2015 Mr Kamunguma at the request of the Anti-Corruption Commission, deposed to an affidavit. In that affidavit, he stated that he did not expect any commission as he did not have any business dealings with the sender. He further stated that he withdrew an amount of N\$ 780 000 from the amount of N\$ 2 788 054-37 that he received. He stated that the amount that he withdrew was a loan from the close corporation which loan he had to repay to the close corporation once the close corporation was registered and had its own bank account. He further stated that the N\$ 2 000 000 that he transferred to his investment account held at First National Bank account was being held in that account on behalf of the Mckuma and Lenga Trading CC and would be transferred to that close corporation once it had opened its own Bank account.

[8] On the basis of those facts, the Prosecutor-General, who is the applicant in this matter, formed the view that the properties (that is the N\$ 2 000 000, the Volkswagen Polo Vivo motor vehicle and the Mazda 3.0 DIT 4x2 SLE) are proceeds of unlawful activities namely fraud, theft and money laundering as set out in ss, 4, 5 and 6 of the Prevention of Organised Crime Act, 2004<sup>2</sup> (I will, in this judgment, refer to it simply as the Act, or 'POCA'). The Prosecutor General accordingly sought and obtained, from the Deputy Judge President, Angula DJP, on 9 February 2016, a preservation of property order in terms of s 51(1) of the Act in respect of:

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<sup>2</sup> Act 29 of 2004.

- (a) The positive bank balance in an account held at First national bank investment account , account number 712537xxxxx, held in the name of the first respondent, Moses Pasana Uanjanda Kamunguma;
- (b) A Volkswagen Polo Vivo motor car with registration number N 58897 W, purchased by the first respondent for an amount of N\$ 85 000 on the 24 November 2014; and
- (c) A Mazda 3.0DIT 4x2SLE with registration number N 78991 W.

I will, in this judgment, refer to these properties as the 'preserved property'.

[9] Section 52(1) of the Act enjoins the Prosecutor-General to, if the High Court has made a preservation of property order, '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 to publish a notice of the order in the *Gazette*.' The preservation order granted by this Court on 9 February 2016 was published in the *Government Gazette* of 4 March 2016 and the preservation order, together with the notice of motion, the founding affidavit and the annexures to the founding affidavit were served by the Deputy Sherriff for the District of Windhoek, on Mr Kamunguma on 26 February 2016.

[10] On 17 March 2016, Mr Kamunguma, acting in his personal capacity, and also on behalf of the second respondent, the Mckuma and Lenga Trading CC, of which he holds 50% members' interest filed an application in terms of s 52(2), (3), (4) and (5) of the Act of their intention to oppose the making of a forfeiture order and an application for the condonation of the late filling of the notice in terms of s 52(3). In the notice given in terms of s 52(3) of the Act, the respondents amongst other things indicated as follows:

**'BE PLEASED TO TAKE NOTICE** that the two abovementioned interested parties has (*sic*) chosen the address of SISA NAMANDJE & CO INC (as stated below) as the address at which they will accept service of all documents relating to this matter.'

[11] The address which was indicated 'below' is No. 13 Pasteur Street, Windhoek West, Windhoek. On 13 June 2016 the Prosecutor-General caused an application for a forfeiture of property order in terms of s 59, read with s 61 (1) of

the Act to be issued out of this Court by the Registrar. On 22 June 2016 the respondents gave notice of their intention to oppose the forfeiture application and simultaneously filed an application for the condonation of the late filing of their intention to oppose the forfeiture application. On 3 August 2016 the Prosecutor-General indicated that she will oppose the respondents' application for the condonation of the late filing of the notice in terms of s 52(3).

[12] Between August 2016 and February 2017 the matter was case managed by Mr Justice Parker and on 6 February 2017 he made an order condoning the late filing of the Prosecutor-General's replying affidavit. The application was then set down for hearing on 27 April 2017. That hearing did not proceed and the matter was thereafter assigned to me for hearing. I heard the application on 4 July 2017. I have indicated above that the respondents opposed the Prosecutor-General's application for the preserved property to be forfeited in terms of s 59 read with s 61 of the Act. In the opposing affidavit Mr Kamunguma raised a point *in limine*. I will therefore first deal with the point *in limine* raised by the respondents.

The point *in limine*.

[13] The point *in limine* raised by the respondents relates to the manner in which the Prosecutor-General served the forfeiture application on the respondents. When the Prosecutor-General served the s 59 application on the respondents she did not serve it at the address given by the respondents in their s 52(3) but the Prosecutor-General served or caused the application to be served at the Law Society (GOSP).<sup>3</sup> It is also not clear as to who served the application at the Law Society.

[14] The manner of service adopted by the Prosecutor General led the respondents to argue that, the applicant was required in terms of s 59(2) of the Act to give notice to the respondents, *in the prescribed manner* of the application under s 59 (1) of the Act. Mr Namandje, who appeared on behalf the respondents, argued that 'Prescribe' has been defined under s 1 of the Act to mean "prescribe by regulations made under s 100 of the Act". He continued and submitted that in

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<sup>3</sup> 'GOSP' means the General Office for the Serving of Processes in which the Society provides service of process in terms of a contractual agreement between the Society and a participating party. See General Notice No. 385 of 2007 as published in *Government Gazette* No. 3948 of 6 December 2007.



terms of s 59(3) of the Act a notice of the forfeiture application must be delivered at an address indicated by a person who gave notice in terms of s 52(5). The respondents indicated their address of service as No. 13 Pasteur Street, Windhoek West, Windhoek but no notice was ever delivered at that address, argued Mr Namandje.

[15] Mr Namandje further submitted that the Deputy Sheriff or a Police officer contemplated in Rule 3 of the Rules of the High Court Regulating Proceedings Contemplated in Chapters 5 and 6 of the Prevention of Organised Crime Act<sup>4</sup> did not deliver or serve the forfeiture application at the nominated address. It therefore follows that the purported forfeiture application being heard is a complete nullity for want of proper delivery and service of the notice of application, argued Mr Namandje.

[16] Ms Boonzaier, who appeared for the Prosecutor General argued that the purpose s 59(2) is to ensure that persons like the first and second respondents should receive proper notice of applications for forfeiture and that this has clearly happened in this case. She further argued that the respondents were not prejudiced by the service at the law society's office and thus prayed that the point *in limine* be dismissed with costs.

[17] I first pause to make some general comments. There is no doubt that the provisions, purpose and scope of POCA are by and large stringent and invasive of the rights of persons subject thereto. In the matter of *Lameck and Another v President of the Republic of Namibia and Others*<sup>5</sup>, this Court recognised the need for the POCA legislation. In that case the full bench of this Court remarked that the restrictions and prohibitions with regard to the proceeds of unlawful activities are eminently reasonable and are also in the public interest and serve a legitimate object. Quoting from the South African Constitutional Court pronouncement in the case of *National Director of Public Prosecutions v Mohamed NO*<sup>6</sup> this Court set out the purpose of POCA legislation as follows:

<sup>4</sup> Promulgated under Government Notice Number 79 in *Government Gazette* 4254 of 5 May 2009 Rule 3, amongst other things reads as follows:

**'Service of process and other documents**

3(1) In addition to the sheriff referred to in rule 4 of the Rules of the High Court, the police may also effect service of process of court or document when circumstances so require.'

<sup>5</sup> 2012 (1) NR 255 (HC).

<sup>6</sup> 2002 (4) SA 843 (CC) at paras 14 – 15.

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

[18] There is equally no doubt that the level of criminal activity is a relevant and important factor in the limitations exercise undertaken under chapter five and six of the Act, but it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.

[19] From the above legal principles it is more than plain that the rather stringent and peremptory provisions of POCA ought not to be liberally interpreted. Strict compliance with the provision of Chapters five and six of POCA is called for in the circumstances, particularly bearing in mind the scope and purpose of that Act. For example, ss 52(1), (2), 53(30) and 59(1), (2) and (3) relating to the manner of service of the notices in terms of those sections; the manner of the delivery of an appearance to defend; and what particularity the appearance to defend should contain, all use the word 'must'.

[20] In the Oxford Advanced Learners Dictionary 8<sup>th</sup> ed, the word 'must' is defined as expressing "Necessity or Obligation" it says 'must . . . is used in the present to say that something is necessary or should be done.' All of the above suggest convincingly that ss 52(1), (2), 53(30) and 59(1), (2) and (3), are peremptory in nature. Each case must, of course, be decided on its own merits.

[21] In the present matter the purpose of the legislation plays an important role. When regard is had to the requirement in s 52(5) that the notice of intention to

oppose a forfeiture application must contain an address for delivery of documents, it appears that the purpose of s 59(3) requiring that the application for a forfeiture of the preserved property must be served at the address chosen in terms of s 52(5) of the Act was to ensure that the application for the forfeiture of the preserved property must come to the attention of the concerned person.

[22] In matter of *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*<sup>7</sup> Smuts J (as he then was) expressed the view that:

‘The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import).’

[23] Also see the case of *Standard Bank Namibia Ltd and Others v Maletzky and Others*<sup>8</sup> where Justice O’Regan said:

‘The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice. The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her and the rules governing service of process have been carefully formulated to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.’

[24] In the *Standard Bank v Maletzky* matter, the Supreme Court opined that acknowledging the possibility that irregular service may be condoned where there has not been a ‘complete failure of service’ will avoid an over-formalistic approach to the rules, for an approach that precludes condonation whenever there has been non-compliance with the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice. The possibility of condonation of irregular service that falls short of a nullity, said the Supreme Court, would also

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<sup>7</sup> 2013 (1) NR 245 (HC).

<sup>8</sup> 2015 (3) NR 753 (SC) at para [21].

accord with the approach to civil procedure evident in the new Rules of the Namibian High Court that came into force in April 2014, and with the recently introduced practice of judicial case management that seeks to ensure expedition, fairness and cost-effectiveness in the administration of justice.

[25] In the present application the service of the forfeiture application on the respondents' legal practitioners of record may be viewed as irregular, but cannot be categorised as a 'complete failure of service' resulting in a complete nullity because the service at the Law Society's office indeed had the effect that the respondent duly entered an appearance to oppose the application. The fact that the application was served at the Law Society's office is in my view of no moment, because the legal practitioners were the identified agents (for the purpose of service of the s 59(1) application) for the respondents and the agents had concluded an agreement with the Law Society that services of process could be effected there at the Law Society's office. The irregularity can and is condoned. It would follow in my view that the point taken concerning service must fail. I now proceed to consider the forfeiture application.

The statutory framework in respect of forfeiture of preserved property.

[26] The application for forfeiture of the preserved property was initiated by a notice of motion. The notice of motion is framed as follows:

**'KINDLY TAKE NOTICE** that the applicant intends to apply to this Honourable Court in terms of section 59 read with section 61 of the prevention of Organised Crime Act, No. 29 Of 2004 ("POCA") . . . . for an order in the following terms:

1. That a forfeiture order in terms of section 61 of POCA be granted in terms of the draft order annexed hereto as annexure X'.
2. . . .

**TAKE FURTHER NOTICE** that the affidavit of **OLYVIA MARTHA IMALWA** as well as all affidavits and annexures filed in support of the preservation of property application granted by this Honourable Court on 19 February 2016 under the same case number will be used in support of this application.' (Own emphasis)

[27] As regards the basis or facts on which the Prosecutor General relies for the application to forfeit the preserved property, the Prosecutor-General states the following in her affidavit:

'21. I refer this Honourable Court to the documents and annexures filed in support of the preservation application filed under the same case number. The papers filed in support of the present application continue from those filed in support of the preservation application and the latter papers are accordingly incorporated herein.

22. The affidavit of Justine Namukwambi Kanyangela (Ms Kanyangela) and the relevant annexures thereto filed in support of the preservation application set out the facts upon which this application is based.

23 The full facts in support of Ms Kanyangela's belief that the properties are the proceeds unlawful activities are set out in the supporting affidavit which is attached to the preservation and this Honourable Court is referred thereto as if specifically incorporated herein.'

[28] The respondents take issue with this approach by the Prosecutor-General. Mr Kamunguma who deposed to the opposing affidavit filed in the opposition of the forfeiture order contends that:

'2. This [i.e. the forfeiture application] is a distinct application in terms of section 59 of POCA. It is different from the preservation application brought earlier by the applicant in which application the applicant was granted a preservation order on an *ex parte* basis. The fact that the Registrar allocated the same case number as that of the preservation does not make this application part of the preservation application. Each one has to be considered separately and on its own merits.'

[29] In view of the above contentions between the protagonists in this matter I find it appropriate to, before I deal with the basis upon which the applicant seeks a forfeiture order and the basis upon which the respondents oppose the order forfeiting the preserved property (if necessary), briefly deal with certain provisions that are relevant to the issues between the Prosecutor General and the respondents.

[30] I have above set out the purpose the Act.<sup>9</sup> I am in full agreement and echo the words of Ackerman J<sup>10</sup> that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. Ackerman J went on to say:

'The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature.'

[31] The above statement applies with equal force to our 'young' Republic. The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the State. These mechanisms are set forth in chapters five<sup>11</sup> and six.<sup>12</sup> Chapter five provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the 'defendant' is convicted of an offence.<sup>13</sup> Chapter six provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based; it may be invoked even when there is no prosecution.

[32] Section 59 forms part of a two-stage procedure, whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited.<sup>14</sup> The procedure leading to the civil forfeiture of property is set out in great detail in ss 51 to 73 of the Act, which form chapter six of the Act. Chapter six provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. Section 61(1) of the Act provides that:

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<sup>9</sup> The purpose of the Act was neatly summarised by Ackermann J in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (2) SACR 196 (CC) quoted above in para [17].

<sup>10</sup> *Supra*.

<sup>11</sup> Chapter 5 comprise ss 17 to 49).

<sup>12</sup> Chapter 6 comprise ss 50 to 73).

<sup>13</sup> See s 32.

<sup>14</sup> See s 50 also see *Prosecutor-General v Uuyuni* 2015 (3) NR 886 (SC).

## '61 Making of forfeiture order

(1) The High Court must, subject to section 63, make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned-

- (a) is an instrumentality of an offence referred to in Schedule 1; or
- (b) is the proceeds of unlawful activities.'

[33] This court has held that Chapter six is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings. There is, however, a defence at the second stage of the proceedings, when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence.<sup>15</sup>

[34] The forfeiture process provided for in chapter six of the Act commences when the Prosecutor-General applies (sometimes *ex parte*) in terms of s 52 of the Act to this Court for a preservation order. Once the preservation order is granted, notice must be given to 'all persons known to the Prosecutor General to have an interest in the property'; and a notice of the preservation order must be published in the Gazette in terms of s 52(1).

[35] Thereafter, within 21 days of notice of the order, an affected party who wishes to oppose the grant of a final forfeiture order must enter an appearance of his or her intention to oppose that order. The Prosecutor General must then within 120 days of the grant of the preservation order *apply* for the forfeiture of the property. At that stage, affected parties are entitled to a full hearing to determine whether the property should be forfeited or not. Ackerman J thus commented that the provisions of chapter six are complex and tightly intertwined, both as a matter of *process* and *substance*.

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<sup>15</sup> See s 63 (2) of the Act.

[36] What is clear is that the legislature in its quest to combat organised crime designed a two stage process whereby it would be able to target proceeds of crime or 'instruments' of crime. Because under chapter six the focus is not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime, at the preservation stage the law enforcement agency need not establish that the property has been used to commit an offence or that it constitutes the proceeds of crime but only to establish that there is a reasonable suspicion that the property may have been used to commit a crime or may be the proceeds of crime. Once that is established the Court will then 'preserve' the property so as to ensure that the property is not dissipated or decimated. The law enforcement agencies are then granted a period of 120 days within which to investigate and gather evidence to show the court that on a balance of probabilities the property has been used to commit an offence or that it constitutes the proceeds of crime. The evidence so gathered must then be placed before court.

[37] The procedural aspects are contained in the Regulations made under s 100 of the Act. As I have indicated above s 59(1) of the Act enjoins the Prosecutor General to, if a preservation of property order is in force, apply to the High Court for an order forfeiting to the State all or any of the property that is subject to a preservation of property order. The Prosecutor-General is required to make application in the prescribed manner.<sup>16</sup>

[38] Section 91(1) of the Act provides that 'every application under sections 25, 43, 51, 59 and 64 must be made in the prescribed manner.' As we have seen above s 51 deals with preservation applications whereas s 59 deals with forfeiture applications which must be made in the prescribed manner. The fact that s 91(1) of the Act provides for applications under ss 51 and 59 is indicative of the fact that the legislature envisaged two separate applications. It follows that a forfeiture application must be made in the prescribed manner.

[39] Section 90 of the Act empowers the Judge-President to make rules for the High Court regulating the proceedings contemplated in Chapters 5 and 6 and s 100 of the Act empowers the Minister to provide for any matter which is required or

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<sup>16</sup> See section 59(2) of POCA.



permitted to be made or to be prescribed under any provision of the Act. Both the Judge President of the High and the Minister of Justice made the rules required under s 90 and the regulations required under s 100.

[40] Regulation 7 of the Regulations<sup>17</sup> made under s 100 of the Act provides as follows:

**‘7 Procedure for certain applications**

Subject to section 91(2), (3) or (4) of the Act, every application made pursuant to section 25, 43, 51, 59 or 64 of the Act, is made as follows-

- (a) it must be in writing;
- (b) a notice of application of at least 7 days must be given to the respondents to an application and to any other person upon whom an application is required to be served, unless leave to serve short notice is given by the High Court; and
- (c) it must be supported by affidavit evidence, unless otherwise stated in the Act or by an order of the High Court.’

[41] Rule 79(2) of the Rules of the High Court provides as follows:

**‘79 Application in terms of POCA**

(1) This rule applies to applications brought in terms of sections 25, 43, 51, 59 and 64 of the POCA.

(2) An application referred to in sub-rule (1) must comply with rule 65(1) and (3) as well as the provisions that apply to specific applications referred to in the relevant sections of the POCA.’

[42] Rule 65(1) and (3) of the Rules of the High Court, require an application to be by a notice of motion accompanied by an affidavit, setting out the relevant allegations on which the applicant relies for the relief sought.

The Prosecutor General’s affidavit in support of the forfeiture application.

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<sup>17</sup> Prevention of Organised Crime Regulations, see footnote 3.

[43] I mentioned earlier that s 50 of the Act provides that proceedings under chapter six of the Act are civil and not criminal. The section continues and stipulates that the rules of evidence applicable in civil proceedings apply to proceedings under chapter six, but any evidence which would be admissible in criminal proceedings, is admissible in proceedings under chapter six. It is now a well-established principle of our law that in motion proceedings, such as the present proceedings, the affidavits constitute both the pleadings and the evidence.<sup>18</sup>

[44] Since affidavits constitute both the pleadings and the evidence in motion proceedings, a party must make sure that all the evidence necessary to support its case is included in the affidavit.<sup>19</sup> In other words, the affidavits *must*<sup>20</sup> contain all the averments necessary to sustain a cause of action or a defence. If the documents are so bulky that the applicant is not expected to attach them to the affidavit, the applicant must say so in its affidavit, and then identify, for the benefit of the court and the other parties, the particular documents or portions of such documents which the respondent desires to use and rely on, annex the portions of the documents that they intend to rely on and explain the contents of the documents or the portions thereof and their relevance to the issues at hand. It is not sufficient to just mention the documents which are alleged to be bulky. The Supreme Court<sup>21</sup> quoting with approval the crisp and clear statement by Joffe J<sup>22</sup> said:

‘ . . . “Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the

<sup>18</sup> *Nelumbu and Others, v Hikumwah and Others* (An as yet unreported judgment of the Supreme Court of Namibia Case Number (Case No: SA 27/2015 delivered on 13 April 2017) *Laicatti Trading Capital Inc v Greencoal (Namibia) (Pty) Ltd* (A 273-2014) [2015] NAHCMD 240 (8 October 2015). *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA).

<sup>19</sup> *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC) at 634G-H.

<sup>20</sup> That is the language used in Rule 65 (1) of the Rules of the High Court: That rule reads as follows:

‘65(1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes.’

<sup>21</sup> In *Nelumbu and Others, v Hikumwah and Others* (*supra*).

<sup>22</sup> In *Swissborough Diamond Mines v Government of RSA* 1999 (2) SA 279 (T) at 324F-G.

strength thereof. If this were not so the essence of our established practice would be destroyed.”

As the adage goes, in motion proceedings you stand or fall by your papers’

[45] The Supreme Court proceeded in the *Nelumbu*<sup>23</sup> matter and said:

[42] When reliance is placed on material contained in annexures, the affidavits must clearly state what portions in the accompanying annexures the deponent relies on. It is not sufficient merely to attach supporting documents and to expect the opponent and the court to draw conclusions from them. In that regard, practitioners will do their clients a great service by heeding the following warning by Cloete JA in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts ... A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted.”

[43] O’Regan AJA stated in *Standard Bank Namibia Ltd & others v Maletzky & Others* 2015 (3) NR 753 (SC) at 771B-C para 43 that it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts in the annexure upon which the litigant relies.’

[46] In the present application the Prosecutor-General does not even attach the affidavits and annexures on which she relies in the preservation application to her affidavit in support of the application for the preserved property to be forfeited. The Prosecutor-General simply tells us that she ‘incorporates’ the affidavits and annexures on which she relied in the preservation application in her affidavit in support of the application for the preserved property to be forfeited. Ms Boonzaier who appeared for the Prosecutor-General justified the procedure adopted by the Prosecutor-General as follows:

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<sup>23</sup> *Supra* (footnote 17).

'3. The Supreme Court referred to chapter six proceedings as two staged where, the preservation application is the first stage of the proceedings and the Court need only be satisfied that there are reasonable grounds to believe that the property concerned is an instrumentality of an offence or proceeds of unlawful activities. The forfeiture application is the second stage where the Court applies the balance of probabilities test.

1 The applications are inter - linked and one cannot exist without the other. Without the preservation order, it is impossible to bring a forfeiture application as the existence of the preservation order is a pre-requisite for applying for a forfeiture order. The preservation order cannot exist longer than 120 days if the forfeiture application is not applied for.

2 Since the proceedings are two staged, it is unnecessary for the Applicant to repeat the evidence presented in the preservation application in the forfeiture application, specifically because the preservation papers are incorporated in the forfeiture papers and therefore form part of the forfeiture application . . .

64 It is respectfully submitted that since the Supreme Court in *Uuyuni supra* and the above Honourable Court in *Kennedy supra* accepted that chapter 6 of POCA proceedings are two staged, the Respondents allegations that the evidence in support of the preservation application cannot be relied on stands to be rejected.'

[47] Ms Boonzaier in her submission relies on the matter of *The Prosecutor-General v Kennedy*<sup>24</sup> where the Deputy Judge President said:

'The applicant in her founding (*sic*) filed an affidavit in support of this application for the forfeiture order, and asked this court to consider that all the documents and annexures filed in support of the application for the preservation order be deemed to have been incorporated in her founding affidavit. Those affidavits, document and annexures form part of the court file in this matter.'

[48] In my view the matter of *The Prosecutor-General v Kennedy* does not assist Ms Boonzaier. I say so for the reason that in the *Prosecutor General v Kennedy* matter the point was not argued and the Deputy Judge President was not referred

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<sup>24</sup> 2017 (1) NR 228 (HC).

to the authorities that I have quoted above in paragraphs [38] to [40] of this judgment. The *Prosecutor General v Kennedy* matter is therefore no authority for the proposition that in motion proceedings evidence can be placed before court by simply asking the Court to 'incorporate' allegations contained in documents which have not been annexed to the affidavit supporting the application before Court.

[49] The point that, in my view, Ms Boonzaier misses is that the mere fact that the forfeiture proceedings under chapter six are the second stage of the proceedings under that chapter and are intertwined with the first stage, which is the preservation proceedings stage does not make the process a single process. The legislature has clearly intended that every stage of the proceedings under chapter six be it the preservation stage or the forfeiture stage be supported by evidence on affidavit that is relevant to the stage in question.

[50] The legislature also clearly envisaged that the preservation and forfeiture stages are two separate stages of the proceedings under chapter six of the Act and that the rules relating to the tendering of evidence in respect of those proceedings apply at all the stages. Ms Boonzaier furthermore misses the point, the argument is *not* that the evidence that was used in support of the preservation application cannot be relied upon in forfeiture proceedings. The argument is that the evidence that was used in the preservation proceedings must be properly and in accordance with the rules governing the admissibility of evidence be placed before Court.

[51] I therefore agree with Mr Namandje that it is insufficient and thus impermissible for the Prosecutor General to rely on affidavits relied on in the preservation application without annexing those affidavits to her affidavit in support of the forfeiture application and without directing the other party and the court's attention to the portions and documents in those affidavits on which she relies in her affidavit in support of the forfeiture application. I furthermore agree with Mr Namandje that the Prosecutor-General in paragraph 35 of her affidavit relies on evidence contained in an affidavit of a certain Kanyangela who did not contemporaneously file an affidavit in support of the forfeiture application. Her affidavit is also not part of the forfeiture application. The Prosecutor-General's evidence in that respect, in so far as she does not have personal knowledge of the

investigations and the findings of the investigations by Kanyangela, is therefore inadmissible.

Has the Prosecutor General succeeded to prove that the funds preserved are instrumentality of an offence referred to in Schedule 1?

[52] I have indicated above that s 61(1) of the Act obliges (the section uses the word must) this Court to make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1; or is the proceeds of unlawful activities. The issue in this matter therefore is whether, the positive bank balance in an account held at First National Bank investment account, account number 712537xxxxx, held in the name of the first respondent, Moses Pasana Uanjanda Kamunguma; a Volkswagen Polo Vivo motor car with registration number N 58897 W, and a Mazda 3.0DIT 4x2SLE with registration number N 78991 W should be forfeited to the State under chap 6 of the Act.

[53] The Act in section 1 defines 'instrumentality of an offence' to mean 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within Namibia or elsewhere. In the matter of *National Director of Public Prosecutions v Seevnarayan*<sup>25</sup>, the South African Supreme Court of Appeal held that:

' . . . in giving meaning to 'instrumentality of an offence' the focus is not on the state of mind of the owner, but on the role the property plays in the commission of the crime. The phrase must be interpreted independently of the guilt or innocence of the property-owner. Where a forfeiture order is sought the Court thus undertake a two-stage enquiry. In the first, it ascertains whether the property in issue was an 'instrumentality of an offence'. At this stage the owner's guilt or wrongdoing, knowledge or lack of it, are not the focus. The question is whether a functional relation between property and crime has been established. . . .

In a real and substantial sense the property must facilitate or make possible the commission of the offence. As the term instrumentality itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and

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<sup>25</sup> 2004 (2) SACR 208 (SCA) at para [21].

not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the act: The deprivation would constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.'

[54] The above formulation of the interpretation of instrumentality has been accepted by this Court.<sup>26</sup> The Prosecutor-General submits that the preserved property is on a balance of probabilities the proceeds of unlawful activities. That submission is based on the investigation conducted by Ms Kanyangela. I have made a finding that the evidence of Ms Kanyangela is not properly before Court and the Prosecutor-General can therefore not properly rely thereon. The entire evidence of the Prosecutor-General is based on the information she obtained from persons whose evidence is not before court. It therefore follows that there is no admissible evidence that Mr Kamunguma or Mr Olenga made any misrepresentations to First National Bank and thus committed fraud on FNB.

[55] From the test formulated above, it is clear that to establish 'instrumentality' there must be a scheduled offence. The Prosecutor General did not at any stage in her, affidavit, claim that the funds originated from unlawful activities by Mr Kamunguma or any other person, nor did she point to the commission of a scheduled offence. There is equally no evidence that Mr Olenga diverted the payment of the money to Mr Kamunguma's account in order to avoid paying tax in the Democratic Republic of the Congo. This argument was based on inference there is no iota of evidence in that regard.

[56] Mr Olenga explained that the funds were from his legitimate business in the Democratic Republic of the Congo. He explained that he had concluded a contract to purchase trucks from a Chinese Company and that when the agreement to purchase the trucks fell through and was cancelled, he directed that the funds be paid into the account of Mr Kamunguma in order for them to start a business together.

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<sup>26</sup> See *Prosecutor General v Kennedy (supra) The Prosecutor-General v New Africa Dimensions CC And Two others* (POCA 10/2012) [2016] NAHCMD 123 (20 April 2016).

[57] The Prosecutor-General pointed out that Mr Kamunguma failed to explain the differences in the explanations to FNB as to the sources or origin of the funds. But she does not deal with Mr Olenga's explanation. It is also true, that the legitimacy of the funds was a matter peculiarly within Mr Kamunguma or Mr Olenga's knowledge. I am of the view that the Prosecutor-General's contention that those funds must by probable inference be inferred to derive from unlawful activities as founded on conjecture and speculation.

Has the Prosecutor General succeeded to prove that the funds are the proceeds of unlawful activities?

[58] The Act defines 'proceeds of unlawful activities' as meaning:

'any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, *in connection* with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity' (own emphasis)

[59] I am similarly of the view that in order in order to establish that the property constitutes proceeds of unlawful activity the Prosecutor-General must establish that the respondents or some other persons committed some or other unlawful activity. The Prosecutor-General has not placed before Court an iota of evidence pointing to the commission of an unlawful activity.

[60] I accordingly conclude that, upon a proper construction of the Act, the preserved property does not constitute instrumentality of an offence referred to in Schedule 1 of the Act or the proceeds of unlawful activities. For the reasons set out in this judgment, I conclude, therefore, that the applicant is not entitled to the order which she seeks.

[61] I accordingly make the following order:

1 The application be dismissed.



2 The Prosecutor General must pay the respondents' cost of the application.

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SFI UEITELE  
Judge

**APPEARANCES**

**APPLICANT:**

Ms. M Boonzaier

Of The Prosecutor-General, Windhoek

**RESPONDENT**

Mr. S Namandje

Of Sisa Namandje and Co Inc, Windhoek