



**REPORTABLE**

CASE NO: SA 76/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PROSECUTOR-GENERAL**

**Appellant**

and

**JOSE DOMINGOS TANDE DE PIEDADE OLIVEIRA**

**First**

**Respondent**

**CONTINENTAL INFRASTRUCTURE DEVELOPMENT**

**(PTY) LTD**

**Second Respondent**

**Coram:** SHIVUTE CJ, SMUTS JA and FRANK AJA

**Heard:** 27 October 2021

**Delivered:** 29 November 2021

**Summary:** The appeal concerns the question whether the High Court is empowered to make a provisional preservation of property order in the circumstances where the Prosecutor-General, in an application for a preservation order, relies on hearsay evidence and has been directed to file complete papers in terms of s 91(4) of the Prevention of Organised Crime Act 29 of 2004 (POCA). In an urgent and *ex parte* application for a preservation of property order, the

Prosecutor-General informed the High Court that she would rely on an unsworn statement from the Angolan authorities in response to a request for mutual legal assistance. As the statement is unsworn, it is hearsay and ordinarily inadmissible. The High Court relied on hearsay information contained in the statement and made a provisional preservation of property order. At the same time, it directed the Prosecutor-General to file 'complete papers' by a specified date before the return date.

The persons against whom the preservation of property order had been made (the respondents) anticipated the rule *nisi* and argued that the High Court could not make a provisional preservation of property order where it had ordered the filing of complete papers before such papers are filed. The High Court agreed with the respondents that it was not permitted to direct the filing of complete papers and at the same time make the preservation of property order. The court then discharged the rule *nisi*.

On appeal,

*Held that*, the language of s 91(4) is permissive and not mandatory or exclusive.

*Held that*, there is nothing in the section that precludes the making of a provisional preservation of property order.

*Held further that*, an unauthenticated and unsworn statement of response to the request for mutual legal assistance makes the information contained therein hearsay.

*Held that*, in terms of s 91(3) of POCA, hearsay information may be considered provided that that evidence would not render the proceedings unfair.

*Held that*, reliance on information based on hearsay did not render the proceedings unfair as complete papers were ordered to be filed on a specified day before the return day of the rule *nisi* and even for a stronger reason, because the

ensuing orders granted *ex parte* are by their very nature provisional and subject to being set aside on the return day or on an application to anticipate the rule *nisi*.

*Held that*, there had been sufficient information at the preservation stage that the property concerned constituted proceeds of unlawful activities and that the court was entitled to make the order it initially made.

Appeal allowed with costs.

---

### APPEAL JUDGMENT

---

SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Introduction

[1] The Prosecutor-General, referred to in this judgment as the appellant, made an *ex parte* and urgent application in the High Court for a preservation of property order under s 51(1) of the Prevention of Organised Crime Act 29 of 2004 (POCA) in relation to the positive balance in bank accounts held in the name of the first respondent and in respect of a motor vehicle registered in the name of the second respondent. The thrust of the appellant's case in the preservation application was that the assets in question were proceeds of unlawful activities as that phrase is defined in POCA.

[2] In her founding affidavit, the appellant indicated that she would be relying on information provided by the Government of Angola that still needed to be confirmed under oath. Accordingly, the appellant requested the court to dispense with the affidavit requirements in relation to the information provided by the

Angolan Government. This the appellant was entitled to do by virtue of s 91(2) of POCA read with regulation 7<sup>1</sup>, provided that certain requirements had been met.

[3] On 28 October 2019, the High Court heard the application and made an order dispensing with the requirements set out in POCA and the regulations; granted a provisional preservation of property order as contemplated in s 51 of POCA in respect of the property, and issued a rule *nisi* returnable on 8 December 2019 directing the appellant to file complete papers on or before 12 November 2019 before the provisional order is confirmed as well as calling upon the respondents or any other party with an interest in the property to show cause why the provisional preservation of property order should not be made final.

[4] On 12 November 2019, the respondents filed a notice anticipating the rule *nisi* in terms of rule 72(7) of the Rules of the High Court. The respondents raised what they referred to as an exception to the effect that an order contemplated in s 91(4) of POCA can only be made after and not before the High Court had considered the complete papers or complete evidence. Therefore, so the respondents contended, the High Court was precluded from making a provisional preservation of property order and at the same time direct the appellant to file complete papers. As such, the provisional order and the rule *nisi* granted on 28 October 2019 could not be supported on the basis of s 91(4) of POCA and was not capable of lawful confirmation. The respondents thus sought the discharge of the rule *nisi*. The High Court agreed with the respondents' contentions and so on 21

---

<sup>1</sup> Prevention of Organised Crime Regulations: Prevention of Organised Crime Act, 2004, GN 78, GG 4254, 5 May 2009 (POCA Regulations).

November 2019, it discharged the rule *nisi*. Dissatisfied with the decision of the High Court, the appellant has now lodged an appeal against that judgment and order.

[5] According to the appellant's founding papers in the preservation of property application, a SWIFT payment of an amount of USD400 000 was made by a Mauritius based company called Capital Horizons Ltd on 15 January 2019 to a Namibian bank where the first respondent held a bank account. The first respondent instructed the bank to credit his cheque account with the SWIFT payment. Accordingly, the equivalent amount in the local currency totalling N\$5 536 000 was paid into his account. On 22 January 2019, the first respondent opened an investment account and a savings account at the bank. On the same day he invested N\$4 000 000 for 12 months in his investment account. The remainder of the money was transferred from his cheque account to entities controlled by him and to his savings account on the same day. A total amount of N\$1 025 000 was so transferred. One of the companies to which an amount of N\$750 000 referenced as 'company loan' was transferred on 22 January 2019, was the second respondent's. On 23 January 2019, the second respondent purchased a Toyota Hilux double cab vehicle from a local dealer for the amount of N\$672 360,47. All the purchase and registration documents were completed by the first respondent who acted as a proxy for the second respondent for these purposes. The first respondent is the sole shareholder and only director of the second respondent.

[6] The SWIFT payment triggered an alert with the bank's money laundering department, which queried the transaction. The matter was ultimately cascaded to the Namibian Police, which lodged an investigation.

[7] The Namibian Police obtained an affidavit from the first respondent explaining the source of the money. He explained that an off-shore company registered in Seychelles of which he was the sole shareholder and director concluded an agreement with Capital Horizons Ltd in Port Louis, Mauritius on 16 November 2018. The agreement styled 'Introducer Agreement – Income Sharing and Income Protection' was signed between Capital Horizons Ltd (CHL) and his company called Oil, Gas Hydrocarbons Limited (OGAH). He signed on behalf of OGAH. In terms of the agreement, OGAH introduced CHL to the Sovereign Wealth Fund of Angola known in Portuguese as *Fundo Soberano de Angola* (FSDA). OGAH allegedly facilitated CHL's and FSDA's engagement for the provision of services. CHL and OGAH wished to establish an 'Introducer – Income sharing and Income Protection Agreement' in respect of the income received by CHL from FSDA. CHL would retain 55 per cent of the income while OGAH would retain 45 per cent.

[8] The first respondent explained further that he had intermediated and facilitated the signing of the agreement between CHL and FSDA. Consequently, CHL issued an invoice for USD1 000 000 to FSDA and the first respondent, in his capacity as the owner and director of OGAH, issued an invoice to CHL. The first respondent instructed CHL to pay USD400 000 into his personal Namibian account and USD50 000 to a Seychelles registered company called Red

Cherokee Limited which CHL duly did. OGAH did not have a bank account as it had been dormant and was used to sign the 'Introducer Agreement – Income sharing and income protection agreement'. The first respondent explained that he had several companies registered in Namibia, but that due to low revenue none of such companies had operational offices.

[9] On 11 September 2019, the Namibian authorities submitted a request for Mutual Legal Assistance to the Angolan authorities through diplomatic channels. On 17 October 2019, the appellant's office received a response to the Mutual Legal Assistance request from the Office of the Prosecutor-General of Angola. The initial response was in the Portuguese language. The English translation was received only on 21 October 2021. The response to the Mutual Legal Assistance request was not stated under oath. The appellant informed the High Court that the Angolan authorities would provide a response on affidavit to the Namibian authorities at a later stage. She therefore requested that in light of the urgency of the matter, the High Court should dispense with the requirement with regards to hearsay and should rely on the information contained in the response from Angola to the Mutual Legal Assistance request.

[10] The unsworn statement of response to the Mutual Legal Assistance request shows that it had been signed by one Eduardo Rodrigues, the Head of the National Service for Asset Recovery in the Office of the Prosecutor-General of Angola. The statement starts by clarifying that the Office of the Prosecutor-General of Angola was designated, by Presidential Decree, as the Central Authority in Angola for the receipt of and transmission of requests for international

judicial cooperation in criminal matters. The author explains furthermore that by a specified Presidential Decree, a Working Group comprising the Minister of Foreign Affairs, the Minister of Justice and Human Rights, the Minister of Finance as well as the Chairperson of the Angolan Sovereign Wealth Fund was established to recover the assets of the Angolan Sovereign Wealth Fund. The Prosecutor-General of Angola is the coordinator of the Working Group.

[11] According to the statement, the Government of Angola initiated legal proceedings in the United Kingdom and in Mauritius to recover its assets. In Mauritius, the government had engaged Capital Horizons Limited, which was described in the statement as a law firm, to assist in the process of recovering the assets. Towards that end, the Working Group engaged the first respondent, a national of Angola (who also happens to be a Namibian national), to advise the Working Group by virtue of his knowledge of the situation in Mauritius and also to serve as an interpreter. On 14 December 2018, at the initiative of the Working Group, the Angolan Sovereign Wealth Fund (FSDA) and Capital Horizons Limited (CHL) signed an agreement for the recovery of FSDA's assets. FSDA initially paid CHL USD1 000 000 pursuant to the agreement. After signing the agreement with CHL, the Working Group decided that 'in view of his mobility' the first respondent would remain in Mauritius to 'follow up, support and monitor the implementation of the agreement' by CHL. It is for this consideration that the first respondent was accredited by the Coordinator of the Working Group and a 'Declaration' was issued to him on 9 January 2019. The Declaration reads in part that the first respondent had been 'authorised to liaise with the authorities of the Republic of



Mauritius as well as with Capital Horizons, Attorneys of the Sovereign Fund, in order to ensure compliance with the above Agreement'.

[12] By virtue of the Declaration issued to him, so the statement of response explained, the first respondent acquired the status of civil servant, 'within the meaning of Art 52(1)(e) Act 3/14, of 10 February, the Criminalization of Offences Underlying Money Laundering Act'. The statement alleges further that as a civil servant, the first respondent 'misused his position within the Working Group to accept financial advantages for himself by signing a fake agreement between himself and CHL, to embezzle the sum of USD450 000, thereby harming the Angolan State'. The statement accused the first respondent of having flouted his obligation to monitor the implementation of the agreement and to advocate for the interests of the Angolan State by inflating the amount of money the Angolan State was supposed to pay to CHL in order to embezzle part of the sum.

[13] The statement alleged that the first respondent's conduct in Angola constituted a crime of 'unlawful participation in business and influence peddling' punishable by law under the Criminalization of Offences Underlying Money Laundering Act and that a criminal case had been initiated and a parallel asset investigation was also being conducted in Angola. The statement concluded with the request for the Namibian authorities to 'authorize the immediate transfer of the amount of USD400 000' to Angola.

Legislative scheme

[14] Section 91(1) of POCA provides that an application, amongst others, under s 51 must be made in the prescribed manner. Regulation 7 of the POCA regulations stipulates that an application made under s 51 must be in writing and must be supported by affidavit evidence, unless otherwise stated in the Act or by an order of the High Court.

[15] Section 91 is central to the issues that must be decided by this court. As such, it is necessary to set it out in full. Its provisions read as follows:

**'Procedure for certain applications**

**91(1)** Every application under sections 25, 43, 51, 59 and 64 must be made in the prescribed manner.

(2) The Prosecutor-General may, in cases of urgency, apply to the High Court to dispense with any requirements prescribed for an application made under section 25 or 51.

(3) In an application in terms of subsection (2) the court may have regard to oral evidence and evidence with regard to hearsay provided that that evidence would not render the proceedings unfair.

(4) In an application in terms of subsection (2) the court may-

(a) direct the applicant to file complete papers or to adduce further evidence at a date and time specified by the court before deciding whether or not to make an order, including an order referred to in paragraph (b);

(b) make a provisional order having immediate effect and may simultaneously grant a rule nisi calling on the person against whom

the order is made to appear on a day mentioned in the rule and to show cause why the order should not be made final.'

[16] As is evident from s 91(2) above, on a basis of urgency, the Prosecutor-General may apply to dispense with a requirement prescribed for an application made under s 51. The requirement that would trigger the application to dispense with the prescribed requirement is urgency. Thus on a basis of urgency, the Prosecutor-General may for example, make application to be granted leave to make oral application for a preservation of property order, instead of doing so in writing. The Prosecutor-General may also seek leave to lead evidence based on hearsay, provided that proceedings would not be rendered unfair by such evidence. Section 91(4) says that if the Prosecutor-General has made application to dispense with the prescribed requirements, in such application the court may direct the Prosecutor-General to file complete papers or to adduce further evidence at a date and time specified by the court. But then the section also provides that the court may direct the filing of complete papers or the adduction of further evidence 'before deciding whether or not to make an order, including an order referred to in paragraph (b)'. As can be seen from s 91(4)(b) above, the order referred to therein is a provisional order having immediate effect, which may be made 'simultaneously' with the grant of a rule *nisi* calling on the person against whom the order is made to show cause why the order should not be made final.

#### Arguments of the parties

[17] The respondents contend in the first place that having directed the appellant to file the complete papers, the High Court was precluded from making a

provisional preservation of property order because such order could not be made before the court had considered the complete papers. The filing of the complete papers, the respondents further contend, was meant to enable the court to decide whether or not to make a provisional preservation order. This, the respondents submit, is clear from the use of the words 'before deciding whether or not to make an order, including an order referred to in paragraph (b)'. The respondents further contend that there was in any event no evidence placed before the High Court establishing reasonable grounds for the belief that the property in question constituted proceeds of unlawful activities. The information from Angola was hearsay and inadmissible; the document on which reliance was placed as a source of that information was unauthenticated and the legislation on which the appellant relied for establishing a predicate offence in Angola was in the Portuguese language and not translated for the High Court to have regard to it.

[18] The appellant on the other hand argues that the interpretation of s 91 contended for by the respondents, if adopted, would render the provisions of ss 91(2) and (3) superfluous as the Prosecutor-General would not be able to effectively employ them. The appellant submits that the direction to file complete papers did not preclude the High Court from making a provisional preservation of property order and that the filing of complete papers is an in-built mechanism to save the proceedings from being rendered unfair. The initial decision of the High Court to grant a preservation order was correct as s 91(3) permitted the court to consider and rely on hearsay within the parameters set out in the section, so the appellant contends.

## Discussion

[19] It will be recalled that the appellant had made application for the dispensing of the requirement pertaining to hearsay evidence in the form of a statement obtained from the Angolan authorities which was not on affidavit. The appellant cited urgency as a basis for the application. The court granted the application and was obviously satisfied that the information before it showed on the face of it that there were reasonable grounds for the belief that the subject matter of the preservation of property order constituted proceeds of unlawful activities, the High Court made the preservation of property order and issued a rule *nisi*. As a general rule, when interpreting legislation courts consider the text, context and purpose of the affected provision as part of a unitary process.<sup>2</sup>

[20] Some of the purposes of POCA as stated in its preamble are 'to provide for the recovery of the proceeds of unlawful activities' and 'to provide for the forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities'. Chapter 6 (comprising ss 50-73) of POCA deals with the forfeiture of property and related matters. Section 50(1) makes it clear that the proceedings under Chapter 6 are civil and not criminal. Section 50(2) provides that no evidence which is inadmissible in criminal proceedings 'pursuant to a rule of evidence applicable only in those proceedings, is for that reason alone inadmissible in proceedings under this Chapter'.

[21] Section 51(1) authorises the Prosecutor-General to make application to the High Court for a preservation of property order prohibiting any person from dealing

---

<sup>2</sup> *Joseph v Joseph* 2020 (3) NR 689 (SC) para 32.

in any manner with any property 'subject to such conditions and exceptions as maybe specified in the order'. If the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is the proceeds of unlawful activities, and the court is satisfied that the information shows on the face of it that there are reasonable grounds for that belief, the High Court must make the order for a preservation of property without requiring notice of the application to be given to any person or that further evidence should be adduced.<sup>3</sup>

[22] The effect of the appellant's application for the court to dispense with the affidavit requirement was that the court should consider making a preservation of property order on the information based on hearsay as provided for under s 91(2) read with s 91(3). The High Court is not precluded from making a provisional preservation of property order and at the same time directing the applicant to file complete papers or to adduce further evidence. The language of s 91(4) is permissive and not mandatory or exclusive so as to exclude the making of the order. It does not say expressly or by implication that no such order may be made. Had the provision been exclusive, one would expect the section to provide that the court may direct the applicant to file complete papers or to adduce further evidence only before deciding whether or not to make an order, including an order referred to in paragraph (b).<sup>4</sup>

---

<sup>3</sup> Section 51(2).

<sup>4</sup> Cf. *Joseph v Joseph* paras 34 and 35.

[23] If the interpretation contended for by the respondents is to be preferred, it would defeat the purpose of POCA in an urgent application for the preservation of property order, which is to expeditiously preserve the assets believed to be either an instrumentality of an offence referred to in Schedule 1 to POCA or the proceeds of unlawful activities before such assets are dissipated. Such interpretation would also render the provisions of ss 91(2) and (3) nugatory in the sense that while the Prosecutor-General may apply for urgent relief in the circumstances contemplated in ss 91(2) and (3), relief would be refused on the basis that the papers are incomplete or the evidence is inadmissible.

[24] The respondents' complaint that there was in any event no evidence on the basis of which a provisional preservation of property order may be made can be disposed of shortly. An unauthenticated statement from the office of the Prosecutor-General of Angola makes information contained therein hearsay, which in terms of s 91(3) the High Court may be considered 'provided that that evidence would not render the proceedings unfair'. That in an urgent application where the effect of the order sought is not final, an applicant may rely on hearsay evidence is also in line with our common law.<sup>5</sup>

[25] The information contained in the unsworn statement from Angola was provided as a response to the request for mutual legal assistance. The statement was authored by the person responsible for asset forfeiture in the foreign country concerned. It contained official information. It is not as if the information about the Angolan law was sourced from the internet or some dodgy social media account.

---

<sup>5</sup> *Mahamat v First National Bank of Namibia Ltd* 1995 NR 199 (HC).

[26] Even though not under oath, the information is not so unreliable or of such a poor quality that it can be ignored. Given the low threshold of the admission of 'information' as opposed to evidence set out in POCA,<sup>6</sup> the High Court correctly had regard to it and made a provisional preservation property order based on the overall assessment of the information before it, including the information provided by the Angolan authorities. The *S v Koch*<sup>7</sup> matter on which the respondents heavily relied for the submission that the information from Angolan authorities was wholly inadmissible was decided in a different context of proceedings under our Extradition Act 11 of 1996 that requires *prima facie* proof or evidence of the charges before a person sought to be extradited could be committed to prison, a standard of proof described by the court as placing a heavy burden on State resources<sup>8</sup> and which was regarded as setting the bar too high<sup>9</sup> for extradition proceedings.

[27] The real question is whether reliance on hearsay information had made the proceedings unfair. It bears emphasis that s 51 is the first of a two-stage procedure where the target is the property believed to be an instrumentality of an offence referred to in Schedule 1 or the proceeds of unlawful activities. The guilt or wrongdoing of the owner or possessor of the property is not the primary focus.<sup>10</sup> Reliance on evidence with regard to hearsay did not render the proceedings unfair as the appellant was directed to file complete papers by a specified date prior to the return day, which was actually done by the time of the hearing on the date

---

<sup>6</sup> Cf. *Prosecutor-General v Uuyuni* 2015 (3) NR 886 (SC) para 29, for example.

<sup>7</sup> 2006 (2) NR 513 (SC).

<sup>8</sup> Para 149.

<sup>9</sup> Para 160.

<sup>10</sup> *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (4) SA 843 (CC) para 17.



anticipated by the respondents. There is even a stronger reason why the proceedings were not rendered unfair. As this court recently observed, Art 12 of the Namibian Constitution is not necessarily engaged in proceedings held *ex parte* in exceptional circumstances as authorised by the High Court in terms of the applicable provisions of POCA.<sup>11</sup> This is so because ‘the ensuing orders granted *ex parte* are by their very nature provisional, irrespective of the form they take, and subject to being set aside on the return date or on application by a person affected by it when the civil rights and obligations of a person affected are determined’. Indeed, the preservation order in this case was set aside on application by the respondents prior to the return day. It follows that the respondents’ submission that there was not sufficient information justifying the making of the preservation order on the facts of this case cannot be accepted as correct.

[28] The respondents also complained about the fact that the police officer investigating the property believed to be proceeds of unlawful activities was also appointed *curator bonis* in respect of the property, contending that as a *curator bonis* is required to act on behalf of the person against whom the preservation order has been made, it is undesirable to appoint an investigating officer as a curator. He or she is unlikely to act in the interests of the owner or possessor of the property as he or she may be conflicted.

[29] The appellant’s response to the respondents’ contention is that a person affected by the appointment of a *curator bonis* may at any time apply for the

---

<sup>11</sup> *Kazekondjo & others v Minister of Safety and Security & others* (SCR 1-2021) [2021] NASC (25 October 2021), footnote 16.

variation or rescission of the order or the variation of the terms of the appointment of the *curator* in terms of ss 58(7)(a) and 7(b) respectively.

[30] Section 55(a) provides that ‘where the High Court has made a preservation of property order, it must, if it deems it appropriate, at the time of the making of the order or at a later date appoint a *curator bonis* . . .’. Subject to the directions of the High Court, a *curator bonis* is appointed to perform certain duties ‘on behalf of the person against whom the preservation of property order has been made.’<sup>12</sup> Such duties include – to assume control over the property; to take care of the property; to administer the property and to do any act necessary for that purpose, and where the property is a business or undertaking, to carry on the business or undertaking.

[31] While the respondents’ concern may be valid in an appropriate case, there is no allegation in this appeal that there are assets that require administration. The assets as earlier noted, comprise money and a vehicle. In any event, on the assumption that the curator in this case may be called upon to perform duties in relation to the vehicle as argued by the respondents, the person affected by the appointment of a *curator bonis* is not bereft of remedies. In addition to the provisions cited by the appellant to whom the person may resort to, the High Court may also ‘if necessary in the interests of justice, at any time vary of the terms of the appointment of the *curator bonis* concerned’.<sup>13</sup>

## Conclusion

---

<sup>12</sup> *Id.*

<sup>13</sup> Section 58(8)(a)(ii).

[32] In the final analysis, it has been found that the High Court was not precluded from making a provisional preservation of property order in *ex parte* and urgent proceedings and at the same time directing the Prosecutor-General to file complete papers in terms of s 91(4) of POCA prior to a return date. The order granted *ex parte* by its very nature being provisional, it was subject to being set aside on application by the person affected by it. For this reason, the proceedings of the date of the making of the provisional preservation of property order were not unfair. The court below evidently had sufficient information at its disposal at that stage to form a reasonable belief that the property concerned constituted proceeds of unlawful activities. It had thus correctly made the preservation of property order. It follows that the appeal must succeed. As the merits of the application for a preservation of property order were not decided by the High Court, the matter has to be remitted for the merits to be considered and decided.

#### Order

[33] In the premise, the following order is made:

- (a) The appeal succeeds.
- (b) The order of the High Court discharging the rule *nisi* is set aside and an order dismissing the exception raised by the respondents (applicants in the court *a quo*) is substituted therefor.
- (c) The rule *nisi* is extended and returnable on 9 February 2022 at 15h15.

- (d) The application for a preservation of property order is postponed to 9 February 2022 at 15h15 for case management.
- (e) The respondents are to pay the appellant's costs both in the High Court and in this court jointly and severally the one paying the other to be absolved. Such costs to include the costs of two legal practitioners where engaged.

---

**SHIVUTE CJ**

---

**SMUTS JA**

---

**FRANK AJA**

APPEARANCES

APPELLANT:

M Boonzaier (with her L Angula)

Instructed by the Government

Attorney

RESPONDENTS:

S Namandje (with him J A Janke)

Of Sisa Namandje & Co Inc