REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00285

In the matter between:

JAMES NEPENDA HATUIKULIPI	**APPLICANT**

and

PROSECUTOR-GENERAL	**1ST RESPONDENT**
ATTORNEY-GENERAL	**2ND RESPONDENT**
MINISTER OF JUSTICE	**3RD RESPONDENT**
DAVID JOHN BRUNI	**4TH RESPONDENT**
IAN ROBERT MCLAREN	**5TH RESPONDENT**
RICARDO GUSTAVO	**6TH RESPONDENT**
TAMSON TANGENI HATUIKULIPI	**7TH RESPONDENT**
SAKEUS EDWARD TWELITYAAMENA SHANGHALA	**8TH RESPONDENT**
BERNARDT MARTIN ESAU	**9TH RESPONDENT**
PIUS NATANGWE MWATELULO	**10TH RESPONDENT**
NAMGOMAR PESCA NAMIBIA (PROPRIETARY) LIMITED	**11TH RESPONDENT**
ERONGO CLEARING AND FORWARDING CLOSE CORPORATION	**12TH RESPONDENT**
JTH TRADING CLOSE CORPORATION	**13TH RESPONDENT**
GREYGUARD INVESTMENTS CLOSE CORPORATION	**14TH RESPONDENT**
OTUAFIKA LOGISTICS CLOSE CORPORATION	**15TH RESPONDENT**
OTUAFIKA INVESTMENTS CLOSE CORPORATION	**16TH RESPONDENT**
FITTY ENTERTAINMENT CLOSE CORPORATION	**17TH RESPONDENT**

TAMSON TANGENI HATUIKULIPI (TRUSTEE FOR THE TIME BEING OF CAMBADARA TRUST)	**18TH RESPONDENT**
OLEA INVESTMENTS NUMBER NINE CLOSE CORPORATION	**19TH RESPONDENT**
STOAN HORN (TRUSTEE FOR THE TIME BEING OF OMHOLO TRUST)	**20TH RESPONDENT**
JOHANNA NDAPANDULA HATUIKULIPI	**21ST RESPONDENT**
SWAMMA ESAU	**22ND RESPONDENT**
AL INVESTMENTS NO. CLOSE CORPORATION	**23RD RESPONDENT**
OHOLO TRADING CLOSE CORPORATION	**24TH RESPONDENT**
GWAANIILONGA INVESTMENTS (PROPRIETARY) LIMITED	**25TH RESPONDENT**

Neutral citation: *Hatuikulipi v Prosecutor-General* (HC-MD-CIV-MOT-GEN-2022/00285) [2023] NAHCMD 657 (17 October 2023)

Coram: UEITELE J, OOSTHUIZEN J *et* PARKER AJ
Heard: **7 June 2023**
Delivered: **17 October 2023**

Flynote: Constitutional law – Challenge to provisions of the Prevention of Organised Crime Act 29 of 2004 – The provision ‘or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against the defendant’ not violating article 12(1)*(d)* and article 16 of the Namibian Constitution.

Summary: The applicant is facing certain charges under the Prevention of Organised Crime Act 29 of 2004 (POCA) and is awaiting trial. The court made a restraint order against the applicant in terms of s 24(1)*(a)*, read with s 25(2), of POCA. The applicant contends that the ‘reasonable grounds’ test in s 24(1)*(a)* and s 25(2) is unconstitutional because it violated his rights under articles 12(1)*(d)* and 16 of the Constitution. The court found that since restraint order proceedings are civil and not criminal, the right to presumption of innocence under article 12(1)*(d)* of the Constitution did not apply to proceedings for a restraint order under POCA. The court found further that a restraint order, being a reasonable interim order, aimed at

preserving the realisable assets of the applicant pending the conclusion of his criminal trial, did not violate his rights under article 16 of the Constitution. In the result, the court dismissed the application with costs.

Held, since the right to presumption of innocence is under article 12 of the Constitution which is not derogable, article 25(2) did not apply.

Held, further, where the court is seized with a constitutional challenge of a provision of a statute, the court must concern itself with only the formulation of the said provisions and not any act taken to implement the said provisions to see whether the formulation as it stands is Constitution compliant.

ORDER

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1. The application is dismissed.

2. There is no order as to costs.

3. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ (UEITELE J *et* OOSTHUIZEN J concurring):

Introduction

[1] It serves no good purpose to garnish this judgment with a regurgitation of a great amount of background information because they are set out amply in the papers filed of record and the written submissions of both counsel. I shall only say this. The court made a restraint order against the applicant in terms of ss 24(1)*(a)* and 25(2) of the Prevention of Organised Crime Act 29 of 2004 (POCA). These

provisions permit the court to make a restraint order against a defendant who is being prosecuted, if there are reasonable grounds to believe that a confiscation order may in due course be made against him.

[2] The applicant seeks an order in the following terms verbatim:

'1. It is declared that the following words in s 24(1)(a)(ii) of the Prevention of Organised Crime Act, No 29 of 2004 (POCA) are unconstitutional and hereby struck down: "or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant".

2. It is declared that s 25(2) of POCA is unconstitutional to the extent that the reference to s 24(1) therein does not expressly exclude the words "or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant" as these words appear in s 24(1)(a)(ii).

1. It is declared that any restraint order granted in terms of s 24(1)*(a)*(ii) and s 25(2) as they presently read is unconstitutional and falls to be set aside.

2. Accordingly, the restraint order issued by High Court in Case No HC-MD-CIV-MOT-POCA-2020/00429 against the Applicant, and thereafter extended from time to time, is declared to be unconstitutional and is hereby set aside.

3. Directing that such Respondents who oppose the application are directed to pay Applicant's costs.

4. Granting to the Applicant further and/or alternative relief.'

[3] Thus, the issue raised is simply the constitutionality of the aforementioned sections of POCA. The respondents have moved to reject the application and are represented by Mr Trengrove SC (with him Dr Akweenda). Mr Soni SC (with him Mr Kurtz and Mr Kasper) represents the applicant. I am grateful to counsel for their industry in producing the comprehensive heads of argument, supported by a bevy of authorities. I shall distill from those authorities principles and approaches that are of assistance on the point under consideration.

[4] For good reason, I shall set out at the threshold the applicable principles and certain connected aspects that are relevant to the determination of the application.

Civil and not criminal proceedings and remedies

[5] The proceedings under POCA are civil, as opposed to criminal proceedings and the remedies thereunder are civil remedies, as Mr Trengrove submitted. The court described the Chapter 5 (of POCA) remedy in *Lameck v President of the Republic of Namibia*[1] as a civil remedy, though it is referred to in s 32(1) as 'criminal forfeiture', because a confiscation order may only be made against a person who has been convicted of an offence. Once an accused has been convicted, the court determines the value of the benefit the accused derived from the offence of which he has been convicted and from such other criminal activities as it finds to be sufficiently related to that offence. It may then in terms of s 32(6)*(b)* make a confiscation order against the accused 'for the payment to the State of any amount it considers appropriate' up to the value of the benefits he or she derived from his or her crimes. Although the order is called a 'confiscation order', it is according to s 32(2), read with s 37, in fact a civil judgment against the accused for the payment of an amount of money to the State. The overall effect of Chapter 5 is to allow a court, which convicts an accused, to grant a civil judgment against him in favour of the State for the payment of an amount up to the value of the benefits he derived from the crime for which he has been convicted and such other criminal activity which, the court finds, to be sufficiently related to it. Indeed, s 18(1) of POCA vindicates the court's holding that applications for confiscation and restraint orders are civil and not criminal proceedings.

[6] It is neither insignificant nor aleatory that the title of s 18 of POCA is: 'Proceedings are civil not criminal'. Subsection (1) of s 18 provides:

> 'For the purposes of this Chapter (ie Chapter 5, titled "Confiscation of Benefits of Crime"), proceedings on application for a confiscation order, a restraint order or an anti-disposal order are civil proceedings, and are not criminal proceedings.'

[1] *Lameck v President of the Republic of Namibia* 2012 (1) NR 255 (HC) paras 62-69.

[7] The essence of those words is that they mean what they say, namely, that proceedings in respect of an application for a restraint order or confiscation order under POCA are civil proceedings and not criminal proceedings.

Justification for and purpose of POCA

[8] The justification for and purpose of POCA lie in both international law and Namibia's domestic law, including the Namibian Constitution (the Constitution), as Mr Trengrove submitted.

[9] International law requires Namibia to provide for the freezing and confiscation of the proceeds of crime. The purpose of the international legal instruments or treaties is to combat crime generally and particularly transnational organised crime and corruption of the kind of which the applicant stands accused. Namibia is a State party to the United Nations Convention against Transnational Organised Crime. Article 12(1) provides that State parties must to the greatest extent possible adopt such measures as may be necessary to enable the confiscation of the proceeds of crime or property to the value of such proceeds. Article 12(2) provides that they must adopt such measures as may be necessary to enable the freezing or seizure of such property for the purpose of eventual confiscation.

[10] Namibia is a State party to the United Nations Convention against Corruption. Article 31 rehearses article 12 of the aforementioned Convention against Transnational Organised Crime.

[11] Moreover, Namibia is a State party to the African Union Convention on Preventing and Combating Corruption. It, too, requires member States, in article 16(1), to adopt such legislative measures as may be necessary to enable its authorities to freeze and seize the proceeds of corruption pending a final judgment for their confiscation.

[12] These treaties are significant for a variety of reasons. They impose an obligation on Namibia as a member of the comity of States under international law to enact and implement laws for the seizure, freezing and ultimate confiscation of the proceeds of crime generally and transnational corruption in particular. Moreover,

these treaties form part of the domestic law of Namibia in terms of article 144 of the Constitution. Indeed, in *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial*[2] the Supreme Court laid down that international agreements being part of the law of Namibia in terms of Article 144 'must be given effect to'. Furthermore, the treaties are significant because they make it clear that measures for the seizure, freezing and ultimate confiscation of the proceeds of crime are regarded internationally as permissible and, indeed, necessary means of combating crime, and they are compatible with international human rights norms.

[13] In *Shalli v Attorney-General*[3] the court described the purpose of asset forfeiture under POCA thus:

'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 security threat. South African common and statutory law failed 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.

'It is common cause 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. 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

[2] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) at 259H.

[3] *Shalli v The Attorney-General* 2013 (3) NR 613 (HC) para 8, approving the ground-breaking South African case of *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) paras 14 and 15.

their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature….'

[14] In the earlier case of *Lameck v President of the Republic of Namibia*, the court emphasised that the primary purpose of asset forfeiture under POCA is not to punish criminals but to ensure that nobody benefits from their wrong doing. The court had in 2012 stated that-

'From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.'[4]

[15] The holding by the court in *Lameck* concerns asset forfeiture. I see no good reason why it should not apply with equal force to asset preservation which are all dealt with under Chapter 6 of POCA. More important, the holding by the court is in tune with the objects of the aforementioned international treaties.

<u>Applicable principles and approaches</u>

[16] In considering the applicant's constitutional challenge based on article 12(1) *(d)* and article 16 of the Constitution, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach.[5] Before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition.[6] Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the

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[4] *Lameck v President of Namibia* footnote 1 para 71, approving *S v Shaik and Others* 2008 (5) SA 354 (CC).
[5] *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC).
[6] *S v Berg* 1995 NR 23.

correct interpretation thereof to see whether the legislative provision has in truth been violated in relation to the applicant.[7]

[17] In that regard and crucially, where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Constitution, the court must concern itself with only that statutory provision; the court must not concern itself with an ensuing act of the public authority that administers the statute concerned.[8] Doubtless, it makes legal sense.

[18] Keeping the foregoing principles, approaches and authorities in my mind's eye, I proceed to consider the present application.

<u>The notice of motion</u>

[19] The applicant contends that the reasonable grounds test provided in s 24(1)*(a)*(ii) and s 25(2) of POCA is unconstitutional because it violates his right to presumption of innocence guaranteed to him by article 12(1)*(d)* of the Constitution and his right to property guaranteed to him by article 16 of the Constitution.

[20] As I see it, the 'reasonable grounds' test gives the court a statutory compass to guide it when considering the issuance of a restraint order against the respondent, who has been criminally charged and is being prosecuted, if there are reasonable grounds for believing that a confiscation order – and this is significant – might, not will, be made against the respondent.

[21] Indeed at that stage, the court exercises a guided (ie restricted) discretion as opposed to absolute discretion whereby the court ought to be satisfied that the 'prescribed objectively determinable facts'[9] s 24(1)*(a)*(ii) existed before issuing a restraint order. That in itself answers to the rule of law in contradistinction to arbitrary exercise of discretion. And all that s 25(2) of POCA does is that it provides that it suffices if the 'prescribed objectively determinable facts' appear on the face of it in an application for a restraint order.

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[7] *Kennedy v Minister of Safety and Security* 2020 (3) NR 731 (HC) para 13.
[8] Loc cit.
[9] *Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2015 (1) NR 220 (HC) paras 10-12.

[22] Indeed, it has been held that a court hearing an application for a restraint order-

> 'is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefitted from the offence of from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that assessment must be appraised of at least the nature and tenor of the available evidence, and cannot rely merely upon the applicant's opinion … it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed.'[10]

[23] Above all, a restraint order is in form and substance an interim order through and through. It operates in the interim pending the final outcome of the criminal trial. Restraint order proceedings being civil proceedings, as aforesaid, the standard of proof required for any interim order is the standard in civil proceedings. Thus, a prima facie proof suffices, even if it is open to doubt.[11]

[24] Mr Soni argued that the court may issue a restraint order only if the court believed that the respondent would be convicted at his criminal trial. With the greatest deference to Mr Soni, the width of the wording of the provisions in question and the court's interpretation thereof[12] debunk such argument.

[25] In all this, I find it surprising and, indeed, cynical that the applicant contends that his property has been preserved by an order of the court and yet he has not been found guilty of the offences he has been charged with. For example, s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) empowers a peace officer to arrest any person without a warrant, if the peace officer reasonably suspects that such person has committed any offence referred to in Schedule 1 to the Act, other than the offence of escaping from lawful custody. In doing so, the peace officer takes

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[10] *Prosecutor-General v Lameck* footnote 1 para 23.
[11] *Standard Bank of Namibia Ltd v Atlantic Meat Market (Pty) Ltd* 2014 (4) NR 1158 (SC) para 23.
[12] *Prosecutor-General v Lameck* footnote 8 loc cit.

away, without judicial oversight, that person's right to freedom of movement guaranteed to that person by article 21(1)*(g)* of the Constitution.

[26] As we speak, the applicant's right to freedom of movement under article 21 (1)(*g*) of the Constitution has been whittled down without having been found guilty of the offences he has been charged with, as Mr Trengrove, submitted. Yet, I have not heard the applicant to complain that his right to freedom of movement has been violated without a competent court having found him guilty of any offence.

[27] I have not found in the law reports and Namibia's Superior Courts' website any case where the provisions of s 40(1)*(b)* of the CPA has been challenged as being unconstitutional. Mr Soni did not refer any such case to the court when he was engaged on s 40(1)*(b)* by the bench. What is usually challenged is rather the act of a peace officer who has implemented the CPA provision, especially where the arrestee contended that he or she was arrested without being *Mirandized*.[13]

[28] Accordingly, I find that the applicant's attack on the reasonable grounds test in relation to article 16 of the Constitution is plainly based on the applicant's erroneous interpretation of the concerned provisions in POCA. The attack is, therefore, rejected as having no merit.

[29] Furthermore, the applicant attacks the reasonable grounds test under the right to presumption of innocence guaranteed by article 12(1)*(d)*. The muted premise of his attack is that a restraint order may only be granted after compliance with the article. It will mean that the court may only grant a restraint order after-

(a) a fully-fledged criminal trial in which the defendant is given the opportunity of calling witnesses and cross-examining those called against him; and

(b) the court has found beyond a reasonable doubt that the defendant is guilty of the crimes of which he stood accused and has benefited from.

[13] See, eg, *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC); *Miranda v Arizona* 384 U.S. 436 (1966) is where the term *Mirandize* derived from.

[30] It means that a restraint order would be competent only after completion of the criminal trial. The applicant's attack would like to have restraint orders done away with altogether. That would render the object of restraint orders under POCA[14] otiose and would mean Namibia failing to carry out its international obligations under the aforementioned treaties.[15] That would in turn be bad for the attainment of the rule of law and public order, considering the object of POCA set out in paras 12 and 13 above.

[31] The Supreme Court has held that article 12(1)*(b)* to *(f)* relate only to criminal trials.[16] Furthermore, for instance, the right of presumption of innocence is protected by article 6(2) of the European Convention on Human Rights and Fundamental Freedoms. In interpreting that provision, the European Court of Human Rights held that the article applies to criminal proceedings only and not applications for asset forfeiture.[17] The Privy Council came to a similar conclusion in *McIntosh v Lord Advocate*[18] where the Privy Council was interpreting similar provisions found in s 3(2) of the Proceeds of Crime (Scotland) Act 1995 (c.43). Additionally, the House of Lords also came to the same conclusion when interpreting comparable provisions in *R v Rezvi*.[19]

[32] Significantly, *R v Rezvi*, *McIntosh v Lord Advocate* and *Phillips v United Kingdom* were referred to with approval in *Shalli v The Attorney-General*.[20] *Shalli* binds this court as I do not think it is wrong.[21]

[33] The court in *Lameck* held that civil forfeiture under Chapter 6 of POCA is a civil remedy unrelated to criminal prosecution and punishment of offenders and do not engage article 12(1)*(d)* of the Constitution.[22] Therefore, asset forfeiture proceedings in Chapter 6 of POCA do not violate the right to presumption of innocence applicable to criminal proceedings embodied in article 12(1)*(d)* of the Constitution. I see no good reason why the court's conclusion in *Lameck* should not

[14] See paras 12-13 above.
[15] See paras 8-11 above.
[16] *Attorney-General of Namibia v Minister of Justice and Others* 2013 NR 806 (SC) para 17.
[17] *Phillips v The United Kingdom* 2001 ECHR (12 December 2001) paras 31-32.
[18] *McIntosh v Lord Advocate* [2003] 1 AC 1078 paras 13-28.
[19] *R v Rezvi* [2002] UKHL 1.
[20] *Shalli v The Attorney-General* footnote 3.
[21] *Chambo v Minister of Safety and Security and Others* [2018] NAHCMD 37 (20 February 2018) paras 57-69.
[22] *Lameck v President of the Republic of Namibia* footnote 4.

apply with equal force to civil preservation of assets which – significantly – is also under Chapter 6 of POCA. By a parity of reasoning, I accept *Lameck* as good law.

[34] That is not the end of the matter. Mr Soni had added strings to his bow. I shall consider them in the succeeding paragraphs.

[35] The first string relates to what Mr Soni characterised as the 'untrammelled discretion of the Prosecutor-General'.

[36] Mr Soni submitted that the Prosecutor-General 'is given untrammelled discretion' in the exercise of her (or his) discretionary power under POCA in respect of her (or his) application for restraint orders. I disagree. With respect, I do not see any merit in such submission. The Prosecutor-General does not have such power. The discretion she exercises is not absolute discretion: It is guided discretion.[23] If the court found that the 'prescribed objectively determinable facts' did not exist, the court is entitled to refuse the application.

[37] The second string relates to article 22*(b)* of the Constitution. Mr Soni submitted 'that, for the purposes of this application, in order to impose a valid limitation on a defendant's Article 12(1)*(d)* right and his or her Article 16 rights and freedoms, the law in question, in this case POCA, must specify the extent of the limitation and identify the Article on which reliance is placed for imposing the limitations.'

[38] With respect, I think counsel's submission has no merit. Article 22 applies to those fundamental rights and freedoms that are derogable, but article 12 is not derogable. As to article 16, I say the following: the Constitution does not, in article 22*(b)*, prescribe the manner in which the constitutional instructions in article 22*(b)* must be formulated. In my view, the long title of POCA sets out sufficiently and satisfactorily the extent of the limitation and that it concerns article 16 of the Constitution. A purposeful and contextual interpretation[24] of the long title of POCA vindicates such view. Above all, it is worth noting that the court has not found

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[23] *Nguvauva v Minister of Regional and Local Government and Housing and Rural Development* footnote 9 loc cit.

[24] G E Devenish *Interpretation of Statutes* (1992) at 35-39; *Coetzee v Transnamib Holdings Ltd and Another* 2015 (4) NR 1183 (HC).

restraint orders and forfeiture orders to be unconstitutional.[25] As Mr Trengrove submitted, though not in so many words, the case that the respondents have been dragged to court to meet is that the reasonable grounds test in s 24(1)*(a)*(ii) and s 25(2) is unconstitutional.

[39] The third string is that POCA 'does not impose any limitation on the reach of restraint orders in respect of the property held by a defendant which he or she is prohibited from dealing with'. Mr Soni's submission overlooks a cardinal rule of interpretation of statutes, namely, that the provisions of a statute must be read globally and intertextually with other provisions of the statute in question to arrive at the correct interpretation.[26] On that score, it is my view that s 24 should be read intertextually with s 25 in order to arrive at a correct interpretation of the two connected sections of POCA.

[40] I have found previously that a restraint order under POCA is essentially a hold over order, serving in the interim a reasonable purpose. It preserves the applicant's realisable assets to cater for the possibility, not likelihood, of a confiscation order at the end of the applicant's criminal trial. Nothing prevents the applicant from persuading the court seized with a restraint order proceeding to invoke its power under s 25(2) and (3) to find that an open-ended restraint order, covering all the realisable assets of the applicant, would occasion hardship to the applicant and, accordingly, pray the court to exclude some assets from the purview of the restraint order it might grant.

[41] Mr Soni's last string is this. Counsel took issue with the word 'must' in the chapeau of s 25(2) of POCA. According to counsel, the interpretation of the chapeau was to command the court to grant a restraint order without reference to the court's judicial obligation under article 5 of the Constitution. Several obstacles stand in Mr Soni's way as to counsel's interpretation of s 25(2) of POCA.

[42] In our law, the word 'must' in a statutory provision does not lead to only one conclusion, without more, that the provision is peremptory, as opposed to directory.

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[25] See *Lameck* footnote 1 and *Shalli* footnote 3.

[26] *Nolte v The Minister of Environment, Forestry and Tourism* [2023] NAHCMD 361 (28 June 2023) para 15, relying on G E Devinish *Interpretation of Statutes* footnote 23 at 116-117.

Regard must be had to the intention of the Legislature.[27] Besides, the scheme of the provision is that the court is vested with discretion and a duty to act. It is only when the court has exercised its discretion that 'prescribed objectively determinable facts' in s 24(1)*(a)*(ii) existed that its duty to issue a restraint order would arise.[28] Indeed, such scheme of the dichotomy between a court's exercise of discretion and its duty to act is not uncommon in our law – statute law[29] or common law.[30]

[43] The conclusion is inescapable that, *pace* Mr Soni, the use of 'must' in the chapeau of s 25(2) does not take away the court's judicial obligation under article 5 of the Constitution. Any argument that it does is, with respect, fallacious and self-serving, and must be rejected, as I do.

Costs

[44] There remains the matter of costs. It has been held that where a private individual approached the court to vindicate a constitutional right against the State and the State was successful, it was just and reasonable that each party paid its own costs.[31]

Conclusion

[45] Based on these reasons, I come to the ineluctable conclusion that the applicant has failed to make out a case for the relief sought.

[46] In the result, I order as follows:

1. The application is dismissed.

2. There is no order as to costs.

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[27] *Compania Romana De Pescuit (SA) v Rosteve Fishing (Pty) Ltd and Tsasos Shipping Namibia (Pty) Ltd* (Intervening): In Re *Rosteve Fishing (Pty) Ltd v MFV 'Captain B1', Her Owners and All Others Interested in Her* 2002 NR 297 (HC).

[28] See *Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* footnote 9 loc cit.

[29] Loc cit.

[30] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).

[31] *Namrights Inc v Government of the Namibia and Others* 2020 (1) NR 36 (HC) paras 33-34.

3. The matter is finalised and removed from the roll.

C PARKER

Acting Judge

I agree.

S F UEITELE

Judge

I agree.

G H OOSTHUIZEN

Judge

APPEARANCES

APPLICANT:	V Soni SC (with him R Kurtz and G Kasper) Instructed by Murorua Kurtz Kasper Incorporated, Windhoek
1ST – 3RD RESPONDENTS:	W Trengrove SC (with him K Saller, S Akweenda and M Boonzaier) Instructed by Office of the Government Attorney, Windhoek