REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: POCA 8/2011

In the matter:

THE PROSECUTOR-GENERAL **APPLICANT**

IN RE: The Toyota Corolla with registration number N111-386W; a white Toyota Corolla 160iGLE with registration number N104-258W; an Isuzu KB 350I V6 Double Cab 4x4 with registration number N105-382W; and a Volkswagen Golf with registration number N136-531W

Neutral citation:

Ex parte Prosecutor-General In re Application for a Forfeiture Order in terms of s 59 of the Prevention of Organised Crime Act 29 of 2004 (POCA 8-2011) [2013] NAHCMD 282 (14 October 2013)

Coram: VAN NIEKERK, J

Heard: 20 January 2012

Delivered: 14 October 2013

Flynote: Legal practitioner – Representative of Prosecutor-General appearing in court in preservation proceedings under Chapter 6 of Prevention of Organised Crime Act, 29 of 2004 – Such representative not admitted legal practitioner – Prosecutor-General seeking condonation or ratification of irregularity - Chapter 6 proceedings are civil proceedings – *In casu* fact that representative not authorised to appear under Legal Practitioners Act, 15 of 1995 regarded as so fundamental an irregularity as to nullify entire proceedings when the preservation application was moved – application dismissed.

ORDER

The application is dismissed.

JUDGMENT

VAN NIEKERK, J:

[1] On 22 September 2011 the applicant the applicant *ex parte* obtained a preservation of property order (hereinafter "preservation order") before Parker J under section 51 of the Prevention of Organised Crime Act, 2004 (Act 29 of 2004) (hereinafter "POCA") in respect of certain vehicles. This order was duly published as required and also served on the interested parties. None of them have taken any steps to oppose any further proceedings under POCA or to apply for the exclusion of their interest in the vehicles from the operation of the preservation order.

[2] Before me is an application moved on 20 January 2012 in which the applicant seeks a forfeiture order of the said vehicles in terms of section 59 of POCA. In prayer 1 of the application the following relief is claimed:

> '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.'

[3] On the same day the applicant also set down another matter (Case No. POCA 9/2011) in which she moved for relief in the same terms as in this case. The applicant 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.

[4] In her affidavits filed in support of the two applications, the applicant 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 applicant 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 applicant explains that the mistake only came to her attention after the preservations orders in the instant case and in Case No. POCA 9/2011 were granted.

[5] During argument on 20 January presented by Mr *Small* for the applicant it became evident that although the issue of delegation of prosecutorial power to a non-admitted representative had been raised before, the matter only became the subject of a judgment when Miller AJ held on 2 December 2011 in *Ex parte Prosecutor-General In re: Application for a Preservation Order in terms of s 51 of the Prevention of Organised Crime Act 29 of 2004* 2012 (1) NR 146 (HC) 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. The reason for this is that all proceedings under Chapter 6 of POCA, which include preservation and forfeiture proceedings, are considered civil proceedings whilst the applicant's powers of delegation under Article 88(2)(e) are confined to appearances in criminal proceedings. Furthermore, POCA itself provides that the applicant may in writing authorise a public prosecutor to make certain applications under the Act, even though these applications are civil proceedings, namely an application for a confiscation order under section 32 and an application for an anti-disposal order

under section 33. However, there is no such power given to the applicant in relation to applications under Chapter 6.

[6] After hearing Mr *Small* on the issue of ratification and condonation as prayed for in prayer 1 of the notice of motion in each case, I reserved judgment in both matters. Subsequently matters in POCA 9/2011 took a different turn, leading thereto that on 2 May 2012 I dismissed 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, as well as the application for forfeiture. The order granted by this Court in POCA 9/2011 for preservation of property and related relief dated 30 September 2011 was set aside as null and void and without force and effect (See *Martin Shalli v The Prosecutor-General,* (Case No. POCA 9/2011), unreported judgment delivered on 2 May 2011).

[7] I now turn to the arguments advanced by Mr *Small* in the instant application for condonation and/or ratification. He referred to *S v Shikunga* 1997 NR 156 (SC) where the Supreme Court set out the common law approach in assessing the effect of an irregularity on appeal in a criminal case. As stated in the headnote (at p 158C-D) the approach adopted was –

> '..... essentially to ask whether or not a failure of justice had resulted from the irregularity or defect. To this effect two categories had been delineated: there was a general category, under which the test was whether, on the evidence and findings of credibility unaffected by the irregularity or defect, there was proof beyond reasonable doubt of the accused's guilt. If there was no such proof, the accused was acquitted on the merits, and could not be

> retried. Then there was an exceptional category, under which an irregularity was held to have amounted to a failure of justice per se, without applying the general test. An irregularity fell within the exceptional category when its nature was so fundamental and serious that the proper administration of justice and the dictates of public policy required it to be regarded as fatal to the proceedings in which it occurred. In that event the conviction was set aside without reference to the merits, and the accused could be retried.'

[8] The Supreme Court held, according to the headnote, which is accurate (at p. 158G-H) that:

> '..... the test proposed by the common law was adequate in relation to both constitutional and non-constitutional errors. Where the irregularity was so fundamental that it could be said that in effect there had been no trial at all, the conviction should be set aside. Where the irregularity was of a less severe nature, then, depending on the impact of the irregularity on the verdict, the conviction should either stand or an acquittal on the merits should be substituted therefor. The essential question was whether the verdict had been tainted by the irregularity. Two equally compelling claims had to be balanced: the claim of society that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity was of a fundamental nature or where the irregularity, though less fundamental, tainted the conviction, the latter interest prevailed. Where, however, the irregularity was not of a fundamental nature and did not taint the verdict, the former interest prevailed.'

[9] Based on the above exposition Mr *Small* submitted that the preservation order was not tainted by the fact that the public prosecutor who appeared at the hearing of the preservation application on 22 September 2011 was not an admitted legal practitioner. The grounds for this submission were stated by counsel to be: (i) Ms Boonzaier was an admitted attorney in South Africa and she previously held employment at the National Prosecuting Authority in South Africa where she specialized in South African POCA related applications; (ii) Ms Boonzaier acted in good faith and under the impression that the applicant had the authority to delegate to her the power to move preservation applications in terms of POCA; (iii) (iv) the Applicant had signed the notice of motion and deposed to the founding affidavit in the preservation application; (iv) Parker J was satisfied that a case for a preservation order had been made out on the merits of that application; (v) It is not difficult to imagine the dire consequences that may follow of all the applications in which public prosecutors who were not admitted legal practitioners appeared were to be found null and void.

[10] The grounds set out in (i) and (ii) above are facts mentioned in the heads of argument, not facts deposed to by affidavit under oath. As such the Court should not have regard to them. However, even if they were accepted to be true, they are ultimately irrelevant for the reasons advanced below.

[11] Essentially Mr *Small's* argument amounted thereto that as the preservation application itself had been authorised by the applicant and had already succeeded on the merits, therefore there is no prejudice to the persons who held any interest in the property concerned. Furthermore, that the matter of the court appearance by an

non-admitted representative paled into insignificance when seen in the light of the aforementioned considerations and when weighed against the prejudice that would be suffered if the preservation order would be considered to be of no force and effect.

[12] In *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A) considered a similar argument in several applications for a special entry in terms of s 317(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977). It is necessary to quote extensively from this judgment in order to put the issues in perspective. The accused in each of these matters had previously been defended by a person who, although legally trained and experienced, was not an admitted advocate. The Court also distinguished between irregularities which are fatal *per se* and other kinds of irregularities which are less serious and less fundamental. The Court then stated:

> 'The facts in the well-known case of *S v Moodie* 1961 (4) SA 752 (A) serve as a useful illustration of what is regarded in law as a fatal irregularity. In a jury trial of an accused charged with murder - as pointed out in the quoted passage from the *Naidoo* case - the deputy sheriff was present throughout the deliberations of the jury on its verdict. He took no part in the discussion and there was no suggestion that any juryman was influenced or inhibited by his presence. Section 143(2) of Act 56 of 1955, which was the statutory provision applicable at that time, provided that when the jury withdraws for the purpose of considering its verdict

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'they shall be kept by an officer of the court in some convenient private place apart by themselves until the majority prescribed in s 113 are agreed upon the verdict...'.

It was held at 759 of the judgment that these provisions, enjoining privacy,

'are no mere formality. It is fundamental to the jury system that the members should have the fullest freedom of private discussion throughout their deliberations. The presence of an unauthorised officer of the Court for some two hours, in the small and crowded room in this case, strikes at the very root of that essential right of privacy. It was so gross a departure from established rules of procedure that it can be said that the appellant was not properly tried. In other words it was an irregularity of such a nature as to amount *per se* to a failure of justice'.

In these appeals the question to be considered in the first place is whether the irregularity, with which we are concerned, is of the same order.

As the decisions in our law on the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred. (Cf *S v Mushimba en Andere* 1977 (2) SA 829 (A) at 844H.)

In order to decide this question in these appeals it is necessary to examine the statutory requirements for the admission of an advocate to practise, the

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> underlying reasons for such provisions and the role an advocate is called upon to fulfill in the administration of justice.'

[13] Having considered the particular provisions of the applicable South African legislation (which are in substance similar to the Namibian legislation relating to the requirements for admission to practice as a legal practitioner), the court emphasised (at p873E-F) that, in deciding on an application for admission, it is first and foremost and at all times the court's duty to be satisfied that the applicant is a proper person to be allowed to practise and a person whose re-admission to the ranks involves no danger to the public and no danger to the good name of the profession (*Ex parte Knox* 1962 (1) SA 778 (N) at 784H); and that the grant or refusal of the application is a matter in the discretion of the Court (*Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 786H).

[14] The Court continued (at p873:

> 'Thus the Act and the relevant Rule make it plain that admission to practise as an advocate is more than a formality. Though an applicant may be duly qualified and satisfy the other requirements for admission, his character and integrity are of cardinal importance. These are matters in which the public, the profession and the Courts have a vital interest. The Rule does all it can to ensure that any factors casting a doubt upon whether an applicant is a 'fit and proper person' to be admitted are brought to light and investigated fully.'

> Finally, it should be noted that, should the application be granted, the applicant is required to take the oath or make an affirmation in which he swears or affirms
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> > 'that I will truly and honestly demean myself in the practise of I advocate according to the best of my knowledge and ability, and further, that I will be faithful to the Republic of South Africa'.'

[15] The Court later stated (at p874I-875G:

> '..... an alternative argument or approach was raised and debated, namely, that the fact that counsel is or is not 'a fit and proper person' is a relevant factor to be taken into account in a particular case in deciding on the gravity of the irregularity. This argument, one infers, arose from an illustration given, and commented on, in the First Report of the Commission of Enquiry. The hypothetical case put forward was that of a person, of flawless character and vast experience in criminal matters, who returns to the Bar and resumes practice but who inadvertently fails to have himself re-admitted as an advocate. The possibility of such a 'hard case' arising cannot be discounted but the chances would appear to be extremely remote. The present case appears to be the first of its sort ever to have come before Court in the legal history of this country. But even if the likelihood were less remote, I do not consider this argument to be cogent for more than one reason. Firstly, though couched in another form, this contention in essence relies upon the absence of any prejudice in a case such as the one postulated: for that reason it is said that the irregularity should not necessarily vitiate the trial. However, as the *Moodie* case confirms and illustrates, the presence or absence of prejudice in a particular case is not a relevant consideration in deciding in the first place

on the fundamental significance of the irregularity. Secondly, when considerations of public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided. Thirdly, it would be wholly impracticable to attempt to determine *ex post facto* (that is, at some later stage when the irregularity comes to light) whether counsel concerned was 'a fit and proper person' in the sense that this term is applied and understood in the Act, ie whether he is generally a person of integrity and reliability. (Cf *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 782H - 783H.) If, on the other hand, these words are taken to refer to his competence in the actual conduct of the case the difficulty is, if anything, compounded. It would be even more impracticable, if not impossible, for the Court to attempt to determine, by applying some norm of competence (and by way of an enquiry into the merits of the case and counsel's counduct thereof) whether he in his defence of the accused has been proficient.

In *Cooper v Findlay and Others (1)* 1954 (4) SA 697 (N) at 700A - B Broome JP stated that:

> 'It is quite clear that the provision for the admission of advocates is part and parcel of the provision for the better and more effectual administration of justice. The Act is obviously conceived in the public interest.'

In my view, having regard to all the relevant considerations discussed above, it is in the public interest that the defence in a criminal trial be undertaken by a person who has been admitted to practise as an advocate in terms of the Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceeding.'

[16] Although *Mkhize's* case is concerned with criminal proceedings, I have no hesitation in holding that the same considerations expressed in that case apply in civil proceedings under POCA. I specifically follow the approach that the presence or absence of prejudice in the particular case is not a relevant consideration in deciding on the fundamental nature of the irregularity (see *Mkhize, supra*, at p875B-C). The powers of the applicant under Chapter 6 are far-reaching and no special written authority is required to bring applications under Chapter 6 where the applicant is not acting in person. It cannot be overlooked that the legislature thought it appropriate that public prosecutors who are not admitted legal practitioners should not appear in Chapter 6 proceedings. I am of the view that it is similarly in the public interest that the applicant's representative in Chapter 6 proceedings be a person who has been admitted as a legal practitioner and that the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire proceedings before this Court when the preservation application was moved.

[17] In coming to this conclusion I am further fortified by the judgment in *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) in which Maritz, J (as he then was) considered the provisions of section 21(1) of the Legal Practitioners Act, 1995 (Act 15 of 1995), which read as follows:

> '**21 Certain offences by unqualified persons**
> (1) A person who is not enrolled as a legal practitioner shall not-

(a) practise, or in any manner hold himself or herself out as or pretend to be a legal practitioner;
(b) make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such;
(c) issue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of law in the name or on behalf of any other person, except in so far as it is authorised by any other law; or

(d) perform any act which in terms of this Act or any regulation made under section 81(2)(d), he or she is prohibited from performing.'

[18] In this regard the learned judge stated (at p.303E-G):

> '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.'

(See also *Maletzky v Attorney-General* (Unreported judgment by SHIVUTE, J delivered on 29 October 2010 in Case No. A298/2009).

[18] Counsel for the applicant further submitted with reference to *S v Kaevarua* 2004 NR 144 (HC) that this Court has the inherent power to condone and ratify the irregularity in this case at any stage if it is in the interest of justice. The reliance upon *Kaevarua* is not apposite. That case dealt with an irregularity committed in a magistrate's court which was corrected on appeal on the principle that this Court has inherent jurisdiction to correct the proceedings of an inferior court at any stage in the interest of justice (see *Kaevarua* at 150A; *S v Lubisi* 1980 (1) SA 187 (T) at 188H). Clearly this principle does not find application in the instant case as the irregularity did not occur in an inferior court. Furthermore, the applicant is not seeking 'correction', but condonation or ratification. This relief is notionally irreconcilable with 'correction', which contemplates that that which is tainted by the irregularity, be set aside.

[19] In the *Shalli* judgment I came to the conclusion that an application for condonation such as this is not proceedings under POCA and that, in principle, notice should be given to any person having an interest in the relief sought (see paras. [33] – [44]). No notice was given to such persons in the instant application. However, given that the application for condonation is plainly misconceived and falls

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to be dismissed, there is no prejudice suffered and I do not intend to order service at this stage.

[20] To sum up, the irregularity is not capable of condonation or ratification and the preservation proceedings are null and void. It follows that a forfeiture order cannot be issued. This being the case, the preservation order previously granted would in any event expire in terms of section 53(2) of POCA when the hearing of the application for a forfeiture order is concluded without the making of a forfeiture order. It therefore remains only for me to order that the application is dismissed.

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K van Niekerk

Judge

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APPEARANCE

For the applicant: Adv D F Small

Office of the Prosecutor-General