REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: POCA 13/2015

In the matter between:

THE PROSECUTOR-GENERAL **APPLICANT**

and

ALEXES PAULO **FIRST RESPONDENT**

RHAPSODY CLOSE CORPORATION **SECOND RESPONDENT**

Neutral citation: *The Prosecutor General v Paulo* (POCA 13/2015) [2017] NAHCMD 337 (22 November 2017)

Coram: ANGULA DJP

Heard: **9 August 2017**

Delivered: **22 November 2017**

Flynote: Practice – Applications and motions – Prevention of Organized Crime Act, Act 29 of 2009 (POCA) – Application for a forfeiture of property order – Respondent raising point of law *in limine* that the application had not been issued by the registrar before 'service'; that the preservation order upon which the validity of the application for a forfeiture of property order is dependent, had already lapsed after 120 days from the date of publication of the preservation order in the Government Gazette; and that the application was not served on the respondents by

the deputy-sheriff or a police officer at the chosen address as stipulated by regulation 4(8) made under POCA.

Summary: A perseveration of property order was granted by this court on 24 December 2015. The order was duly served on the respondents. Thereafter and on 4 February 2016, the respondents delivered to the PG's office a written notice of their intention to oppose the making of a forfeiture order in terms of sub-sections 52(3), (4) and (5) of POCA. The respondents notice to oppose chose No. 13 Pasteur Street, Windhoek-West, as the address at which the respondents would receive further notices of further proceedings that may be contemplated by the PG regarding the said property. On 29 April 2016, the Prosecutor General launched this application wherein she sought an order that the property being certain positive balances held in two bank accounts in the names of the respondents be forfeited to the State.

The respondents raised three points *in limine*. Consequently, the court was faced with the following issues for consideration; whether or not an application for a preservation of property order and an application for a forfeiture of property order are two separate and distinctive applications or whether they constitute one application divided into two separate stages. Secondly, it is whether or not an application for a forfeiture of property order requires issuance by the registrar or whether it can simply be delivered to the opposing party without it being issued. Thirdly, whether or not the delivery of the application for forfeiture of property order by the PG at the General Office for Service of Process ('GOSP') office complied with the provisions of POCA Act, read with POCA regulations and the rules of this court.

Court held: – An application for forfeiture is separated and distinct from the application for a preservation of property order and is not an integral part of the application for the preservation of property order. It stands alone from the application for the preservation of property order.

Court held further: - An application for forfeiture of property order is an application initiating new proceedings within the meaning of rule 65(1) of the court and must be issued by the registrar before such an application is be served on the affected person.

Court held further: - The PG's non-compliance with the provisions of rule 65(1) by not causing the application to be issued before it was served on the respondents rendered the application a nullity.

Court held further:-: The non-issuance of the application was of such a nature that the application could not be cured by the fact that the respondents have taken steps by filing opposing papers; that the defect was incurable; and that the application was an irredeemable nullity. Accordingly the court struck the application from the roll with costs.

ORDER

The application is struck from the roll, with costs.

JUDGMENT

ANGULA DJP

Introduction

[1] This is an application by the Prosecutor-General ('the PG') in which she seeks a forfeiture of property[1] order, the property being certain positive balances held in two bank accounts in the name of the second respondent. One account is held at Standard Bank Namibia at Windhoek; and a second account is held at Bank Windhoek. There is a further positive balance in an account in the name of the first respondent held at Bank Windhoek. The positive balances are hereinafter jointly referred to as 'the property'.

[1] Section 61 of the Prevention of Organised Crime Act 29 of 2009 ('POCA').

[2] The PG alleged that the property is the proceeds of unlawful activity and that the accounts are instrumentalities of offences listed in schedule 1 to the Prevention of Organised Crime Act 29 of 2009 ('the POCA' or 'the Act')[2]. The PG specifically alleged that the first respondent contravened Regulation 2(1) of the Exchange Control Regulations promulgated under the Currency and Exchange Control Act[3] in that he illegally traded in foreign currency. The PG further alleged that the first respondent contravened section 30 of the Immigration Control Act[4], in that the he traded in foreign currency on behalf of the second respondent without a work permit. Finally, the PG alleged that the first respondent committed offences of fraud and money laundering.

[3] The application is opposed by the respondents who raised a number of points of law *in limine*. In view of the points *in limine* raised by the respondents, it is not necessary for present purposes, to set out the respondents' defence to the merits. It suffices to state that the respondents denied having contravened any of provisions of the statutes alleged by the PG.

[4] The first respondent is Alexes Paulo, a businessman, originally from the People's Republic of Angola. He is the sole member of the second respondent, a Close Corporation, registered and incorporated in terms of the laws of this Republic.

[5] Ms Boonzaier appeared on behalf of the PG, whereas Mr Namandje, appeared on behalf of the respondents.

Factual background

[6] On 24 December 2015, the PG launched an urgent *ex parte* application in which she sought and was granted a preservation of the property order by this court. The order was duly served on the respondents. Subsequent thereto and on 4 February 2016, the respondents delivered to the PG's office a written notice of their intention to oppose the making of a forfeiture order in terms of section 52(3), (4) and (5) of the Act. The respondents notice to oppose chose No. 13, Pasteur Street, Windhoek-West, as the address at which the respondents indicated they would

[2] Section 61(1)*(b)* of the POCA Act.

[3] Act 9 of 1993.

[4] Act 7 of 1993.

receive further notices of further proceedings that may be contemplated by the PG regarding the said property.

[7] On 29 April 2016, the PG launched this application wherein she sought an order that the property be forfeited to the State. It is common cause that the application for the forfeiture of property order was delivered at the General Office for Service of Process ('GOSP'), an address agreed upon by the legal practitioners in Windhoek where they exchange legal process amongst themselves. In other words, the application papers were not served at the respondents chosen address being No. 13, Pasteur Street, Windhoek-West.

Points *in limine*

[8] The respondents raised three points *in limine*, contending firstly that the application for forfeiture of property order was not issued by the Registrar of this court. Secondly, they contended that the application was not served on them by the Deputy-Sheriff or a police officer at the chosen address as stipulated by regulation 4(8) made under the Act. Thirdly, they stated that the preservation order had not been served on the respondents at the chosen address within 120 days after publication of the preservation order in the Government Gazette in accordance with the relevant provisions of the Act.

[9] In support of the foregoing contentions, the respondents pointed out that the preservation of property order was published in the Government Gazette on 8 December 2016 and was valid for 120 days calculated from 8 February 2016. Accordingly, so the contention continued, when the preservation order expired on 9 May 2016, the forfeiture application had not been served on the respondents by the deputy sheriff or a police officer as required by law. In other words the preservation order had already lapsed at the time when the application for the forfeiture order was purportedly served on the respondents through the GOSP office as stated earlier.

[10] Accordingly the respondents submitted that for those reasons the application for the forfeiture of property order must be dismissed with costs.

The PG's response to the points *in limine*

[11] In response to the respondents' first point *in limine* that the application is invalid or defective due the fact that it has not been issued by the Registrar of this Court, the PG argued that an application for a forfeiture order does not require to be issued by the Registrar as it does not constitute the initiation of new proceedings; that the application for the forfeiture of property order constitutes the second part of the two stages of the proceedings, the first one being the preservation of property order application which is issued because it constitutes the initiation of new proceedings. The second one, so the argument went, is the forfeiture of the property application.

[12] Regarding the point *in limine* that the service of the application for forfeiture of property was defective, the PG argued that the requirement for service of process by the deputy sheriff in terms of rule 8 is only applicable to documents initiating proceedings; that the forfeiture application is not distinct from the application for preservation of property proceedings; and that the forfeiture application is the second part of proceedings that have already been initiated by the PG. It was further the PG's case that the rules of the court make provision for service by the party initiating proceedings upon the legal practitioner of record for a party. The PG further submitted that the reference to the deputy-sheriff in the regulations promulgated under the Act is in relation to the deputy sheriff's duties in terms of rule 8 of this court and does not create an additional burden on the 'applicant', being the PG in this case.

[13] The PG further argued, in the alternative, that the respondents were equally non-compliant with the service of their sub-section 52(3) and 52(5) notice and opposing affidavit in that they delivered the said documents at the GOSP's office and not at the office of the Government-Attorney, as indicated in the preservation of property order which stipulated that the notice and the affidavit must be served at the office of the Government-Attorney. The PG accordingly submitted that if it were to be found that the service of the forfeiture application by the PG on the respondents' legal practitioner through the GOSP's office did not constitute proper service then in that event and conversely the respondents' service of their sub-sections 52(3) and 52(5) notice and affidavit is equally not served on the PG and therefore in terms of the provisions of POCA the respondents are barred from participating in the application for forfeiture of property proceedings.

[14] The PG argued in the further alternative that the defective service of the application for the forfeiture order did not render the application a nullity. Relying on what was stated by the court in the matter of *Witvlei Meat (Pty) Ltd v Disciplinary Committee for Legal Practitioner and Others*[5] that the fundamental purpose of service is to bring to the attention of a party that proceedings have been instituted against him or her and therefore there had been substantial compliance in this case. In this respect following service of the application upon respondents they proceeded to deliver the required notice as well as opposing papers. In addition the respondents in the present matter have not shown that they have suffered prejudice because of the defective service.

Issues for determination

[15] It would appear to me that there are three issues for determination in this matter. Firstly, it is whether or not an application for a preservation of property order and an application for a forfeiture of property order are two separate and distinct applications or whether they constitute one integral application divided into two separate stages. Secondly, it is whether or not an application for a forfeiture of property order requires issuance by the registrar or whether it can simply be delivered to the opposing party without it being issued. Thirdly, whether or not the delivery of the application for forfeiture of property order at the GOSP office complied with the provisions of POCA, read with POCA regulations and the rules of this court. In other words the question is whether there had been a proper service of the application on the respondents and if not, whether there had been substantial compliance with respect to service of the present application.

Main submissions on behalf of the respondents

[16] Mr Namandje for the rrespondent's argued that the applicant did not serve the application for the forfeiture order as mandatorily prescribed by section 59(2) of the POCA Act read with regulation 4(8), promulgated under the POCA Act, on the respondents' chosen address being No. 13, Pasteur Street, Windhoek-West, Windhoek.

[5] 2014 (1) NR 245 (HC).

[17] Counsel further submitted that the preservation order expired by operation of law on 9 May 2016 on account of the present application not having been properly instituted within a period of 120 days calculated from the date the preservation order was published in the Government Gazette, being 8 February 2016[6].

[18] Regulation 4 promulgated under POCA provides that service of any document required in terms of POCA, must be effected in terms of the rules of the High Court. Counsel therefore asserted that the PG's non-compliance with the above mandatory provisions of POCA, the Regulations and rules of this court, rendered the present application a nullity and liable to be dismissed with costs.

[19] Mr Namandje submitted further that the address chosen by the respondents in terms of section 52(5) of the POCA Act, contemplates that service of the forfeiture application shall be effected in terms of Rules 8(1) which provides that any process of the court directed to the deputy-sheriff and any document initiating application or action proceedings must be effected by the deputy-sheriff. Rule 8(2)*(d)* provides that if the person to be served has chosen a *domicilium citandi,* by leaving a copy at the *domicilium* so chosen.

[20] Mr Namandje further submitted that delivery of the application for forfeiture of property order on the respondents' legal practitioners through the GOSP was statutorily defective. This is because, he argued, in terms of POCA, an application for a forfeiture of property order is separate and distinct from an application for the preservation of property order. In developing this argument, counsel, made the analogy that an application for the preservation order is similar to an application for an interim relief pending institution of a main action say by way summons; that in the POCA environment, an application for a forfeiture order is similar to an action by way

---

[6] Section 59(2) the POCA Act reads:

'The Prosecutor-General must, in the prescribed manner, give 14 days' notice of an application under subsection (1) to every person who gave notice in terms of section 52(3).'

Regulation 4(8) of the POCA Act reads:

'Notice of application for a forfeiture order pursuant to section 59(1) of the Act must be given by serving a copy of the application upon any person who has given notice in accordance with section 52(3) of the Act…' (Underlining supplied)

of summons. Furthermore, he contended that both applications (application for a preservation order and an application for the forfeiture of property order), require service in terms of the Rule 8 of the court.

Main submissions on behalf of the PG

[21] Countering the respondents' points *in limine*, Ms Boonzaier submitted that proper service of the application for forfeiture of property has been effected; that there is a clear distinction between 'service' and 'delivery'. In this connection counsel pointed out that section 52(2) of POCA requires that 'service' of the preservation of property order be effected by the deputy-sheriff or a police officer. On the other hand section 52(3) of the same Act requires a person giving notice of opposition to appoint an address for delivery of documents concerning further proceedings. Furthermore section 59(3) requires the PG to deliver a notice of the forfeiture application who has given notice to the PG in terms of section 52(3) of the Act[7]. Counsel therefore submitted that based on the wording of the section referred to, the word 'delivery' must be given its ordinary meaning. In this connection, counsel submitted that the delivery of the application in the instant matter was effected as the application came to the notice of the respondents who cannot claim to have suffered any prejudice. (Underlined for emphasis).

[22] Counsel further argued that failure to deliver the notice of application to an affected person does not render the forfeiture proceedings null or void. This is so, the argument continued, because of the provisions of section 61(4) and 61(5) of POCA. Subsection (4) provides that a person who has given notice in terms of section 52(3) and whose interest is affected by the forfeiture order made in his or her absence may within 20 days after he or she acquired knowledge of that order apply to court to have the order varied or rescinded. Subsection (5) simply provides that the court may, on good cause shown, vary or rescind the order.

[23] Ms Boonzaier submitted further that an application for the preservation of property order constitutes the first and initiating stage of proceedings, whereas applications for forfeiture constitute the second and inseparable stage of the initiated

[7] Section 59(3) stipulates that a 'notice under subsection (2) must be delivered at the address indicated by the relevant person in terms of section 52(5)'.

proceedings; and that an application for a forfeiture order need not comply with Rule 65(1) of this Court as it does not constitute the initiation of new proceedings envisaged in the rules of court.

[24] I now proceed to consider the issues in the sequence they have been set out under the heading 'issues for determination'.

An application for preservation of property order versus an application for forfeiture of property order

[25] The determination of this issue will help to solve the dispute between the parties whether the application for the forfeiture of property order requires service by the deputy-sheriff or it can simply be delivered.

[26] As has been noted, Mr Namandje argued that an application for a forfeiture order is separate and distinct from an application for the preservation of property order.

[27] Ms Boonzaier for the PG on the other hand argued that an application for the preservation order constitutes the first and initiating stage of proceedings, whereas applications for forfeiture of property order constitutes the second and inseparable stage of the initiated proceedings. In other words the two application are so to speak 'two- in- one'.

[28] In *The Prosecutor-General v New Africa Dimensions CC and Others*[8], the Court set out the procedure envisaged under Chapter 6 of POCA. In its exposition, the Court explicitly drew a distinction between an application for preservation of property order and an application for forfeiture of property order. The Court stated as follows:

'In drawing the distinction between applications for preservation and forfeiture, this Court stated that:

[8] POCA 10/2012 [2016] NAHCMD123 (20 April 2016), following *Shalli v Attorney-General and Another* 2013 (3) NR 613 (HC).

[11] Chapter 6 of POCA, 2004 establishes a two-stage asset forfeiture mechanism or procedure. The first stage is a preservation of property order and the second stage is the forfeiture of asset order. As a general rule the procedure followed is the following, the Prosecutor General may, under s 51(1), apply, (she normally does so *ex parte)* to this court for an order prohibiting a person from in any way dealing with any property mentioned in the notice of motion. The order granted is referred to as the 'preservation of property order' - … which may be granted if the court has reasonable grounds to believe that the property concerned is either:

(a) An 'instrumentality' of an offence referred to in Schedule 1 to POCA, 2004; or

(b) Is the proceeds of unlawful activities.

[12] Once the court has granted the 'preservation of property order' the Prosecutor General is then obliged to give notice of the 'preservation of property order' to all persons known to have an interest in the property (the notice to a person who the Prosecutor General knows has an interest in the property 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) and to publish the notice in the Government *Gazette*. Once a notice has been given in this way s 51(3) goes on to provide that a 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. A notice under s 51(3) must be delivered to the Prosecutor General within, in the case of person on whom a notice has been served, 21 days after the service of the notice; or in the case of any other person, 21 days after the date on which a notice was published in the *Gazette* and must and is to contain various particulars.

[13] A preservation of property order expires 120 days after the date on which notice of the making of the order is published in the *Gazette* except where there is an application in terms of s 59(2) for a forfeiture order pending before this court in respect of the property which is subject to the preservation of property order; or there is an unfulfilled forfeiture order in force in relation to the property which is subject to the preservation of property order; or the order is rescinded before the expiry of that period. Where the Prosecutor General applies for a forfeiture order the preservation of

property order expires when the hearing of the application for a forfeiture order is concluded without the making of a forfeiture order and in respect of an unfulfilled forfeiture order the preservation of property order expires when the forfeiture order is fulfilled in terms of section 68.

[14] A forfeiture order can only be issued in respect of property which is the subject of an existing preservation order under s 51. The power of this court to issue a forfeiture order is to be found in s 59 read with s 61(1) which provides:

> "59 Application for forfeiture order
>
> (1) If a preservation of property order is in force the Prosecutor-General may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to a preservation of property order.
>
> (2) 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." '

[29] What can be deduced from the foregoing exposition is that the scheme of Chapter 6 of POCA is of a separate and distinct nature or character between an application for the preservation of property order and an application for a forfeiture of property order.

[30] Last month, Ueitele J in *The Prosecutor General v Moses Pasana Uanjanda Kamunguma*[9] had to consider whether it was proper or permissible for the PG to use the same evidence in the form of affidavits previously filed in support of an application for the preservation of property order, to support of the application for a forfeiture of property order. It was contended in that matter on behalf of the respondent that an application for forfeiture order is distinct from an application for

[9] (POCA 01/2016 [2017] NAHCMD (2017) delivered on 20 October 2017.

the preservation order. Furthermore, it was held the fact that the Registrar has allocated the same case number to the forfeiture application as that of the preservation application did not make the forfeiture application part of the preservation application; and that each application has to be considered separately and on its own merits. I interpose here to mention that the same argument was advanced in the present matter on behalf of the PG by Ms Boonzaier during oral argument, namely that the two applications are one application, hence they have been allocated one case number by the registrar.

[31] Ueitele J rejected the argument that the two applications are in fact one, two staged applications and held at para 38 as follows:

> 'Section 91(1) of the Act provides that 'every application under section 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.'

[32] This court is in full agreement with exposition of the legal position by Ueitele J.

[33] There are additional indications which clearly indicate that the two applications were conceived by the legislature to be different and have to be treated as separate. I highlight the separate nature to the two applications below.

[34] An application for a preservation of property order is normally brought *ex parte* and therefore it is only addressed to the registrar of this court because there is no respondent in that event. A forfeiture application is brought on notice of motion and must be must be served by the deputy-sheriff or a police officer at the address chosen by the interested or affected person in terms of section 52(5*)* of POCA*.* The interested or affected persons are parties to the proceedings and the PG is under obligation to give (14) fourteen days' notice of the application to every person who gave notice in terms of section 52(3).

[35] The required degree of proof in respect of an application for the preservation of property order is different from the required degree of proof in respect of an

application for a forfeiture of property order. In respect of the preservation of property order application, the court must be satisfied that there are reasonable grounds to believe that the information presented under oath shows that, *prima facie*, there are reasonable grounds for the belief that the property is an instrumentality of an offence set out in schedule 1 to POCA that the property is the proceeds of unlawful activities. The degree of evidential proof in respect of the forfeiture application is more onerous than with the application for preservation of property order in that the court must be satisfied on the balance of probabilities that the preserved property is an instrumentality of an offence in schedule 1 to POCA or is the proceeds of unlawful activities.

[36] Furthermore, the preservation of property order is interim; it can be anticipated[10]; it can be varied or rescinded on application. A preservation order, however, is not appealable. A forfeiture order on the other hand is final and it is therefore appealable. In respect of the application for the preservation of property order, it is the order which is served on the interested or affected persons, whereas in respect of the forfeiture application it is a copy of the application itself which must be served on the interested or affected persons by the deputy-sheriff or a police officer.

[37] In addition, applications for preservation and forfeiture orders are referred to both in POCA and in the Regulations disjunctively, and not conjunctively thereby highlighting their separate and distinct nature. Sections 91(1)[11] of POCA, for instance, provides that the every application for preservation of property order and application for forfeiture order must be made in the prescribed manner. It is to be noted that this section refers to applications for preservation and forfeiture disjunctively. Furthermore sub-rule 79(1)[12] refers to the applications for preservation and applications for forfeiture disjunctively. Sub-rule 79(2) on the other hand, provides that applications referred to in sub-rule 79(1), which are applications for preservation and forfeiture orders, 'must comply with Rule 65(1)'. Rule 65 prescribes the requirements of an application in general.

---

[10] *Prosecutor General v Lameck and Others* (POCA 1/2009) [2010] NAHC 2 (22 January 2010).

[11] Section 91(1) of POCA: '(1) 'every application under sections 25, 43, 51, 59 and 64 must be made in the prescribed manner'.

[12] '79. (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 subrule (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.'.

[38] It appears from case law that the preservation of property proceedings is not a new invention with the advent of and the enactment of POCA. It existed under the common law as an *interim interdict pendent lite*. In *Knox D'Arcy Ltd & Others v Jamieson & Others*[13], Stegmann J gave recognition to the interdict in *securitatem debiti* as an ancient remedy in our common law with its origin in civil law. The learned judge coined the name for the remedy as an *'anti-dissipation interdict*' to emphasis its purpose, being to obviate a person shown to have assets, likely to defeating other person's claim thereto, by dissipating the assets before judgment can be obtained or executed, and thereby successfully defeat the ends of justice. The learned judge pointed out that anti-dissipation orders, like the preservation of property orders, are normally obtained on urgent basis, *ex parte* and *in camera*. The purpose and procedure of anti-dissipation orders is similar to an application for a preservation of property order. The fate of property forming the subject matter of anti-dissipation order remains pending, until the final determination of the main action, unless the interim anti-dissipation order is, in the interim rescinded or set aside.

[39] This view finds support in the works of the learned author Albert Kruger in his book: *Organised Crime and Proceeds of Crime Law in South Africa*, who equates preservation orders to provisional sequestration orders by stating that 'preservation orders create a holding situation similar to that created by a provisional sequestration order[14]'. This view further supports Mr Namandje's submission that an application for preservation of property order is akin to an interim interdict granting an interim relief, for the reason that it merely preserves property pending the institution of the forfeiture property order application.

[40] By comparison, the preservation application stands in the same position as an application for interim interdict. On the other hand, the application for a forfeiture order stands in the same position as the main action instituted subsequent to the issuing of an interim interdictory order. A preservation application is separate and distinct from an application for forfeiture order for the reason that the sole purpose of the preservation order is to preserve the property pending the institution of an application for forfeiture order proceedings.

[13] 1994 (3) SA 700 (W).
[14] At page 123.

[41] In my view, the mere fact that an application for a forfeiture order is dependent upon a valid preservation of property order being in force does not make the application for a forfeiture of property order one and the same or being an integral part of the application for the preservation of property order. In my considered view, based on a proper and the plain reading of POCA and the rules of this Court, the argument advanced on behalf of the PG that an application for a forfeiture of property order is incidental to or is part of an application for the preservation of property order is untenable and cannot be sustained. It is rejected.

[42] Reverting to the matter at hand, it is common cause that when the current application for the forfeiture order was instituted, the PG had already obtained a preservation of property order which was then in force. The said application was brought on an *ex parte* basis[15]. The order sought was not (and is never) final in nature – it remains (and is always) on an interim basis – pending the institution of the application for the forfeiture of property order.

[43] Applying the above principles to the facts of the present matter, I have arrived at the conclusion that an application for a forfeiture of property order is a separate and distinct; it stands alone from the application for the preservation of property order. The application for forfeiture of property order constitutes a new application initiating 'new proceedings' within the meaning of rule 65(1). The application for the forfeiture of property order constitutes '*new proceedings'* which is separate and distinct from the application for preservation of property order.

Whether the application for a forfeiture order requires issuance by the Registrar or whether it can simply be delivered or served

[44] I have concluded that an application for a forfeiture of property order is a separate and constitutes a new application initiating new proceedings. I next proceed to consider whether such an application requires to be issued by the registrar before it is served on the interested or affected persons.

[15] Rule 72 of the High Court: '*Ex parte* application
72(1) An application brought *ex parte* on notice to the registrar supported by an affidavit as stated in rule 65(1) must be filed with the registrar and set down in the motion court before 12h00 on the day but one before the day on which it is to be heard'.

[45] Rule 65(1) provides that 'every application brought on notice supported by affidavit …and every application initiating new proceedings, not forming part of the existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with official stamp and uniquely numbered for identification purpose'. (Underlining supplied).

[46] The court in *Yorkshire Insurance Co Ltd v Reuben*[16] had an occasion to consider the provisions of sub-rule (11) of rule 6 of the old rules, which is equivalent to the new rule 65(1). The court concluded that the use of the word 'notice' in sub-rule (11) of rule 6, as opposed to the 'notice of motion' in the other sub-rules to Rule 6, indicates clearly that interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice in the same way as applications initiating proceedings. All that is required, the court held in terms of rule 6(11), is a notice advising the other party that an application would be brought on a date assigned by the registrar.

[47] The differences between an application brought on notice of motion and an interlocutory application can be highlighted as follows: An application brought on notice of motion sets out the relief sought and specifies the affidavit to be used in support of such relief; it makes provision for the appointment of an address at which the applicant will receive notice and service of documents in the application; it informs the respondent of the time within which notice of opposition should be given, and that failing such notice application will be made to court on unopposed basis on a stated date; and finally the application further informs the respondent of the time-limit within which the respondent's answering affidavit should be delivered with a notice calling upon the respondent to appoint an address at which he or she will accept service of documents.

[48] An interlocutory application and other applications incidental to pending proceedings must be brought on notice to the other side that an application will be brought on a date assigned by the registrar or by a judge. The application may be supported by an affidavit. Unlike with an application brought on notice of motion, the notice is not served by the deputy-sheriff and can be served on a party's legal

[16] 1977 (2) SA 263 at p265 F-G.

practitioner of record. The time-limits applicable to the application brought on notice of motion do not apply to an interlocutory application[17].

[49] In the present matter the PG brought the application for the forfeiture of property order by way of a 'notice of motion' and not a simple 'notice'. The application was addressed to the Registrar and to the legal practitioner for the respondents. It is fair to say that the application complied, in all material respects, with all the requirements for an application brought on notice of motion as opposed to an interlocutory application. In my view having regard to all the requirements for an application brought on notice of motion as out lined in the preceding paragraph, the application for the forfeiture of property order in the present proceedings does '*not forming part of an existing cause or matter'* and is not incidental to any pending proceedings. The preservation of property application is not pending because a preservation order had already been issued, valid for a period of 120 from the date of publication in the Government Gazette. In fact, in my view, the steps or conduct by the PG with regard to the present application contradicts the PG's own case as argued by Ms Boonzaier that the application for a forfeiture of property order constitutes the second and inseparable stage of the initiated preservation application proceedings.

[50] It is common cause that the notice of motion in the present matter was not issued by the Registrar of this Court as required by rule 65(1) of this Court.

[51] On a question by the court to Ms Boonzaier during oral argument whether the application for the forfeiture order had been issued she replied in the negative, re-asserting the PG's position that an application for a forfeiture order need not comply with rule 65(1) as it does not initiate 'new proceedings' within the meaning of rule 65(1). Ms Boonzaier further mentioned that the non-issuance of the of the applications for the forfeiture orders formed the basis why both applications for the preservation order and the application for the forfeiture order, have, since the inception of the POCA applications, been allocated one case number and not a separate number in respect of the application for preservation of property order and a separate number in respect of the application for the forfeiture order. It is necessary to point out that in the present matter the application could not have been

[17] Herbstein and Van Winsen: *The Civil Practice of the Superior Court in South Africa*, third edition, Chapter 4 at pages 69-98; and LAWSA par 134.

allocated with the same number by the registrar as the preservation application because the application never saw the inside of the registrar's office before it was delivered.

[52] Counsel did not refer the court to any provision in POCA or in the rules of this court or the POCA regulations or any other statutory provision upon which the PG's office or the office of the Government-Attorney practice is based for not causing the application for the forfeiture order to be issued by the Registrar. I must confess that I failed to conceptually comprehend the basis upon which it is contended that the application for forfeiture of property order is part and parcel or integral part of the application for preservation of property order. In any event I have already earlier in this judgment endeavoured to demonstrate the separate features of the two applications and concluded that the forfeiture application is separated and distinct from the preservation of property applications and does indeed constitute an application initiating new proceedings within the meaning of rule 65(1).

[53] It is common practice that in an application for an interdictory or prohibitory order, a court when granting such interim order, normally gives the applicant leave to approach the court, on the return day, on the same papers duly amplified to move for a final order. It is now a settled practice by the office of the PG that the preservation orders are not applied for with a *rule nisi*. In my view, in the absence of a court order giving leave to the PG to file papers in respect of the application for a forfeiture order on the same file as that of the application for the preservation of property order, there would be no legal basis upon which the PG can file the papers for the forfeiture application, on the file for the preservation order application and under the same case number. I say so on the basis of my earlier finding that a forfeiture application is not an interlocutory application. It is a separate and substantive application.

[54] It follows therefore in my view that the practice followed by the PG and/or the office of the Government-Attorney in preparing forfeiture applications and causing such applications to be served on the affected person without such applications having first been issued by the registrar is irregular as such applications do not comply with the provisions of rule 65(1). I am prepared to go as far as to hold that the practice constitutes a vitiating irregularity. I am of the further considered view that an application for the forfeiture of property order filed without leave of court and

without being issued is a mere bundle of papers without being clothed with the force of law.

[55] A reader may ask: what is the significance of issuance of an application or summons by the registrar? The simple answer, which encapsulates the rationale of the act of issuance of court process, is that the act of issuance clothes the application papers or summons with legal force; a document which was prepared by a legal practitioner for an applicant or the plaintiff and submitted for issuing by the registrar, upon it being issued, changes from a mere bundle of papers to court process clothed with a force of law. Once a document has been issued it is clothed with authority of a court process. Such court process may henceforth not be altered say by the legal practitioner for the plaintiff or applicant who originally prepared it, without being first sanctioned by the registrar by initialing such proposed alteration or amendment. Should the purported amendment be made without the registrar's sanction, such amendment will be ineffective, in fact it will amount to a mere defacement of the court process. It will be considered in law as of no force or effect.

[56] The issuance has a further effect that, after a court process has been served on the respondent or defendant, it may only be amended with the leave of court subject to the opposing party's right to object to the prosed amendment. Such is the effect of the act of issuance. It follows therefore if an application or summons commencing proceedings is served on the respondent or defendant without first being issued, it will have no legal effect as it will be a mere bundle of papers delivered and strictly speaking no legal consequences should follow if the recipient ignore same.

[57] In order to place the significance of the issuance of the application in context, it is perhaps necessary to refer to specific provisions of the rules dealing with the issue of issuance. Rule 79(1) of the High Court, regulating applications in terms of POCA, provides that the rules of the High Court apply to applications brought in terms of sections 51 (applications for preservation) and 59 (applications for forfeiture) of POCA and rule 79(2) of the High Court, provides that applications for the preservation and forfeiture must comply with rule 65(1) of the High Court. Rule 65(1)[18] provides that every application initiating new proceedings, not forming part of

[18] Rule 65(1) of the High Court 'Requirements in respect of an application: …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

an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped and uniquely numbered for identification purposes. It follows therefore that an application for a forfeiture of property order must comply with the provisions of rule 65(1) for it to be valid and of legal consequence.

[58] It is common cause that the current application has not been so issued by the registrar. It was simply delivered at GOSP. A question arises: What is the consequences of non-compliance with the provisions of rule 65(1)? The court in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*[19] held that the provision to rule 30(1) of the Uniform Rules of Court, (which is the equivalent of the current rule 61 does not apply when the irregular step complained of in the proceedings amounts to a nullity or the defect is such that the opposing party cannot cure the defect even though he were to waive his right to object thereto. Thus a summons which was not signed or issued by the registrar was found to be so defective that it could not be cured by the opposing party taking further step by entering an appearance to defend. The wording of rule 7(2) which deals with summons reads the same as rule 65(1); it provides that a summons is considered as having been properly issued when the registrar date-stamps it with the official court stamp and uniquely numbers it for the purpose of identification. The identification is to differentiate it from other applications and this is significant.

[59] I consider the court's reasoning and conclusion in the *Monumental Art Co* matter (supra) persuasive and I shall follow the reasoning for the purpose of the present matter. It follows therefore, in my view, that the PG's non-compliance with rule 65(1) in the present matter, renders the application a nullity. In other words, I find that the non-issuance of the application is of such a nature that the application cannot be cured by the fact that the respondents have taken steps by filing opposing papers. In my view the defect is incurable. The application is an irredeemable nullity.

[60] In light of conclusion I arrived at in the preceding paragraphs, it is no longer necessary for me to deal with the remaining third question, namely whether the application had been properly served.

---

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.'

[19] 1974 (2)SA 377

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

The application is struck from the roll, with costs.

_____

H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	M BOONZAIER Of Government Attorney, Windhoek
FIRST AND SECOND RESPONDENTS:	S NAMANDJE Of Sisa Namandje & Co. Inc., Windhoek