

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON AN APPLICATION FOR POSTPONEMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00172

In the matter between:

**THE PROSECUTOR-GENERAL**

**FIRST APPLICANT**

and

**ATLANTIC OCEAN MANAGEMENT GROUP (PTY) LTD**

**FIRST RESPONDENT**

**FISH SPAIN SL**

**SECOND RESPONDENT**

**Neutral citation:** *The Prosecutor-General vs Atlantic Ocean Management Group (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 163 (12 June 2017)

**Coram:** ANGULA DJP

**Heard:** 9 June 2017

**Delivered:** 12 June 2017

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**ORDER**

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1. The application is granted and leave is granted to the Prosecutor General to file her papers in response to the applicants' application to anticipate the order granted pursuant to the provisions of the Prevention of Organised Crime Act, Act No 29 of 2004 ('POCA') on 26 May 2017 ('the POCA order'), such papers to be filed on or before closure of business on Tuesday, 13 June 2017.
2. The respondents in this application are ordered to file their replying affidavit, if so advised, on or before closure of business on Wednesday, 14 June 2017.
3. The respondents are ordered to pay the first applicant costs occasioned by their opposition to this application for a postponement, jointly and severally the one paying the other to be absolved.
4. The matter is postponed to Thursday, 15 June 2017 at 11 o'clock for hearing.

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## JUDGMENT

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ANGULA DJP:

### Introduction

[1] I have before me two main separate applications brought by Atlantic Ocean Management Group (Pty) Ltd and Fish Spain SL. Both applications were brought on an urgent basis and were set down for hearing on 9 June 2017. In the first application, Atlantics and Fish Spain, seek an order against Bank Windhoek to release a sum of money held by Bank Windhoek in Atlantics and Fish Spain's foreign custom currency account ('the CFC'). I will refer to this application in this judgment as 'the POCA application'.

[2] The second application, which was filed after the first application had been filed, Atlantics and Fish Spain seek to rescind the POCA order issued against the

money held in the CFC account, which was granted by Usiku AJ on 26 May 2017. I will in this judgement refer to this application as 'the application to anticipate' in accordance with the title to which it has been consigned by the applicants.

[2] Both applications are opposed by the Prosecutor-General ('the PG'). The third respondent, the Bank of Namibia, filed an affidavit in the POCA application.

[3] In respect of the application to anticipate the PG seeks a postponement.

[4] Atlantics and Fish Spain oppose the PG's application for a postponement even though they did not file opposing affidavits. They chose to argue their opposition to the application on the PG's papers.

#### *Grounds for postponement*

[5] In her founding affidavit the PG sets out the factual background preceding both applications as well as the reasons and grounds upon which she bases her application for postponement.

[6] The PG says that her legal practitioners were served with the POCA application on Friday, 2 June 2017 at 15h17. She soon thereafter caused a notice to oppose to be served and filed together with a notice to Atlantics and Fish Spain to furnish her with security for costs in accordance with the rules. Thereafter on Wednesday, 7 June 2017 she filed a notice pursuant to rule 66 in which she raised certain questions of law regarding the POCA application.

[7] The issues of furnishing security for costs and the amount of security to be paid by Atlantics and Fish Spain were agreed upon by the legal practitioners for the parties on Wednesday, 7 June 2017.

[8] According to the PG, on Wednesday afternoon, 7 June 2017, the application to anticipate was served on the PG via what commonly referred to as the GOSP office at 15h30. The notice to oppose that application was served on Atlantics and Fish Spain's legal practitioners late in the afternoon of Wednesday, 7 June 2017.

The previous legal practitioner for Atlantics and Fish Spain having withdrawn in the meantime, the current legal practitioner came on record.

[9] The PG states further that she has not had an opportunity to consider the application to anticipate, to consult and to give instructions to her legal representatives with regard to the said application. Furthermore, that as in the POCA application, she intends to file a request that Atlantics and Fish Spain furnish a bond of security for costs in respect of this application to anticipate.

[10] With regard to the application to anticipate, the PG advances as grounds for the postponement the fact that the issue of furnishing of security in the POCA application has not been resolved. I should interpose here to say that this ground fell away because at the commencement of hearing of this application for postponement, the court was informed by the legal practitioner for Atlantics and Fish Spain that the bond of security had been posted. This fact was confirmed by the PG's legal representative. The other ground advanced by the PG, with regard to the postponement, is the issue of alleged hearsay, vexatious, scandalous and irrelevant matters contained in the founding affidavit of Atlantics and Fish Spain in respect of which she intends to file a notice to strike out the offending allegations.

[11] In respect of the application to anticipate, the PG states that the papers which were initially served on her were not signed and that it also appeared to her that they were not properly commissioned in accordance with the rules. She asserts that she needs time to properly respond thereto. The PG further points out that the POCA order which is sought to be rescinded states that an affected party must give three days' notice of his or her intention to have the order reconsidered; and that Atlantics and Fish Spain only gave her 24 hours to respond to their application.

[12] Finally, the PG states that it is her view that Atlantics and Fish Spain would not be prejudiced if the postponement is granted. Furthermore, in her view the need for the postponement is to be attributed to the conduct of legal practitioners for Atlantics and Fish Spain's by not timeously responding to her requests on the issue of costs and the offending allegations in their founding affidavit.

### *Counsel submissions against the postponement*

[13] As mentioned earlier, Atlantics and Fish Spain did not file opposing affidavits. With reference to the grounds for the postponement put forward by the PG, Mr. Heathcote, who appeared for Atlantics and Fish Spain, argued that POCA does not provide for a requirement to furnish security for costs. Counsel further points out that, in any event, the notice demanding the furnishing of security gave Atlantic and Fish Spain 10 days within which to pay the security amount of N\$300,000 demanded by the PG and that the 10 days period has not yet expired. In any event his clients intend to object to the amount demanded as security.

[14] Counsel's main point of contention with respect to the postponement is that the PG does not require time to file any further papers with regard to the challenge to the validity of the POCA order since his clients intend to approach the matter in the same way as the court in *Stipp and Another v Shade Centre and Others*<sup>1</sup>. According to the *Stipp* approach propounded by counsel, the court needs only to look at the founding affidavit of the PG in the POCA matter, and if the allegations set out therein do not sustain a proper cause of action upon which the POCA order of 26 May 2017 was granted, then that would be the end of the matter. In the meantime, the urgent application by Atlantics and Fish Spain to anticipate POCA order will stay in abeyance pending the delivery of judgement on the validity of the POCA order.

[15] Counsel further submits that if the *Stipp* approach were to be adopted, there would be no need for the PG to file further affidavit because the matter will be decided on the PG's founding affidavit. Equally, the need to strike out the alleged offending portions from the Atlantic and Fish Spain affidavit would fall away. Regarding the alleged prejudice by the PG for having been served with unsigned and uncommissioned affidavit, Counsel points out that such complaint has fallen away because in the meantime the PG has been served with a properly signed and commissioned affidavit.

### *Legal considerations attendant to an application for postponement*

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<sup>1</sup> (SA 29/2006) [2007] NASC 2 (18 October 2007).

[16] The principles for consideration by the court in an application for postponement such as the one presently before the court were neatly summarised by Damaseb JP in the matter of *Hailulu v Anti-Corruption Commission and Others*<sup>2</sup> at paragraphs 33 and 34 as follows:

[33] The principles for the consideration of a postponement application are settled: an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. An application for postponement must be bona fide and must not be used as a tactical manoeuvre. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and is not due to delaying tactics. The overriding considerations in the courts exercise of the discretion whether or not to grant a postponement is the need to do 'substantial justice' between the parties. The court is principally concerned with one question: what is the prejudice to be suffered by the party adversely affected by the postponement and can it be cured by an appropriate order of costs? It must now be accepted as settled that it is unacceptable to assume that as long as the opponent's prejudice is satisfactorily met with an appropriate costs order nothing else matters.

[34] In the litigation process, litigants and their legal practitioners have a duty not only towards each other but also towards the court and the interests of the administration of justice. A litigant's duty is to avoid conduct that imposes a supererogatory cost burden on the opponent. The duty towards the court and the interests of the administration of justice has two aspects to it: the first is the convenience of the judge assigned to hear the case and the second is the proper functioning and control over the court roll. When an indulgence is sought from the court, the litigants' duty towards the court and the interests of the administration of justice was stated as follows by this court:

[17] The grant of an indulgence for failure to comply with rules of court or directions is in the discretion of the court – to be exercised judicially. Lack of prejudice to the opposing party is an important consideration in assessing whether or not to grant condonation – but in this day and age it cannot be the sole criterion. In my view, the proper management of the roll of the court so as to afford as many litigants as possible the opportunity to have their matters

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<sup>2</sup> (I 2191/2009) [2010] NAHC 187 (11 November 2010).

heard by the court is an important consideration to be placed in the scale in the court's exercise of the discretion whether or not to grant an indulgence.

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It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive court time because the roll is overcrowded. Litigants and their legal advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the court.' [Own emphasis added.]'

[17] Similarly, each party is entitled to an opportunity to be heard. Effective enjoyment of that right requires a reasonable time period to evaluate the other party's submissions and prepare one's response. As explained by Masuku AJ, (as he then was) in the matter of *Dr Kuiri Tjipangandjara v Namibia Water Corporation (Pty)*<sup>3</sup> the reasonableness of the time period is 'not a one size fits all. . . The more complex and long drawn a matter is, a longer period may be necessary. Furthermore, the bigger the respondent entity, the longer the period that may be required as necessary consultations and other internal requirements, not to mention collecting and collating relevant documents. Appointment of legal practitioners, including counsel, drafting and settling of relevant papers must also be adequately catered for'. In this way, the nature and history of the matter are crucial to an evaluation of the adequacy of time afforded.

#### Application of the law to the facts

[18] Keeping in mind the principles outlined above I now proceed to consider whether the PG has made out a case to be granted a postponement. The PG bears the onus.

[19] There is no dispute that the PG has a legal right to be heard. She is entitled to be afforded adequate and sufficient time to consider the papers served on her by Atlantics and Fish Spain; to consult and to be advised by her legal representatives

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<sup>3</sup> (LC 60/2015) (2015) NALCMD 11 (15 May 2015)

and to give instructions to her legal representatives with the regard to her response to the application brought against her on urgent basis. That right is not gainsaid and cannot be taken away by Atlantics and Fish Spain under the guise of the approach propounded by their legal representatives by adopting the *Stipp's* approach in these proceedings.

[20] In my view, PG's complaint that she was not afforded sufficient time by Atlantics and Fish Spain within which to respond to their case is well founded and justified. The application was, so to speak, sprung upon her on urgent basis while she was busy dealing with the POCA application also brought on urgent basis. The PG was given a day within which to respond to an entirely new application. In my view, and by any standard of fairness, one day is wholly inadequate and entirely unreasonable for Atlantics and Fish Spain and their legal representatives to impose on the PG and her legal practitioners. The legal practitioners for Atlantics and Fish Spain as officers of this court have a duty to act fairly towards their colleagues in this matter, the legal practitioners for the PG. In my view, this application for postponement could have been avoided had the legal practitioners for Atlantics and Fish Spain acted with due consideration and fairness towards their colleagues acting for the PG.

[21] The administration of justice will suffer if legal practitioners act inconsiderately towards each other. The court will be deprived of the opportunity to be presented with properly considered and drafted pleadings and arguments.

[22] Furthermore, in my view, the PG was justified in her reluctance to start responding to unsigned and uncommissioned preliminary papers initially served on her by the legal practitioners for Atlantics and Fish Spain. I found her conduct quite acceptable and justified under those circumstances. The properly commissioned documents were only served at the offices of the PG legal representatives at about 19h30. It consisted over 800 pages. The PG was virtually left with a day for her to collect and collate relevant documents to consult with her legal practitioners, including counsel, drafting and settling of relevant papers. The period is highly inadequate by any reasonable standard and borders on the oppressive.



[23] I am satisfied that the application for the postponement by the PG is *bona fide*. I agree with the PG's view that the postponement has been occasioned by Atlantics and Fish Spain and in particular by the conduct of their legal representatives in how they went about conducting and advancing the two respective applications. In particular the application to anticipate has been brought on an urgent basis but no facts or allegations have been put forward establishing why it is alleged to be urgent. This is so notwithstanding the mandatory requirement of Rule 74(3). In the process the original application has been, so to speak, 'parked' to the detriment of the other respondents, in particular the Bank of Namibia and its legal representatives who have had to wait and see what the outcome of the application to anticipate would be. Although they are not parties, they have been obliged to sit through the proceedings because the POCA application has been set down for hearing by Atlantics and Fish Spain on the same day as the application to anticipate. This is highly inconsiderate on the part of the legal practitioners' for Atlantics and Fish Spain not only towards their colleagues but also to the court.

[24] I am further satisfied that the application for a postponement has been brought timeously and that there has not been a delay in bringing the application once the circumstances to bring the application became known to the PG and her legal representatives.

[25] I am of the considered view that it is in the interests of justice that the PG be granted an opportunity to respond to Atlantics and Fish Spain's application to anticipate the POCA order.

[26] In my view there is no prejudice to be suffered by Atlantics and Fish Spain if the postponement is granted. During his arguments, Counsel for Atlantics and Fish Spain did not allude to any prejudice which would be suffered by his clients if the application for a postponement is granted.

[27] In light of the uncontested facts put forward by the PG and in consideration of the interests of justice, I am satisfied that a case has been made for this court to exercise its discretion by granting the application for a postponement.

[28] There remains the issue of costs. Mr Boonzaier for the PG asked for an order of costs against Atlantic and Fish Spain. Similarly Mr Obbes for the Bank Namibia asked for an order of costs against Atlantic and Fish Spain in respect of the POCA urgent application which was set down by Atlantic and Fish Spain on the same day but as mentioned earlier has been parked on the side pending the determination of the application for an order to anticipate and also pending this application for a postponement which has been vehemently opposed by the by Atlantic and Fish Spain. I do not consider that this is an appropriate stage of the proceedings or forum to consider the costs incurred by the Bank of Namibia with regard to the POCA urgent application. Those costs will be considered at an appropriate time when the POCA urgent application will be dealt with.

[29] In my view, it bears repeating, had the legal practitioners for Atlantic and Fish Spain acted reasonably and with due consideration to the PG and her legal representatives as colleagues, as well as taking into account the interests of justice, this application would not have been necessary. To have allowed their colleague a day or two to file their papers would not have prejudiced their clients' case in any manner whatsoever. As I have found earlier in this judgment, the PG and her legal representative were given highly insufficient time to deal with complex and highly technical legal points upon which the application is predicated and which application been brought on urgent basis. As if that was not enough, the legal representatives for the Atlantic and Fish Spain vehemently opposed the PG's application for postponement resulting in a day being spent on hearing arguments on the postponement. They did not file opposing affidavits in which they set out the facts or grounds upon which they oppose the PG's application for a postponement.

[30] I am of the considered view, based on the conduct of Atlantics and Fish Spain legal representatives that they acted unreasonably and indeed I dare say their conduct has been reprehensible. As a sign of disapproval of the conduct of the legal practitioners for Atlantics in fiscal Fish Spain, this court considered it appropriate that Atlantics and Fish Spain be ordered to bear the costs occasioned by the application for postponement. And I so order.

[31] In the result I make the following order:

1. The application is granted and leave is granted to the Prosecutor General to file her papers in response to the applicants' application to anticipate the order granted pursuant to the provisions of the Prevention of Organised Crime Act, Act No 29 of 2004 ('POCA') on 26 May 2017 ('the POCA order'), such papers to be filed on or before closure of business on Tuesday, 13 June 2017.
2. The respondents in this application are ordered to file their replying affidavit, if so advised, on or before closure of business on Wednesday, 14 June 2017.
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H Angula  
Deputy-Judge President

APPEARANCES:

APPLICANT:

M G BOONZAIER

Of Government Attorney, Windhoek

RESPONDENTS:

R HEATHCOTE SC (with him J JACOBS)

Instructed by van der Merwe-Greeff Andima Inc.,  
Windhoek