



**REPORTABLE**

CASE NO: SA 53/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PROSECUTOR-GENERAL**

**Appellant**

and

**ATLANTIC OCEAN MANAGEMENT**

**PROPRIETARY LIMITED**

**First Respondent**

**FISH SPAIN S L**

**Second Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and SMUTS JA

**Heard:** 20 June 2019

**Delivered:** 09 October 2019

**Summary:** The appeal concerns the upholding of an application for the rescission of a preservation of property order by Angula DJP, granted earlier by Usiku AJ (as he then was) in favour of the appellant on 26 May 2017. Two Spanish companies and an Angolan company concluded a charter agreement in terms of which they agreed that the Angolan company would utilize vessels of the two Spanish companies and would in addition carry all the costs arising from the operation of the vessels. Subsequent to entering into the agreement, the Angolan Government

introduced foreign exchange regulations which restricted the export of foreign currency, making it difficult for the Angolan company to remit payment to the Spanish companies. As a result, the Spanish companies experienced a liquidity problem. In order to address the problem, Mr Martinez and Mr Maqueira acting on the instructions of the Spanish companies registered a Namibian company, Atlantic Ocean Management (Pty) Ltd (the first respondent). Mr Maqueira and Mr Martinez, being the directors and equal shareholders in the first respondent, would receive money from the clients of the Angolan company for fish supplied to them and in turn they opened up a Customer Foreign Currency (CFC) account at Bank Windhoek in which they deposited the money received which would be transferred to Fish Spain's Bank account in Spain. This arrangement ran smoothly until Bank Windhoek informed the directors of the first respondent that the transfer of some USD886 722,20 was blocked by the compliance department within the Bank itself. This was due to a Determination issued by the Financial Intelligence Centre (FIC) in 2016, which held that any money in excess of N\$100,000 had to be declared to an officer of Customs and Excise at the port of entry into or at the port of departure from Namibia. Being alerted to this, the appellant then caused an urgent application to be brought on an *ex parte* basis due to the belief that the first respondent contravened s 36 of the Financial Intelligence Act (the FIA) and in turn resulted in an act of money laundering in terms of s 4 of the Prevention of Organised Crime Act (the POCA). The application so brought was for the preservation of such money in terms of s 51 of the POCA. This was granted by the court *a quo* on 5 January 2017. The matter was opposed by the respondents in February 2017. On 28 April 2017, the appellant through the Government Attorneys, sent a letter to respondents' legal practitioners in which she conceded that she would not be able to obtain a forfeiture order in respect of the money in the CFC account as it became common cause that the Determination, purportedly issued in terms of s 36 of the FIA, had in fact not been issued or published in the Government Gazette. As a result, the appellant decided to allow the preservation order to lapse by effluxion of time. On 22 May 2017, the respondents' legal practitioners sent a formal letter of demand to Bank Windhoek demanding that the bank release its funds, in light of the fact that the preservation order which preserved the funds had lapsed. This was not done. The appellant on 24 May

2017 caused a fresh POCA application for the preservation of property order to be issued in respect of the same positive balance in the first respondent's CFC account and set it down for hearing on 26 May 2017. The application was again brought *ex parte*. The application served before Usiku AJ (as he then was), who granted the order on 26 May 2017. The respondents lodged an urgent application in which they sought to compel the appellant, Bank Windhoek and Bank of Namibia (BoN) to release the funds. In their opposition to the second preservation order granted, they sought to anticipate it and have it rescinded or set aside as well.

Angula DJP heard the various applications and delivered judgment on 6 September 2017 in which he set aside the second preservation order and gave a costs order against the appellant. Being aggrieved, the appellant appealed against that judgment and order to this court.

*Held*, that the point in *limine* raised by the appellant in the court a quo, contending that the respondents had no right to anticipate the second preservation of property order in terms of Rule 72, fails.

*Held*, further (on the question that the appellant brought the second application *ex parte*, when she should not,) that any application under s 51 of the Act can never be dismissed solely on the ground that it has been brought *ex parte*. It is the court hearing the application in terms of s 51 which is obliged to ensure that the proceedings before it are always fair.

*Held*, further that the case of the *Prosecutor-General v Uuyuni* is not authority for the proposition that all preservation of property orders must be brought *ex parte*, but rather that the use of the word 'may' in s 51 of the POCA bestows a discretion on the appellant to proceed on an *ex parte* basis or by way of notice.

*Held*, further that it is now settled law that the High Court is authorised to grant preservation orders under s 51 without requiring that notice of the application be

given to any person and if satisfied that the requisites set out in s 51(2)(a) and (b) have been met must grant a preservation order.

*Held*, further that this does not preclude the appellant from giving notice of such an application in appropriate instances to another party. The appellant is not obliged to bring an application under s 51 on an *ex parte* basis.

*Held*, further that the High Court is not precluded from granting a rule *nisi* in preservation of property orders under s 51 or that there is in principle no procedural bar to a High Court hearing an application *ex parte* and in camera under s 51 of the Act and granting a rule *nisi*, together with an interim preservation and seizure order, pending the return day of the rule. *National Director of Public Prosecutions v Mohamed No & others* 2003 (4) SA 1 (CC) para 33. In fact it is preferable for the High Court to grant a rule *nisi* when an application is brought *ex parte* so as to comply with the sacred *audi alteram partem* rule, one of the main pillars of Art 12 of the Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order . . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. *De Beer No v North-Central Local Council & South-Central Council and others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11.

*Held*, further that even if the High Court does not frame its order in the form of a rule *nisi*, an order granted *ex parte* is in any event provisional and subject to being set aside by a party on application against whom it was granted. A party is furthermore not confined to the narrow basis to rescind an order set out in s 58(6) when challenging an order granted *ex parte* against him or her and it may entail a reconsideration of the order given.

*Held*, further on the question whether the appellant was entitled to apply for and obtain the second preservation order, that it would depend on the circumstances

of each case. In this case where the appellant deliberately let an erroneously obtained preservation of property order run a full course of 120 days without approaching the court to rescind the same, appellant abused the provisions of s 51 of the Act and was therefore not entitled to obtain the second preservation of property order.

*Held*, further that appellant committed material non-disclosures and/or relied on misleading statements in the first and second preservation order applications. In *ex parte* applications the deponents should adhere to the requirements of *uberrima fides*.

*Held*, further that the second preservation of property order was correctly set aside and accordingly the appeal is dismissed with costs.

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## APPEAL JUDGMENT

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MAINGA JA (SHIVUTE CJ and SMUTS JA concurring):

### Introduction

[1] This appeal is against the whole judgment and order of Angula DJP. The appeal concerns the upholding of an application for the rescission of a preservation of property order by Angula DJP,<sup>1</sup> which was earlier granted by Usiku AJ (as he then was) in favour of the appellant (Prosecutor-General) (the PG) on 26 May 2017. The preservation order was in respect of the positive balance in the Customer Foreign Currency account (the CFC account) held at Bank Windhoek in the name of the first respondent, Atlantic Ocean Management Group (Pty) Ltd (Atlantic). First respondent is a Namibian registered company.

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<sup>1</sup> The judgment of Angula DJP is reported: *Atlantic Ocean Management Group (Pty) Ltd & another v Prosecutor-General* 2017 (4) NR 939 (HC).

[2] For the purpose of this judgment, the parties would be referred to as appellant and first and second respondents or whenever necessary as respondents. Second respondent (Fish Spain S L) is a Spanish company operating in Angolan waters. The other Spanish company is Rio Algar. The second respondent and Rio Algar would whenever necessary be referred to as the Spanish companies.

[3] This judgment should be read with the findings of fact formulated by Angula DJP. His findings are comprehensive enough for the purposes of this judgment. In fact, I do not intend to reinvent the wheel, so to speak, regarding the background facts of this case. Except for minor changes where necessary, I will reproduce the background facts as presented by the learned DJP. That background is in this form:

- (a) Messrs Alberto Iglesias Martinez (Mr Martinez) and Juan Jose Martinez Maqueira (Mr Maqueira) are equal shareholders and co-directors of the first respondent.
  
- (b) The Spanish companies and Sadino LDA (Sadino), an Angolan company, had concluded a charter agreement in terms of which it was agreed that Sadino would utilise vessels of the two Spanish companies and would in addition carry all the costs arising from the operation of the vessels. However, subsequent to entering into the agreement, the Angolan Government introduced foreign exchange regulations which restricted the export of foreign currency, making it

difficult for Sadino to remit payment to the Spanish companies. As a result, the Spanish companies experienced a liquidity problem. At a certain stage the Spanish Embassy in Angola intervened to try to help the Spanish companies.

- (c) In order to address the problem, the Spanish companies instructed Mr Martinez and Mr Maqueira to explore market opportunities in Namibia in order to develop an alternative market for the Spanish companies in Namibia. The reliability of the Namibian banking system was one of the key considerations. To this end, first respondent was registered in Namibia, in which Mr Martinez and Mr Maqueira are equal shareholders and co-directors as stated earlier.
- (d) According to the Memorandum of Association of the first respondent, its main business is manufacturing, distribution of produce, construction and marketing all commodities, rendering services, and investing in properties.
- (e) During May 2016 the directors applied on behalf of first respondent to open a CFC account at Bank Windhoek, at its branch at Walvis Bay.
- (f) On 19 August 2016 the Bank of Namibia granted approval for the opening of the CFC account in the name of first respondent through Bank Windhoek.

- (g) Sadino then entered into an agreement with three of its Angolan clients, in terms whereof it was agreed that the clients would pay the purchase price for Sadino's fish in Namibia instead of paying same into Angolan banks; and that the money would be paid to the representatives of the Spanish companies being Mr Martinez and Mr Maqueira. The directors would in turn deposit the money into the CFC account, from which it would be transferred to Fish Spain.
  
- (h) Pursuant to the agreement, a client of Sadino, one Raimando Domingos, paid the sum of USD59 400 to Mr Martinez, which amount he in turn deposited into the CFC account on 16 November 2016. This money was transferred by Bank Windhoek to Spain without any problem.
  
- (i) Thereafter, on 17 November 2016, Mr Martinez deposited the total sum of USD905 780 into the CFC account. The amount was made up of two payments received from Sadino's clients. A sum of USD499 512 received from one Mrs Rosa Tangui Tandi and another sum of USD500 014 received from one Mr Candido. Of that amount, Bank Windhoek charged one percent commission equal to USD9 057 80. Mr Martinez then decided to retain USD10 000 in the account for incidentals and instructed Bank Windhoek to transfer USD886 722,20 to Fish Spain's bank account in Spain.



- (j) Thereafter, on 19 November 2016 Bank Windhoek informed Mr Martinez that the transfer of USD886 722,20 had been blocked by the compliance department of Bank Windhoek.

POCA 1/2017 application

- (k) On 4 January 2017, appellant filled an urgent *ex parte* application which was set down for hearing on 5 January 2017 in which she sought a preservation of property order the property being the positive balance of USD886 722,20 in the CFC account of first respondent held at Bank Windhoek. The application served before Angula DJP. Having considered the papers filed of record and having heard counsel's submissions, the DJP issued the preservation of property order on 5 January 2017.
- (l) The facts relied upon by the appellant in that application the DJP briefly summarised as follows: The positive balance in the CFC account held at Bank Windhoek in the name of first respondent are the proceeds of unlawful activities, namely contravention of s 36(1) of the Financial Intelligence Act, 13 of 2012 (the FIA), in that the Financial Intelligence Centre (FIC) had made a Determination No 3 of 2016 (the Determination) which stipulated that any money in excess of the sum of N\$100 000 must be declared to an officer of Customs and Excise at the port of entry into or at the port of

departure from Namibia. In that connection, the appellant contended that first respondent had contravened the provisions of s 36 when it received the cash amounts of USD59 400 and USD9 057,80. The appellant further pointed out that the Director of Customs and Excise had no record of any declaration made either in the name of first respondent or the directors; and that the money was acquired from Angolan nationals. Accordingly, the appellant alleged that first respondent had committed an act of money laundering in contravention of s 4 of the Prevention of Organised Crime Act, 29 of 2004, (the POCA) (the Act) by depositing the money in the CFC account. Further, it was alleged, that Mr Martinez, who deposited the money in the CFC account, knew, or ought to have known, that the money was the proceeds of a contravention of s 36 of the FIA and finally, that the CFC account and the money in that account were instrumentality of the contravention of s 36 of the FIA.

- (m) On 10 February 2017, the respondents filed a notice to oppose the preservation order in terms of s 51 of the Act. Mr Maqueira deposed to the main opposing affidavit.
- (n) On 28 April 2017, the appellant through the Government Attorneys, sent a letter to respondents' legal practitioners in which she conceded that she would not be able to obtain a forfeiture order in respect of the money in the CFC account. According to the appellant, it had 'emerged' and become common cause that the determination,

purportedly issued in terms of s 36 of the FIA, had in fact not been issued or published in the Government Gazette.

- (o) Thereafter, the appellant decided to allow the preservation order to lapse by effluxion of time. On 20 May 2017, the preservation order lapsed after 120 days from the date it was published in the Government Gazette.
- (p) On 22 May 2017, the respondents' legal practitioners sent a formal letter of demand to Bank Windhoek demanding that Bank Windhoek should release its funds, in the light of the fact that the preservation order which preserved the funds had lapsed.

#### POCA 8/2017 application

- (q) On 24 May 2017, the appellant caused a fresh POCA application, POCA 8/2017, for a preservation of property order to be issued and set it down for hearing on 26 May 2017. That application sought a second preservation of property order in respect of the same positive balance in first respondent's CFC account. The application was again brought *ex parte*, notwithstanding the fact that the respondents had given notice of their intention to oppose the first lapsed preservation of property order. It needs mentioning that, according to the papers that application was also brought in camera. Whether the application was indeed moved in camera is not possible to establish.

- (r) New grounds were advanced for the contention that the monies in the CFC account were, on reasonable grounds, proceeds of unlawful activities and that the CFC account constitutes an instrumentality of an offence.
- (s) The application served before Usiku AJ (as he then was), who granted the order on 26 May 2017 ('the second preservation order'). It is this order that the respondents had anticipated and sought to have rescinded or set aside in their application.

#### Application by the respondents for an order to release the money

- (t) On 2 June 2017, the respondents launched an urgent application against the appellant, Bank Windhoek and the Bank of Namibia, in which they sought an order against Bank Windhoek to immediately release the money to second respondent in accordance with first respondent's original instructions. The application was set down for hearing on 9 June 2019.

#### The respondents' notice of intention to oppose

- (u) On 7 June 2017, the respondents filed a notice to oppose the POCA 8/2017 application. Essentially, the notice was of their intention to oppose the making of a forfeiture of property order in respect of the money in the CFC account and in addition an application for the

exclusion of their property from the preservation order in terms of s 52(4)<sup>2</sup> read with Regulation 4(6)<sup>3</sup> of the Act.

Application to anticipate and to rescind the second preservation of property order in POCA 8/2017

- (v) Simultaneously with the application for an order to release the money the respondents launched an urgent application in which they sought to anticipate the second preservation order and also sought an order to rescind the said preservation order. Both applications were set down for hearing on the same day, namely 9 June 2017. In response, the appellant filed notices to oppose both applications for the release of the money and the application to anticipate the preservation order. It should be mentioned that it would appear that at the time when the respondents launched the application for an order to release the money, they were not aware that the appellant had already applied and obtained the second preservation of property order by means of POCA 8/2017.
- (w) On 9 June 2017, when both applications to anticipate and to rescind the preservation order were called, the appellant sought a

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<sup>2</sup> Section 52(4) provides that a person who has been served with a preservation order is required to serve the appellant with notice to oppose within 21 days from date of service of the preservation of property order. The notice must *inter alia* contain a chosen address for delivery of further documents concerning further proceedings; the person must in addition indicate whether he/she intends to oppose the making of the order or varying the operation of the order in respect of the property.

<sup>3</sup> Regulation 4(6) provides that: 'Any person claiming to have an interest in property the subject of a preservation of property order made pursuant to section 51 of the Act and who wishes-

- (a) to oppose the making of a forfeiture order over the property in which they claim an interest; or
- (b) to apply for an order to exclude that property from the operation of the preservation order, must serve a notice that substantially corresponds to Form 6 of the Annexure upon the Prosecutor-General in accordance with section 52(4) and (5) of the Act.'

postponement. The respondents vehemently opposed the appellant's application for a postponement. They did not, however, file opposing papers but argued the matter on the appellant's papers.

- (x) After hearing counsel's arguments, the DJP granted a postponement and gave the appellant one day to file her answering affidavit and one day to the respondents to file their replying affidavits and postponed the application to 15 June 2017 for hearing. The application for the release of the money was, also postponed, for practical reasons, to the same day, ie 15 June 2017. Argument was heard on that day and judgment was delivered on 6 September 2017.

[4] On 6 September 2017, the DJP delivered judgment and summed up the judgment as follows:

'[105] To sum up, I have found firstly that there were no compelling reasons for the PG to have brought this application on an *ex parte* basis and without notice to the applicants and accordingly the PG inappropriately and incorrectly exercised her statutory discretion which negatively affected the applicants' right to a fair trial. Secondly, that the PG committed material non-disclosure both in POCA 1/2017 application when she failed to inform the court after she had discovered that the Determination upon which she had obtained the first preservation order was not in force, as well in POCA 8/2017 application when the second preservation order was applied for and granted, by not disclosing to the court the circumstances under which the first order was erroneously obtained. Thirdly and lastly, that it was not permissible for the PG to have applied for and be granted a second preservation order after she had deliberately allowed the first preservation order to lapse. For those reasons the second preservation order stands to be set aside and it is so ordered.'

[5] As a consequence the DJP made the following order:

- '1. The preservation of property order granted on 26 May 2017 is hereby set aside.
  
2. The PG is to pay the applicants' costs of this application to anticipate and to rescind the preservation order under POCA 8/2017, such costs to include the costs of one instructed counsel and one instructing counsel.
  
3. The application is regarded as finalised and is removed from the roll.'

[6] It is this order appellant appeals against.

[7] The issues which arose for determination in the court a quo and were persisted with in this court as grounds of appeal are:

- (a) whether the respondents had a right to anticipate the preservation of property order in POCA 8/2017;
  
- (b) whether it was appropriate for the appellant to bring a second application for the preservation of the same property and/or;
  
- (c) whether the appellant was entitled to apply for and obtain the second preservation order; and

- (d) whether there were material non-disclosures of facts and/or misrepresentation of facts by the appellant in obtaining the second preservation of property order.

The respondents' right to anticipate the preservation of property order in POCA 8/2017

[8] The issue was raised as a point *in limine* in the court a quo, by the appellant, contending that the respondents had no right to anticipate the preservation of property order in terms of rule 72 of the High Court; that the POCA s 51(2) application for the preservation of property order is not an application in terms of rule 72 in that there is no rule *nisi* and there is no return date and therefore rule 72 was not applicable. Counsel for the appellant in the court a quo further contended that the preservation of property order is interim, but is not in any sense provisional, that it is an order made to preserve the property and remains in force until the forfeiture application is decided. As a result, counsel submitted that a preservation order is final. Counsel relied for this submission on the decision of this court in the *Prosecutor-General v Uuyuni*,<sup>4</sup> where this court in the course of its judgment *obiter* stated that the POCA s 51 application, is *ex parte* and does not make provision for a *rule nisi*. It was therefore, submitted that the respondents had adopted an irregular procedure and their application should have been dismissed.

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<sup>4</sup> 2015 (3) NR 886 (SC).



[9] The High Court rejected that argument on the authority of the *Prosecutor-General v Lameck*<sup>5</sup>, *Shalli v Attorney General & another*<sup>6</sup> and *National Director of Public Prosecutions v Braun & another*<sup>7</sup> and held that the applicants were entitled to have anticipated the preservation order granted by the court a quo on 26 May 2017 under case number POCA 8/2017.

[10] In this court, counsel for the appellant sought to draw a distinction between rule 6(12)(c)<sup>8</sup> of the Uniform Rules of South Africa, which rule the court in the *Braun* matter held to be a procedural remedy which gives recognition to the importance of the *audi* principle and rule 72(7)<sup>9</sup> of the High Court and argued that the *Braun* matter is not authority for the anticipation of an order granted *ex parte* without a *rule nisi* and that the judgment had nothing to do with anticipation. Counsel further contended that the court a quo appeared to have merged a notice to anticipate in terms of rule 72(7) of the rules of the High Court with the notice for reconsideration in terms of rule 6(12)(c) of the Uniform Rules of South Africa. He further argued that for rule 72(7) to exist there must be an *ex parte* order granted against a person and

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<sup>5</sup> 2010 (1) NR 156 (HC) at 159I-160A, para 4, the High Court, per Damaseb JP referred with approval to the South African Supreme Court of Appeal in the matter of *Pretoria Portland Cement Co Ltd and another v Competition Commission & others* 2003 (2) SA 385 (SCA) at 404B where it was stated: ‘. . . an order granted *ex parte* is by its nature provisional, irrespective of the form it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought.’ See also *Ghomeshi-Bozorg v Yousefi*: 1998 (1) SA 692 (W) at 696D-E.

<sup>6</sup> 2013 (3) NR 613 HC, at 626 D, para 36, where it was said, ‘But even in the absence of a *rule nisi*, . . . an order granted *ex parte* is in, any event provisional and subject to being set aside on application by a party affected by it.’

<sup>7</sup> 2007 (1) SA 189 (CPD) at 195I where an argument was made in *limine* that rule 6(12)(c) cannot apply in an application made in terms of s 38(2) of POCA was rejected the court holding that ‘I do not believe that the powers granted in the Act in any way limit a courts’ jurisdiction to invoke the provisions of Rule 6(12)(c). To do so would open the door to abuse of the right to approach the court *ex parte* and would undermine the *uberrima fides rule*’.

<sup>8</sup> Rule 6(12)(c) of the Uniform Rules of South Africa provides that ‘a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order’.

<sup>9</sup> Rule 72(7) of the High Court provides that ‘any person against whom an order is granted *ex parte* may anticipate the return day on delivery of not less than 24 hours’ notice’.

a return day fixed and that the corresponding provision in the Uniform Rules of South Africa is rule 6(8) and not rule 6(12)(c). Rule 72(7) comes to the aid of a person who has been taken by surprise by an order granted *ex parte* while sub rule 12(c) deals with a somewhat different situation and allows a person against whom an order was granted in his absence in an urgent application to set the matter down on notice for reconsideration,<sup>10</sup> so the argument ran. It was further contended that Namibia does not have a corresponding rule that governs the reconsideration of an order already granted as is provided by rule 6(12)(c) and that the closest in Namibia to rule 6(12)(c) is rule 103,<sup>11</sup> which may be invoked to reconsider an order granted *ex parte* and that s 58<sup>12</sup> of the Act provides for its own procedure to reconsider an

<sup>10</sup> Erasmus HJ *et al: Superior Court Practice Juta & Co Ltd Service 5*, (1996) at B1-52 – B1-53.

<sup>11</sup> **Variation and rescission of order or judgment generally**

103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

- (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) in respect of interest or costs granted without being argued;
- (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) an order granted as a result of a mistake common to the parties.

(2) A party who intends to apply for relief under this rule may make application therefor on notice to all parties whose interests may be affected by the rescission or variation sought and rule 65 does, with necessary modifications required by the context, apply to an application brought under this rule.’

(3) The court may not make an order rescinding or varying an order of judgment unless it is satisfied that all parties whose interests may be affected have notice of the proposed order.’

<sup>12</sup> Section 58 provides for variation and rescission of orders. The relevant provision provides:

‘(1) When the High Court has made a preservation of property order it may vary or rescind the order if it is satisfied that –

- (a) the order concerned –
  - (i) will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
  - (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or
- (b) there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission.

order granted in terms of s 51(2)<sup>13</sup>. It was further contended that in this particular case there was no *rule nisi* or a return date fixed. Counsel further proceeded to make a distinction between rule 72 *ex parte* application and s 51 POCA application in that the applicant in a rule 72 *ex parte* application has no right to have the application heard and decided on a *ex parte* basis, but has to convince the court

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- (2) When a court orders the variation or rescission of an order authorising the seizure of property under ss (1)(a) the court must make such other order as it considers appropriate for the proper, fair and affective execution of the preservation of property order concerned.
  - (3) When the court has made a preservation of property order it may rescind that order if it was –
    - (a) erroneously sought or erroneously made in the absence of the person applying for its rescission; or
    - (b) made as a result of a common mistake of both the Prosecutor-General and the person affected by that order.
  - (4) Only the –
    - (a) Prosecutor-General; or
    - (b) person affected by a property preservation order who has given notice in terms of s 52(3) accompanied by an affidavit in terms of s 52(5), may apply for an order under ss (1) or ss (3).’

<sup>13</sup> (1) The Prosecutor-General may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court must make an order referred to in ss (1) without requiring that notice of the application be given to any other person or the abduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is –

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

and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.

(3) When the High Court makes preservation of property order it must at the same time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under ss (3) must be dealt with in accordance with directions of the High Court.’

that the application is a justified *ex parte* application whereas the applicant in a POCA s 51 application, on the other hand, has the statutory right to proceed on an *ex parte* basis and the court is required by the Act to hear and decide the matter on that basis and that rule 72(4) and (5) provide for a person who may be affected by the decision in the rule 72 *ex parte* application to apply for leave to oppose, whereas in POCA s 51 application the court is obliged to make the order without adducing evidence other than that of applicant. The further distinctions drawn are that the rule 72 *ex parte* application, the order is provisional in the form of a *rule nisi*, which would be revisited on the return date and the matter is considered afresh, whereas the s 51 application is an order preserving the property and remains in force until the forfeiture stage (short of saying final), where a different question arises, ie whether the property should be forfeited as opposed to the initial stage where the test is whether there are reasonable grounds for believing that the property is an instrumentality of an offence or the proceeds of unlawful activities. Counsel submitted for all these reasons that rule 72 is not applicable to applications in terms of s 51 of the Act, the latter being a special provision created by statute, with its own procedures and that rule 72 is subordinate to the statute and the court a quo should have found that respondents could not have anticipated a 'final preservation of property order' and the point *in limine* should have been upheld.

[11] The respondents did not fully or did not address us at all on the issue above. But I understand the court a quo mixed, perhaps in the phraseology to say, because of the provisional nature of an *ex parte* order irrespective of the form it takes, any person against whom it is granted may anticipate the return day upon

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delivery of not less than 24 hours' notice. In *Lourenco & others v Ferela (Pty) Ltd and another (No 1)* Southwood J said:<sup>14</sup>

'Nowhere in the notice of motion or the supporting affidavit is there a reference to a Rule of Court, section in a statute or rule of common law which would entitle the respondents to approach the court for the relief sought. Mr Bowman on behalf of the respondents argued that the respondents were entitled to approach the court in terms of rule 6(8) or rule 6(12)(c) of the Uniform Rules of Court or under the common law.

Under the common law it was argued with reference to *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, & others* 1995 (4) SA 1 (A) at 19D-H, 21H-J and 23D-E; *Univeral City Studios Inc & others v Network Video (Pty)Ltd* 1986 (2) SA 734 (A) at 755F-G; and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549F-551A that the court has an inherent power to set aside or alter the order granted on 31 October 1997.

In the present case the order does not contain a provision that the respondents are entitled to apply on notice to vary or discharge the order: it is simply in the form of a rule *nisi*. This indicates clearly that the respondents are entitled to show cause on the return day why the rule should not be made final. That would obviously include showing that the order should not have been granted at the outset because there was no proper case made out for that order on the papers. The fact that the order does not expressly provide for the respondents to anticipate the return date or provide that they are entitled to apply on notice to discharge the order cannot be an obstacle to the court entertaining an application on either basis. *Anton Piller* relief is of such a drastic nature that the court should not adopt an unduly strict or technical approach when a respondent seeks to be heard.

In any event both rule 6(8) and rule 6(12)(c) cover the case.

In terms of rule 6(8) any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice. The respondents advised the applicants before 13:00 on 6 November 1997 that they wished to set aside the order and they indicated this clearly to the applicants' legal representatives when they met at court. Sufficient notice was given and, if this is not so, if this is not strictly in terms of the rule, it can and must be condoned.

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<sup>14</sup> 1998 (3) SA 281 (TPD) at 289F-290A-D.

Insofar as this may be relevant I grant condonation for any failure to comply with the provisions of rule 6(8).

In terms of rule 6(12)(c) a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. This rule is very widely framed and I have no doubt that the word 'reconsideration' must bear its widest meaning.'

[12] When one compares the above with what Traverso DJP said about rule 6(12)(c) in the *Braun* matter, the equation made between rule 6(8) (which is Rule 72(7) of the High Court Rules) and 6(12)(c) in the *Lourenco* matter, there is very little criticism to be levelled at the conclusion arrived at by the court a quo on this point. The authors Erasmus *et al* state that 'the rules do not provide substantively for the granting of a *rule nisi* by the court' but that 'the practice of doing so is, nevertheless, firmly embedded in our procedural law.'<sup>15</sup> The learned authors refer to the *Lourenco* matter above and state that, 'a return day may be anticipated under sub rule (8) even if the order granted *ex parte* does not explicitly provide for the anticipation of the return day.'<sup>16</sup>

[13] But in my opinion, the answer to the attack on the conclusion arrived at on the point under consideration lies in the respondents' notice to anticipate and their application in terms of s 58(4) of the Act where the following was stated:

**'1. TAKE NOTICE that:**

- 1.1 the respondents hereby anticipate the interim preservation order granted in favour of the applicant in case number POCA 8/2017 on

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<sup>15</sup> Erasmus HJ *et al*: *Superior Court Practice, Juta and Co Ltd, Service 5*, 1996 at B1-52 – B1-53.

<sup>16</sup> *Ibid.*

26 May 2017, on an urgent and *ex parte* basis, to **FRIDAY 9 JUNE 2017** at 09h00, or as soon thereafter as counsel for the respondent can be heard;

1.2 the respondents hereby set this matter down for hearing simultaneously and/or separately (and even if the urgent application in case number HC-MD-CIV-MOT-GEN-2017/00172 is not heard), for the hearing of the relief sought herein;

1.3 the respondents also set the matter down in terms of s 58(4)(a) of the Prevention of Organised Crime Act 29 of 2004 ("POCA");

2. **TAKE NOTICE FURTHER that:**

2.1 section 58(5) of POCA provides that notice must be given in the prescribed manner. However, the regulations made in terms of POCA, particularly regulation 4(7) is only applicable in circumstances where the registrar of the High Court has given a return date to the Prosecutor-General when she obtained a preservation order as envisaged in s 52 of POCA. In this case, no rule *nisi* with a return date was issued by the court when it granted the *ex parte* order in POCA 8/2017, neither did the registrar ever issue a return date to the Prosecutor-General. In such circumstances,

2.1.1 where no procedure is prescribed, in addition the regulations must be strictly interpreted, as apparently, in terms of regulation 9, any person who contravenes such a regulation, may be imprisoned for a period not exceeding 3 years or a fine not exceeding N\$60 000 or both.

2.1.2 respondents apply the rules of the High Court regulating proceedings concerning POCA applications, in circumstances where the regulations, do not specifically deal with a particular matter (such as this rescission application of the respondents). Therefore respondents rely on rule 2 of the POCA rules, and apply

High Court rule 72(7) to set this matter down, by giving not less than 24 hours' notice.

2.2 Moreover, and even in circumstances where no rule *nisi* has been issued, but the order has been couched in final form (albeit that in law it remains an interim order), the respondents anticipate the matter or set the matter down for purposes of reconsideration, or for the purposes as set out above, in the manner as approved by the Supreme Court of Namibia, ***Government of the Republic of Namibia v Sikunda 2002 NR 203 (SC)***.

3. **TAKE NOTICE FURTHER** that at the hearing, the following relief will be sought:

3.1 That the preservation of property order made by His Lordship, the Honourable Mr Justice Usiku J, on Friday 26 May 2017, and on an urgent and *ex parte* basis, be rescinded.'

[14] POCA Regulations, reg 4(7) provides:

'(7) Notice of application by a person referred to in s 58(4)(b) of the Act for an order to be made under s 58(1) or (3) of the Act must be given by serving a copy of the application together with any affidavit material filed in support of the application upon the Prosecutor-General at least 14 days prior to any return date given to the application by the Registrar of the High Court.' (The underlining is mine.)

[15] One cannot fault the respondents to have proceeded the way they did. The drafters of the regulations, it would appear were with respect carefree in that they did not make a distinction in the applicability of the regulations between applications in terms of s 51(2) and s 91(2). It was for this reason that this court in the *Prosecutor-General v Taapopi*<sup>17</sup> held amongst other things that reg 7(b)<sup>18</sup> was

<sup>17</sup> 2017 (3) NR 627 (SC) at 639A-641A.

<sup>18</sup> 'Procedure for certain applications



not applicable in an application in terms of s 51(2). Even if I was wrong on the appellant's argument on the respondents' application to anticipate POCA 8/2017, the respondents did apply for rescission of the preservation of property order in terms of s 58(4) and whatever shortcomings that might have bedeviled the application, should have been condoned and the appellant's argument on that point takes their case no further, the point *in limine* was correctly refused and it should fail.

The appropriateness for the appellant to have brought a second application for the preservation of property order in respect of the same property on an *ex parte* basis, given the fact there had been a first application for the preservation of the same property which was opposed by the respondents

[16] Counsel for the appellant in the court a quo relied on the provisions of s 51(1)<sup>19</sup> of the Act and *Uuyuni*<sup>20</sup> and contended that the section vests the appellant with a discretion to proceed *ex parte*, without notice of the application to any other person and that the court hearing the application has no discretion but to grant the order, subject only to being satisfied that there are reasonable grounds for the belief that the property is the proceeds of unlawful activities or is an instrumentality of an offence. In the *Uuyuni* matter reliance is placed on the statement where this court

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7. Subject to s 91(2), (3) or (4) of the Act, every application made pursuant to ss 25, 43, 51, 59 or 64 of the Act, is made as follows –

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

<sup>19</sup> Footnote 13 above.

<sup>20</sup> Footnote 4 above.

had said: 's 51(2) makes it plain that such applications must be granted without notice to any person or adduction of any further evidence from other person,'<sup>21</sup> to argue that all applications in terms of s 51(1) must always be brought on an *ex parte* basis. The court a quo rejected this argument holding that the *Uuyuni* judgment is not authority for the proposition that all POCA applications for the preservation of property order are to be brought on an *ex parte* basis and that the Full Bench in *Shalli* above expressed a view that the legislature instead of vesting the court with the discretion to determine in which matters notice to the affected party may be dispensed with, vested the discretion in the appellant to decide if and when to bring the application for a preservation of property on an *ex parte* basis. The court a quo further reasoned that in each application the appellant must demonstrate to the court on the papers that there is a legitimate reason to bring the application *ex parte* and she is obliged to justify why notice should not be given to the other party and that if the *Uuyuni* judgment were to be interpreted as the appellant contended, such interpretation would defeat the clear provision of s 51(1), which gives the appellant a discretion to decide whether or not to bring the application *ex parte*.

[17] In this court counsel for the appellant repeated the same argument contending that the *Uuyuni* judgment did hold that all preservation applications must always be brought on an *ex parte* basis. Counsel disputed the holding or view attributed to the *Shalli* judgment and stated that the Full Bench in *Shalli* stated that the legislature . . . made it peremptory for a court to grant such applications without notice and without the need for the prosecuting authorities to raise exceptional or compelling circumstances why notice should not be given. He further contended

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<sup>21</sup> Ibid at 901B-C para 31.

that the appellant is of right entitled to launch a preservation of property order *ex parte* and that the appellant does not have to convince a court of some special circumstances to justify an *ex parte* application. Counsel further contended that this contention was recently reiterated by the South African Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions (ex parte application)*,<sup>22</sup> but disagreed with that court's reasoning in para 22<sup>23</sup> of its judgment. Counsel supported the holding in *National Director of Public Prosecutions v Alexander & others*<sup>24</sup> where the court stated: 'the Act clearly and expressly allows an applicant to apply *ex parte* . . . [b]ut to require an applicant to convince a court of some special circumstance to justify an *ex parte* application, would be to ignore the wording of s 26(1) or to render it meaningless. . . [b]ut the clear intention of the legislature that applications of this kind may be brought *ex parte* is unavoidable'. Counsel submitted that the court a quo erred when it found that there were no compelling reasons for the appellant to have brought the second application for the second preservation of property order on an *ex parte* basis and that the appellant inappropriately and incorrectly exercised her statutory discretion, which negatively affected the respondents rights guaranteed in Art 12 of the Constitution and that the order stood to be set aside.

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<sup>22</sup> 2018 (2) SACR 176 (SCA).

<sup>23</sup> '[22] The court *a quo* said further, "[s]ection 38(1) gives the NDPP discretionary power to approach the court on *ex parte* and *in camera* for preservation of property order. Such discretionary power must be exercised properly based on the facts of each case. Abuse of the section ought to be discouraged. In others words, utilization of an *ex parte* application as a matter of must and right may not get the pleasure of the court unless there are facts justifying the bringing of any application on *ex parte* and or *in camera*." Furthermore, the court *a quo* went on to say "[a]s I said, bringing the present application in terms of s 38 for possible forfeiture under s 48 read with section 50 of the POCA without giving notice, amounts to an abuse".'

<sup>24</sup> 2001 (2) SACR 1 (T).

[18] The reasoning on this point appears to be that because the appellant inappropriately and incorrectly exercised her statutory discretion thereby depriving the respondents their right to a fair hearing, the order stood to be set aside. In other words, the appellant brought the second application *ex parte* when she should not have done so. In my opinion that would mean to have dismissed the preservation order for the reason that it was brought *ex parte*, which with respect is wrong. Any application under s 51 can never be dismissed solely on the ground that it has been brought *ex parte*.<sup>25</sup> An *ex parte* application in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence.<sup>26</sup> In the *National Director of Public Prosecution & another v Yasien Mac Mohamed NO* (Mohamed 2 in the CC) Akermann J stated: 'The phrase in sec 38 (our s 51) '[t]he National Director may by way of an *ex parte* application apply' means no more than that, if the National Director is desirous of obtaining an order under section 38, she or he may use an *ex parte* application, in the sense defined in para 27 above'.<sup>27</sup> (Paragraph 27 in the above case contains the definition of *ex parte*). 'It sanctions a particular initiating procedure to be employed when relief of a particular nature is being sought. An important consequence of this is that an application by the National Director under s 38 can never be dismissed solely on the ground that it has been brought *ex parte*.'<sup>28</sup> In as much as the appellant has a discretion to proceed one way or another in terms of s 51(1) in my opinion, it is the court hearing the application in terms of s 51 which is obliged to ensure that the proceedings before it are always fair. In this case it was the judge hearing the second application on the same

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<sup>25</sup> *National Director of Public Prosecutions v Mohamed NO & others* 2003 (4) SA 1 (CC).

<sup>26</sup> *Ibid*, para 27, see also *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783B.

<sup>27</sup> *Ibid*, para 33.

<sup>28</sup> *Ibid*.

property who should have queried the procedure preferred by the appellant or declined to grant the same without notice to the respondents. The importance of the *audi alteram partem* rule, as one of the main pillars of Art 12 of our Constitution needs no repetition, it is sacred.<sup>29</sup> The underlining is mine.

[19] Against what I said above, I proceed to deal with the reliance by the appellant on *Uuyuni*. The statement in para 31 appellant relies on is read out of context. It must be understood in the context of the High Court judgment which dismissed the preservation of property order for the reason that it was heard in camera.<sup>30</sup> In fact, the High Court muddled substance with procedural issues. The statements relied on, is an emphasis on the provisions of s 51 and the procedures leading to the forfeiture stage. Therefore *Uuyuni* does not say all preservation property order applications should be made *ex parte*. This court could not have said what the appellant relies on in *Uuyuni* given the use of the word 'may' in s 51(1). It is very clear that the use of that word bestows a discretion on the appellant to proceed on an *ex parte* basis or by way of notice, where the court issues a *rule nisi* calling on the interested parties to appear on a certain fixed date to provide reasons why the *rule nisi* should not be made final and at the same time order that the *rule nisi* should act immediately as a temporary order, pending the return day. Section 51(1) provides '. . . subject to such conditions and exceptions as may be specified in the order . . . .'

[20] Counsel for the appellant concedes in as many words to the interpretation above when in para 75 of his heads states that, 'it is correct that the court a quo

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<sup>29</sup> *R v Ngwevela* 1954 (1) SA 123 (A) at 131B-C.

<sup>30</sup> See para 25 of *Uuyuni* above and the extracts from the High Court *Uuyuni* reported as *Prosecutor-General v Uuyuni* 2014 (1) NR 105 (HC) paras 45-93.

can issue a rule *nisi* especially as the legislature provided for same as per the circumstance provided for in s 91(4) POCA. The issuing of a rule *nisi* is a discretion of the court hearing the *ex parte*' sic. In para 27 of the appellant's affidavit she submits that only 'in unusual circumstances that an *ex parte* application for a preservation order will be inappropriate'. As the court a quo correctly observed, that submission flies in the face of the contention that all cases of preservation of property orders must be brought *ex parte*. The concession by counsel demonstrates that the legislature had intended that the appellant could proceed in applications under s 51 one way or another and the reliance on statements from *Uuyuni* is without merit. In the *Braun* matter above, it was stated:

'[21] It is clear from the wording of s 38 that it is merely an empowering provision which empowers the applicant to apply *ex parte* if circumstances so dictate. The *ex parte* procedure is not one that will, in all cases, or invariably, be invoked. It should only be invoked where there is some good cause or reason for the procedure, such as genuine urgency or when the giving of notice would defeat the very object for which the order is sought.'<sup>31</sup>

[21] Having clarified the misunderstandings that might have been caused by *Uuyuni* I reiterate the following:

- (i) It is now settled law that the High Court is authorised to grant preservation orders under s 51 without requiring that notice of the application be given to any person and if satisfied that the requisites set out in s 51(2)(a) and (b) have been met must grant a preservation order.

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<sup>31</sup> Footnote 7 above at 196G.

- (ii) This does not preclude the appellant from giving notice of such an application in appropriate instances to another party. The appellant is not obliged to bring an application under s 51 on an *ex parte* basis.
- (iii) The High Court is not precluded from granting a rule *nisi* in preservation of property orders under s 51 or there is in principle no procedural bar to a High Court hearing an application *ex parte* and in camera under s 51 of the Act and granting a *rule nisi*, together with an interim preservation and seizure order, pending the return day of the rule.<sup>32</sup> In fact it is preferable for the High Court to grant a rule *nisi* when an application is brought *ex parte* so as to comply with the sacred *audi alteram partem* rule, one of the main pillars of Art 12: 'The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order . . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.'<sup>33</sup>

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<sup>32</sup> Footnote 25 para 32.

<sup>33</sup> *De Beer NO v North-Central Local Council and South-Central Council & others (Umhlatuzana Civic Association Intervening)* 2001 (11) BCLR 1109 (CC) 2002 (1) SA 429 (CC) para 11.

- (iv) Even if the High Court does not frame its order in the form of a *rule nisi*, an order granted *ex parte* is in any event provisional and subject to being set aside by a party on application against whom it was granted. A party is furthermore not confined to the narrow basis to rescind an order set out in s 58(6) when challenging an order granted *ex parte* against him or her and it may entail a reconsideration of the order given.

[22] I agree with the court a quo that the appellant must in applications in terms of s 51 of the Act justify or demonstrate to the court a legitimate reason to bring the application *ex parte*. The appellant in my view, is not relieved by the provisions of s 51 (1) from the normal burden imposed on every applicant who approaches a court for an *ex parte* order.<sup>34</sup>

[23] In South Africa twice the High Court declared s 38 of POCA, (our s 51) constitutional invalid, but twice the Constitutional Court refused to confirm the declaration or the invalidity. In *Mohamed 2* of the CC, Ackermann J went into the historical development of *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of a rule *nisi* and the great importance of the *audi* rule and rejected the High Court's main ground that because that country's POCA s 26(3)(a) in Chapter 5 makes express provision for a provisional restraint order and a *rule nisi*, but such provisions were absent in s 38 in Chapter 6, it meant that the *audi* principle had been excluded from the provisions of s

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<sup>34</sup> Footnote 7 at 196F, para 20.



38 and that the power of the High Court to grant a *rule nisi* together with a temporary restraining order pending the return day had been excluded. Among other things, the court found that, 'it is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it'<sup>35</sup> and that there are circumstances when the inclusion of a particular provision occurs because of excessive caution or where the legislature is 'either ignorant or unmindful of the real state of the law.'<sup>36</sup>

[24] It may well be that with the enactment of s 51, the legislature was either ignorant or unmindful of the real state of the history of the *ex parte* applications and the great importance of the *audi* rule. However laudable the purpose of POCA might be, its implementation particularly s 51, should not plunge us back in the yesteryear where the *audi* rule was trampled on or placed in abeyance whenever it suited the then government. The purposes of POCA should be honoured but the implementation of provisions like s 51 should be aligned to our long established principles of law. In my opinion the use of the word 'may' in s 51 and provisions of s 91 and the regulations, the legislature must somehow have had the *audi* principle in mind and the courts should ensure that s 51 is implemented fairly.

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<sup>35</sup> Footnote 25, para 37 and the authorities cited in note 34.

<sup>36</sup> *Ibid* para 41 and the reference to Maxwell on the Interpretation of Statutes 2 ed (Sweet & Maxwell 1962) by Roy Wilson and Brian Calpin in footnote 41.

Whether the appellant was entitled to apply for and obtain the second preservation order.

[25] In my opinion this question would depend on the circumstances of each case. The appellant has no entitlement to bring a second, third, fourth and more applications on the preservation of the same property as counsel for the appellant argued before us. It is startling if not absurd to think that the appellant can approach court six times on application for the preservation of the same property. That would be a serious violation of rights of the person whose property has been ordered for preservation. In the wisdom of the legislature, 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*.<sup>37</sup> The 120 days is just not a number, the legislature intended for the parties involved, to attend to all that is necessary within those 120 days before the forfeiture application. Preservation of someone's property for more than 120 days *ex parte* is a very drastic step, and the appellant should always be conscious of that and so is the fact that not all property subject to a preservation of property order, would be forfeited on application; some applications would fail.

[26] In this court, counsel for the appellant in his heads of argument, argued that the first preservation of property order lapsed *ex lege*, and relied on para 28 in the matter of *Swakopmund Airfield CC v Council of Municipality of Swakopmund*<sup>38</sup>

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<sup>37</sup> Section 53(1).

<sup>38</sup> 2013 (1) NR 205 (SC), para 28, Strydom AJA said:-

'[28] In Namibia, as in other divisions in South Africa (see *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd & another* 1981 (4) SA 108 (C) at 110G), and as was also submitted by Ms Schneider, an urgent application generally starts with a prayer for condonation with the non-compliance with the rules of the court, particularly in regard to the form in which the application is brought and the limited time or service whereby notice of the application is given to the other party.

to argue that once the first preservation of property order lapsed *ex lege*, there was no *lis* between the parties, and as the merits were not decided, the appellant was entitled to bring the second application. In my opinion the principle in para 28 of the *Municipality of Swakopmund* is distinguishable from the facts of this case. In that case it was a failure to comply with the rules, while in this case it was a deliberate act (as the court *a quo* had put it) by the appellant calculated to give her office a tactical advantage when she let the first preservation of property order lapse. The question is, at what point did the appellant discover that the determination issued by the FIC was not published in the *Government Gazette*? Publication of the determination in the *Gazette* is very crucial in setting the application for preservation of property order in motion. At the time she discovered the non-publication why did she not approach the court to cancel the order? Why would she sit back after the discovery and let the order lapse. The respondents through legal channels approached the banks in Namibia to open an account with the purpose of paying the Spanish companies. In this court we were not informed why after the discovery of the non-publication the appellant did not seek to cancel

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Where a court refuses to condone non-compliance with the rules that is, generally speaking, the end of that particular process unless the court gives other directions regarding its prosecution or unless the parties otherwise agree. Because there was no adjudication on the merits of the disputes between the parties, a litigant may, now in the ordinary course and using the prescribed form, bring such dispute before the court. However, once the matter is struck from the roll for lack of urgency, it is no longer part of the litigious process and an application is left with various options which he can choose from. He can again use the affidavit evidence which supported the urgent application but he will have to adapt his notice of motion to now comply with the rules in regard to forms and times prescribed for delivery of a notice to oppose, delivery of answering affidavits etc. He could bring a totally new application or he may choose to take no further steps. In this particular instance the applicant chose to bring a new application based on fresh affidavits and, in my opinion, it could do so without risking a plea of *lis alibi pendens* because the urgent application was struck from the roll and was no longer a pending *lis*. (See in this regard *Mahlangu & another v Van Eeden and Another* [2000] 3 All SA 321 (LCC) at 335 para 25 and *Commissioner, South African Revenue Services v Howker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership & other* 2006 (4) SA 292 (SCA) ([2006] 2 All SA 565) at para 9.) Another indication that the matter, once struck from the roll, was not alive, is that whatever choice an applicant should make, it would again have to serve that process on the other party.'

the order immediately. There must be a very good reason why a second preservation of property order should be sought, unfounded reasons or what amounts to an abuse of s 51 would not be tolerated. For the reason that she deliberately let the order lapse and failed to set out good reasons justifying a second preservation order, I hold that she was not entitled to a second preservation of property order as she abused the provisions of s 51.

#### The material non-disclosures

[27] The respondents in their application to anticipate the interim preservation order granted in favour of the appellant in case number POCA 8/2017 on 26 May 2017, on an urgent and *ex parte* basis allege that as was the case with POCA 1/2017, the second preservation of property order application under POCA 8/2017 was littered with numerous material non-disclosures and even contains deliberate misleading statements. Martinez, on behalf of the respondents, states that on 18 November 2016, he instructed Bank Windhoek to transfer funds to Fish Spain, which Bank Windhoek did not do, due to a regulatory intervention made on 19 November 2016. The unidentified regulatory intervention refers to s 42 of FIA.<sup>39</sup> The s 42 among other things provides that the (FIC) may place a block on funds or

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<sup>39</sup> 'Intervention by Centre

42. (1) If the Centre, after consulting an accountable or reporting institution, has reasonable grounds to suspect that a transaction or a proposed transaction may involve the proceeds of unlawful activities or may constitute money laundering or the financing of terrorism; it may direct the accountable or reporting institution in writing not to proceed with the carrying out of that transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period determined by the Centre, which may not be more than 12 working days, in order to allow the Centre-

(a) to make the necessary inquiries concerning the transaction; and

(b) if the Centre thinks it appropriate, to inform and advise an investigating authority or the Prosecutor-General.'

transaction suspected to involve the proceeds of unlawful activities or may constitute money laundering or the financing of terrorism, which block may not be more than 12 working days. In this case the block was placed on the respondents' CFC account or respondents' account at Bank Windhoek on 18 November 2016 and expired on 6 December 2016. On 5 January 2017 when the appellant applied for the first preservation order of the amount in the CFC account, there was no lawful basis to retain the money. The respondents contended that the money was unlawfully retained between the periods 18 November 2016 to 4 January 2017. When applying for the preservation order on 5 January 2017 the appellant failed to disclose the fact that the respondents' money was unlawfully retained, which the respondents contend was crucial for disclosure to the court at the time.

[28] The appellant in response states that the block on the funds or the 'statutory intervention' was issued by the Director of the FIC and therefore had nothing to do with the appellant's action to apply for the preservation order of the money and that the allegation that the money was unlawfully retained was without any basis. The appellant went on to state that the intervention related to POCA 1/2017 and that the intervention was properly disclosed in both the first and second applications and that appellant understood that the statutory interventions were issued by the Director of the FIC and were an administrative function. The appellant went on to say that if the respondents were dissatisfied with the decision of the Director of the FIC to file a further intervention order over the account, then the respondents were at liberty to approach the correct forum to challenge the actions of the FIC. Notwithstanding this response, in the second application under POCA 8/2017, the appellant in moving the application stated that:

- (9) I respectfully submit that this application is urgent and request the Honourable Court to condone any non-compliance with the time periods prescribed by the rules of the above Honourable Court. It is respectfully submitted that the matter cannot be redressed at a hearing in due course.
- (10) During January 2017 I applied for a preservation of property order in respect of the same property under POCA 1/2017.
- (11) The basis for obtaining this order was on the premises that the determination issued by the Financial Intelligence Centre (FIC) was properly published in the Government Gazette as required in terms of the Financial Intelligence Act (FIA) and money laundering offences on the receipt of the proceeds of the contravention of the determination. It, however, later emerged that the determination was not gazetted in the Government Gazette. I noticed that the determination was later published with the effective date still indicated as 16 October 2016.
- (12) As the forfeiture proceedings set out in Chapter 6 of POCA provides for a 2 stage proceedings I was under the impression that the error in the preservation application can be amplified by setting out additional evidence in relation to the grounds advanced in the preservation application in the subsequent second stage of the proceedings, namely the forfeiture application. I was, however, advised that the preservation order can still be set aside whilst there is an application for forfeiture pending which in effect will nullify the subsequent forfeiture application even if there are grounds in the forfeiture application justifying the granting of a forfeiture order.
- (13) As a preservation order only has a limited validity period of 120 days and due to the fact that I cannot proceed with the forfeiture application on the erroneously sought preservation of property order, I elected to apply for a new preservation order in this application on the grounds as set out below, as there are reasonable grounds to believe that the property constitutes the proceeds of unlawful activities.

- (14) The 120 day period for the preservation order under POCA 1/2017 lapsed on 20 May 2017. As indicated I cannot apply for a forfeiture application under POCA 1/2017's preservation order. Once the order lapsed the property is available to the owners of the property to be dissipated.
- (15) On 28 April 2017 the Government Attorney wrote a letter to Shelfco Investments' legal practitioners indicating that I will not apply for a forfeiture application in respect of the erroneously sought preservation order under POCA 1/2017 but that I will apply for a new preservation application unless they can provide me with the necessary proof that the money deposited into the account was legally brought into Namibia.
- (16) This application was prepared to be applied for when the preservation order under POCA 1/2017 expired on Monday 22 May 2017 but the affidavit from the Ministry of Finance and Bryan Eiseb from the Bank of Namibia in support of this application were only received on Tuesday 23 May 2017.
- (17) On 22 May 2017 a request was sent to the FIC by my office to indicate that I intend to apply for a new preservation application on new grounds that the money on reasonable grounds were illegally imported into Namibia but that certain affidavits were still outstanding and that there might be a risk of dissipation of the money prior to the institution of this preservation of property application.
- (18) I understand that the FIC filed an intervention order which will expire on 6 June 2017. (Underlining for emphasis)
- (19) However, also on 22 May 2017 Shelfco Investments wrote a letter to Government Attorney demanding that I release the money and that they will proceed to file an urgent application for the release of the money. They also claim in the letter that a new preservation application would be vexatious and would amount to a second bite of the cherry. I attach the letter from ESI hereto as annexure **OMI4**.

- (20) I further respectfully submit that this application is one of urgency as envisaged by section 91(2) of POCA and the Rules of the High Court and request the Honourable Court to dispense with the requirements under Regulation 7 of the regulations under POCA and any other requirements as prescribed in POCA or the Rules of the Honourable Court. I am advised that the next first motion court dates is only on 09 June 2017.

***EX PARTE AND IN CAMERA***

- (21) I respectfully submit that section 51(2) of POCA, read with section 98 thereof entitle me to approach this Honourable Court on an *ex parte* basis and *in camera*.
- (22) Furthermore, I submit that the expressed provision made for *ex parte* proceedings under section 51(2) of POCA is based on the recognition by the Legislature that there is an inherent need to proceed without notice in applications for preservation orders. Further, that the structure of Chapter 6 of POCA as a whole is geared towards allowing in general for an initial *ex parte* order to secure assets that may be disposed of, with any opposition thereto being dealt with after this initial objective has been met.
- (23) Proceedings on notice to anyone with an interest in the property will lead to a delay of various months. During that time the State's interest in the property will be under someone else's control, and unprotected.
- (24) The parties interested in property of this nature inevitably have a powerful incentive to dissipate their property if they get notice of a pending application for its preservation.
- (25) In this specific case, the risk of dissipation is eminent as the parties with interest have already demanded for the release of the money.
- (26) The risk exists whether the property is movable or immovable as there would be no prohibition on the owner of the property to dispose of the property pending the hearing of the application. In matters of this nature there is accordingly an inherent need to proceed on the basis of an initial *ex parte* application.



(27) I submit that it will only be in unusual circumstances that an *ex parte* application for a preservation order will be inappropriate. My submission is that no such circumstances exist in this case and the preservation order serves only as an interim order. Shelfco Investment already requested the release of the funds despite being informed that there are reasonable grounds to believe that the money was imported illegally into Namibia.'

[29] While the appellant conceded that the first preservation order was sought erroneously, she denied that she sought that order on erroneous facts. She further stated that 'I had no choice than not to proceed with a forfeiture of property application once I was advised that the preservation order sought could not be remedied by a subsequent forfeiture application'. What immediately springs to mind is, how could the preservation order be remedied in the forfeiture application which is premised on a different enquiry. There is no indication how she had hoped to remedy the preservation order in the forfeiture application, particularly if the failure to seek forfeiture was premised on the failure to publish. The appellant further states that, 'I cannot find any compelling reason why I must apply for a forfeiture application whilst I am aware that there was an error in law when I applied for a preservation order.' What was the error in law when she applied for the first preservation order when she states that the statutory interventions issued by the FIC are an administrative function divorced from her office? In fact the appellant distances herself/office from the activities of the Centre, when s 42 states the contrary. One would have thought commercial banks have an obligation to report illegal activities on 'individuals' accounts to the Bank of Namibia (BoN) where the FIC is supposed to be housed and in terms of s 42 that institution would put a block on the particular account and advise or report the same to the police who would

launch an investigation and/or the appellant who would cause an investigation and on the result of the investigation elect to seek a preservation order. In fact in para 29, case number POCA 1/2017, the appellant states that 'Nampol received a suspicious transaction report from FIC on 01 December 2016 and on 6 December 2016, the matter was assigned to Sgt Shaakumeni'. In para 17 of her founding affidavit, POCA 8/2017 the appellant states that, 'on 22 May 2017 a request was sent to the FIC by my office to indicate that I intend to apply for a new preservation application on new grounds that the money on reasonable grounds were illegally imported into Namibia.' This means the extended statutory intervention expiring on 6 June 2017 was issued at the appellant's request, contrary, as the respondents contended, to s 42 of the FIA.

[30] What is undoubtedly clear though as the court a quo found, is that the appellant works in tandem with the FIC and her failure to have informed the court when she applied for the first preservation order on 5 January 2017 that the respondents' money in the CFC account of Bank Windhoek was unlawfully retained from November 2016 to 4 January 2017 was a material non-disclosure which could have influenced the court and her evidence on the 'statutory intervention' issue, particularly given that how the interventions are issued and executed is shrouded in secrecy and its omission amounts to misleading the court. On the one hand appellant says the interventions are an administrative function of the Director of the FIC, and had nothing to do with her application for a preservation order, and while on the other, it appears that appellant made a request, contrary to s 42, to the FIC to extend the intervention, so she could bring

the second application. In the application in case number: POCA 1/2017 under the heading urgency she states:

- '8. A statutory intervention in terms of section 42 of the Financial Intelligence Act 13 of 2012 ("FIA") was issued by the Financial Intelligence Centre ("FIC") in respect of the Bank Windhoek account on 1 December 2016 on the suspicion that the money in the account is the proceeds of unlawful activities and/or instrumentality of an offence. On 16 December 2016, the intervention was extended for another 12 days and will lapse on 5 January 2017.'

[31] Appellant states that she was under the impression that the erroneous preservation order or the error in law in the first application could be amplified by setting out additional evidence in relation to the grounds advanced in the preservation application in the subsequent second stage of the proceedings, namely, the forfeiture application. Without elaborating how she would have amplified additional evidence at the forfeiture stage, on for example, the failure to publish the determination issued by the FIC in the Government Gazette (GG), her assertions on the point amount to misleading the court. It is a false attempt to justify why the erroneous order, notwithstanding its discovery before the expiry of the 120 days, was deliberately, to use the words of the respondents and the court a quo, left to run a full course.

[32] It was contended in this court that the facts clearly supported the inference that when the appellant applied for the first preservation order she believed that the determination was in full force and effect and that a wrongful belief cannot be a fact that should have been disclosed at the time when one is not

aware of the existence of one's mistake and that the appellant's wrong reliance on the determination in the first preservation application does not constitute a material non-disclosure but an error.

[33] It is incomprehensible how the appellant could approach court, seek a preservation order without verifying that the 'intervention' was alive, published and that appellant was within the 12 days provided for in the Determination. The appellant relied on that Determination for the application and could not assume that it was in full force and effect. The court believed that the CFC account was blocked (in terms of s 42 of the FIA) when it was not the case. The argument lacks merit. The fact that the appellant conceded the error in the second application does not alter the circumstances under which the appellant obtained the first preservation order. Appellant had approached the court on the Determination which did not exist, for it not having been published as required by law. The disclosure of the fact that the property suspected to be proceeds of unlawful activities or instrumentality of an offence is under a block in terms of s 42 is very crucial in the application under s 51 of the Act.

[34] It is now settled law that in *ex parte* applications, the deponent should adhere to the requirements of *uberrima fides*. These requirements have been stated and restated.<sup>40</sup> By the very nature of *ex parte* applications, having to be

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<sup>40</sup> See footnote 1 at 953H-954A-E; *Prosecutor General v Lameck & others* 2010 (1) NR 156 (HC) at 167J-168A-F. In *Schlessinger v Schlessinger* 1979 (4) SA 342 (W) at 349A-B the *uberrima fides* rule principles are formulated as follows:

- (1) (I)n *ex parte* applications all material facts must be disclosed which might influence a court in coming to a decision;
- (2) the non-disclosure or suppression of facts need not be willful or *mala fide* to incur the penalty of rescission [ie order obtained *ex parte*]; and

decided on the one sided version of the applicant, an applicant who approaches a court for an application of this nature has a duty to disclose each and every fact and circumstance which might influence the court in deciding to grant or withhold the relief.<sup>41</sup>

[35] The appellant, approaching the court in terms of s 51 or on any provision under POCA is no exception to these requirements. Where an applicant withholds material facts which might influence the court in coming to a decision, a court will be entitled to reconsider and rescind an order made irrespective of whether the non-disclosure was wilful or *mala fide*.<sup>42</sup>

[36] In the *Schlessinger* matter at 350B-C, Le Roux J puts it this way:

‘It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.’

[37] It was argued before us that the court a quo erred in its findings that POCA 1/2017 did not serve before the court for reconsideration as the order lapsed *ex lege* on 20 May 2017 and that POCA 1/2017 was placed before the court a quo by the respondents as an annexure to the respondents’ founding affidavit and that the respondents did not seek to rescind the order of POCA 1/2017 in the notice of application to anticipate, nor raise the material non-

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(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.’

<sup>41</sup> Footnote 7 above at 196J.

<sup>42</sup> *Ibid* at 197E.

disclosure. Further, that the appellant denied the allegation that the funds were retained without any lawful basis; that there were no facts upon which the court a quo could have made a finding that the appellant, when she applied for the first preservation order, considered the action of the FIC lawful as it is a well-known principle of our law that an administrative decision stays valid until set aside by a court of law. It was further contended that the appellant had no authority to review administrative decisions of the Director of the FIC; that she could not have alleged at court that the FIC acted unlawfully. It was also argued that in the absence of a decision by a court to review the administrative conduct of the FIC, the appellant could not have made a material non-disclosure. It was further argued that there was no factual basis for the court a quo to conclude that the reason why the appellant did not disclose something (she had no reason to believe was unlawful) was to avoid alerting the applicant that the money was free to be released. Counsel submits that the fact that the appellant disclosed the existence of the intervention of the FIC was a full disclosure and had no bearing on the second preservation of property application nor could it have been the cause of the rescission of the second preservation of property order.

[38] These contentions have no merit. Whether the first preservation order had lapsed *ex lege* and was not available for reconsideration, the fact is that it was brought forth by the respondents in their application and the appellant in her second application and even attached that order to her affidavit and the court a quo had to pronounce itself on that order. What is clear though is that it should not have been given. That much is conceded by the appellant. In her own words, it was erroneously sought. Whether the respondents did not raise non-disclosure or

did not apply for rescission of the first preservation order is immaterial as s 58(3) (a) of the Act provides that when the court had made a preservation of property order it may rescind that order if it was '(a) erroneously sought or erroneously made in the absence of the person applying for its rescission; or (b) made as a result of a common mistake of both the Prosecutor-General and the person affected by that order'.

[39] Nothing could stop the court a quo from rebuking the appellant or holding it against her for the reckless conduct of relying on the determination to secure a preservation order which she would not otherwise have obtained. It is not clear from the appellant's evidence as to why the FIC extended the determination from 16 December 2016 to 5 January 2017. Sergeant Shaakumeni who supported the application for the first preservation of property order also only stated that the intervention was extended for another 12 days to 5 January 2017, from 16 December 2016. The Prosecutor-General who approaches courts to seek preservation of properties has an obligation to reveal this information to court, failing which, it is a material non-disclosure.

[40] I do not see any purpose why the respondents would have sought a review of the decision of the Director of the FIC on issuing or extending the intervention when he/she did not approach the court to seek the preservation of the respondent's property. In my opinion, the serious condemnation of the appellant was her reliance on an invalid Determination to obtain a preservation of property order. She could not guess or assume that the determination was in force. In my opinion, that document is a must attachment to the appellant's

founding affidavit. To argue that what she did was an error and not a non-disclosure with greatest respect is absurd. The first application for the preservation of property order has a bearing on the second application that is why it was the starting point of the appellant's affidavit.

[41] From 16 December 2016 to 20 May 2017, a period of little over 6 months the property of the respondents was retained without any basis, to which the appellant casts a bare denial. Even when she had discovered that the Determination on which she relied to obtain the first order of 5 January 2017 was not published she chose to let the erroneous order run the full 120 days and provides an unsubstantiated reason why she thought the non-publication could be remedied at the forfeiture stage. That is not expected from the office of the Prosecutor-General. As the court a quo correctly articulated, the appellant's office is constitutionally obliged to place the truth, correct information before court, for it to arrive at correct decisions. It is not in the mandate of the appellant to twist words or provide misstatements to win cases. Take for example, in the second application, paras 17 and 18, where she says: 'On 22 May 2017 a request was sent to the FIC by my office to indicate that I intend to apply for a new preservation application on new grounds that the money on reasonable grounds were illegally imported into Namibia . . .'. '(18) I understand that the FIC filed an intervention order which will expire on 6 June 2017'.

[42] The statements sound so divorced from the FIC and as the court a quo found, yet it is clear as daylight that the Office of the Prosecutor-General works hand in hand with the FIC when it comes to POCA matters. The appellant's request to FIC for an extension of the intervention states that she intended to



apply for a fresh preservation order on new grounds that the money was illegally imported into Namibia. In para 6 of her affidavit that allegation is omitted in the possible statutory contraventions and not in the supporting affidavit of W/O Green, notwithstanding that the authorisation letter in terms of s 83 of the Act from the Inspector-General to W/O Green, W/O Nambadi and Sgt Shaakumeni of 7 December 2016 authorised them to exercise any power under any law relating to the investigation of the crime (money laundering) and the obtaining of information in the course of an investigation, for the purposes of enabling the Prosecutor-General to institute and conduct proceedings in terms of Chapters 5 and 6 of the Act.

[43] As the respondents contended, there is no new evidence, the second application is a repetition of the information in the first application, except that W/O Green supported the second application and Sgt Shaakumeni supported the first. Therefore, the appellant's argument on this point should also fail.

[44] The second application for the preservation of property order of 26 May 2017 was correctly set aside and I find no reason to consider the merits of the case.

[45] In the result I make the following order.

The appeal is dismissed with costs, which include the costs of one instructing and two instructed counsel, where engaged.

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**MAINGA JA**

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**SHIVUTE CJ**

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**SMUTS JA**

**APPEARANCES:**

Appellant:

M G Boonzaier

Of the Government Attorney, Windhoek

Respondents:

R Heathcote (with S J Jacobs)

Instructed by Van der Merwe-Greeff

Andima Inc., Windhoek