

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

Case No: HC-MD-CIV-MOT-POCA-2018/00140

In the matter between:

**THE PROSECUTOR-GENERAL**

**APPLICANT**

and

**MARTIN NANDE SHILENGUDWA**

**1<sup>ST</sup> RESPONDENT**

**HILMA DALONDOKA SHILENGUDWA**

**2<sup>ND</sup> RESPONDENT**

**BUSINESS AND INTELLECTUAL PROPERTY**

**AUTHORITY**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation**     *The Prosecutor-General v Shilengudwa* (HC-MD-CIV-MOT-POCA-2018/00140) [2023] NAHCMD 665 (19 October 2023)

**Coram:**                MASUKU J

**Heard:**                **Decided on the papers**

**Delivered:**           **19 October 2023**

**Flynote:**     Civil Procedure – Legislation – Prevention of Organised Crime Act 29 of 2004 ('POCA') – Effect of noting an appeal on a ruling declaring certain provisions unconstitutional – Whether common law rule that an appeal suspends execution applies.

**Summary:** The applicant, the Prosecutor-General ('PG') obtained a preservation order against Mr and Mrs Shilengudwa, the respondents in 2018. After several legal battles between the parties, the respondents launched a constitutional application in which they challenged the constitutionality of the definition section of 'proceeds of unlawful activity', as being too broad and unjust. A Full Bench of this court found in the respondents' favour, culminating in an appeal to the Supreme Court by the PG. The respondents are desirous of the matter proceeding to the forfeiture stage. The PG reasons that the forfeiture application must be stayed, pending the decision of the Supreme Court on appeal, regarding the correctness of the Full Bench decision.

*Held:* That on the authority of *S v Huseb* 2012 (1) NR 130 (HC), where there has been a constitutional declaration of invalidity ie that a certain provision is unconstitutional, the common law rule that an appeal suspends execution of the order does not apply.

*Held that:* In the instant case, the decision in *Huseb*, it being not the case of the PG that the said judgment is wrongly decided, it is one of a full court, which is binding. In that connection, considerations of judicial deference, comity and reasons of practicality do not serve to change force, effect and validity of the *Huseb* decision.

Application was thus set down for allocation of a date for hearing the forfeiture application.

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## ORDER

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The matter is postponed to **2 November 2023** at **08:30** for the setting of a date of hearing of the application for forfeiture in terms of section 59 of the Prevention of Organised Crime Act 29 of 2004.

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## RULING

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### MASUKU J:

#### Introduction

[1] The question for determination in this ruling, is whether this is an appropriate case in which to proceed with the hearing of a forfeiture of property application in terms s 59 of the Prevention of Organised Crimes Act 29 of 2004, ('POCA'), notwithstanding that a judgment favourable to the respondents has been appealed by the Prosecutor-General ('PG'), to the Supreme Court.

#### Background

[2] This is a matter in which a number of judgments and interlocutory rulings have been delivered by this court on a number of matters in dispute among the parties cited as the applicant and the first and second respondents. The third respondent has long ceased being an interested party in these proceedings – in fact, it never really participated in the proceedings as far as I can recall.

[3] The latest instalment, in terms of rulings arises as a result of a constitutional application wrought by the respondents, ie Mr and Mrs Shilengudwa. In that application, the Shilengudwas approached a full bench of this court seeking an order declaring the provisions of s1 of POCA, relating to the definition of 'proceeds of unlawful activities' unconstitutional. This was to the extent that the concept of including property, which is mingled with property that is proceeds of unlawful activity, is concerned.

[4] A Full Bench of this court comprising of Oosthuizen J, Prinsloo J and the undersigned,<sup>1</sup> found in favour of the Shilengudwas and accordingly declared the said definition unconstitutional. The court held that ‘the last portion of the definition of “proceeds of unlawful activities” contained in s 1 of the Prevention of Organised Crime Act 29 of 2004, (‘POCA’), which reads “and includes property which is mingled with property that is proceeds of unlawful activity” is declared to be unconstitutional and is struck from the definition.’

[5] Aggrieved by the decision of the court, the PG filed a notice of appeal, seeking that the order of this court, declaring the said provision unconstitutional, be set aside. The question that confronts this court is whether the noting of the appeal should have a staying effect on the implementation of the judgment of the Full Bench, pending a final determination of the issue by the Supreme Court.

#### The arguments

[6] Mr Heathcote, for the respondents, applied that the matter should, with the constitutional ruling in the respondents’ favour, proceed to forfeiture stage in terms of s 59 of POCA. He argued that the respondents have, whilst the matter was pending, been deprived of the use of the money that was held unlawfully, as a result of the overbroad definition of unlawful activities, as recorded in s 1 of POCA. It was his argument that the respondents should not be denied the enjoyment of the judgment pending the appeal.

[7] Much store was laid by Mr Heathcote, in support of his argument on a judgment of a Full Bench of this court, per Smuts J and Miller JA in *S v Huseb*.<sup>2</sup> In that case, s 14 of the Stock Theft Act 12 of 1990, which imposed mandatory sentences on convicts, was struck down as being unconstitutional. The PG noted an appeal against the order of unconstitutionality returned by

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<sup>1</sup> *Shilengudwa v The Prosecutor-General* (HC-CIV-MOT-GEN-2020/00374) [2023] NAHCMD 496 (11 August 2023).

<sup>2</sup> *S v Huseb* 2012 (1) NR 130 (HC).

the High Court. As the appeal on the correctness of the decision of this court was pending, the trial magistrate did not impose the mandatory sentences, in line with the finding of this court. That was so notwithstanding that the question was still to be resolved finally by the Supreme Court.

[8] Mr Heathcote, in particular, referred to the following paragraphs in the judgment, namely paras 17 and 18, where this court expressed itself as follows:

‘[17] I respectfully agree with the approach of the South African Constitutional Court that an appeal against a declaration of constitutional validity of legislation will not breathe new life into that law in the absence of a competent court tampering the effect of the order of constitutional invalidity as contemplated by art 25(1)(a). It could follow in my view that the common-law rule that the execution of a judgment is suspended pending an appeal would likewise have no application to declarations of constitutional invalidity of legislation.

[18] It would follow in the circumstances that the appeal against the declaration of invalidity of the two subsections in the Stock Theft Act by the full court would not have the effect of suspending the operation of that judgment. It follows that the sentence imposed by the magistrate in this matter was thus valid and competent in the circumstances.’

[9] Mr Heathcote accordingly implored the court to follow the *ratio* of the *Huseb* matter. He, in particular urged the court to consider that the respondents’ funds have been preserved since 3 May 2018, thus occasioning some hardships on them in providing for themselves in line with a provision that has been held to be unconstitutional. The noting of an appeal by the PG does not, further submitted Mr Heathcote, breathe life to the portion of the definition that has been held to be unconstitutional.

[10] Mr Budlender, who represented the PG argued contrariwise. First, it was his argument that if we take a few steps back, we will realise that this court ordered the forfeiture application to be heard after the constitutional matter had been heard. It was his argument that because of the noting of the

appeal against the judgment of the Full Bench, it follows that the constitutional matter has not yet been finalised. That being the case, the forfeiture application can only be dealt with by this court after the Supreme Court speaks the final word on this matter.

[11] In regard to *Huseb*, it was submitted on the PG's behalf that the order by the Full Bench in this matter, is in force. That notwithstanding, the judgment of the Full Bench does not constitute a final determination on the validity of the provision in question. That will be done only once the Supreme Court has spoken the final word on the matter. The court was thus urged to stay the hearing of the forfeiture application until the matter has been finally determined by the Supreme Court.

[12] It was also urged on the PG's behalf that the considerations of practicality should dictate that the forfeiture application should stand over for determination until the judgment of the Supreme Court. It was argued that for the court to proceed to hear the forfeiture application, carries with it inherent risks that this court may decide the forfeiture on the basis of a version that the Supreme Court may find is not sustainable. It was further argued that the possibility exists that the forfeiture application may be rendered moot after all and once the Supreme Court has rendered its decision on the matter.

[13] Finally, it was submitted on the PG's behalf that when the entire matter is taken into account, it becomes clear that practicality, judicial prudence, judicial deference and judicial economy, all point inexorably in one direction – namely, the stay of the hearing of the forfeiture application until the Supreme Court has pronounced itself on this very important matter. The court was also requested to consider that the appeal has not been noted for frivolous reasons or ends.

[14] The appeal, the court was reminded by the PG, concerns a very important and serious matter of constitutional interpretation that may change the landscape in this regard. There is nothing that should, that taken into

account, prevent the Supreme Court being allowed to deal with the matter with finality, once and for all before judicial clarity is attained.

[15] In a brief reply, Mr Heathcote asked a rhetorical question – does the PG's stance mean that there will be no forfeiture application that this court will entertain until the Supreme Court has spoken the last word on the matter? Mr Boonzaier, who appeared when the matter came for a status hearing, contented himself by stating that the PG stands by the heads of argument filed.

### Determination

[16] I have listened and considered the argument presented on behalf of both protagonists and for which I am most grateful. I do not, considering the submissions by the PG, get the impression that the PG argues that the *Huseb* case was wrongly decided and is as such not worthy of being followed by this court.

[17] I consider that the judgment was delivered by two eminent judges of this court. It was a fully reasoned judgment that lays down a principle, to the effect that where a declaration of invalidity has been returned by this court, an appeal against that declaration, does not have the effect of suspending the operation of this court's judgment, the appeal notwithstanding.

[18] As intimated above, it was not argued that the judgment in *Huseb* is wrong or was wrongly decided. I also take it into account that it being a judgment of a full court, that it is binding on me. This becomes more pronounced in the absence of an argument or submission that the judgment was wrongly decided. I consider that the judgment is correct and that it is furthermore, binding on me, sitting as I do, as a single Judge of this court.

[19] I do understand perfectly that in an ideal world, it would be prudent, practical and convenient to allow the Supreme Court to speak the last word on this matter before the question of forfeiture is entertained in this matter. That

is, however, not the test. The full court in *Huseb* pronounced itself with devastating clarity that once an appeal is noted against a declaration of invalidity of a legislative provision, which is the very issue in this matter, 'the common law rule that the execution of a judgment is suspended pending an appeal would have no application . . .' echoes resoundingly and is binding upon me.

[20] I cannot, in this wise, close my eyes to the hardship that the respondents have been subjected to, as this matter has been determined in this court over the last few years. I say this cognizant that the respondents are not entirely without blame for the matter being drawn out as long as it has been. That said, I am of the considered view that there is nothing that should prevent or stay the forfeiture application from being heard and determined notwithstanding that the appeal has been noted. That is how I understand the imperatives of *Huseb*, binding as they are and constitute the law in Namibia presently.

[21] I am not able nor equipped to answer the rhetorical question posed by Mr Heathcote regarding whether the appeal suspends all applications for forfeiture. I do not, in any event, have to answer that question because all I need to do is to follow what I understand to be a judgment that is correct in principle and the law and one which has binding effect on me, as I have already stated.

[22] It must be mentioned that *Huseb* states that an appeal against a declaration of constitutional validity of legislation does not breathe new life in the absence of a competent court tampering with the effect of the order. In the instant case there is no such order and as such, there no reason why the hearing of the application for forfeiture should not ensue.

### Conclusion

[23] Having regard to the foregoing considerations and conclusions, I am of the considered opinion that it is appropriate, all things taken into account – the



law, as adumbrated above and the personal circumstances of the respondents, not to halt the train of justice in this matter, the appeal notwithstanding.

Order

[24] Appreciating the conclusion reached above, I am of the considered opinion that the application for the staying of the forfeiture application, pending the hearing of the appeal, must on the law as it stands, be refused. I accordingly issue the following order:

The matter is postponed to **2 November 2023** at **08:30** for the setting of a date of hearing of the application for forfeiture in terms of section 59 of the Prevention of Organised Crime Act 29 of 2004.

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T S Masuku  
Judge

## APPEARANCES

APPLICANT: GM Budlender SC (With him M Boonzaier)

Instructed by: Office of the Government Attorney

RESPONDENTS: Mr. Heathcote SC, (With him Mr J Jacobs)

Instructed by: Van der Merwe, Greef, Andima, Windhoek.