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REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: POCA 5/2014

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

And

EDWARD HATEGEKIMANA

RESPONDENT

Neutral citation: *The Prosecutor General v Hategekimana* (POCA 5-2014) [2015]
NAHCMD 238 (8 October 2015)

Coram: PARKER AJ

Heard: 30 July 2015

Delivered: 8 October 2015

Flynote: Practice – Applications and motions – Prevention of Organized Crime Act 29 of 2004, s 61(1) – Forfeiture of property – In determination of application for an order of forfeiture of property the following constituent elements of the interpretation and application of s 61(1) of the Act are crucial: (a) The property which

is presently subject to a preservation of property order granted by this Honourable Court under case number POCA 5/2014 on 16 May 2014, namely the Nissan Hardbody with Engine Number KA..... and Vin Number ADNJ..... ('the property'), be forfeited to the State in terms of section 61, read with section 64, of the Prevention of Organized Crime Act, Act 29 of 2004 ('POCA'), (b) That Sergeant Emilia Nambadi, in whose control the property is in terms of the preservation of property order, is authorized to: (i) sell the property at a public auction for a value not less than the current market value; and (ii) pay the proceeds of the sale into the Asset Recovery Account, Ministry of Justice – POCA, Standard Bank Account Number 5....., branch code 0....., (c) That any person, other than the respondent and Corporate Development Consortium (CDC), whose interest in the properties concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission of this order by the Court, (d) Prayers (a) to (c) shall not take effect before the expiration of 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of Act 29 of 2004 or an appeal has been disposed of.

Summary: Applications and motions – In terms of Prevention of Organized Crime Act 29 of 2004, s 61(1) – Forfeiture of property – In determination of application for an order of forfeiture of property the following constituent elements of the interpretation and application of s 61(1) of the Act are crucial: (a) The property which is presently subject to a preservation of property order granted by this Honourable Court under case number POCA 5/2014 on 16 May 2014, namely the Nissan Hardbody with Engine Number KA..... and Vin Number ADNJ..... ('the property'), be forfeited to the State in terms of section 61, read with section 64, of the Prevention of Organized Crime Act, Act 29 of 2004 ('POCA'), (b) That Sergeant Emilia Nambadi, in whose control the property is in terms of the preservation of property order, is authorized to: (i) sell the property at a public auction for a value not less than the current market value; and (ii) pay the proceeds of the sale into the Asset Recovery Account, Ministry of Justice – POCA, Standard Bank Account Number 5....., branch code 0....., (c) That any person, other than the respondent

and Corporate Development Consortium (CDC), whose interest in the properties concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission of this order by the Court, (d) Prayers (a) to (c) shall not take effect before the expiration of 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of Act 29 of 2004 or an appeal has been disposed of. – In instant case, court found that certain payments to respondent's youth organization were made through corruption of named officials of the Ministry of Youth and payments obtained fraudulently by the respondent – Court found that respondent failed to prove to the satisfaction of the court that respondent's organization provided training in favour of the Ministry and supplied certain equipment to the Ministry – Respondent paid cash for a motor vehicle (the property to be forfeited) it purchased with part of moneys that were paid through such corruption and moneys obtained fraudulently – At all material times no moneys had been paid to the organization's bank account except those moneys that were paid by the Ministry to the organization – Court was satisfied that applicant has established that the motor vehicle (the property) was purchased with proceeds begotten by those unlawful activities – Court concluded that applicant has satisfied the relevant requirements of s 61(1) of the Act – Consequently, court granted the application for forfeiture of the property.

ORDER

- (a) The property which is presently subject to a preservation of property order granted by this Honourable Court under case number POCA 5/2014 on 16 May 2014, namely the Nissan Hardbody with Engine Number KA..... and Vin Number AND..... ('the property'), be forfeited to the State in terms of section 61, read with section 64, of the Prevention of Organized Crime Act, Act 29 of 2004 ('POCA').

- (b) That Sergeant Emilia Nambadi, in whose control the property is in terms of the preservation of property order, is authorized to:
- (i) sell the property at a public auction for a value not less than the current market value; and
 - (ii) pay the proceeds of the sale into the Asset Recovery Account, Ministry of Justice – POCA, Standard Bank Account Number 5....., branch code 08.....
- (c) That any person, other than the respondent and Corporate Development Consortium (CDC), whose interest in the properties concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission of this order by the Court.
- (d) This order must be published in the Government Gazette as soon as practicable, after it is made.
- (e) Prayers (a) to (c) shall not take effect before the expiration of 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of Act 29 of 2004 or an appeal has been disposed of.

JUDGMENT

PARKER AJ:

[1] This application brought in terms of the Prevention of Organized Crime Act 29 of 2004 ('POCA'). The respondent registered an organization, called Corporate

Development Consortium ('CDC'), as a youth organization, with the Ministry of Youth ('the Ministry'). CDC was awarded contracts to conduct training in favour of the Ministry and to deliver equipment to the Ministry. It is the payment for certain training and delivery of certain equipment that gave rise to the present matter. Ms Kazondunge represents the applicant; and the respondent appears in person.

[2] In May last, the court granted a provisional preservation of property order, being a rule nisi in terms of POCA for the preservation of a motor vehicle Nissan Hardbody with Engine Number KA..... and Vin Number AD..... ('the property'). The provisional preservation order was subsequently confirmed by the court; and the respondent was duly served with the order and application by the deputy sheriff. Thereafter, the Prosecutor General ('PG') launched a forfeiture of property application in terms of POCA, and the respondent was duly served with the process. In the course of events, the court directed the parties to file answering papers and replying papers, as the case may be.

[3] In his answering papers, the respondent has moved to reject the forfeiture application and he denies that the property in question was begotten by proceeds of unlawful activities. The burden of the court is, therefore, to determine whether a forfeiture order should be granted in respect of the property.

[4] In terms of s 61(1) of POCA, the court *must*, not may, make the forfeiture order if the court finds *on a balance of probabilities* that the property was (1) an instrumentality of any of the offences referred to in Schedule 1 of POCA or (2) was begotten by proceeds of unlawful activities. (Italicized for emphasis). The PG contends item (2) in her application.

[5] The following is important: In the determination of a forfeiture application under POCA the following constituent elements in the interpretation and application of s 61(1) of POCA are crucial:

- (a) If the court finds that the property in question was an instrumentality of any of the offences referred to in Schedule 1 to POCA or was born out of proceeds of unlawful activities, the court has a duty, not a discretion, to make a forfeiture order.
- (b) Proof that the property was an instrumentality of such offence or was born out of unlawful activities is established on the standard of proof in civil cases.
- (c) The offence involved need not have been committed by the respondent.
- (d) The unlawful activities complained of need not be exclusively the activities of the respondent.

[6] As to (b) (in para 5, above) it is well entrenched that in a civil case -

'where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

(National Employers' General Insurance v Jagers 1984 (4) SA 437 at 440E-F)

[7] Furthermore, in *DM v SM 2014 (4) NR 1074*, para 26, I applied the principle enunciated by the Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz (2) NR 775 (SC)* at 790B-E, where the Supreme Court stated:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although (though) its so doing does not exclude every reasonable doubt ... for, in finding facts or making inferences in a civil case, it seems to me that one may ... by balancing probabilities select a

conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[8] On the papers, and having applied the principles in *Jagers* and in *Kurz*, and not forgetting the four constituent elements that emerge from the interpretation and application of s 61(1) of POCA (set out in para 5 of this judgment), I make the following factual findings (in the proceeding paras 9 – 12).

[9] In order for him to succeed in registering CDC with the Ministry as a youth organization, the respondent included the names of Onesmus Max and Ishmael Shamena as members of CDC in order to satisfy the requirement for registration that such members should be Namibians between the ages of 18 and 35. There is the uncontradicted claim by Shamena and Max that they have no idea about CDC; that is, they are not members of CDC. The inference I draw is that from day-one the respondent cooked a plan to use CDC to deceive the Ministry. I hasten to add that this inference is not, of course, enough for the application to succeed, if the respondent had done no more than misuse the names of Shamena and Max. But the inference I have drawn is significant: it goes to the state of mind of the respondent when he registered CDC with the Ministry, that is, to use CDC to deceive as I have found previously. On her part, Ms Kazondunge submitted that the respondent planned to use CDC to defraud the Ministry. The submission is not far from the truth.

[10] In the period May 2012–March 2013 the Ministry paid N\$938 630 to CDC in respect of seven transactions. Payment vouchers of five of the seven transactions are nowhere to be found in the Ministry. The five transactions were only reflected in the payment history ledger. The five transactions relate to: (a) N\$155 780, for a 'mini loading crane'; (b) N\$196 000, for a 'paver'; (c) N\$105 000, for 'training'; (d) N\$165 000, for 'training'; and (e) N\$116 850, for 'equipment'.

[11] The Ministry's procurement procedures were not followed in the making of payments for the five transactions based on the following findings: An Acting Chief Clerk in the Procurement Department of the Ministry, Ms Tjatindi, did not process the

payment in item (b) (N\$196 000) for a 'paver', even though her name is reflected in the record as the official who processed the payment. I accept that another official Joseph Haita used Tjatindi's password illegally to process the payment. Another Ministry official Ms Van Zyl did not process the payment although, in her case, too, her details are reflected on the record. Here, too, Haita used Van Zyl's password illegally to process the payment in item (e) (N\$116 850) for 'equipment'. The payments under item (b) was made to CDC in August 2012. It was after CDC had received the payment of N\$196 000 that on 17 September 2012 the respondent paid N\$95 000, by direct bank transfer from CDC account, for the property.

[12] I am satisfied that the property was paid for from the N\$196 000 that had irregularity been paid to CDC because no amounts from a source other than the Ministry were paid into CDC's account between the date that the N\$196 000 was paid into the CDC account by the Ministry and the date the N\$95 000 was transferred from CDC's account to pay for the property. There is more. Two of the five transactions were signed by Mr Hoveka who at all material times was an Acting Director of the Ministry when the payments were processed. But as the Acting Director, Hoveka did not work in the Ministry's Procurement Department and could not have lawfully authenticated invoices; and so, his signatures on the payment vouchers were illegally placed thereon and, therefore, irregular. Hoveka's bank account received cash deposits to the tune of N\$200 200, some of which were made after payments were made to CDC from the Ministry.

[13] In this regard, it has been said that it is trite law that odd coincidences, if unexplained, may be supporting evidence. See the recent case of *S v Ochurub* (CC 30/2010 [2015] NAHCMD 171 (5 May 2015)). In the instant case, the respondent does not give any explanation for these odd coincidences, that is, the unlawful use of other officials' passwords, the unlawful authentication of the invoices by Hoveka, the cash deposits of large amounts of money in Hoveka's account and Hoveka's denial of contacts with the respondent. Hoveka's contention that he had no contact with the respondent cannot possibly be true. There were as many as 503 telephone calls between Hoveka and the respondent when the Ministry made payments to CDC. If

their contact was innocent, why would Hoveka deny such contact? The evidence of odd coincidences in this case provide support for the evidence of irregular and fraudulent payments made to CDC, considering the illegal use of Tjatindi's password and Van Zyl's password, as found previously, to process the payments, and Hoveka's unlawful authentication of the invoices.

[14] The respondent's response that as an outsider he did not know the operations and procedures of the Ministry cannot assist the respondent. It takes his case nowhere. Upon the true construction of s 61(1) of POCA, which I have set out in para 5, above, the unlawful activities from which the proceeds were born need not be exclusively the activities of the respondent. I have found that Haita's was an unlawful activity when he illegally used other officials' password with the sole purpose of processing the irregular payments to CDC. Hoveka authorized and signed for payments to CDC when he was aware and knew that no services had been rendered by CDC to the Ministry and no equipment has been delivered by CDC to the Ministry. No documentary proof of the service and the delivery was placed before the court. Indeed, the court asked the respondent to give one example of any store from which he obtained the equipment that he says he delivered to the Ministry. The respondent failed totally to give one single name. And the respondent does not contend that he manufactured the 'paver' himself. Additionally, the respondent does not say in his papers what type of training he provided and to whom, for the benefit of the Ministry. All this amounts to fraud on the part of the respondent. That is an unlawful activity.

[15] The foregoing factual findings point inevitably to the conclusion that the transaction for which CDC was paid N\$196 000 (item (b)) was fraudulent; and the obtaining of the payment amounted to fraud. And the fraudulent act and the fraud were made possible by the corruption of Haita and Hoveka, within the meaning of s 43 of the Anti-Corruption Act ('ACA'). As I have shown previously, the property was purchased with the proceeds of the fraud on the part of the respondent and corruption of the two Ministry officials. These are unlawful activities, as I have said. Thus, the respondent on his part contravened s 45 of ACA because he used the

proceeds of the fraud and the corruption of the Ministry officials to purchase the property.

[15] Based on these reasons, I am satisfied that the applicant has proved on a balance probabilities that the property was purchased from the proceed of the unlawful activities. Having so found, the application succeeds. Accordingly, I have a duty under s 61(1) of POCA to make the forfeiture order; whereupon I order as follows:

- (a) The property which is presently subject to a preservation of property order granted by this Honourable Court under case number POCA 5/2014 on 16 May 2014, namely the Nissan Hardbody with Engine Number KA..... and Vin Number ADNJ..... ('the property'), be forfeited to the State in terms of section 61, read with section 64, of the Prevention of Organized Crime Act, Act 29 of 2004 ('POCA').
- (b) That Sergeant Emilia Nambadi, in whose control the property is in terms of the preservation of property order, is authorized to:
 - (i) sell the property at a public auction for a value not less than the current market value; and
 - (ii) pay the proceeds of the sale into the Asset Recovery Account, Ministry of Justice – POCA, Standard Bank Account Number 5....., branch code 0.....
- (c) That any person, other than the respondent and Corporate Development Consortium (CDC), whose interest in the properties concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission of this order by the Court.

- (d) This order must be published in the Government Gazette as soon as practicable, after it is made.

- (e) Prayers (a) to (c) shall not take effect before the expiration of 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of Act 29 of 2004 or an appeal has been disposed of.

C Parker
Acting Judge

APPEARANCES

APPLICANT: K Kazondunge
Of Government Attorney, Windhoek

RESPONDENT: In person