



REPORTABLE

CASE NO: SA 73/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL

Appellant

and

ALEXES PAULO

First Respondent

RHAPSODY CLOSE CORPORATION

Second Respondent

Coram: HOFF JA, MOKGORO AJA and NKABINDE AJA

Heard: 15 March 2019

Delivered: 24 June 2020

Summary: The Prosecutor-General of Namibia (the appellant) filed an appeal in this court against the decision of the High Court declaring her application for a forfeiture order in respect of certain properties of the respondents in terms of section 51 of the Prevention of Organised Crime Act 29 of 2004 (POCA) a nullity and struck it from the roll with costs.

In the High Court, the appellant launched an urgent *ex parte* application for a preservation of property order in terms of s 51 of POCA, which was granted by the

court on 24 December 2015. Having duly served the respondents with the preservation order, the respondents delivered to the appellant a written notice of their intention to oppose the granting of a property forfeiture order on 4 February 2016. In their notice to oppose, the respondents elected to have 13 Pasteur Street, Windhoek West as their chosen address at which they would receive further notices relating to any further proceedings affecting the properties as required under s 52(5) of POCA.

On 29 April 2016, the appellant launched her application for the forfeiture of the respondents' properties in terms of s 59(2) read with s 61 of POCA. The respondents raised several points in *limine*. Firstly, the respondents submitted that the appellant failed to comply with s 65(1) of POCA in that when she launched the property forfeiture application, the respondents were not issued with the notice of her intention to do so by the Deputy-Sheriff or the Police. Secondly, the respondents submitted that the notice of the appellant's intention to proceed with the application for the property forfeiture was not delivered to the address of the respondents' legal representative, which was their chosen address in terms of regulation 4(8) of the POCA regulations. Ultimately, the question before the court revolved around the issue of whether the application for the preservation of the properties and the application for their subsequent forfeiture are two separate, distinct procedures, each with its own case identity, thus raising the question whether the forfeiture application was a new application, separate from that of the property preservation application and whether the appellant had to invoke rule 65(1) of the High Court Rules.

Before determining the appeal against the decision of the High Court, this court was ceased to deal with the preliminary issues raised by the appellant's application for condonation for the non-compliance with rules 5 and 21(1) of the Rules of the Supreme Court. Those rules concern the late submission of the appellant's bundle of authorities and her failure to lodge the bundle of authorities simultaneously with the heads of argument in the main matter respectively.

Ad the condonation application

Held that an application for condonation is not there for the asking merely on the basis that a respondent is not opposed to it being granted. Courts will condone non-compliance with their rules, exercising their discretion based on a number of judicially established factors in the context of the surrounding circumstances of a case.

Held that an application for condonation must be submitted as soon as the delay has come to notice. If not, a reasonable, accurate and acceptable explanation for the delay must be provided.

Held that the prospects of success is an additional consideration in determining whether condonation will be granted.

Held that the appellant's legal representative and the explanation for their non-compliance with the rules was not reasonable, however as soon as the legal representative realized her error she treated the matter with utmost urgency thereby mitigating the negative impact of the lateness of the bundle of authorities.

Held that although the High Court did not address the merits of the main matter, the prospects of whether this court is likely to overturn the decision of the High Court in relation to the interlocutory question of the applicability of rule 65(1) in the property forfeiture application must be considered in the determination of the application for condonation in this matter.

Ad the points in limine

Held that the property forfeiture proceedings in the context of the application of rule 65 of the High Court rules manifest in a single, but two-stage procedure constituted first by the process that preserves the property, followed by the process forfeiting it to the State.

Held that the High Court was therefore wrong in considering the forfeiture application as a distinct, separate procedure from that of the preservation application.

Held that the High Court was therefore wrong in striking the forfeiture application from the roll.

Held further that this court refrains from considering the application for the forfeiture of the properties, remitting that matter back to the High Court for a decision.

The appeal is upheld.

APPEAL JUDGMENT

MOKGORO AJA (HOFF JA and NKABINDE AJA concurring):

Introduction

[1] This is an appeal by the Prosecutor-General of Namibia (appellant) against the decision of the High Court, striking from the court roll with costs, her application for a forfeiture order in respect of the properties of the respondents in terms of section 59 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The first respondent is Alexes Paulo, a businessman of Angolan origin and the only member of the Rhapsody Close Corporation (CC) and the latter is the second respondent. It is necessary to give a brief background of this appeal.

Background

[2] Before the High Court, the appellant had launched an urgent *ex parte* application for a preservation of property order in respect of the positive balances

held in the Standard Bank Namibia business banking account number 60001553274 held in the name of the second respondent; the Standard Bank Namibia Premium call account number 60001400222 also held in the name of the second respondent; the Bank Windhoek Namibia cheque account number 8003095691 held in the name of the first respondent; and the Bank Windhoek Namibia account number 8004741004 also held in the name of the first respondent. Together these positive balances are called 'the properties'.

[3] The High Court granted the preservation order on 24 December 2015. The appellant proceeded to launch an application for the forfeiture of the properties in terms of s 59(1) read with s 61 of POCA. The appellant had taken the position that the application for a forfeiture order is not a new proceeding under rule 65(1)¹ of the High Court Rules, but merely the second stage of the POCA property forfeiture process. Without issuing a rule 65(1) notice, the appellant launched the application for a forfeiture order in respect of the properties.

[4] Having been duly served with the preservation order, the respondents on 4 February 2016 in terms of s 52(3), (4), and (5) of POCA gave due notice of their intention to oppose the granting of the forfeiture order. In their notice, the respondents elected to have 13 Pasteur Street, Windhoek-West (which is the address of their legal representative) as their chosen address at which they would receive further notices relating to any further proceedings affecting the properties as required under s 52(5) of POCA.

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

[5] In their opposing papers, the respondents raised several points in *limine*. They contended that when the appellant launched her application for a forfeiture order without filing the rule 65(1) notice, she was non-compliant with the mandatory requirements of the rule. The respondents also contended that they were not issued with the notice by the Deputy-Sheriff or the Police as the rule required. Instead, the notice was delivered by the Registrar.

[6] That raised before the High Court, the question whether the property forfeiture proceedings under s 59 read with s 61 of POCA constituted one single process manifested in two intertwined stages, namely the stage of the application for a preservation order on the one hand and that of the forfeiture of the preserved property on the other; or whether the property forfeiture proceedings manifested in two self-contained, separate and distinct processes. The question gave rise to a further issue, in other words, whether each of the two purported stages of the forfeiture proceedings required compliance with rule 65(1) or whether it suffices that the requirements be met only at the property preservation stage, which initiates the property forfeiture proceedings and not at the stage of the forfeiture order.

[7] In addition, the respondents contended that the appellant failed to comply with the requirements of regulation 4(8) of the POCA regulations² in that the appellant's notice was not delivered to the respondents' address of choice, but was instead delivered at the general office for service of process (GOSP), which is the address of exchange of legal process generally agreed to by legal practitioners

² Prevention of Organised Crime Regulations: Prevention of Organised Crime Act, 2004, GN 78, GG 4254, 5 May 2009.

in Windhoek among themselves. The contention was that there was as a result no service within the prescribed 120 days after the notice was published in the Government Gazette, that the argument went, caused the forfeiture application to expire. It was on that basis that the respondents contended that the forfeiture application was in fact and in law a nullity and should be removed from the court roll with costs.

[8] The High Court proceeded to hold that the application for a forfeiture order is separate and distinct from that of the preservation order. Thus, like the latter application, it also initiates new proceedings which, like the application for a preservation order, must comply with the peremptory terms of rule 65(1) of the High Court Rules. Further, the forfeiture application must also be issued and authorized by the Registrar prior to the application being served on the respondents by the Deputy-Sheriff or the Police. Being a separate, independent process on its own, held the court, the application for a forfeiture order also had to adhere to the notice requirements of rule 65(1). The appellant having failed to do so thus rendered the forfeiture application a nullity.

[9] The High Court further held that the notice defect in the forfeiture application was not cured by the respondents having filed their opposing papers in response, notwithstanding the appellant's non-compliance, as the latter had argued. The court found that the application nonetheless remained a nullity, relying on rules 79(1), (2) and 65(1) of the High Court Rules read with s 59 of POCA and its regulations. The application for a forfeiture order which was the

main matter in this case, was thus ordered to be struck from the court roll with costs. It is that decision which is the subject of this appeal.

[10] Before determining the appeal, it behoves this court to consider the appellant's application for condonation of her non-compliance with the rules of this court.

Application for condonation

[11] The application for condonation concerns the appellant's non-compliance with rules 5 and 21(1) of the Rules of the Supreme Court, in respect of the late submission of the appellant's bundle of authorities and her failure to lodge the bundle of authorities simultaneously with the heads of argument in the main matter respectively. In addition, the appellant applies for any further and/or alternative relief from this court.

[12] In this court, Ms Boonzaier from the Office of the appellant justifies their failure to comply with rule 21(1) of the Supreme Court Rules. She submitted that as early as 13 February 2019, the day they filed the application for leave to appeal as the instructed legal practitioners acting for the appellant, they proceeded to prepare the heads of argument as well as the bundle of authorities. During the process, a colleague inquired as to whether the bundle of authorities were to be filed simultaneously with the heads of argument. Her response was that it is practice that the bundle of authorities are to be handed up to the court on the day of the hearing.

[13] Almost a month later, on 11 March 2019, as copies of the bundle of authorities were being produced in preparation for the court hearing, Ms Boonzaier realized that the bundle of authorities should instead have been lodged simultaneously with their heads of argument. She had confused the Supreme Court's previous procedure with the new rule 21(1) procedure, which provides that the legal representative shall file the bundle of authorities at the same time as their heads of argument.

[14] Having realized her error and on that same day, she immediately prepared the condonation application for the late filing of the bundle of authorities. On 12 March 2019, only three days before the date of the appeal hearing in this court, the appellant filed her condonation application.

[15] Submitting that as soon as she realized her error, she took immediate steps to address it. The appellant contended that there was no intentional and/or flagrant disregard of the prescribed time periods or the rules of this court on her part, nor was there any intention to act to the detriment of the respondents. Her mistake, the appellant contended, was an honest one made in good faith.

[16] For that reason, went the contention, the application for condonation itself was *bona fides* as can be seen from her efforts, including in the bundle a variety of authorities that would inform the court's decision-making. Furthermore, as the issues regarding the rule 65(1) question on appeal before this court are a novelty, they would be precedent-setting, bringing about legal certainty in the field. The

appeal, submitted the appellant, should therefore be heard and resolved by this court as the apex court in the land.

[17] The respondents are not opposed to the condonation application. Even if they did, the argument goes, the non-compliance for which there is a reasonable explanation, can be cured by an appropriate cost order.

[18] Finally, before apologizing to this court for the inconvenience that might have resulted from non-compliance with rule 21(1), the appellant contended that there are good prospects that the appeal against the decision of the High Court, declaring the application for a forfeiture order a nullity, would succeed. That, it is submitted, is apparent from the case made out in the heads of argument.

[19] The respondents indeed do not oppose the application for condonation. The assumption is that they are not prejudiced by the appellant's non-compliance with the time periods and this court has no reason to doubt the submission. Nonetheless, it is important to emphasize here that a respondent's non-opposition to a condonation application is not the only and/or determining factor for a court condoning an applicant's non-compliance with its rules.³

[20] Courts have the authority to determine and regulate their own rules and procedures. That authority is integral to their independence. Court rules and procedures are adopted to create court operational systems that provide orderly access to justice and other court services. Thus, compliance with court rules and

³ *Mentoor v Usebiu* (SA 24/2015) [2017] NASC 12 (19 April 2017).

procedures is a rule of law requirement which enables courts to perform with utmost efficacy their important role and function of providing access to justice and focus on resolving the dispute at hand. Non-compliance with court rules thus poses not only an inconvenience to the court itself in performing its central role and function, it also inconveniences other litigants, whose cases may be delayed and/or not heard at all.⁴ Thus, non-compliance with court rules and processes, even where the respondent may not be opposed thereto, may still be inconvenient to the court and other litigants, impacting on whether or not a court will grant condonation for non-compliance.

[21] There are, however, a number of judicially established factors which courts will take into account when exercising their discretion, condoning non-compliance with their rules. The factors will be based on the surrounding circumstances of the case.⁵ The court in *Telecom Namibia Ltd v Michael Nangolo & others*, restated the settled legal principles and factors that a court will take into account when exercising its discretion notwithstanding that the respondents are not opposed to condonation. First, an application for condonation must be submitted as soon as the delay has come to notice. If not, a reasonable, accurate and acceptable explanation for the delay must be provided.⁶

[22] Further, the court in *Metropolitan Namibia v Amos Nangolo*⁷ held that not only shall an applicant provide a reasonable and acceptable explanation for their non-compliance, it must also be shown that the main matter has prospects of

⁴ *Felisberto v Meyer* (SA 33/2014) [2017] NASC 11 (12 April 2017).

⁵ See *Felisberto v Meyer*; *Nakale v S* (SA 04/2010) [2011] NASC 2 (20 April 2011); *Telecom v Nangolo & others* 2015 (2) NR 510 (SC); *Arubertus v S* (SA 15/2009) [2010] NASC 17 (1 December 2010).

⁶ See also *Felisberto v Meyer*; *Nakale v S*; *Arubertus v S*.

⁷ (CA 03/2015) [2017] NAHCNLD 2 (30 January 2017).

success in fact and in terms of the applicable law. A court may however decline to consider the prospects of success on the merits, if the non-compliance is found to be glaring, flagrant and there is no reasonable explanation for the non-compliance.⁸ It goes without saying that each case will be determined on its own merits.

[23] The above requirements were re-affirmed by the Supreme Court in *Minister of Health and Social Services v Amakali Matheus*,⁹ where the court in addition considered the *bona fides* of the application as a factor for condonation.

[24] The error of the appellant's legal representative and the explanation thereof was not acceptable.¹⁰ A legal representative acts on behalf of a client and is expected to do so with due diligence and be conversant and updated with the rules of the court before which they are imminently due to appear. Confusing the previous Supreme Court Rule with the new one points to the fact that the legal representative was aware of the existence of a new rule. At the time when the inquiry about the time periods of the submission of the bundle of authorities was to be filed was made, there was still sufficient time to confirm the particular time periods and avoid the error. The bundle of authorities were already in the process of being prepared and could easily have been submitted together with the heads of argument.

⁸ See *Felisberto v Meyer; Mthembu & others v Minister of Housing & another* (94/2017) [2018] SZSC 15 (30 May 2018); *Mavimbela & others v Mavimbela* (39/2018) [2019] SZSC 51 (26 November 2019).

⁹ (SA 4/2017) [2018] NASC 413 (6 December 2018).

¹⁰ See *Felisberto v Meyer*.

[25] Nevertheless, as soon as the legal representative realized her error on 11 March 2019, she treated the matter with utmost urgency. She immediately finalized the preparation of the bundle of authorities and on the same day submitted it together with an application for condonation for the late filing of the bundle of authorities and for failure to submit it together with the heads of argument. Although these were submitted only three days prior to the hearing of the appeal in this court instead of the prescribed 21 days,¹¹ much effort was however made, preparing the documents for immediate lodging, thus avoiding further delay¹² and further inconvenience to this court in preparing for the hearing by their failure to timeously lodge the bundle of authorities together with their heads of argument. The urgency with which the legal representative treated the condonation application in our view, mitigates the negligence of her error and the inconvenience to this court.

[26] The *bona fides* of the appellant's legal representative in bringing this appeal is not in doubt. The urgent efforts she made points to the seriousness of her purpose. The variety of authorities provided in the bundle indeed demonstrates the cogency of the arguments she was preparing herself to advance in the main case, showing the importance with which she regards the issues at stake.¹³ In the *Amakali Matheus* matter cited above, this court having restated the established factors a court would take into account when considering a condonation application for non-compliance with the rules of court, took into account the prospects of success as an added factor. It held that a determination

¹¹ Rule 17(1) of the Supreme Court Rules.

¹² Rule 17 of the Supreme Court Rules.

¹³ See *Foster v Stewart Scott Inc.* (1997) 18 ILJ 367 (LAC).

of the prospects of success in an application for condonation necessarily requires this court to revisit the circumstances that led to the High Court order. That simply points to the fact that should condonation be granted and the appeal in regard to the interlocutory rule 65(1) question is heard, there is a likelihood that this court will reverse the decision of the High Court.

[27] In this case, it is the respondents' submission as it was before the High Court, that the procedure provided for the forfeiture of property to the State in Chapter 6 of POCA is constituted by two separate and independent proceedings, each with its own cause or matter. For that reason, they contended, the rule 65(1) notice requirements must be fully complied with at the institution of each application proceedings.

[28] The appellant's position that the Chapter 6 forfeiture procedure is a single, intertwined two-stage process where the application for a property preservation order is the first of the two stages and the application for a forfeiture order of the preserved property is the second stage and the two procedures are not separate and independent of each other mirrors the interpretation adopted by this court in the POCA matters which have come before it.¹⁴ Thus, the appellant's interpretation that once a rule 65(1) notice had been duly served on the respondents in the first stage, makes it unnecessary to repeat that service in the second stage, makes it likely that that interpretation will find support in this court's interpretation of POCA and its developing jurisprudence. Therefore, there is in our view, reasonable prospects that this court will reverse the decision and order of

¹⁴ *Prosecutor-General v Kamunguma* (SA 62/2017) [2019] NASC (12 June 2019), *Prosecutor-General v Uuyoni* 2015 (3) NR 886 (SC).

the High Court, that the application for the forfeiture order of the properties before it was non-compliant with rule 65(1) and therefore a nullity. However, the prospects of success, like all the others, is but only one of the factors that may be taken into account in a condonation application.

[29] In *Felisberto*, the court found that for a condonation application to be granted,

'These factors [relevant in determining a condonation application] are not individually determinative, but must be weighed, one against the other, nor will all the factors necessarily be considered in one case.

A court may decline to consider prospects of success on the merits of the appeal where non-compliance with the rules have been glaring, flagrant and inexplicable.'

[30] In our view and for the above reasons, the appellant's non-compliance with the rules has not been found to be glaring and flagrant. Nor has it been found to be inexplicable, making the prospects of success a factor to be taken into account in determining whether condonation may be granted in this case. In our view, as shown above, the appellant has met all the necessary requirements of an application for condonation. In the result, that application is granted.

The appeal

[31] The High Court did not consider, decide or make an order on the merits of this case. In other words, there is no decision and no order on the merits, making the case not ready to be heard in terms of s 18(3) of the High Court Act. Further,

no exceptional circumstances are present nor have any been presented, contending otherwise.¹⁵ In this matter however, the novelty of the issues to be decided regarding POCA is not sufficient to make an exception to the s 18(3) requirements as contended by the appellant. Rather, because of the novelty of the issues, it is important for questions of access to justice as it affects the parties and for the development of the POCA jurisprudence of this court that the High Court is first granted the opportunity to determine the facts together with the law, playing its role and function as a court of first instance, giving this court the final say on the legal issues arising from the merits of the case on appeal, as a court of final instance. Thus, this court should be most reluctant to hear and decide the merits, the application for the forfeiture order, being the main matter without a High Court decision and order in that regard. Doing so would be usurping the role and function of the High Court as the court of first instance. The appellant has therefore failed to persuade this court to do so. The application for a forfeiture order is therefore remitted to the High Court for determination.

The rule 65(1) issue

[32] Here, the primary question raised by the decision of the High Court is whether, following the granting of an application for the preservation order, the subsequent application for a forfeiture order of the preserved property initiates new application proceedings which require it to be brought on notice of motion in terms of the mandatory requirements of rule 65(1). Alternatively, whether the subsequent application for a forfeiture order of the earlier preserved property is

¹⁵ See *Likanyi v S* 2017 (3) NR 771 (SC), where the court held that the case presented exceptional circumstances that required it to relax the *res judicata* rule to comply with the principle of legality where a manifest injustice would have resulted if the court did not grant a litigant leave to seek relief from the Supreme Court in terms of Article 81 of the Constitution.

part of a single two-stage intertwined process, freeing the application from the mandatory notice of motion requirements of rule 65(1).

[33] The further question relates to whether the notice in the property forfeiture application was defective because it was delivered at the GOSP instead of the chosen address.

[34] This court must first consider the interpretation of rule 65(1) prior to determining whether the High Court was correct in its conclusion that the appellant had to comply with the requirements of the rule in her notice regarding the application for the forfeiture order subsequent to having obtained the preservation order and having met the peremptory rule 65(1) notice requirements.

[35] Rule 65(1) provides:

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

From the plain reading of the rule, all applications must be on notice of motion. That is so whether or not the applications initiate new proceedings. However, when an application initiates new proceedings it must be supported by an affidavit reflecting the facts on which the application is based and on which the applicant

relies on for the relief sought. The rule further provides that an applicant who initiates new proceedings starts by issuing a notice of motion which has been signed by the Registrar. The new application must be given its own unique numbering, officially date-stamped by the Registrar. To be regarded as new, proceedings must not be part of already existing proceedings with an existing cause or matter. New proceedings must thus have their own separate *causa* or matter and be based on their own particular set of facts and circumstances on which they rely. New proceedings can therefore not be part of existing proceedings, with which it shares not only a cause or matter, but also the facts on which the relief is sought.

[36] Thus, while every application must be brought on notice of motion, an application which initiates new proceedings must meet the peremptory affidavit requirements of rule 65(1), other than the peremptory notice of motion requirements that must be met by every application. A new application must in addition be supported by an affidavit. The affidavit must contain the facts and/or the circumstances on which the applicant relies for the relief sought and the cause or matter of the application must not be part of any such existing cause or matter. Thus, if an application process shows the above traits, it initiates new proceedings, making it peremptory for the applicant to comply with the rule 65(1) affidavit requirements. It follows that, where an application does not demonstrate the above listed factors which signifies the newness of the application, it does not initiate new proceedings and is therefore not required to comply with the mandatory affidavit requirements of rule 65(1). The application will therefore not be a nullity.

[37] In *Kaune v Tjonzongoro*,¹⁶ the court was faced with a similar question but in the context of the meaning of 'an application' in rule 97(3) of the High Court Rules and with reference to the wording of rule 65(1), which defines the initiation of proceedings as that which must be based on a notice of motion (supported by the required affidavit). In terms of rule 65(1), the court there held that a rule 97(3) application for a costs order where there was no consent as to the payment of costs in a notice of withdrawal, is not a valid application if it does not comply with the notice of motion requirements of rule 65(1).

[38] Thus, where application proceedings are new and initiated without the mandatory rule 65(1) notice of motion, the application will lapse as the court in *Kaune v Tjonzongoro* quite correctly held. Thus, where the application does not commence new proceedings and might simply be a *continuum* of the initial application proceedings, the rule 65(1) notice of motion supported by the required affidavit in our view, is not required and non-compliance will therefore not be fatal to the application. In the context of the above exposition of the rule, the question whether or not the rule 65(1) notice of motion was required in the application forfeiture order has now to be determined.

The rule 65(1) notice and the application for the forfeiture order

[39] To determine whether the application for the preservation order and that of the forfeiture order constitute two separate, distinct proceedings independent of each other, where each must meet the peremptory requirements of rule 65(1) as the High Court held or whether the two proceedings constitute two stages of one

¹⁶ (HC-MD-CIV-ACT-CON-2018/01674) [2019] NAHCMD 257 (26 July 2019).

single and intertwined process aimed at the forfeiture of the properties to the State, we start by first showing the relationship between the two proceedings in the context of the operation and implementation of the relevant POCA provisions.

[40] It is well established that the Namibian POCA replicates its South African counterpart as this court noted in *Prosecutor-General v Uuyoni*.¹⁷ In that matter, this court placed reliance on the Constitutional Court of South Africa's explanation of the application of Chapters 5 and 6 of the South African POCA as articulated in *National Director of Public Prosecutions v Mohamed NO and Others*.¹⁸ In that case, the Constitutional Court defined the s 38 property forfeiture process in Chapter 6 as one complex two-stage process. The first stage is the *ex parte* application for an order which aims to preserve the property - proceedings which are most likely applied on an urgent basis - are non-conviction based and have their focus on the property and not on the owner or the possessor. At this first stage of the intertwined process, the applicant must show on the face of it that the particular property is the proceeds of crime or the instrumentality of crime, or of illegal activities and that reasonable grounds exist for that belief.¹⁹ The application for a preservation order may thus be invoked even where no prosecution has been instituted against the owner or possessor. The guilt of the owner or possessor is thus not an issue in the property preservation proceedings.

[41] The property forfeiture process in Chapter 6 is such that within 120 days of the grant of the preservation order, an application for a forfeiture order must be

¹⁷ 2015 (3) NR 886 (SC).

¹⁸ 2002 (4) SA 843 (CC).

¹⁹ Section 51 of POCA.

lodged, based on the operational preservation order whose existence has been published in the Government Gazette. Within 14 days of the publication, potential respondents identified by the applicant as having an interest in the forfeiture of the preserved property must give notice of their intention to oppose the forfeiture application. Having given their notice to oppose the application, they must show their interest by evidence, which must establish that the property which is the subject of the forfeiture order applied for is not derived from crime and has not been used as an instrument of crime or any other unlawful activities. Should the respondents succeed in showing that, the forfeiture order must not be granted.

[42] From the start of the proceedings in the application for a preservation order in terms of s 51 of POCA, leading up to the proceedings of the application for the forfeiture order under s 59, a series of interrelated legislative requirements link the two sets of proceedings.

[43] In *Uuyoni*, this court noted that Chapter 6 of the South African POCA,

“ . . . tightly intertwined, both as a matter of process and substance. At the initial stage of the proceedings, when the National Director launches an *ex parte* application for a preservation of property order, a Court must grant the order if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities or the instrumentality in a crime. Thereafter, the preservation order may be varied or rescinded in terms of ss 44 and 47. If the preservation of property order remains in force, then—within 90 days—the National Director must apply for an order of forfeiture. In the absence of such application the preservation of property order will lapse.”²⁰

²⁰ *Prosecutor-General v Uuyoni* 2015 (3) NR 886 (SC), para 280. The court quoted the Constitutional Court in the case of *National Director of Public Prosecutions v Mohamed NO & others* 2002 (4) SA 843 (CC).

Noting the replication of the South African POCA by the Namibian POCA and drawing parallels between some of the provisions of the two Acts, the court in *Uuyoni* held in respect of the latter POCA that the particular legislation utilizes the mechanisms of property preservation, provided for in Chapter 5 and that of its forfeiture permitted in terms of Chapter 6, to ensure that property derived from criminal activity and that used as instruments of illegal activity are forfeited to the State.

[44] Similar to its South African counterpart, the Namibian POCA also provides for a process aimed at the forfeiture of property, associated with organised criminal activity, to the State. In *Uuyoni*, the interrelation between the two application proceedings were also defined and held to be two stages of one single intertwined procedure. At the first stage, *Uuyoni* also found, the preservation order application proceedings in terms of s 51 of POCA, may be sought even where there is no criminal prosecution instituted in regard to the property to be preserved. The application on an urgent basis, is *ex parte*. Thus, the criminal activities and/or guilt of the owner or possessor have no relevance in the proceedings at this stage. The idea is indeed to preserve the property so as to avoid its dissipation while the application for a forfeiture order is put in place. At the second stage, the court found that when applying for a forfeiture order it must be shown that a crime or illegal activity had been committed in relation to the property subject to an operative preservation order and sought to be forfeited. Here, the link between the preservation application proceedings and those of the forfeiture order is clear.

[45] The application for a forfeiture order is not *ex parte*. It makes room for a respondent, who has a right to be heard, to oppose the application and must by evidence show that the preserved property which is the subject of the forfeiture application is not the proceeds of crime, nor the instrumentality of crime or unlawful activities. The respondents could be any of the parties known to the applicant to have an interest in the property,²¹ which is subject to an operative preservation order which must be in place when a forfeiture order is sought.²²

[46] The notice of the existence of the preservation order must be published in the Government Gazette²³ and served on all interested parties. Within 14 days of the publication of the existence of the preservation order, the interested parties have an opportunity to make known their interest in the preserved property so that they determine whether or not to exercise their right to be heard and participate in the forfeiture application proceedings as respondents. The opportunity to oppose the grant of a forfeiture order is in respect of the same property and therefore the same cause or matter which was the cause or matter in the application proceedings for the preservation order.

[47] The opportunity to be respondents and oppose the application for a forfeiture order is therefore given only to those who have an interest in the preserved property. Here too, it is clear that the application for a forfeiture order is a continuation of the proceedings initiated by the application for the preservation of the same property. The application proceedings for a forfeiture order does not

²¹ Section 52(1)(a) of POCA.

²² Section 59(2) read with s 53 and/or s 58.

²³ Section 52(1)(b).

initiate new proceedings as defined in rule 65(1) of the High Court Rules. Rather, those proceedings are a *continuum* of the proceedings initiated by the application for the order preserving the properties. And as decided in *Uuyoni*, we agree that it is but only the second stage of the single, intertwined property forfeiture process or mechanism provided for in Chapter 6 of POCA in the context of the very objective of POCA articulated in its preamble. The mandatory requirement that the notice of motion in terms of rule 65(1) be supported by affidavit in all new application proceedings is therefore not applicable in the application for a forfeiture order. Concerning the High Court decision that the application proceedings for the forfeiture order was separate and distinct from the initial application proceedings for the preservation order, we hold that for the reasons stated above and in the context of this court's decision in *Uuyoni*, was clearly incorrect. The application for the forfeiture of the properties was therefore properly filed.

[48] Section 91(1) of POCA, submits the appellant, requires that the property preservation application in s 51, the forfeiture application in s 59 and the application by the appellant for a default forfeiture order under s 64 must be in terms of the prescribed procedure determined by regulation 7 of the POCA regulations,²⁴ in relation to the rules of the court.

[49] In respect of the ground of appeal which pertains to the question whether the notice in the property forfeiture application was defective having been delivered at the GOSP, the appellant contended that when s 52(5) provides for the subsec (3) notice to be delivered at a chosen address, the focus of s 52(3) is not

²⁴ Issued in terms of s 103 of POCA.

so much on the address, but on the delivery and receipt of the documents to enable the participation of the respondents in the subsequent property forfeiture applications procedure.

[50] In this case, the respondents' chosen address had been that of his legal representative, but the address of the exchange of documents for the Chapter 6 proceedings had taken place at the GOSP. That, the court heard, is the address generally agreed upon among legal practitioners in Windhoek where, among themselves they exchange legal process. For convenience and ease of service, it seems, the respondents' legal practitioner is in agreement with other legal practitioners in Windhoek having chosen the GOSP as his address of service. The GOSP is therefore by convention, the address of the respondents' legal practitioner's address for legal service. To insist on regarding the office address of the legal practitioner as the address of legal service when he has chosen a change of address for those purposes is unreasonably placing form before substance. Legal service at the GOSP is therefore in our view, proper service.

[51] Finally, argues the appellant, it was peremptory for the High Court to grant the forfeiture order in terms of s 61 of POCA once it had found that on a balance of probabilities the said property was an instrumentality of an offence or was the proceeds of illegal activities and should not have struck the application from the court roll. This court has decided that the application for the forfeiture order was not a nullity before the High Court and for that reason should not have been struck from the roll of the High Court. Further, we have held that the forfeiture application shall not be decided by this court at the level of first instance and must revert to the High Court for determination there.

Conclusion

[52] For the above reasons, the appeal is upheld. We decline to hear and decide the application for a forfeiture of the properties without a High Court decision and order in that regard as the appellant strongly contended. As already decided above, that application is remitted to the High Court for determination.

Costs

[53] It is trite that costs follow the result. This rule, however, is not cast in stone.²⁵ A court may in certain circumstances, using its discretion, depart from the general rule when reasonably justified.²⁶ In this case, although the appeal is upheld, the appellant's prayer, strongly contended for in this court, that the application for a forfeiture of the properties be heard and decided here, despite the absence of a High Court decision and order in that regard, did not succeed.

[54] Further, as the appellant herself had submitted, her non-compliance with the rules of this court, for which she applied to be condoned, could be resolved with an appropriate cost order and this court is inclined to so hold. Furthermore, the respondents did not make claims of inconvenience suffered, arising from the appellant's non-compliance with the rules of this court. Specifically, the respondents did not oppose the appellant's condonation application. We therefore find that it is just and equitable to award costs proportionately in this matter. Therefore, notwithstanding that the appellant largely succeeded in this appeal, for

²⁵ *Immanuel Fillemon v Immanuel Shikuambi* (A293/2014) [2017] NAHCMD 148 (24 May 2017).

²⁶ *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996(1) SA 984 (CC).

reasons stated above, this court in its discretion²⁷ orders that each party pay its own costs on appeal.

The Order

[55] In the result, the following order is made:

- (a) The appellant's non-compliance with the rules of court is condoned.
- (b) The appeal is upheld.
- (c) The order of the High Court is set aside and replaced with the following order:
 - i. 'The respondents' application to strike the forfeiture application from the roll is dismissed with costs.'
- (d) The matter is remitted to the High Court for determination of the application for forfeiture of the properties.
- (e) Each party should pay its own costs on appeal.

MOKGORO AJA

HOFF JA

²⁷ *Ferreira v Levin and also PG v Africa Autonet CC t/a Pacific Motors* (POCA 5/2017) NAHCMD 265 (13 September 2017).

NKABINDE AJA

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