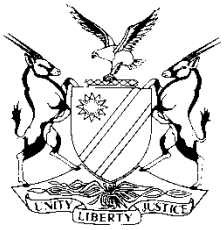

REPUBLIC OF NAMIBIA

CASE NO. POCA 9/2011

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

MARTIN **SHALLI**

Applicant

and

THE PROSECUTOR-GENERAL

Respondent

CORAM: **VAN NIEKERK, J**

Heard: 23 February 2012

Delivered: 2 May 2012

JUDGMENT

VAN NIEKERK, J:

Introduction and background

[1] The applicant (hereinafter "GMS") was formerly the High Commissioner of Namibia in the Republic of Zambia where he served between 2005 and 2006. In 2006 he was appointed Head of the Namibia Defence Force. In January 2011 he retired with the rank of Lieutenant-General.

[2] On 30 September 2011 the respondent (hereinafter "the PG") *ex parte* obtained a preservation of property order (hereinafter "preservation order") before SWANEPOEL J under section 51 of the Prevention of

Organised Crime Act, 2004 (Act 29 of 2004) (hereinafter "POCA"). The order reads as follows:

"1. The order relates to the amount of USD359 526.27 held at Standard Chartered Bank, Lusaka, Account Number 8700222632700 in the name of Martin Shalli and the amount of USD1 389.00 held at Standard Chartered Bank, Account Number 8700260305400 held in the name of Elsie Maseke Ausiku ("the properties") (*sic*).

2. In terms of section 51 of the **Prevention of organised Crime Act, 2004, Act No. 29 of 2004** ("the Act") all persons with knowledge of this order are, other than as required and permitted by this order, prohibited from removing, taking possession of or control over, dissipating, interfering with, diminishing the value or, or dealing in any other manner with any of the properties (*sic*) to which this order relates.

3. The Attorney General of Zambia shall in terms of the relevant Zambian domestic law exercise control over the properties (*sic*) until finalisation of the forfeiture proceedings relating to the properties (*sic*).

4. The Applicant shall:

    4.1 In terms of section 52(1)(a) cause notice of this order, in the form set out in Annexure A hereto, together with documents supporting the application, to be served by the sheriff on

        4.1.1 Martin Shalli residing at 72 Amasoniet Street Erospark, Windhoek;

        4.1.2 Elsie Maseke Ausiku residing at 49 Omatjene Street Cimbebasia, Windhoek;

    4.2 In terms of section 52(1)(b) cause notice of this order, in the form set out in Annexure B hereto, to be published in the Government Gazette as soon as practicable after the order is granted.

5. Any person who has an interest in the property and who intends opposing the application for an order forfeiting the property to the State or applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance giving notice of his or her intention in terms of section 52(3) of the Act.

6. Such notice must be delivered to the applicant:

    6.1 in the case of any person specifically identified for service in terms of this order, within 21 days of service; and

    6.2 in the case of any other person, 21 days after the date when a notice of the order was published in the Government Gazette.

7. A notice in terms of section 52 of the Act must contain full particulars of the chosen address for the delivery of documents concerning further proceedings in this matter and must be accompanied by an affidavit setting out:

    7.1 the full particulars of the identity of the person giving the notice;

    7.2 the nature and extent of his or her interest in the property concerned;

    7.3 whether he or she intends opposing the making of the forfeiture order, or whether he or she intends applying for an order excluding his or her interest in that property from the operation of the order;

    7.4 whether he or she admits or denies that the property concerned is an instrumentality of an offence referred to in schedule 1 of the Act, or is the proceeds of unlawful activities and the basis for such defence;

    7.5 if he or she intends applying for the exclusion of his or her interests from the operation of the forfeiture order, the basis for such an application.

8. Any person who is affected by the order may on good cause shown, apply by way of application for reconsideration. Such application shall be made:

    8.1 in instances where the person is able to justify the application on grounds of urgency, upon 3 days notice (or such shorter period as the court may determine on good cause shown).

    8.2 in other instances, upon at least 7 days notice to the applicant and all other persons identified in this order as being persons who may have an interest in the property.

    8.3 Such an application must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.

9. The international letter of request annexed as annexure **Y** is issued by this Honourable Court in terms of section 23(1) of the International Co-operation in Criminal Matters Act 9 of 2009."

[3] When the respondent's office sought to effect service of the preservation order on GMS, he requested the Deputy-Sheriff to serve it on his legal practitioners who are also the legal practitioners of record.

[4] On 7 November 2011 Mr Angula of GMS' legal practitioners wrote a letter to the respondent, the relevant part of which reads as follows:

"**RE: EX PARTE APPLICATION OF THE PROSECUTOR-GENERAL FOR AN ORDER IN TERMS OF SECTION 51 OF ACT No. 29 OF 3004 – OUR CLIENT LT-GENERAL MARTIN SHALLI**

We act on behalf of our abovementioned client in this matter. As you may be aware the ex parte application papers and Order issued in this matter pursuant to your application were served on us at our client's request.

> This letter therefore serves as a formal notice to your office and to take notice of our office address as the address at which all notices and legal proceedings in this matter or subsequent applications you may intend to bring affecting our client's rights are to be served on our client.
>
> Kindly acknowledge receipt hereof by counter-signing a copy of this letter served on your office."

[5] As requested, an official at the office of the PG acknowledged receipt of Mr Angula's letter on 7 November 2011. The relevant part of the reply by the Chief Clerk of the PG on 11 November 2011 reads:

> "1. We refer to the abovementioned matter and your letter dated 7 November 2011.
>
> 2. We confirm that the order and the application were served on Mr Angula from your office on the instructions of Martin Shalli on 11 October 2011."

[6] On 17 January 2012 the PG filed an *ex parte* application giving notice that she intends to apply "in terms of section 59 of POCA" for an order in the following terms:

> "1. To ratify and or *(sic)* condone the appearance of the public prosecutor who appeared on behalf of the applicant at the hearing of the preservation of property application under the same case number.
>
> 2. That the draft order annexed hereto as annexure "X" be made an order of Court.
>
> 3. Further or alternative relief."

[7] The draft order annexed as annexure “X” is an order in terms of section 61 of POCA forfeiting to the State the property mentioned in the preservation order made on 30 September 2011 by SWANEPOEL, J.

[8] The application was set down on 20 January 2012, (hereinafter “the 20 January application”). The PG also set down another matter (Case No. POCA 8/2011) in which she moved for relief in the same terms as in this case. The PG had filed heads of argument in both matters and as the issues of law and fact were the same in both matters as regards the relief sought in prayer 1 of the notice of motion, I ordered that both matters be argued at the same time.

[9] In her affidavits filed in support of the two applications, the PG in effect explains that the public prosecutor who appeared on her behalf when the preservation orders were obtained, Ms Boonzaier, was not an admitted legal practitioner. At the time the PG had held the *bona fide* but mistaken belief that she was empowered by the provisions of Article 88(2)(e) of the Namibian Constitution to delegate authority to a public prosecutor who was not an admitted legal practitioner to appear in Court in preservation and forfeiture applications under POCA. The PG explains that the mistake only came to her attention after these orders were granted. During argument on 20 January presented by Mr *Small* for the PG it became evident that although the issue of delegation to a non-admitted representative had been raised before, the matter only became the subject of a judgment when MILLER AJ in Case No. POCA 11/2011 held on 2 December 2011 that Ms Boonzaier, not being an admitted legal

practitioner, did not have *locus standi* to move the application for the preservation order in that case.

[10] After hearing Mr Small for the PG on the issue of ratification and condonation as prayed for in prayer 1 of the notice of motion in each case, I reserved judgment. Subsequently, it appears that Mr Angula learnt about the *ex parte* application heard on 20 January and addressed a letter to the PG on 2 February 2012 in which he *inter alia* referred to the contents of his previous letter dated 7 November and objected to the fact that the 20 January application was brought *ex parte*. He requested the PG's consent to an urgent re-hearing of the application before me on argument by both parties.

[11] On 6 February 2012 the PG replied, declining to give such consent, inter alia relying on the fact that GMS did not give notice of his intention to oppose the application for a forfeiture order under section 51 of POCA and did not in several other instances comply with the said section. (It is common cause that the applicable section is in fact section 52.) It was further suggested that GMS has an alternative remedy, and that is to wait for the Court's judgment, and if a forfeiture order is granted, to apply for rescission in terms of section 64(3) and (4) of POCA.

[12] Thereafter GMS launched an urgent application on 7 February 2012 which was set down on 23 February 2012 before me. In the present application the applicant initially sought an order in the following terms:

"1. Authorising this application to be heard as a matter of urgency, and condoning any non-compliance with the Rules of this Honourable Court in terms of Rule 6(12).

2. Directing that the respondent's application (under case number POCA 9/2011) to "condone" and or [sic] ratify" her irregularly-procured preservation order relating to the applicant, purportedly in terms of section 51 of Act 29 of 2004 ("the Act"), and thereafter the application for a forfeiture order against the applicant, both purportedly heard on 20 January 2012, be reheard.

3. Declaring that the applicant is entitled (through his legal practitioners of record) to proper and adequate notice of such rehearing, and is entitled to be heard at such rehearing, represented by legal practitioners.

4. Declaring that the preservation order purportedly obtained against the applicant on 30 September 2011 was irregularly procured, and is without force and effect.

5. To the extent necessary, condoning any non-compliance by the applicant with the requirements of sections 52(3)-(5) of the Act.

6. For further or alternative relief.

7. For costs of suit."

[13] The PG entered notice of opposition, filed answering papers and also gave notice of a conditional counter application, which is opposed.

[14] On the day of the hearing, Mr *Gauntlett* (who appeared with Mr *Pelser*) for GMS moved for the following order after presenting argument:

"1. Paragraph 114 of the respondent's answering affidavit (at Record p 228) is struck out as scandalous and vexatious, in terms of Rules

6(15) and 23(2), with costs on the scale as between attorney and client and including the costs of two instructed legal practitioners.

2. The three *in limine* points raised by the respondent in her answering affidavit are dismissed.

3. The application by the respondent to "condone and ratify" the preservation order issued under Case no: POCA 9/2011 against the applicant on 30 September 2011, and for forfeiture is dismissed.

4. The order granted by this Court for preservation of property and related relief (at Record p 24-27) dated 30 September 2011 is set aside as null and void and without force and effect.

5. The counter-application lodged on 16 February 2012 by the respondent be dismissed.

6. The respondent is directed to pay the applicant's legal costs in relation to the application and the counter-application, including the costs of one instructing and two instructed legal practitioners."

The relevant legislative provisions under POCA

[15] Chapter 6 of POCA provides for the preservation and seizure of property as a preliminary step to an application for forfeiture of such property. Section 50(1) in Part 1 expressly provides that the proceedings under this chapter are civil and not criminal proceedings. (This is the reason why the appearance by Ms Boonzaier was problematic).

[16] Part 2 of the Chapter contains provisions relating to preservation of property, the relevant sections for purposes of this case being sections 51, 52 and 58:

“**51 Preservation of property orders**

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

(2) The High Court must make an order referred to in 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.

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

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

52 Notice of preservation of property order

(1) If the High Court makes a preservation of property order, the Prosecutor-General must, as soon as practicable after the making of the order-

(a) give notice of the order to all persons known to the Prosecutor-General to have an interest in the property which is subject to the order; and

(b) publish a notice of the order in the Gazette.

(2) A notice under subsection (1)(a) must be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served or in any manner prescribed by the Minister.

(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 a forfeiture order.

58 Variation and rescission of orders

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

(a) the order concerned-

(i) will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or

(b) there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission.

(2) When a court orders the variation or rescission of an order authorising the seizure of property under subsection (1)(a) the court must

make such other order as it considers appropriate for the proper, fair and affective execution of the preservation of property order concerned.

(3) When the court has made a preservation of property order it may rescind that order if it was-

(a) erroneously sought or erroneously made in the absence of the person applying for its rescission; or

(b) made as a result of a common mistake of both the Prosecutor-General and the person affected by that order.

(4) Only the-

(a) Prosecutor-General; or

(b) person affected by a property preservation order who has given notice in terms of section 52(3) accompanied by an affidavit in terms of section 52(5),

may apply for an order under subsection (1) or subsection (3).

(5) Any person referred to in subsection (4)(b) intending to apply for an order under subsection (1) or (3) must, in the prescribed manner, give notice of that application to the Prosecutor-General.

(6) A preservation of property order may not be varied or rescinded on any grounds other than those provided for in this section.

(7) Any person affected by an order for the appointment of a curator bonis may at any time apply-

(a) for the variation or rescission of the order;

(b) for the variation of the terms of the appointment of the curator bonis concerned; or

(c) for the discharge of the curator bonis.

(8) Where the High Court has made an order for the appointment of a curator bonis it-

(a) may, if it is necessary in the interests of justice, at any time-

(i) vary or rescind the order;

(ii) vary the terms of the appointment of the curator bonis concerned; or

(iii) discharge the curator bonis;

(b) must rescind the order and discharge the curator bonis concerned if the relevant preservation of property order is rescinded.

(9) Any person affected by an order in respect of immovable property, made under section 56, may at any time apply for the rescission of the order.

(10) Where the High Court has made an order in respect of immovable property it-

(a) may, if it is satisfied that the operation of the order concerned will cause undue hardship for the applicant, which hardship outweighs the risk that the property concerned may be mortgaged or otherwise encumbered, attached or sold in execution or in any manner disposed of, at any time rescind the order; or

(b) must rescind the order if the relevant preservation of property order is rescinded.

(11) If an order in respect of immovable property is rescinded, the High Court must direct the registrar of deeds to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and the registrar of deeds must give effect to that direction.

(12) The noting of an appeal against a decision to vary or rescind any order referred to in this section suspends that variation or rescission pending the outcome of the appeal.

[17] Forfeiture of property is dealt with in Part 3 of Chapter 6. The sections which were relevant in this matter are sections 59, 60, 61 and 64:

"**59 Application for forfeiture order**

(1) If a preservation of property order is in force the Prosecutor-General may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to a preservation of property order.

(2) The Prosecutor-General must, in the prescribed manner, give 14 days notice of an application under subsection (1) to every person who gave notice in terms of section 52(3).

(3) A notice under subsection (2) must be delivered at the address indicated by the relevant person in terms of section 52(5).

(4) Any person who gave notice in terms of section 52(3) may-

(a) oppose the making of the order; or

(b) apply for an order-

(i) excluding his or her interest in that property from the operation of the order; or

(ii) varying the operation of the order in respect of that property.

(5) When application under subsection (1) is made the High Court may, on the application of any of the parties, direct that oral or other evidence be heard or presented on any issue that the court may direct, if the court is satisfied that a dispute of fact concerning that issue exists that cannot be determined without the aid of oral or other evidence.

60 Failure to give notice

(1) Any person who, for any reason, failed to give notice in terms of section 52(3), within the period specified in section 52(4) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.

(2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 59(1), but must be made before judgment is given in respect of the application for a forfeiture order.

(3) The High Court may condone the failure and grant the leave as contemplated in subsection (1), if the court is satisfied on good cause shown that the applicant-

(a) was unaware of the preservation of property order or that it was impossible for him or her to give notice in terms of section 52(3); and

(b) has an interest in the property which is subject to the preservation of property order.

(4) When the High Court grants an applicant leave to give notice as referred to in subsection (3), the Court-

(a) must make an appropriate order as to costs against the applicant; and

(b) may make an appropriate order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order.

(5) A notice given after leave has been obtained under this section must contain full particulars of the chosen address of the person who gives the notice for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by the affidavit referred to in section 52(5).

61 Making of forfeiture order

(1) The High Court must, subject to section 63, make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned-

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

(b) is the proceeds of unlawful activities.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under the order.

(3) The absence of a person whose interest in property may be affected by the forfeiture order does not prevent the High Court from making the order.

(4) Any person who has entered a notice in terms of section 52(3) and whose interest in the property concerned is affected by a forfeiture order made in his or her absence under subsection (3), may, within 20 days after he or she has acquired knowledge of that order, apply for variation or rescission of the order.

(5) On good cause shown in an application referred to in subsection (4), the High Court may vary or rescind the order made under that subsection or make some other appropriate order.

(6) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute those proceedings, in respect of an offence with which the property concerned is in some way associated.

(7) The registrar of the High Court must publish a notice of the forfeiture order in the Gazette as soon as practicable after it is made.

(8) A forfeiture order under subsection (1) does not take effect-

(a) before the period allowed for an application under section 65 or an appeal under section 66 has expired; or

(b) before an application or appeal referred to in paragraph (a) has been disposed of.

64 Forfeiture order by default

(1) On application by the Prosecutor-General for a forfeiture order by default, the High Court may, if it is satisfied that no person has given notice in terms of section 52(3), make any order that the court could have made under section 61(1) and (2).

(2) The High Court may, before making an order in terms of subsection (1), call on the Prosecutor-General to adduce any further evidence, either in writing or orally, in support of his or her application.

(3) Any person whose interest in the property concerned is affected by a forfeiture order or other order made under subsection (1) may, within 15 days after he or she has knowledge of the order, apply to the High Court for a rescission or variation of the order.

(4) On receipt of an application under subsection (3), the High Court may, on good cause shown, rescind or vary the default order and make any other order which is appropriate in the circumstances."

The PG's points *in limine*

[18] Mr *Labuschagne* on behalf of the PG raised three points *in limine.*

The first point *in limine*

[19] This point was raised in the papers in the event that the present application is allocated to a different judge than me. Both parties were in agreement that, as I had heard the first application, I should also hear the present application. In the premises, this point fell away.

The second point *in limine*

[20] This point constitutes an attack on the alleged urgency of the present application. GMS states in his founding affidavit that the application is urgent because (i) judgment in the 20 January application may be handed down at any time; (ii) what transpired at the 20 January application entailed an infringement of his constitutional and statutory rights in several important respects; and (iii) it is undesirable from the point of view of the administration of justice that uncertainty and delay

should take place in relation to obtaining finality as to whether his property is to remain under preservation and to be permanently forfeited.

[21] In the answering papers the PG makes the general statement that GMS does not make out a case for urgency. She adds that, if there is any urgency, it is self-created as GMS failed to comply with the statutory provisions of section 52 of POCA and the terms of the preservation order requiring GMS to give notice of his intention to oppose the forfeiture proceedings by following the provisions of section 52.

[22] GMS' case is that the letter by Mr Angula, coupled with the application for condonation of certain defects as set out in the founding affidavit, qualifies as such a notice of his intention to oppose, which entitles him to a re-hearing of the first application. As such it forms part of the merits of the present application. I agree with Mr *Gauntlett* that this part of the attack on urgency involves a defence by the PG on the merits of the application. The legal position is clear – urgency is to be assessed on the basis that the applicant's case is good and that he has a right to the relief he seeks. (See *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G; *Bandle Investments (Pty) Ltd v Registrar of Deeds and others* 2001 (2) SA 203 (SE) at 213E-F; approved in *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and others* (unreported Full Bench judgment delivered on 31 July 2007 in Case No. A91/2007). In the premises this attack on urgency cannot be upheld.

[23] The PG has two further arrows to direct at the allegations of urgency. Firstly she points out that Mr Angula already knew of MILLER AJ's judgment in December 2011 and shortly thereafter advised GMS of it, but that there is no explanation why the preservation order was not challenged earlier. In reply GMS states that Mr Angula advised him that the PG would either appeal against the said judgment or apply for a preservation order afresh and that the new application would be served on GMS on Mr Angula's office. The clear implication is that GMS expected notice to be given of any application under POCA. It is precisely the fact that no notice was given and that the subsequent first hearing took place which renders the present application urgent. This arrow in my view misses the mark.

[24] The second arrow points to the fact that GMS' funds in his Zambian account with Standard Chartered Bank had already been frozen since May 2009 as a result of a seizure by the Zambian authorities, but that there is no explanation why the application only now has become urgent. It seems that this arrow is aimed at the allegation by GMS in para. 48 of his founding affidavit that "it is undesirable (as regards the administration of justice) that uncertainty and delay should take place in relation to obtaining finality as to whether my property is to remain under preservation and indeed to be permanently forfeited." This issue was only raised in the PG's heads of argument without making the point in the answering papers. GMS therefore could not deal with it in reply. This attack was also not mentioned in oral argument. I therefore do not intend

to deal with it any further except to state that, even if this attack were sound, there are other reasons, namely those mentioned in connection with the judgment expected in relation to the 20 January application, that are sufficient to make out a case for urgency.

[25] I further note that the PG's suggestion in her letter dated served 6 February 2012 that a rescission application under section 64 would take care of GMS's concerns was not pertinently raised in the answering papers and no argument was directed at it either in the PG's heads of argument or during oral submissions at the hearing. In any event on GMS's case any forfeiture order would not be a true default order and any section 64 application could, arguably, only deal with rescission of the forfeiture order and not the preservation order.

[26] The result is therefore that this point is dismissed and the application is considered to be urgent.

The third point *in limine*

[27] In her answering affidavit the PG states:

> "11. The preservation order that was served on the applicant on 11 October 2011 specifically mentions that if the applicant intends to oppose he needs to comply with the provisions of section 52(3) of POCA read with section 52(2) of POCA.
>
> 12. Secondly, annexure A to the Court Order was also served on the applicant. In terms of this annexure the applicant's attention was yet again drawn to the provisions of Sec 52 of POCA.

13. Only a person who enters such an appearance in terms of Sec 52 of POCA is entitled to receive notice of the forfeiture application and is allowed to participate in proceedings concerning the forfeiture. Sec 52(5) requires an affidavit in which the deponent needs to deal with the merits of the forfeiture or the basis for exclusion of his interests from the preservation order.

14. Neither the applicant nor his attorney filed such a notice. Annexure "C" to the founding affidavit is not a notice as envisaged by Sec 52(3) and 52(5) of POCA It is respectfully submitted that the applicant is, by virtue if his failure to enter an appearance under Sec 52 of POCA, precluded from participation in and appearing in the forfeiture proceedings. The applicant has, by its mere reliance on annexure "C" to the founding affidavit, sought to elevate his position to a party who has complied with Sec 52 of POCA, while he is not, and particularly, where he has failed to disclose what is required by Sec 52(5) of POCA – *inter alia* without disclosing his interest in the property (Sec 52(5)(b)) or whether he makes the admissions or not referred to in Sec 52(5)(d) and the facts on which he opposes (Sec 52(5)(e)).

15. I respectfully submit that the applicant's application should be dismissed with costs."

[28] Expanding upon these contentions in the heads of argument, Mr *Labuschagne* submitted that the third point *in limine*, in essence, amounts to a question of *locus standi*. In summary the argument is that, absent compliance with section 52 of OOCA, the applicant is not entitled to be heard and therefore lacks *locus standi*.

[29] I agree with Mr *Gauntlett's* submission that the applicant clearly has *locus standi* based on the common cause fact that he has an interest in the property being the subject of the preservation order and the forfeiture

application. The issue of whether he is entitled to be heard is part of the merits of the case and not to be disposed of by way of a point *in limine*. In any event, for the reasons provided below I am on the view that a failure to comply with section 52, even in the absence of a successful application for condonation for such failure, does not disentitle GMS to be heard on at least some of the issues to be decided. The third point *in limine* is therefore dismissed.

The merits of the application

Was GMS entitled to notice of the 20 January application and is he entitled to be heard in the current application?

[30] In his application GMS states that the first hearing took place in breach of the request by his legal practitioners that they be served with all further legal notices and proceedings. He states that, had he been given notice, he would have opposed the application and advanced legal argument through counsel of his choice.

[31] He points out that the PG in no respect challenged the contents of Mr Angula's letter. Particularly, she nowhere suggested that the letter did not comply with paragraphs 5, 6 and 7 of the preservation order. He states that the notification by Mr Angula was implicitly accepted as effective and compliant. He submits that, had the PG intended to convey otherwise, she would have noted the contents of the letter under reservation of rights or stated directly that it was not accepted. Furthermore, the PG did not indicate that she would not, contrary to what

was requested, give notice and effect service of all applications relating to GMS at the offices of LorentzAngula Inc. GMS submits that the PG was "as a matter of professional propriety, procedural fairness and law" bound to have rejected M Angula's request for service if her office had no intention of acceding to the request.

[32] GMS draws a distinction between the two kinds of relief sought in the 20 January application. He contends that there were essentially two applications before the Court on that day: the first is what he refers to as the condonation/ratification application and the second is the forfeiture application. The PG agrees with this distinction and admits that there were two applications.

[33] GMS emphasises that the PG realized and admitted in the founding affidavit that the relief sought in prayer 1 is indispensable for the relief in prayer 2 to be obtained – in other words, while recognizing that a valid preservation order is an indispensable requisite for an application to obtain a forfeiture order, it is vital to the PG's case in the 20 January application that she succeeds with the condonation/ratification application. The PG does not take issue with these contentions.

[34] GMS's case is that there was no need to comply with section 52 of POCA in relation to the condonation/ratification application and that the cumulative effect of Mr Angula's letter and the PG's response thereto is such that the PG is to be taken to have agreed to the request made regarding notice and service of any application, alternatively that a

reasonable impression was created in the minds of Mr Angula and GMS that notice and service of any application would follow.

[35] As regards the forfeiture application GMS submits that there has been material compliance with the requirements of section 52(3) such as to entitle him to notice and service. In the alternative it is contended that the conduct of the PG's office in the circumstances constituted a waiver of any deficiency in compliance or that the PG is estopped from evoking any deficiency. In the lat alternative the contention is that any deficiency may be condoned.

[36] In summary it may be stated that the PG denies all these contentions and emphasises that GMS is not entitled to notice or to be heard because he has not complied with section 52 of POCA. As to the alternative submissions, she denies any waiver of the statutory requirements of POCA or that she has entered into any inferred or implied arrangement to give notice. She further submits that GMS cannot rely on estoppel to allow a contravention of the notice provisions of POCA.

[37] It seems to me that the first issue to be decided is whether the condonation/ratification application is an application under POCA. It is common cause that there is no provision in POCA expressly providing for such an application. Although the notice of motion states that the application is made in terms of section 59, which deals with forfeiture applications, the PG does not persist with this stance in the present application, in my view correctly so. She states in her answering affidavit

that the irregularity sought to be condoned/ratified falls within the ambit of section 58(3) of POCA, which provides that a preservation order may be rescinded (a) if it was erroneously sought or erroneously made in the absence of the person applying for its rescission; or (b) made as a result of a common mistake of both the PG and the person affected by that order. This was also insistently argued on her behalf by Mr *Labuschagne*, who relied more specifically on section 58(3)(a).

[38] In my view the reliance is clearly misconceived. Firstly the PG is not seeking to rescind the preservation order, but to condone or ratify it. Secondly, on the PG's case made out on 20 January the order was not sought or made "in the absence of" the person applying for its rescission (if for the purposes of argument it is assumed that rescission is the relief sought) as the application for the preservation order was brought under section 51 of POCA in the name of the PG.

[39] Mr *Labuschagne* also sought to rely on section 58(1)(b) which provides that this Court may vary or rescind a preservation order if it is satisfied that there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission. However, the problem here is also that there was no attempt on 20 January to rescind or vary the preservation order. Nor was there a "patent error" in the order itself. The fact that in the preamble to the order reference is made to "Ms Boonzaier, counsel for the applicant" is not a patent error in the order.

[40] In her affidavit the PG makes the allegation that the condonation/ratification application is “incidental” to the preservation order. In my view this is not correct. Assuming for the moment that the application is in principle well conceived, it is clear that it is to be considered as a substantive application and not merely seeking to condone certain procedural defects related to the preservation order or proceedings as such. The application seeks to condone or ratify the appearance on behalf of the PG by a person who is not an admitted legal practitioner in proceedings where that person is required to be so admitted. The fact that these proceedings were POCA proceedings is merely incidental to the issue at hand and not intrinsically related to the relief sought in the condonation/ratification application. In my view this application is not an application under POCA nor does it constitute POCA proceedings.

[41] However, if I am wrong in coming to this conclusion, I find in the alternative that the condonation/ratification application is not POCA proceedings requiring GMS to have complied with section 52. In this regard I agree with the contention made by GMS that the provisions in section 51(2) ousting his right to be heard in relation to a preservation application in certain circumstances do not extend to what was brought as a separate application nearly three months after the preservation application itself had been brought and granted. The wording of section 51(2) do not expressly of by necessary implication provide for such an ouster.

[42] I further agree with the submissions made on behalf of GSM that the ousting of all right to notice and the opportunity to be heard constitutes an infringement of fundamental rules under the common law and the Constitution. Where such rights are to be infringed in terms of a statute a clear indication must be given. POCA contains several clear and express provisions excluding notice and entitlement to be heard, e.g. section 25(2), 51(2) and 52(6)(a). Where such notice is not clearly excluded a Court should interpret the Act in a manner consistent with the Constitution.

[43] In my view the condonation/ratification application should have complied with the ordinary rules of this Court, either providing for notice in terms of rule 6 or laying a proper basis in the application itself why it is to be considered *ex parte*, in which case consideration would have been given to issue a rule *nisi*. In this regard I note that the Judge-President has specifically provided in rule 2 of the rules for the High Court regulating proceedings contemplated in Chapters 5 and 6 of POCA made in terms of section 90 of POCA that, except where POCA provides for the procedure for proceedings contemplated in Chapters 5 and 6 and unless otherwise stated in those rules or the regulations made under section 100 of POCA, the Rules of the High Court apply, with necessary changes, in relation to those proceedings. (See Government Notice 79 of 5 May 2009 in Government Gazette No. 4254). I can find no contrary provisions in the POCA rules or regulations (For the regulations see Government Notice 78 of 5 May 2009 published in the same Government Gazette).

[44] In the condonation/ratification application no basis was laid for it to be brought *ex parte* other than a reliance on sec 52. The conclusion I have reached is that the PG should have given notice of this application and that GMS is entitled to be heard on this application.

Should the condonation/ratification application be granted?

[45] When the present application was called Mr *Gauntlett* placed on record that Mr *Labuschagne* shortly before had most properly disclosed on behalf of the PG that the notice of motion in the preservation application granted by SWANEPOEL, J had in fact been signed by Ms Boonzaier. Counsel accepted that this was the first opportunity Mr *Labuschagne* had to make such disclosure, but not that it was the first opportunity that the PG had. I shall return to this aspect later.

[44] This disclosure placed a different slant on the condonation/ratification application, which was only concerned with the appearance by Ms Boonzaier. However, it is common cause that the application must now be considered to also include the issue of the notice of motion not having been signed by an admitted legal practitioner.

[45] Mr *Gauntlett* brought to my attention in the heads of argument the cases of *Compania Romana De Pescuit (SA) v Rosteve Fishing (Pty) Ltd and Tsasos Shipping Namibia (Pty) Ltd (Intervening): In Re Rosteve Fishing (Pty) Ltd v Mfv 'Captain B1', her owners and all others interested in her* 2002 NR 297 (HC) and *Maletzky v Attorney-General* (Unreported judgment by SHIVUTE, J delivered on 29 October 2010 in Case No. A298/2009) in

which the Courts considered the issue of legal process, specifically in application proceedings, signed by persons not admitted as legal practitioners to be null and void *ab initio.* He submitted on the basis of these authorities that the short answer to the condonation/ratification application is that the original preservation application is null and void *ex tunc* and not capable of condonation.

[46] Mr *Labuschagne* echoed in many respects the argument presented to me during the 20 January 2012 application. While it was conceded that irregularities occurred, the argument sought to cast the irregularity of both the invalid notice of motion and the fact of the appearance by Ms Boonzaier to move the preservation application on 30 September 2011 in a less serious light. It was submitted with reference to *S v Shikunga* 2000 (1) SA 616 (NmS)(also reported as *S v Shikunga* 1997 NR 156 (SC)) that a distinction should be made between fundamental and non-fundamental irregularities which taint a verdict (in the broad sense of the word) and non-fundamental irregularities which do not taint the verdict.

[47] The Court was requested to "contextualize" the irregularity by having regard to the purpose of POCA and the fact that the PG has made an affidavit in support of that application which led another Court to the conclusion that there were reasonable grounds to believe that the property to be preserved is the proceeds of unlawful activities. It was submitted that the PG is a *sui generis* litigant acting in the public interest under POCA and that, bearing all the aforegoing in mind the irregularity in

the appearance at the *ex parte* stage of the preservation proceedings was not of a fundamental nature tainting the preservation order granted.

[48] As far as the irregularity regarding the signing of the notice of motion is concerned, counsel merely stated that "we are aware of the *Maletzky* judgment" and sought to make an argument on the basis that SHIVUTE, J did not consider the approach set out in *Shikunga.*

[49] Counsel further sought to distinguish the case of *S v Mkhise* 1988 (2) SA 868 (AD) on which Mr *Gauntlett* also relied from the instant case on the basis that in *Mkhise* the irregularity considered fatal of accused persons being represented by a non-admitted person was considered after the criminal trials in which the accused had been convicted and sentenced had been concluded. In contrast, it was submitted, the preservation proceedings is only the first step in proceedings intended to culminate in a forfeiture order and which proceedings are subject to judicial scrutiny and control under POCA. As such the considerations relevant to the irregularity pertaining thereto are submitted to be inherently different to those of the accused in *Mkhise*.

[50] While I agree that all irregularities do not necessarily have a vitiating effect and while I further agree that in general the context in which irregularities occur is a relevant consideration, it is my view that the irregularities under consideration here are fatal. In this regard I respectfully agree with what was stated by MARITZ, J in the *Compania Romana* case when he considered earlier authorities in which the courts

had stressed the importance to the administration of justice of only duly admitted legal practitioners representing parties and signing process as required by the relevant rule at 300B-303G and then concluded by saying:

> "Given the compelling policy considerations behind s 21(1) of the Legal Practitioners Act, 1995 and the formulation, scope and object of the section, I am of the view that the Legislature intends that if a person, other than a legal practitioner, issues out any process or commences or carries on any proceeding in a court of law in the name or on behalf of another person, such process or proceedings will be void *ab initio*. The view I have taken corresponds with the rules of practice in this Court. Any 'looseness' in the enforcement of the well-established practice and of the Rules of Court in that regard is likely to bring the administration of justice into disrepute, erode the Court's authority over its officers and detrimentally affect the standard of litigation."

[50] In my view the distinction sought to be drawn in relation to the facts in *Mkhise* does not detract from the fundamental and powerful policy considerations regarding the administration of justice and the authority of the Courts expressed in the extract quoted above. I therefore hold that the fact that the notice of motion was signed by a person not admitted as a legal practitioner is a fatal irregularity which renders the preservation application null and void *ab initio*. As such it cannot be condoned or ratified.

[51] The further result is that the preservation order must be set aside as being invalid. It therefore follows that the forfeiture application cannot succeed. It is not necessary in these circumstances to deal with the issue of whether GMS was entitled to notice and to be heard regarding the forfeiture application.

The non disclosures by the PG

[52] Mr *Gauntlett* listed several instances in which there was material non-disclosure of matters that should have been disclosed by the PG or on her behalf. The first issue is the very belated disclosure that Ms Boonzaier signed the preservation application. In this regard I must unfortunately state that Ms Boonzaier was in present in Court when the 20 January application was heard and assisted Mr Small from time to time from the public gallery. She heard the argument presented that the irregularity of her appearance should be condoned as a mere technical irregularity because it is the PG herself who made the application and the supporting affidavit which has already been considered to be satisfactory by another Court which gave the preservation order. She must have realised the importance of disclosing the correct facts, but it was not done.

[53] A further aspect is that when it was placed on record on 23 February that she had signed the preservation application, I merely took note of it without realizing at the time that the notice of motion was not only signed by Ms Boonzaier, but was signed, not *per procurationem,* but as the PG herself, i.e. under her purported signature. This fact was also not pertinently disclosed. I only came to realize this at a relatively late stage of preparing the judgment. The most disconcerting aspect about it is that the purported signing in the PG's name conceivably amounts to a fraudulent act or even forgery and may have obstructed the course of justice. It may also constitute an offence under the Legal Practitioners Act. There has been no explanation whatsoever regarding the circumstances

under which the notice of motion was signed by Ms Boonzaier or when and how it was discovered or realized. In the circumstances I regrettably have no other choice but to refer the matter to the Inspector-General of the Namibian Police for investigation.

[54] The second aspect about which there has been inadequate disclosure relates to the fact that the Court's attention was not drawn to easily available and potentially binding legal authority highly relevant to the legal issues in this matter. I refer specifically to the *Compania Romana* case which is reported in the Namibian law reports. The *Mkhize* case hails from the Appellate Division before Independence and is still binding on this Court, but was not mentioned although Mr Small indicated that he was familiar with the case. The *Maletzky* case is recent and not reported and may not have been so easy to trace, but it is available on a recognised site on the internet where one may reasonably expect research to be done especially where *ex parte* applications are brought and moved. The duty of an applicant in such cases is trite. Also regarding this aspect there has been no explanation or apology.

[55] The manner in which the issue of Mr Angula's letter was dealt with in the 20 January 2012 application is another issue. The contents of the letter were not disclosed in the PG's founding affidavit and the PG's reply was not properly marked and dealt with in the affidavit. All that is said about Mr Angula's letter is that it confirms that the application was served on them at the request of GMS. This is by no stretch of the imagination an accurate reflection of the essential contents of the letter, which was to

make a request for notice and service of any applications against GMS. This request was never answered to the point of substance as one would expect. Instead the essence of the request in Mr Angula's letter was studiously ignored, but a red herring reply was sent, presumably for tactical reasons, merely confirming that the court order and application were served on him on the instructions of GMS. No wonder Mr Angula thought all was well.

[56] I must not be misunderstood to exonerate Mr Angula, who regrettably did not serve his client well by not properly reading or following the clear indications in the preservation order regarding the requirements of section 52. However, the point is that if I had known that his letter had not been replied to on the point of substance raised in it, I may very well have dealt with the matter differently than I did. I may very well have required notice of the condonation/ratification application to be given to GMS. I may also very well have considered the issue of the forfeiture order in a different light.

[57] It serves no purpose merely to state, as was done in the present application that Mr Angula's letter was "before" the Court on 20 January. Yes, it formed part of the papers, but that is not sufficient if attention is not properly drawn to it and argument advanced on the merits and demerits of its contents as a ground to give or not give notice of the application. As it is I did not see the letter and even if I did, I would have expected that the relevant issues regarding its significance or otherwise should have been pertinently addressed in argument by the PG. This even

more so when one takes into consideration that this matter served on the first motion court roll after the Christmas recess and the roll was particularly heavy with an urgent application heard earlier that morning. It cannot be expected of a judge in such circumstances to fine comb every annexure in all applications serving on the roll.

[58] This Court was at pains in *Prosecutor-General v Lameck* 2010 (1) NR 156 (HC) to point out the onerous duty resting on applicants generally and specifically the PG under POCA concerning disclosure in ex parte applications as follows:

> "[24] A party approaching the court ex parte must make a full and frank disclosure of all the relevant facts and must act bona fide. Le Roux J deals with the effect of material non-disclosure in ex parte applications in the case of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A as follows:
>
> '(1) in *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;
>
> (2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and
>
> (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'
>
> He then adds at 350B:
>
> 'It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.'

[59] In fact in the *Lameck* case it was material non-disclosure which led to the rule *nisi* being discharged. Looking at the instances of material non-disclosure in the present matter, it would appear as if the *Lameck* case fell on deaf ears. In any event, I agree with Mr *Gauntlett* that also in this case the 20 January application falls to be dismissed on this basis.

The striking out application

[60] GMS gave notice that he intends applying in terms of rule 23(2) for the striking out of the first sentence of paragraph 114 of the respondent's answering affidavit (which reads "It is quite irregular and unethical to request the Registrar to inform a Judge not (*sic)* to deliver a judgment") on the ground that it is scandalous, vexatious and/or irrelevant.

[61] The application is opposed. Mr *Labuschagne* pointed out that the reference to rule 23(2) is incorrect as that rule concerns action proceedings. The correct rule is rule 6(15), which Mr *Gauntlett* orally conceded and corrected. In my view nothing turns around the reference to the wrong rule.

[62] More importantly, Mr *Labuschagne* pointed out that the application does not state what prejudice GMS will suffer if the application is not granted as contemplated by rule 6(15). He also submitted that the complaint is actually the complaint of the applicant's lawyer, as the allegation concerns him and not the applicant. He explained that the statement in paragraph 114 was made in response to the underlined words in the following statement in paragraph 50 of the founding affidavit:

> "I do not however wish to disrupt this Court's roll more than is made essential by the circumstances of the matter. I expect that the Registrar will notify Justice Van Niekerk upon the filing of this application, and that Justice van Niekerk may further be expected not to hand down judgment until this application is determined. How this matter is best to be regulated is, I am advised, in the inherent jurisdiction of the Court....."

[63] Mr *Labuschagne* submitted that it was in order for GMS to bring an application to stay the judgment but not to send a message via the Registrar that the judgment should not be delivered. It was denied that the intention was to send a message via the Registrar, but merely that an expectation was merely expressed that the Registrar would as a matter of practicality and convenience of the Judge inform her of the application to be brought. I accept it in this sense and that the intention was not to influence me improperly.

[64] In my view the allegation sought to be struck may be interpreted as imputing unethical behaviour to the applicant by virtue of the conduct of his legal practitioner. Although prejudice is not alleged in so many words, the prejudice is manifest and I uphold the application to strike, but not with a punitive costs order.

The PG's conditional counter application

[65] The PG gave notice of a conditional counter-application which would become urgent in the event that the Court sets aside the preservation order. Some argument was addressed on this issue. The complaint on

behalf of GMS was mainly addressed against urgency and that he was not granted sufficient time to obtain legal advice and file proper papers. In my view it is premature to consider the counter-application in any detail at this stage. I shall consider the application if it is moved when judgment is delivered. I might mention that it is my intention to propose that a rule *nisi* be issued in order to be fair to both parties. This will secure the property in the interim and also give GMS an opportunity to oppose the relief, should he wish to with sufficient time at his disposal.

[66] To sum up, the following order is made:

1. Paragraph 114 of the respondent's answering affidavit is struck out as scandalous and vexatious, with costs, including the costs of one instructing and two instructed counsel.

2. The three *in limine* points raised by the respondent in her answering affidavit are dismissed.

3. The application by the respondent to condone and ratify the preservation order issued under Case no: POCA 9/2011 against the applicant on 30 September 2011, and for forfeiture is dismissed.

4. The order granted by this Court for preservation of property and related relief dated 30 September 2011 is set aside as null and void and without force and effect.

5. The Registrar is directed to forward a copy of this judgment to the Inspector-General of the Namibian Police for an investigation into the conduct of Ms Boonzaier when she signed the notice of motion in the preservation application.
6. The conditional counter-application lodged on 16 February 2012 by the respondent stands over for determination after this judgment is given.

7. The respondent is directed to pay the applicant's legal costs in relation to the application, including the costs of one instructing and two instructed counsel.

VAN NIEKERK, J

Appearance for the parties

For the applicant: Mr J J Gauntlett SC

and with him Mr F B Pelser

Instr. by LorentzAngula Inc

For the respondent: Mr E C Labuschagne SC

Instr. by Government Attorney