



**REPORTABLE**

CASE NO: SA 63/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**THE PROSECUTOR-GENERAL**

**Appellant**

and

**CHINA SOUTH INDUSTRY AND TRADING CC  
YING ZHANG**

**First Respondent  
Second Respondent**

**Coram:** DAMASEB DCJ, HOFF JA and FRANK AJA

**Heard:** 2 July 2019

**Delivered:** 14 September 2021

**Summary:** A preservation of property order expires 120 days after the date on which notice of the making of the order is published in the Government Gazette unless there is an application for forfeiture of property pending before the High Court.

In terms of s 52(3) of the Prevention of Organised Crime Act 29 of 2004, any person who has an interest in the property subject to the preservation order may give written notice of his or her intention to oppose the making of a forfeiture order. This notice

must be given within a certain period and must further comply with the obligatory requirements set out in s 52(3) and (5).

Non-compliance with the provisions of s 52(3) and (5) triggers s 52(6) which provides that the Prosecutor-General is not obliged to give notice of an intended application for forfeiture of property.

In such an instance, the issue of a chosen address required by s 52(5) and the issue of service do not arise.

The appellant in her founding affidavit stated the basis for her contention that respondents were not entitled to receive notice of the application for forfeiture order. Court *a quo* did not consider the grounds upon which appellant based her contention.

The purpose of a s 52(5) affidavit amongst other things is to define the issues in dispute between the parties, the information contained in the affidavit may enable the appellant to decide whether or not to proceed with the forfeiture application. The information may also afford the appellant time to investigate any allegations made in the affidavit and to verify the grounds upon which an interested party intends to rely in opposition of the application.

The s 52(3) and (5) notice by respondents was on the face of it defective due to the paucity of information provided. In these circumstances, respondents were not entitled to receive notice of an intended forfeiture application.

The appeal against an order of the High Court setting aside an application for a forfeiture order succeeds with costs.

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## APPEAL JUDGMENT

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HOFF JA (DAMASEB DCJ and FRANK AJA concurring):

[1] This is an appeal against an order of the High Court setting aside an application for a forfeiture order served on first respondent. The appeal is opposed by the respondents.

### Factual background

[2] The appellant applied to the High Court on 27 January 2017 for a preservation of property order in terms of the provisions of s 51(1) of the Prevention of Organised Crime Act 29 of 2004 (the Act) in respect of the positive balances of two Nedbank accounts held in the name of China South Industry and Trading CC, the first respondent. The preservation of property order was granted on the same day.

[3] In the notice of appeal, China South Industry and Trading CC was cited as the first respondent and Ying Zhang as second respondent and I shall refer to the respondents as they are cited in the notice of appeal.

[4] The second respondent is the sole member of the first respondent, a close corporation registered in Namibia. The preservation of property order directed that the order and the preservation of property application must personally be served on the first respondent at (the registered address) 28 Trist Street, Ausspannplatz, Windhoek. In the event that the appellant was unable to effect personal service of the

preservation order on behalf of the first respondent, the appellant was granted leave to effect service by way of publication of the preservation order in two newspapers. The court *a quo* also ordered publication of its order in the Government Gazette as soon as practicable.

[5] On 10 February 2017 the preservation of property order was published in the Government Gazette. On 17 February 2017 the Deputy-Sheriff issued a return of non-service in respect of the first respondent's registered address, indicating that the address is made up of blocks of flats, requesting a unit number. On 24 February 2017 the appellant received a letter (dated 10 February 2017) from first respondent's legal practitioners, Sisa Namandje & Co. Incorporated, informing her that they were acting on behalf of the first respondent and requested a copy of the application for a preservation of property order as well as the court order.

[6] On 3 March 2017 the appellant through its legal representative responded to aforementioned letter dated 10 February 2017, indicating that service could not be effected on first respondent's registered address and whether or not service of the application and order at the legal practitioner's office would constitute service on first respondent.

[7] It appears that since the particulars of first respondent's address were not known at the time, the preservation of property order was forwarded to two newspapers and the order was subsequently published on 7 March 2017.

[8] On 22 March 2017 first respondent instructed its legal practitioner to inform the appellant that the legal practitioner's office could be served with the preservation application and on 23 March 2017 the application for the preservation order and the order itself was served on the first respondent's legal practitioner.

[9] On 12 April 2017 the first respondent filed a notice of its intention to oppose the making of a forfeiture order together with an affidavit in terms of s 52(5) of the Act. On 9 June 2017 the appellant applied in the High Court, in terms of s 59(1) of the Act for a forfeiture of property order. In this application the appellant in her founding affidavit *inter alia*, stated that:

- (i) The preservation order was served by publication in two newspapers on 7 March 2017 and by serving a copy on the legal practitioners on 23 March 2017.
- (ii) The s 52(3) notice of the Act delivered by the first respondent did not appoint an address where it will accept service of further proceedings as required by s 52(5) of the Act.
- (iii) The only member of the first respondent, namely the second respondent has an unexecuted warrant of arrest in relation to a case investigated by the Namibian Police which forms part of the subject matter of the investigation in support of the forfeiture proceedings.
- (iv) The first respondent is precluded, in terms of s 99 of the Act, from participating in the forfeiture proceedings.

[10] On 9 June 2017 the first respondent was notified by service on its legal practitioner, through the Law Society of Namibia of the application for a forfeiture of property order.

[11] Sisa Namandje & Co. Inc. in a letter dated 14 June 2017 informed the appellant that first respondent initially gave instructions only in respect of the drafting of the s 52(3) notice (which notice was filed by first respondent itself) and that it held no mandate to accept the application for forfeiture of property order and never provided its address as an address for service of the forfeiture application.

[12] It is common cause that on 15 June 2017 a police officer delivered the forfeiture application on the first respondent at Shop no. W3 China Town, Oshikango.

[13] In a letter dated 20 June 2017 the appellant informed Sisa Namandje & Co. Inc. that first respondent was precluded from participating in the application for forfeiture proceedings due to an unexecuted warrant of arrest; that there was no obligation to serve the application on the first respondent; that the notice in terms of s 52(3) was defective as no address for delivery of documents was appointed; and that the legal practitioner never indicated that he only held instructions to represent the first respondent for purposes of service of the preservation order.

[14] On 3 July 2017 the respondents represented by Sisa Namandje & Co. Inc. brought an urgent application in the court *a quo* in which the following relief was sought:

- '(a) Reviewing, and correcting and setting aside the second respondent's<sup>1</sup> decision to issue the concerned warrant of arrest on 6 January 2017 against the second applicant.
- (b) Declaring the warrant of arrest issued by the second respondent on 6 January 2017 as invalid and unlawful and setting it aside.
- (c) Declaring that the preservation order granted by this Court on 27 January 2017 expired on 12 June 2017.
- (d) Declaring that the first respondent's application for forfeiture did not come into issue and is invalid as there was no lawful and proper delivery of such application on the first applicant's chosen address prior to the expiration of the preservation order of 27 January 2017 on 12 June 2017.
- (e) Ordering the first respondent to forthwith return the applicant's properties (money) that were preserved by this Court by way of preservation order on 27 January 2017.'

[15] On 5 July 2017 the first respondent filed a notice to oppose the forfeiture application. The notice was filed by Kadhila Amoomo Legal Practitioners. The notice indicated 18 Adler Street Windhoek-West as the address where the first respondent would receive all pleadings relating to the forfeiture proceedings. The 'Particulars of Litigant' filed<sup>2</sup> indicated the first respondent's physical address as 91 New Castle Street, Windhoek.

[16] The urgent application, filed by Sisa Namandje & Co. Inc, was withdrawn and the relief in respect of prayers (a) and (b) of the urgent application was settled by the parties on the basis that the warrant of arrest issued was only in respect of the second respondent. The issues relating to the declaratory relief in respect of the

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<sup>1</sup> I.e. the Magistrate of Windhoek.

<sup>2</sup> In terms of rule 6(1) and (4) of the Rules of the High Court.

preservation of property order and the forfeiture of property application were consolidated with the pending forfeiture of property application.

[17] In respect of the urgent application by the respondents, the appellant filed an answering affidavit on 13 July 2017 and the respondents filed a replying affidavit on 17 July 2017.

[18] When the application was heard, the appellant raised five points *in limine* which were all unsuccessful. On 9 October 2017 the court *a quo* ordered that the application for forfeiture of property served on the second respondent on 15 June 2017 be set aside. The appellant was ordered to pay the costs of the application.

#### The judgment of the High Court

[19] The primary question for consideration by the High Court was whether the preservation order had expired by the time the application for a forfeiture of property order was served on the first respondent.

[20] The court *a quo* referred to s 53 of the Act which provides that a preservation of property order expires 120 days after the date on which notice of the making of the order is published in the Government Gazette unless there is an application in terms of s 59(2) for a forfeiture order pending before the High Court (in respect of the property which is subject to the preservation of property order).



[21] The court *a quo* set off by considering the meaning of the word ‘pending’. The court *a quo* referred to the matter of *Noah v Union National South British Insurance Co. Ltd*<sup>3</sup> where Eloff J observed that the word ‘pending’ has different meanings in different contexts. The court *a quo* referred to what Goldsten J had said in *Levy v National Director of Public Prosecutions*<sup>4</sup> that the word ‘pending’ in the context of legislation dealing with the Act in South Africa (POCA) is imprecise and ambiguous.

[22] The court *a quo* agreed with the reasoning of Kentridge AJ in *S v Mhlungu & others*<sup>5</sup> where the view was held that because the ordinary meaning is ambiguous as to when pending proceedings commence ‘an interpretation of the concept of pending proceedings which seeks to align it with the common law is required’. The court *a quo* held the view that at best for the appellant ‘the word “pending” is ambiguous and thus may be interpreted as requiring service of the application on a respondent’. The court *a quo* concluded that by the time the application for a forfeiture order was brought, the preservation order had ceased to operate and therefore in terms of s 59 of the Act, the appellant was not entitled to bring a forfeiture application.

#### Submissions on appeal

[23] Ms Boonzaier who appeared on behalf of the appellant informed the court that the main issue for consideration is whether the forfeiture of property application applied for by the appellant in terms of s 59(1) of the Act on 9 June 2017 constitutes a pending forfeiture application for purposes of s 53(1) of the Act.

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<sup>3</sup> 1979 (1) SA 330 T.

<sup>4</sup> 2002 (1) SACR 162 (W) at 166.

<sup>5</sup> 1995 (2) SACR 277 (CC).

[24] Ms Boonzaier submitted that the court *a quo* erred in finding that there was no valid preservation order at the time when the appellant served the forfeiture application on the first respondent; erred in finding that service in terms of reg 3<sup>6</sup> of the regulations made in pursuance of the Act was irregular; erred in finding that the time period provided for in s 52(4) of the Act for an interested party to file a notice in terms of s 52(3) of the Act, commences when the preservation application is served on the affected party.

[25] Ms Boonzaier submitted that the following issues are before this court:

- (a) Whether the preservation of property order expired;
- (b) Whether the service in terms of reg 3 was irregular;
- (c) Whether the 21 day period in s 52(4) of the Act commences only from the date of service of the preservation of property application.

[26] Ms Boonzaier submitted that a person on whom a preservation of property order was served may participate in a forfeiture of property application by filing a notice in terms of s 52(3) of the Act giving notice of his or her intention to oppose the making of a forfeiture order. This notice must be given within 21 days after service and must be accompanied by an affidavit in which specific particulars must be stated.

[27] If the notice is not filed within the time period stipulated or is not accompanied by an affidavit in terms of s 52(5) then the sanction in s 52(6) becomes applicable which provides that in those circumstances such a person is not entitled to receive

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<sup>6</sup> GN 78, GG 4254, 5 May 2009.

from the appellant a notice of an application for a forfeiture of property order. Section 52(6) it was submitted is not peremptory but directs the appellant not to give notice. It was further submitted at the stage where the appellant applies for a forfeiture of property order, a court would exercise judicial oversight regarding the compliance with the provisions of s 52(3) and (5) or the non-compliance thereof. Where there was non-compliance with s 52(3), (4) and (5) a court may allow a default forfeiture of property order as provided for in s 64 of the Act and may then make certain orders.

[28] It was submitted that the whole issue of whether or not there was a pending forfeiture application is based on the contention by the appellant that when she applied for the forfeiture of property order, the respondents were not allowed to either receive notice or to participate in the application. Therefore, so it was submitted, that service of the application on the respondent was not a pre-requisite for the forfeiture application to be pending.

[29] It was submitted that when the court *a quo* considered the forfeiture application the court was entitled to consider the appellant's contention that the respondents' s 52(3) notice was not compliant with the provisions of the Act.

[30] It was submitted that the appellant in her founding affidavit in the application for a forfeiture order stipulated in which respects the respondents did not comply with the provisions of s 52(5), namely, that the full particulars of the chosen address for the delivery of documents was not provided; that the purported s 52(5) affidavit was defective since the deponent had no authority to represent the first respondent; that

the only member of the close corporation (second respondent) was at that stage precluded from participation in terms of s 99<sup>7</sup> of the Act due to the fact that there was an unexecuted warrant of arrest against her; that the affidavit dealing with the requirements of s 52(5)(e) contains bare denials and unsubstantiated allegations without disclosing the facts which are relied upon in opposing the forfeiture application; and that no basis was laid for denying that the properties are not the proceeds of unlawful activities or instrumentalities of a Schedule 1 offence.

[31] Regarding the issue whether there was a forfeiture application pending, it was submitted by Ms Boonzaier that since forfeiture under the Act are proceedings *in rem*, the commencement of the action is deemed to be the issue of process in contrast with an action *in personam* which commences when the action is served. The forfeiture application was initiated when the appellant filed with the registrar the application within 120 days after the publication of the notice of the preservation of property order in the Gazette. It was submitted that the legislature does not require service of the forfeiture of property application for such an application to be pending as required by s 53(1) of the Act. It was pointed out that s 59(2) of the Act requires the appellant to give 'notice' of 14 days of an application for a forfeiture of property order and if service is a requirement, there would be no need for a person who filed

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<sup>7</sup> Section 99 **Fugitives precluded from participating in proceedings**

A person-

(a) who has been summoned or warned to appear in court on a specific date or otherwise made aware that he or she has to appear in court on a specific date and failed to appear in court on that date; or

(b) in respect of whom a warrant for his or her arrest has been issued and whose attendance in court cannot be secured in spite of all reasonable steps having been taken to execute the warrant, must not participate in any proceedings under Chapter 5 or 6 for as long as he or she continues to fail to appear in court or that warrant for arrest remains in force and unexecuted.

his or her notice to oppose late, to apply for condonation, as the appellant would have been required to serve the application on him or her, rendering s 60 superfluous.

[32] Mr Namandje on behalf of the respondent submitted that the address provided, in the context of the affidavit in terms of s 52(5) is compliant with the requirement of providing full particulars of the chosen address for the delivery of future documents since an address was provided by the deponent. It was submitted that where the appellant alleged that the respondents were not entitled to receive notice of the forfeiture application but then proceeded to serve the document, then by her conduct, despite her subjective view that there was no need to serve the respondents, there was peremption by the appellant of her right not to serve. It was submitted that there was no indication either in oral argument or on the papers that the appellant sought in the court *a quo* a default order in terms of s 64 – such an application being a substantive application on its own.

[33] It was submitted in respect of the unexecuted warrant of arrest that the warrant of arrest only related to the second respondent as agreed by the parties and the resultant court order to that effect. Subsequent to the return of the second respondent from China to Namibia, she appeared in the magistrate's court in Windhoek where the warrant of arrest was cancelled and she was released on bail. Therefore the issue of the unexecuted arrest warrant does not arise.

[34] It was submitted that it was common cause that the validity of the preservation order, ie for 120 days, expired on 9 June 2017, unless a forfeiture application was within the said period of 120 days, properly issued by the registrar and served on the

respondents in terms of the provisions of s 59(2) and (3) read with the regulations issued under the Act.

[35] It was submitted with reference to case law<sup>8</sup> that when common law proceedings are pending, they have commenced by the service, and not the mere issue of summons.

[36] It was submitted that in terms of the provisions of s 59(2) and (3) of the Act which places a peremptory obligation on the appellant to give notice which must be *delivered at the address* indicated (in the s 52(3) affidavit).

[37] Furthermore reg 4(8) of the regulations that the forfeiture application must be served in accordance with the regulations promulgated under the Act. It was pointed out that in terms of reg 3(1)(a) a document required to be served in terms of the Act or the regulations must be effected in accordance with the Rules of the High Court read with the Rules of the High Court regulating the proceedings contemplated in Chapter 5 and 6 of the Act.

[38] It was submitted that reg 4(8) specifically provides that notice of an 'application for a forfeiture order pursuant to section 59(1) of the Act must be given by serving a copy of the application upon any person who has given notice in accordance with section 52(3) of the Act and any other person who the Prosecutor-General reasonably

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<sup>8</sup> *Mahlangu & another v Van Eeden & another* [2000] 3 All SA 321 (LCC).

believes might have an interest in the property the subject of the application for forfeiture order’.

[39] It was submitted that the forfeiture application never came in issue because the preservation order was not in force on 15 June 2017, having expired on 9 June 2017, on the basis that the forfeiture application was not delivered and served upon the first respondent within the period required and on the address indicated by the first respondent in terms of the provisions of s 52(3) and (5) of the Act.

[40] It was further readily admitted by Mr Namandje that if the respondents did not comply with the requirements set out in s 52(3) and (5) the appellant would have been entitled to a forfeiture order without notice, since the issue of service or lack thereof, and lack of a chosen address would not have arisen.

#### Evaluation of submissions and finding of court *a quo*

[41] Both counsel were of the view that *if* the respondents did not comply with the provisions of s 52(3) and (5) that they would in terms of s 52(6) not be entitled to receive from the appellant notice of an application for a forfeiture order in terms of s 59(2) or to participate in proceedings concerning an application for a forfeiture order. In such a scenario the issue of whether there was an application for forfeiture of property order pending before the court *a quo* and the issue of notice of a chosen address for the delivery of documents concerning further proceedings, do not arise.

[42] There are however contrasting submissions as to whether or not the provisions of s 52(3) or (5) had been complied with by the respondents. I shall therefore first consider whether there had been compliance with the provisions of s 52(3), and if not the effect of the sanction imposed by s 52(6) of the Act.

[43] I shall therefore in considering aforementioned issue as a starting point quote the relevant provisions of s 52.

**'Notice of preservation of property order**

...

(3) Any person who has an interest in the property which is subject to the preservation of property order may give written notice of his or her intention to oppose the making of a forfeiture order or apply, in writing, for an order excluding his or her interest in the property concerned from the operation of the preservation of property order.

(4) A notice under subsection (3) must be delivered to the Prosecutor-General within, in the case of –

(a) a person on whom a notice has been served under subsection (1)(a), 21 days after the service; or

(b) any other person, 21 days after the date on which a notice under subsection (1)(b) was published in the *Gazette*.

(5) A notice under subsection (3) must contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by an affidavit stating –

(a) full particulars of the identity of the person giving notice;



- (b) the nature and the extent of his or her interest in the property concerned;
  - (c) whether he or she intends to –
    - (i) oppose the making of the order; or
    - (ii) apply for an order –
      - (aa) excluding his or her interest in that property from the operation of the order; or
      - (bb) varying the operation of the order in respect of that property;
  - (d) whether he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities; and
  - (e) the –
    - (i) facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in subparagraph (c)(ii); and
    - (ii) basis on which he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities.
- (6) A person who does not give notice in terms of subsection (3), accompanied by an affidavit in terms of subsection (5) within the period referred to in subsection (4) is not entitled –
- (a) to receive, from the Prosecutor-General, notice of an application for a forfeiture order in terms of section 59(2); or
  - (b) subject to section 60, to participate in proceedings concerning an application for an forfeiture order.'

[44] The s 52(3) notice, deposed to by Wenlong Zhang, the son of the second respondent, was filed on 12 April 2017 on behalf of the first respondent together with an affidavit in terms of s 52(5) of the Act. This notice informed the appellant of first respondent's intention to oppose the making of a forfeiture order. It was stated that the deponent was employed by the first respondent as general manager and duly authorised to depose to the affidavit on behalf of first respondent.

[45] In dealing with s 52(5)(a), ie the full particulars of the identity of the person giving notice, the first respondent was identified, with its place of business at S 11 Oshikango, China Town, Helao Nafidi Town Council, Republic of Namibia.

[46] In dealing with s 52(5)(b) it was indicated that first respondent was the account holder of two identified accounts with positive balances with Nedbank and that the monies seized belonged to the first respondent.

[47] In terms of s 52(5)(c) it was stated that the forfeiture application was opposed.

[48] In terms of s 52(5)(d) first respondent denied that the property is an instrumentality of an offence or proceeds of unlawful activities.

[49] In respect of s 52(5)(e) it was stated that the appellant relied on various documents and evidence which amount to hearsay, and that allegations were made without any factual basis. It was further stated that the appellant assumed that when Extreme Customs Clearing Services CC (ECCS) and Organise Freight Services CC (Organise CC) made certain payments to some importers, using their own foreign

currency account, they did so on behalf of China South Industry and Trading CC. It was stated that the first respondent shall deny these allegations. It was stated that the first respondent only paid ECCS and Organise CC as clearing agency for services rendered.

[50] It was further stated that allegations that first respondent was not entitled to pay into its foreign currency account cash will be denied as first respondent was licenced to do so. A copy of a licence was attached to the notice. It was denied that the bank account was an instrumentality of an offence.

[51] It was denied that the money in the two bank accounts are proceeds of unlawful activities. It was stated that in cases where the first respondent remitted money itself it did so through its foreign currency account lawfully to importers in respect of services rendered or goods supplied.

[52] It was also stated that the first respondent shall deny all allegations suggesting that it committed any offence and shall rely on such grounds and such further grounds as it may be advised to rely on by counsel in due course at the hearing of an application for a forfeiture order.

[53] It was stated that the appellant's affidavit does not make out a case that the properties seized are proceeds of unlawful activities or instrumentality thereof.

[54] This s 52(3) notice and affidavit was in response to the appellant's founding affidavit in the application for a preservation of property order, which affidavit was extensive and in detail.

[55] The appellant stated in her founding affidavit that there are reasonable grounds to believe that the positive balances in the bank accounts of first respondent are proceeds of the following unlawful activities:

Fraud; forgery; money laundering offences as set out in sections 4 and 6 of the Act; contravention of section 96 read with other provisions of the Customs and Excise Act 20 of 1988. In addition, that first respondents' Customer Foreign Currency Account (CFC account) is an instrumentality of a schedule one offence, namely, contravention of the Exchange Control Regulations of 1961.

[56] The appellant related that fraudulent invoices were used to misrepresent the true value of goods imported. This misrepresentation resulted in the importers paying lower duties to Customs as required by the Customs Act, defrauding Customs, and that the importers unlawfully received a benefit.

[57] It was stated that during an investigation it was discovered that most remittances of large amounts of money done by importers of goods into Namibia to overseas bank accounts were falsified or done on forged invoices. Most of these remittances were done through two clearing agents known as ECCS and Organise CC.

[58] It was stated that invoices submitted to commercial banks to remit the funds overseas differed materially from the invoices submitted to the Ministry of Finance: Directorate Customs and Excise (Customs).

[59] In respect of first respondent for example it was shown that there was a difference of U\$4 076 016. It was stated that goods were either under-declared in terms of value or there was a significant over-payment (capital-flight) to foreign suppliers.

[60] The appellant by way of an example referred to the opening documents and bank statements in respect of the first respondent's two bank accounts at Nedbank. The first account was opened on 11 January 2016 by second respondent at Oshikango and the monthly income expected to be received by the business was indicated at N\$15 000. The bank statements for this account for the period between 16 March 2016 and 21 December 2016 reflected that the account received a total of N\$10 482 478 of which N\$9 351 978 were cash deposits. On 21 December 2016 the account had a positive balance of N\$675 531,43.

[61] The opening documents and bank statements of the second account (the CFC account) was opened on 18 March 2016 by the second respondent. The source of funds were expected from imports and exports with an expected monthly income of N\$1 000 000. The statements for the period 1 March 2016 to 25 December 2016 reflects that the account received a total of US\$507 210 by way of cash deposits.

None of the deposits have been made electronically. A total of US\$510 053 cash transfers were made from this account. On 25 November 2016 the account had a positive balance of US\$149 067,06. Appellant remarked in respect of the cash deposits that USD is not a currency that is used for trade in Namibia and that the amount of N\$507 210 converted into Namibian Dollars using an exchange rate of N\$13 to the USD amounts to approximately N\$6 593 730 generated by the first respondent in a period of ten months.

[62] Appellant further states that what was notable was that none of the funds in these two accounts were withdrawn in cash and could therefore not constitute the source of US\$2 922 241 cash deposits made into the account of Organise CC on behalf of the first respondent, and another cash deposit of US\$130 665 made into the account of ECCS on behalf of the first respondent. The second respondent is the only signatory in respect of both accounts.

[63] The appellant pointed out that reg (3)(1) of the Exchange Control Regulations, 1961, GN R1112, 1 December 1961 prohibits, without permission granted by the treasury, any person from sending out of the Republic of Namibia, *inter alia* bank notes, securities or foreign currency, to or on behalf of a person resident outside the Republic or place any sum to the credit of such person. Appellant stated that the first respondent remitted funds to China using the same Single Administration Document (SAD 500) forms which were already used by ECCS to remit funds. These funds, it was stated, were not allowed to be remitted as the invoices presented did not relate to the true transactions. Where the commercial bank was aware of the true nature of

the transactions, the funds would not have been remitted as there was no treasury approval for this type of transactions.

[64] Before I consider whether the s 52(3) notice and accompanying affidavit complied with the provisions of s 52(3) of the Act, it would be useful to refer to the matter of *Prosecutor-General v Kamunguma & another*<sup>9</sup> where the following appears at paras 18 and 19:

[18] The purpose of the s 52(5) affidavit appears, amongst other things, to establish the standing of the person who wishes to participate in the proceedings. This is so, because an interested party is required to set out the nature and extent of his or her interest in the preserved property; to notify the PG of the relief the interested party intends to seek at the second stage of the proceedings prior to the start of such proceedings, and to define the issues in dispute between the PG and the interested party.

[19] A preservation order is only valid for 120 days, unless there is a pending forfeiture of property application. The purpose of the 120 days period referred to in s 53 would be, amongst other things, to enable the PG to decide whether or not to proceed with the second stage of the proceedings in light of the information disclosed in the s 52(5) affidavit; to afford the PG an opportunity to investigate any allegations made by the person in the s 52(5) affidavit; to afford the PG time to gather more evidence to satisfy the burden of proof, and to give the PG an opportunity to verify the grounds upon which the person intends to rely in the application, in terms of s 63, for the exclusion of the interests in the property subject to the forfeiture order.’<sup>10</sup>

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<sup>9</sup> 2019 (3) NR 651 (SC).

<sup>10</sup> Footnotes omitted.

[65] In *Karas Auto Spares v The National Director of Public Prosecutions*<sup>11</sup> it was held that: 'It seems to me that the purpose of s 39(5) of POCA<sup>12</sup> is to enable the respondent to know as soon as possible on what grounds a forfeiture order will be opposed or on what grounds an application will be made for the exclusion of an interest in the property concerned'. It was further stated in *Karas* that these grounds would often be within the exclusive knowledge of the party opposing the forfeiture order.

[66] The language used by the legislature in s 52(5)(e) is very clear. The person giving notice in terms of s 52(3) *must* state the *facts* he or she intends to rely on in opposing the making of a forfeiture order. In addition such a litigant *must* state the basis for denying (or admitting) that the property is an instrumentality of an offence or the proceeds of unlawful activities.

[67] If a satisfactory explanation is given it may persuade the appellant not to proceed with the forfeiture application as suggested in *Kamuhanga (supra)*. The appellant would only be able to decide not to continue with the application where the facts in opposition of the alleged unlawful activities are of such particularity as to compel the appellant not to proceed with such an application.

[68] In my view, an affidavit is non-compliant with the provisions of s 52(5) where the deponent makes bold denials and unsubstantiated allegations without disclosing

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<sup>11</sup> (618/2016) [2017] ZAECPEHC 11 (2 February 2017), para 18.

<sup>12</sup> The equivalent of s 53(5) the Namibian POCA.



the facts which are relied upon in opposing the forfeiture application as the first respondent did.

[69] The first respondent also failed, in my view, to set out the basis on which it denied that the property is an instrumentality of an offence or the proceeds of unlawful activities.

[70] It does not assist the first respondent at all to indicate that it shall rely on grounds as it may be advised to rely on by counsel in due course at the hearing of the forfeiture application. The facts and the basis of opposition must be apparent from the s 52(5) affidavit.

[71] Where there is non-compliance with the provisions of s 52(5), as in this case, it would deny the appellant the opportunity, as stated in *Kamuhanga* to investigate the allegations made in the affidavit or to verify the grounds upon which the first respondent intends to rely in the forfeiture application, or to gather more evidence to satisfy the burden of proof (on a balance of probabilities) in the intended forfeiture application.

[72] In respect of the allegations of contravening the Exchange Control Regulations, the first respondent stated that the remission of monies by itself to importers had been lawful. First respondent however failed to attach the permission granted by the treasury.

[73] In respect of the allegation, the first respondent was not entitled to pay into its (CFC) account cash, first respondent stated that it was licenced to do so, and attached the licence as an annexure to the notice. On perusal of the licence it appears that it authorises the first respondent to accept foreign currency at its business place in Oshikango 'strictly in payment for goods sold or services rendered . . .' subject to certain conditions. One of the conditions was that the foreign currency 'acquired must be sold to an Authorised dealer<sup>13</sup> not later than the following business day after its acquisition'.

[74] At face value it appears that this annexure is no licence or authority to pay foreign currency into first respondent's foreign currency account – it does not assist the first respondent at all in explaining the cash deposits into its (CFC) account.

[75] Sections 52(3) and (5) are inextricably linked to each other. So for example a s 52(3) notice would be incomplete if not accompanied by the s 52(5) affidavit, and if non-compliance with s 52(5) did not render the s 52(3) notice a nullity it would mean that s 52(5) 'may be breached with impunity'. It does not appear from the s 52(3) notice what the issues in dispute were at that stage.

[76] Although the court *a quo* dealt with the five points *in limine*, it did not deal, except to refer to the fact that the appellant alleged that respondents were precluded from participating in the forfeiture proceedings, at all with the appellant's contention that the respondents were not entitled to receive notice of the intended forfeiture

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<sup>13</sup> A commercial bank.

application. The court *a quo* did not consider or discuss the extent to which the notice in terms of s 52(3) also complied or did not comply with the requirements of s 52(5) (e).

[77] I deem it necessary to comment on the issue of the chosen address as required by s 52(5) as<sup>14</sup> well as the issue of service of the preservation order on the first respondent.

[78] It is not disputed by the first respondent that there was an attempt by the deputy-sheriff to serve the order on its registered address. It was also not disputed that the registered address was incomplete – the deputy sheriff described the address as blocks of flats and was not provided with a unit number. It is further not disputed that the preservation of property order was published in the Government Gazette on 10 February 2017 and the order was published in two newspapers.

[79] Regulation 3(1)(b) of the regulations made pursuant to the Act provides that a document required to be served must be effected by publishing it in the Gazette and in two daily newspapers of wide circulation if the contact details of the effected persons are unknown. Publishing the order in two newspapers is also in compliance with the court order of 27 January 2017 granting leave to effect service by way of publication of the preservation order where the appellant was unable to effect personal service.

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<sup>14</sup> *Karas supra* at paras 15 and 18.

[80] In *Arendsnes Sweefspoor CC v Dalia Marcelle Botha*<sup>15</sup> in an appeal which turned solely on whether service as reflected in the return was to be construed as valid service on the appellant, a close corporation. The summons was served on a certain person at the registered office of the appellant but who was not employed by the appellant. The summons was never handed over to the appellant. By the time of the service of the summons at the registered office, the appellant had ceased all trading activities and had no presence on the premises. The close corporation was however never deregistered.

[81] Shongwe JA at para 15 referred with approval to *Geldenhuis Deep Ltd v Superior Trading Co (Pty) Limited* 1934 WLD 117 at 119 where De Waal JP said:

‘Until notification of change of address is given to the Registrar of companies, the office as originally registered remains the registered office of the company for practical purposes.’

And continues at para 16 as follows:

‘I agree in this regard with the reasoning of the court *a quo* where it reasoned that corporations should not be permitted to register an office address where it has no purpose or business and so doing, frustrate services of summons and other court process upon it.’

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<sup>15</sup> 2013(5) SA 399 (SCA).

[82] Had the registered address of the first respondent been complete or accurate, the Deputy-Sheriff would have been entitled to affix it to the main door of the business and this would have constituted valid service.<sup>16</sup>

[83] In my view, it was not necessary at all for a person employed by the appellant to agree with respondents' legal practitioner that service at his office would be construed as service in compliance with the provisions of s 52(1)(a) of the Act since there was proper compliance with the provisions of s 52(1) prior to the said discussion, by the publication of the order in two newspapers. In a situation where the appellant had not given any notice at all to the first respondent, the agreement could have been considered proper and the appellant would have been bound thereby. However in a situation where notice in compliance with the court order had been given, the agreement to accept service at the office of the attorney would have been superfluous in the circumstances.

[84] Although there was a registered address given by the first respondent, it was incomplete and for all practical purposes, useless. The appellant was, in my view, in these circumstances perfectly entitled to publish the order in two newspapers and in the Gazette. The publication of the preservation of property order constituted service on the respondents and was not irregular.

### Conclusion

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<sup>16</sup> In terms of s 25(1) of the Close Corporations Act 26 of 1988 every corporation shall have in Namibia a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed.

[85] In my view, the court *a quo* erred in failing to consider the contention by the appellant that the respondents were not entitled to receive notice of the application for a forfeiture of property order. The court should have considered whether the sanction provided for in s 52(6) finds application.

[86] In my view, it should have been apparent to the court *a quo*, had it considered the issue, that the notice in terms of s 52(3) was defective in view of non-compliance with the provisions of s 52(5)(e), and should have concluded that the sanction provided for in s 52(6) becomes operative, resulting in the fact that the respondents were not entitled to receive notice of the intended application for forfeiture of property and therefore the issues regarding service or lack thereof and lack of a chosen address did not arise.

[87] As it was common cause that the forfeiture application lodged on 9 June 2017 was filed on the last day of the 120 day period of validity of the preservation order and as there was no need for service on any one of the forfeiture order, it was filed timeously. It is not necessary in these circumstances to decide whether service on a respondent is necessary to render a forfeiture application pending. As this was in essence, an *ex parte* application, it became pending from the time it was lodged with the registrar of the High Court.

[88] In my view, the appeal should succeed.

[89] In the result the following order is made:

- (a) The appeal succeeds.
  
- (b) The order made by the court *a quo* is set aside and substituted with the following order:
  - (i) The application by the first and second respondents dated 3 July 2017 is dismissed with costs.
  
- (c) The respondents are liable for the appellant's costs in the appeal.

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**HOFF JA**

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**DAMASEB DCJ**

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**FRANK AJA**





## APPEARANCES

APPELLANT:

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Of Government Attorney

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