



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA3/2012

In the matter between:

**THE PROSECUTOR-GENERAL**

**APPLICANT**

and

**NATANGWE KONDJENI KANIME**

**RESPONDENT**

**Neutral citation: .....**

**Coram:** GEIER J

**Heard:** 20 September 2012

**Delivered:** 20 December 2012

**Flynote:** Application for confirmation of provisional preservation order granted in terms of Section 51(2) of The Prevention of Organized Crime Act 2004 – On return date Court should reconsider matter as if order was first being applied for - test formulated *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 698 applied –

Applications for preservation orders under POCA – 5 step approach of the Court set out – First - if the circumstances described in the section exist the court “*must*” make a preservation order - it has no discretion in this regard – Second - the

section specifically authorizes the making of the application on an ex parte basis: the court must (if the statutory requirements are met) make the order “*without requiring that notice of the application be given to any other person*” – Third - the tests at the preservation stage and the forfeiture stage differ - at the forfeiture stage, the question is whether the property is found “on a balance of probabilities” to be the proceeds of unlawful activities - at the preservation stage, the question is whether there are “reasonable grounds” for the belief that the property is the proceeds of unlawful activities – Fourth - the approach which the courts are to take in establishing whether a case has been made out at the preservation stage as set out in *National Director of Public Prosecutions v Rautenbach and Others 2005 (4) SA 603 (SCA) ([2005] 1 All SA 412) at para 27* – t – adopted – the court ‘... *is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the applicant’s opinion ... it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed* – Fifth - to the extent that there may be a dispute as to the inference which may be drawn from the facts the test to be adopted is *that the court should not pause to consider the value and persuasiveness of each and every inference that can be drawn but should only confine its attention to the fact or question whether one of the possible inferences to be drawn is in favour of the plaintiff in order to determine whether a prima facie case has been established or not* - What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.”

Application for confirmation of provisional preservation order under POCA – court satisfied that there were indeed reasonable grounds for the belief that the property provisionally preserved were the proceeds of unlawful activities and that the applicant had established that there were reasonable grounds for believing that there was a connection between the alleged unlawful activity and the property identified in the Notice of Motion and that same was derived, received or retained,

directly or indirectly, in connection with or as result of the unlawful activity carried out by the respondent in contravention of the Income Tax Act and/or the Financial Intelligence Act and/or the Casinos and Gambling Houses Act and/or POCA.

**Summary:** Applicant had applied for and had been granted a provisional preservation order in terms of Section 51(2) of POCA – On an afresh reconsideration of the matter – as if the order was first being applied for -

**Held:** That the continuing improbabilities, the respondent's failure to make full and frank disclosure and the self-admitted statutory contraventions on the evidence showed that there were indeed reasonable grounds for the belief that the property provisionally preserved are the proceeds of unlawful activities, alternatively that there were at least reasonable grounds for believing that there is a connection between the alleged unlawful activities and the property listed in annexure to the notice of motion;

**Held:** That one of the reasonable inferences that had emerged from the overall picture was that the provisionally preserved property, at the very least, was derived, received or retained or used, directly or indirectly, in connection with or as result of unlawful activity carried out by the respondent in contravention of the Income Tax Act and/or the Financial Intelligence Act and/or the Casinos and Gambling Houses Act and/or POCA;

**Held:** That the applicant had thus, in the final instance, also satisfied the requirements set by Section 51(2) of POCA, on a reconsideration of all the evidence before the court, 'as if the order was first being applied for'. Interim preservation order thus confirmed.

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## ORDER

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1. The provisional preservation order granted on 27 March 2012 is hereby confirmed;

2. The respondent is to pay the applicant's costs, inclusive of the costs of one instructing and one instructed counsel.

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## JUDGMENT

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GEIER J:

[1] The respondent herein finds himself on the receiving end of a provisional preservation order granted against him on 27 March 2012 in terms of Section 51(2) of the Prevention of Organised Crime, Act 29 of 2004 (herein after referred to as POCA) as a result of which the following assets were preserved :

- a) the respondent's positive balance in the Sanlam Unit Trust – Investor code 65230878 – in the amount of N\$ 2 236 500.00;
- b) a Fiat Uno with registration number N1462OR;
- c) a BMW 3 Series motor vehicle with registration number N79000SH; and
- d) Erf 0014 Oshakati.

[2] The question before the court is whether or not such provisional preservation order should now be made final.

### THE RESPONDENT'S FINANCIAL POSITION AND THE CIRCUMSTANCES LEADING UP TO THE PRESERVATION ORDER

[3] The respondent is an employee of the NAMDEB Diamond Corporation, where he earns a living as an electrician, at a monthly salary of N\$ 14 681.00.

[4] During the period of 5 March 2007 to 28 January 2011 amounts totalling N\$ 2 236 500.00 were deposited into the respondent's Sanlam Unit Trust account.

[5] These deposits were usually made in cash and were predominantly made in the South African currency.

[6] In addition the respondent was able to purchase by way of cash -

- (a) An Fiat Uno motor vehicle for N\$ 7 000.00 in January 2008;
- (b) An Erf in Oshakati for N\$ 45 000.00 in February 2008;
- (c) A Toyota valued at N\$ 176 200.00 in December 2008;
- (d) A BMW for N\$ 234 294.00 in June 2009.

[7] The respondent was able to pay import tax on the Fiat Uno and BMW motor vehicles to the tune of N\$ 39 813.51, again paid in cash.

[8] Throughout this time he was also able to substantively improve the said Oshakati property - on which the buildings alone - exclusive land value - are now valued at N\$ 2 106 970.00.

[9] The respondent tried to explain his income.

[10] On his own version he earns additional income –

- (a) from a bar ( the boxing club) in Oranjemund – were he pockets up to N\$ 30 000.00 alone over a weekend and also often more during month- end

weekends. This income is estimated to be in the region of N\$ 1,5 million per year;

- (b) from the Santon Bar in Oshakati he apparently receives N\$ 10 000.00 per month - amounting to N\$ 120 000.00 per year;
- (c) from four Jackpot machines stationed at Eluwa and Oshakati he generates N\$ 80 000.00 to N\$ 90 000.00 per month - this amounts to approximately N\$ 1 000 000.00 per year;
- (d) from a jackpot machine at the Oshetu Bar in Windhoek he earns N\$24 000.00 to N\$ 30 000.00 per month - amounting to about N\$ 300 000.00 per year.

[11] All this totals to an income of not less than N\$ 2,92 million per year.

[12] According to respondent however his cattle business has been the one which has “ ... by far (*been*) the most profitable ...”.

[13] The respondent admits to own a significant, but undisclosed, number of cattle of undisclosed substantial value.

[14] As on respondent's version the bar in Oranjemund is the second - biggest money-spinner with an income of about N\$ 1.5 million per year - and as the respondent proclaims his cattle business to be 'by far the most profitable' – implicit in this statement being that the cattle business must therefore generate an income 'by far more than N\$ 1.5 million per year' – and taking into account further the total self-proclaimed income from all the other abovementioned sources - applicant submitted convincingly that the respondent's income should at least be estimated to be in the region of N\$ 5 million per year.

[15] It also does not take much to follow why it was initially suspected that the respondent might be involved in illicit diamond dealings. This suspicion was fuelled by factors such as that there were no other determinable sources of income besides his salary received from his employment at the Namibian Diamond Corporation and because certain significant deposits were made in South African Rand.

[16] As respondent was unable to produce any documentary evidence which substantiated his claims relating to the above set out income in any material manner it was not surprisingly submitted on behalf of the applicant that there was good reason that the respondent's bald claims and explanations, relating to the sources of his significant income, were dubious.

[17] The blatant inability to underscore these claims and explanations with any meaningful documentary proof was not enhanced by the respondents inability to remember any precise detail in respect of his alleged financial transactions carried out over a number of years.

#### **THE FALSE DECLARATIONS MADE IN CONTRAVENTION OF THE FINANACIAL INTELLIGENCE ACT 2007 IN RESPECT OF THE SANLAM UNIT TRUST INVESTMENT**

[18] A further telling attack on respondents exculpatory explanations was mounted by the applicant in respect of a patently false declaration made by the respondent in regard to a the self-declared source of income made by him when he deposited an amount of N\$ 180 000.00 into a Sanlam Unit Trust account on 28 January 2011 and for purposes of which he was required to make a declaration in regard to the source of those funds in terms of the *Financial Intelligence Act 2007*.

[19] The respondent literally declared that the source of this investment was “salary”. He also declared that his source of income was “*NAMDEB (operator)*”.

[20] It does not take much to fathom that these were patently false declarations as such funds could not have been derived from a gross monthly salary of N\$ 14 681.00 in terms of which the total amount deposited amounted to more than 12 months’ salary.

[21] In a further improbable attempt at explaining the funds for this investment the respondent also averred that he was able to accumulate this deposit by investing an additional amount of N\$ 1 000.00 per month from his salary towards the Sanlam unit trusts – also this version does not tally with the respondents version as declared for purposes of compliance with the provisions of the Financial Intelligence Act.

[22] In any event it was further telling that the respondent, in his answering papers, did not even attempt to deny having made the aforementioned false declarations.

[23] It was pointed out that the respondent’s self-serving declaration was totally misleading as the declared source of income was obviously too small and insignificant if compared to the greater portion of his self-proclaimed income. It was accordingly submitted that - whatever the true source of the Sanlam Unit Trust investment was - it was not disclosed.

[24] It was against this background forcefully submitted by Mr Budlender, who appeared on behalf of the applicant, that the most reasonable inference - or at least one of the reasonable inferences - to be drawn from such misrepresentation was that respondent was attempting to conceal his real sources of income, for which the only reason would have to be that such income was derived from unlawful activities.



## THE CONTRAVENTION OF THE CASINOS AND GAMBLING HOUSES ACT 1994

[25] In addition it had not gone unnoticed that – in any event - a large part of the respondent's income was self-evidently derived from unlawful activities as it had also emerged that the income generated from the jackpot machines at Eluwa, Oshakati and the Oshetu Bar in Wanaheda, Windhoek - in respect of which the respondent claimed an income from gambling of approximately N\$ 1,3 million per year – was tainted by illegality as these machines were not licensed under the Casinos and Gambling Houses Act, Act 32 of 1994.

[26] No official records were found by the investigating officials in regard to any application for a Gambling House license, nor were any such licenses issued in the respondent's name or produced in the answering papers to controvert the allegations which had been made in this regard in the founding papers. This situation<sup>1</sup> clearly rendered this portion of the respondent's income as income derived from an 'unlawful activity'<sup>2</sup> as defined in Section 1 of the Prevention of Organised Crime Act 29 of 2004, as amended, (hereinafter referred to as 'POCA').

[27] This is where the definition of 'money laundering'<sup>3</sup> - as contained in section 1 of POCA - comes into play. This definition provides a link to sections 4 and 6:

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<sup>1</sup> Section 44 of the Casinos and Gambling Houses Act 32 of 1994 - Offence regarding unlicensed gambling

Any person who in or on any premises carries on or allows to be carried on gambling by means of any game or, for the purposes of gambling, keeps or allows to be kept any gambling machines, without such person being-

(a) the holder of an appropriate licence in respect of such premises; or

(b) an employee of a person who is the holder of an appropriate licence in respect of such premises,

shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

<sup>2</sup> "unlawful activity" means any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.

<sup>3</sup> "money laundering" means doing any act which constitutes an offence under sections 4 to 6;

“OFFENCES RELATING TO MONEY LAUNDERING (ss 4-11)

4. Disguising unlawful origin of property

Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect-

(i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

commits the offence of money laundering.

and

6 Acquisition, possession or use of proceeds of unlawful activities

Any person who-

(a) acquires;

(b) uses;

(c) has possession of; or

(d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.”

[29] It was thus submitted against the background of this all-encompassing legal framework that the respondent had acquired the ‘proceeds of crime’ and that he had used the proceeds of these ‘unlawful activities’<sup>4</sup> - as defined in section 1 of POCA - to enter into numerous transactions.

#### **THE RESPONDENT’S CONTRAVENTIONS OF THE INCOME TAX ACT**

[30] In addition - and brought within the ambit of POCA by the same provisions - it became clear from the papers that the respondent had also failed to declare his income and that he did not pay income tax on it.

[31] Again these aspects were specifically alleged by the applicant and the respondent submitted no facts in contradiction thereof. The respondent’s reply is telling in this regard:

“I am advised and submit that even if I did not pay tax to the Receiver of Revenue (which in any event is denied) in contravention of the Income Tax Act, such failure does not per se render the properties which are subject to the preservation order the proceeds of unlawful activities”.

[32] It does not take much to imagine - given this response - that it was immediately argued on behalf of the applicant that it was noteworthy that the

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<sup>4</sup> "proceeds of unlawful activities" means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity; In this regard the definition of "property" which ‘ ... means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property ...’ – should also be taken into account;

respondent did not actually allege that he has declared his income and had paid income tax on it and that he did not produce any evidence to this effect. It would obviously have been a simple matter for the respondent to have refuted these allegations with his income tax returns.

[33] Again it was thus submitted that the respondent had contravened the Income Tax Act and that any assets which he might have had acquired would have been purchased with his undeclared and untaxed income.

#### **THE RESPONDENTS ARGUMENTS**

[34] On behalf of the respondent Mr Phatela submitted that he is a businessman who buys cattle and sells them for meat, the starting capital for this venture allegedly having been obtained from an inheritance of N\$ 100 000.00 received from his late mother which respondent had apparently utilised to buy young heifers and cows from farmers in Opupa, Otjiwarongo, Grootfontein and Outjo, where after he would slaughter them and then sell their meat, both raw and roasted as kapana, in his village and surrounding villages and in the towns of Oshakati and Ongediwa. The money so made would be used to purchase even more cattle which he sold for profit at auctions and to private individuals. A certain Mr. Tobias carried out this part of the respondent's business. Certain receipts from auction sales were indeed annexed to the answering papers.

[35] It was thus contended that on proper calculation the profits made from the cattle business were sufficient to purchase the immovable property in Oshakati and all the vehicles that were the subject matter of the interim preservation order.

[36] Reliance was also placed on a purported accounting of the respondents financial transactions as reflected from the respondent's bank statements for the period for 2008 to mid 2011. Thus, so it was submitted, there was ample evidence in the respondent's affidavit that the property which formed the subject to the

preservation order did not constitute the proceeds of unlawful activities and that they were not involved or instrumental in crime or in any unlawful activities and that such bank statements provided the factual basis for the respondents extra income.

[37] As far as the relied upon income tax liability was concerned this, so it was submitted - cannot amount to more than 40% of the total income of an individual. It was in any event incomprehensible to subject the earnings of an individual to a preservation order which by far exceeded any potential tax liability of such individual.

[38] In regard to the Sanlam investment of N\$ 180 000.00 it was the respondent's case that there were no facts to suggest or infer a fraudulent non-disclosure as there was no duty on an investor to account for each and every dollar invested or to show over what period the investment had accumulated, and that there was no duty to disclose to a financial institution how the investment is to be utilised.

[39] As the respondent had thus properly accounted for his financial transactions the court had been put into the picture as to how the respondent generated his income. As there was no link that the income and property concerned represented ill-gotten gains, derived from unlawful activities, the rule nisi in question should be discharged.

#### **THE HISTORY PRECEDING THIS APPLICATION**

[40] Given this factual background it does not seem surprising that there was a previous attempt by the Prosecutor-General to set the wheels of POCA against the respondent in motion. The applicant applied for and was granted a first preservation order against the respondent under POCA 10/2011 on 7 October 2011.

[41] At the time the applicant was represented by a member of her staff who was not an admitted legal practitioner. In these proceedings as well as in POCA 8/2011 the question was raised whether or not the appearance of a non-admitted legal practitioner constituted an irregularity which vitiated such proceedings. On 2 December 2011 judgment on this issue was given in POCA 8/2011 where the court held that the appearance of a non-admitted legal practitioner was an irregularity which vitiated the proceedings.

[42] In a further POCA matter, POCA 9/2011, the applicant raised the issue whether or not this was the type of irregularity which could be condoned? Judgment was reserved on this question.

[43] It has to be kept in mind however that a preservation order lapses 120 days after publication in the Government Gazette unless a forfeiture application is pending.<sup>5</sup>

[44] In this instance the first preservation order was published in the Government Gazette on 25 November 2011. While judgment was thus awaited on the question of condonation or ratification the preservation order granted against the respondent was about to expire. In an attempt to avoid a further delay in the proceedings the applicant elected not to proceed to apply for a forfeiture order under that case but instead decided to bring a fresh application in terms of which a new preservation order would be sought.

[45] The preservation order under POCA10/2011 was thus allowed to expire on 24 March 2012.

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<sup>5</sup> Section 33 (1) of POCA at 29 2004

[46] A second application, (this application), was thus made in respect of the property which had been reserved under POCA10/2011 as well as a BMW motor vehicle with registration number N 3322 SH.

[47] In this application the applicant has made full disclosure of the preceding history in which also the defences of the respondent as raised in the first application were disclosed through the attachment of the respondent's answering papers filed in that case.

[48] As a result a second preservation order was granted against the respondent under POCA 3/2012 on 27 March 2012, this time in the form of a provisional order..

[49] The issue which in such circumstances came up with determination was whether or not such provisional order should now be made final in terms of Section 51 of POCA.

#### **THE PURPOSE AND STRUCTURE OF CHAPTER 6 OF POCA**

[50] In his heads of argument Mr. Budlender SC, who appeared on behalf of the applicant, usefully set out the principles against which this matter is to be determined as follows :

“All too often, the criminal justice system does not live up to the adage that crime does not pay. Criminals are frequently able to keep and enjoy the spoils of their crimes. This phenomenon is offensive to public morality and is in itself a powerful incentive for crime. The Namibian legislature has accordingly taken steps to address the problem. This is consistent with a worldwide trend.”<sup>6</sup>

The inter-related purposes of Chapter 6 of POCA include:

- a) removing incentives for crime;

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<sup>6</sup> *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC) at para [53]

- b) eliminating or incapacitating some of the means by which crime may be committed;
- c) advancing the ends of justice by depriving those involved in crime of the property concerned.<sup>7</sup>

Section 59(1) authorizes a court convicting a person of an offence to make an order for the forfeiture of property that is found, on a balance of probabilities, to be the proceeds of unlawful activities.<sup>8</sup>

Section 51 provides for the preservation of property pending an application for forfeiture at the end of the criminal trial.

The test to be applied at the preservation stage:

Section 51(2) of POCA provides as follows:

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

*(a) an instrumentality of an offence referred to in Schedule 1; or*

*(b) the proceeds of unlawful activities,*

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

Attention was drawn to the following aspects emerging from this provision.

First, if the circumstances described in the section exist the court “*must*” make a preservation order. It has no discretion in this regard.<sup>9</sup>

Second, the section specifically authorizes the making of the application on an ex parte basis: the court must (if the statutory requirements are met) make the order “*without requiring that notice of the application be given to any other person*”.

Third, the tests at the preservation stage and the forfeiture stage differ. At the forfeiture stage, the question is whether the property is found “on a balance of probabilities” to be the

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<sup>7</sup> *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC) at para [81]

<sup>8</sup> The section also deals with the instrumentalities of an offence. That does not arise here.

<sup>9</sup> The South African courts have held that under the equivalent South African statute, a discretion exists where a preservation order would result in an arbitrary deprivation of property. No such issue arises here.



proceeds of unlawful activities.<sup>10</sup> At the preservation stage, the question is whether there are “reasonable grounds” for the belief that the property is the proceeds of unlawful activities.

Fourth, and following from this, the approach which the courts are to take in establishing whether a case has been made out at the preservation stage has been explained as follows by a two-judge bench of this Court: The Court adopted what was said in this regard by the Supreme Court of Appeal of South Africa in relation to the equivalent and very similar South African statute.<sup>11</sup>

*... the court in considering whether or not to grant an order under Ch 5 - (National Director of Public Prosecutions v Rautenbach and Others 2005 (4) SA 603 (SCA) ([2005] 1 All SA 412) at para 27) - t:*

*‘... is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the applicant’s opinion ... it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed.’ [Emphasis added]*

Fifth, to the extent that there may be a dispute as to the inference which may be drawn from the facts, the Court held at para [23] that the question is whether a prima facie case has been made out. The Court explained that test by referring to an earlier judgment of a Full Bench of this Court,<sup>12</sup> in which the following was said:

*Thus in proceedings such as the present where a diversity of facts justify different inferences to be drawn, some of which could establish the appellant’s case, the court should not pause to consider the value and persuasiveness of each and every inference that can be drawn but should only confine its attention to the fact or question whether one of the possible inferences to be drawn is in favour of the*

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<sup>10</sup> Section 59(1)

<sup>11</sup> *Prosecutor-General v Lameck and Others* 2009 (2) NR 738 (HC)

<sup>12</sup> *Bourgwells Ltd v Shepavolov and Others* 1999 NR 410 (HC) at 418 - emphasis added-

*plaintiff in order to determine whether a prima facie case has been established or not.*

The South African Supreme Court of Appeal has explained the approach in respect of disputed facts in similar terms as follows:<sup>13</sup>

*... the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order."*

## **THE CONCLUDING ARGUMENT ON BEHALF OF APPLICANT**

[51] With reference to these five points and the background facts Mr Budlender then submitted that it was the applicant's case that were indeed reasonable grounds for the belief that the property provisionally preserved were the proceeds of unlawful activities. Relying further on the defined concept<sup>14</sup> he submitted that the applicant had to establish that there were reasonable grounds for believing that there was a connection between the alleged unlawful activity and the property concerned, and that the property identified in the Annexure to the Notice of Motion was derived, received or retained, directly or indirectly, in connection with or as result of the unlawful activity carried out by the respondent.<sup>15</sup> The unlawful activities relied upon were those involving to the abovementioned contraventions of the Income Tax Act and/or the Financial Intelligence Act and/or the Casinos and Gambling Houses Act and/or POCA.

## **THE APPLICABLE TEST TO THE DETERMINATION OF THE ISSUES RAISED**

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<sup>13</sup> *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA)

<sup>14</sup> defined as "any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity"

<sup>15</sup> *National Director of Public Prosecutions v Carolus* & Others 1999 (2) SACR 27 (C) at 39

[52] It will have become clear by now that the applicant has sought and obtained an interim preservation order in respect of the respondent's positive balance in the Sanlam Unit Trust – Investor code 65230878 – a Fiat Uno with registration number N1462OR, a BMW 3 Series motor vehicle with registration number N79000SH and Erf 0014 Oshakati. The order was provisionally granted – ex parte - in terms of Section 51(2) of POCA.

[53] How the Court is to go about in deciding whether or not such order is then to be confirmed on the return day was considered by Nugent J in *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) where the Court held<sup>16</sup> that:

“ ... It must be borne in mind too that an order granted ex parte is by its nature provisional, irrespective of the form which it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought. (*Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 332B--D) and there is no reason why he should be in a better position in this respect merely because the defendant was unaware that he was called upon to submit to the court's jurisdiction for the purpose of an impending action. The court at that stage considers the matter afresh to decide whether to permit the attachment to continue, and in my view the matter falls to be decided as if the attachment was first being applied for. If the respondent has by then submitted to the jurisdiction, I can see no reason why the matter should not be dealt with in the same manner as if the order was first being applied for...”. (my underlining)

[54] This test was subsequently approved by the South African Appellate Division in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at 404B and adopted by Damaseb JP and Parker J in *Prosecutor-General v Lameck & Others* 2010 (1) NR 156 (HC).<sup>17</sup>

#### **ARE THERE REASONABLE GROUNDS FOR THE BELIEF THAT THE PROPERTY PROVISIONALLY PRESERVED CONSTITUTES THE PROCEEDS OF UNLAWFUL ACTIVITIES**

[55] On the application of this test and thus on an afresh consideration made upon a comparison of the respondent's position - as it stood at the time of the ex parte

<sup>16</sup> on the return date of an ex parte order which had been granted in the form of a rule nisi with immediate effect ordering the attachment of the person of the respondent to answer a claim to be instituted by the applicant

<sup>17</sup> at p159 para [4]

consideration of the facts - with the position as it stands now - after taking into account all the information supplied by the respondent – the following picture emerges :

#### **THE CONTINUING IMPROBABILITIES**

a) whereas it originally seemed strange that the respondent, a salaried Namdeb employee, had made payments, totaling R 2 236 500.00 into this Unit Trust account - predominantly in cash - and most of it in South African Rand - over a period of less than four years - the respondent's subsequent failure to explain why such cash deposits were made in a foreign currency did little to dispel the initial suspicions that he might have been involved in illicit diamond dealings;

b) whereas it originally already seemed inexplicable that a salaried electrician was able to sustain and amass a unit trust investment to the tune of N\$ 2 236 500.00 in less than four years, this *prima facie* inexplicable situation - now viewed in the light of the respondent's self- declared income and coupled with his contentions that in respect of this investment there was no duty on him to account for every Dollar invested and to disclose over what period such investment was accumulated and how it was going to be utilised – was not rendered free from doubt on account of the failure to explain the palpable untruths and direct contradictions contained in this regard in the respondent's own declaration as to the source of this income as made by him for purposes of compliance with the Financial Intelligence Act;

c) whereas originally it already seemed inexplicable and unlikely that the source of the deposit of N\$ 180 000.00 made into the respondent's Sanlam Unit Trust account was '*salary*' or '*NAMDEB(operator)*' - as such salary alone was too little and would have amounted to more than 12 months' gross salary and which amount could also not have been amassed through a monthly contribution of N\$ 1000.00, as averred by respondent – the questions lingering in this regard were not dispelled on account of the respondent's failure to explain the reason for the blatant misrepresentations made in this regard;

d) whereas originally it already seemed likely that the true source of the deposit of N\$ 180 000.00 made into the respondent's Sanlam Unit Trust account had not

been disclosed - as it obviously was not '*salary*' or '*NAMDEB(operator)* -' and that the respondent was therefore actually attempting to conceal his real source or sources of income – the respondent's failure to explain or even attempt to deny the falsity of those declarations – continues to perpetuate the negative inferences to be drawn from such non-disclosures;

e) whereas it originally had seemed inexplicable that a salaried employee of Namdeb was able to purchase three vehicles and finance import tax on such vehicles in excess of N\$ 457 000.00 in the span of two years, purchase immovable property for N\$ 45 000.00 and cause same to be improved – excluding the present land value to N\$ 2 106 970.00 – it now appeared - that the veracity and impact of the respondent's explanations - relating to his ability to finance these transactions through the other sources of his significant additional income - was diminished significantly by the respondent's failure to produce any material supporting documentary evidence, save for a liquor licence, which would/could have underscored his claims relating to his financial transactions and the legitimacy of the sources of income utilized in that regard, which thus continued to remain 'dubious';

#### **NO FULL AND FRANK DISCLOSURE OF SELF - ADMITTED SOURCES OF INCOME**

f) whereas initially only sketchy information in regard to the respondent's self-proclaimed sources of income were available, it appeared now in greater detail from the respondent's answering papers that he apparently derives a substantial income from a number of bars, gambling machines and a cattle business, managed by one Tobias – all of which would have gone a far way to explain the respondent's wealth – (which he attempted to do, for example, with reference to his bank statements) – if the veracity of the respondent claims in this regard would not have been undermined by the failure/inability to produce any material supporting documentary evidence in this regard through which the individually alleged transactions could/would have been substantiated – and if he would have been able to corroborate the allegations made by him in regard to the 'by far most profitable part of his business' through a supporting affidavit of the said Mr Tobias, his manager – a situation which was exacerbated even more by the revelation that the respondent operated no banking accounts for any of these businesses and his inability to remember any of his

financial dealings with any precision – all of which resulted in the perpetuation of the perception that there had not been a full and frank disclosure by the respondent as to the true sources of his income;

#### **THE SELF- ADMITTED RECEIPT OF PROCEEDS OF UNLAWFUL ACTIVITIES**

g) whereas the court originally had only sketchy information before it regarding the respondent's income from a number of bars, gambling machines and a cattle business before it, it emerged, after a full exchange of papers, on the return date, that the respondent actually generates an unlawful income from unlicensed jackpot machines of approximately 1.3 million per year in contravention of the Casinos & Gambling Houses Act 1994 and that he has, in addition, failed to declare - and pay income tax to the Receiver of Revenue on all his self-proclaimed income –estimated to be in excess of N\$ 5 million per year - in contravention of the Income Tax Act 1981 – which income incidentally – is by far in excess of the value of the property which has been preserved – and which income thus constitutes income derived, received or retained as result of the unlawful activity carried out by the respondent in contravention of the Casinos & Gambling Houses and the Income Tax Acts;

h) whereas the court originally only had sketchy information before it regarding the respondent's use of the income derived from a number of bars, gambling machines and a cattle business before it, it emerged, after a full exchange of papers, on the extended return date, that this use was unlawful because it was unlawful income generated in contravention of the Casinos & Gambling Houses Act and the Income Tax Act by respondent – and that - given the definition of 'proceeds of unlawful activities as read with Section 6 of POCA – the respondent - in the use of these moneys - also seems to have committed the offence of 'money laundering'.

[ ] On a reconsideration of all the information now before the court it however appears that the respondent's case has not improved at all. Not only did it appear on that

[56] Given the picture that has emerged on an 'afresh consideration of the case' it admits to no doubt that, if all this information would have served before a court, when

it first considered this matter, that such court would there and then have issued a final preservation order.

[57] In my view the continuing improbabilities, the failure to make full and frank disclosure and the self-admitted statutory contraventions on the evidence show that there are indeed reasonable grounds for the belief that the property provisionally preserved are the proceeds of unlawful activities, alternatively that there are at least reasonable grounds for believing that there is a connection between the alleged unlawful activities and the property listed in annexure to the notice of motion.

[58] One of the reasonable inferences that has emerged from the overall picture is that the provisionally preserved property, at the very least, was derived, received or retained or used, directly or indirectly, in connection with or as result of unlawful activity carried out by the respondent in contravention of the Income Tax Act and/or the Financial Intelligence Act and/or the Casinos and Gambling Houses Act and/or POCA.

[59] The applicant has thus, in the final instance, also satisfied the requirements set by Section 51(2) of POCA, on a reconsideration of all the evidence before the court, 'as if the order was first being applied for'.

[60] In the result:

- a) the provisional preservation order granted on 27 March 2012 is hereby confirmed;
- b) the respondent is to pay the applicant's costs, inclusive of the costs of one instructing and one instructed counsel.

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H GEIER  
Judge

**APPEARANCES****APPLICANT:****GM BUDLENDER SC**

Instructed by, Government Attorney,  
Windhoek

**RESPONDENT:****TC PHATELA**

Instructed by Kaumbi-Shikale Inc  
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