

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2017/00172

In the matter between:

ATLANTIC OCEAN MANAGEMENT GROUP (PTY) LTD
FISH SPAIN SL

FIRST APPLICANT
SECOND APPLICANT

and

THE PROSECUTOR-GENERAL

RESPONDENT

Neutral citation: *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 255
(6 September 2017)

Coram: ANGULA DJP

Heard: 15 June 2017

Delivered: 6 September 2017

Flynote: Applications and motions – Urgent Applications – Prevention of Organized Crime Act 29 of 2004, (the POCA Act) – Section 51 Preservation of Property Orders – Such orders are not final in nature, they are of an interim nature and as such a party

affected has a right to anticipate such an order – Section 53(1) preservation of property order expires 120 days after the date on which notice of the making of the order is published in the Gazette.

Summary: This application deals with two preservation orders sought by the PG namely under case numbers POCA 1/2017 and POCA 8/2017 in respect of the positive balance in the Foreign Custom Currency Account, ('the CFC account') held at Bank Windhoek in the name of the first applicant.

On 5 January 2017 the PG moved and obtained the first preservation of property order under case number POCA 1/2017. Thereafter the applicants served in terms of section 52 (3) on the PG giving the particulars of their chosen address for the delivery of further documents concerning further proceedings. The applicants also filed their opposing affidavits. Subsequent thereto and on 28 April 2017, the PG through the Government Attorney sent a letter to the applicants' legal representative in which she advised that she would not be able to obtain a forfeiture order as it had emerged that a Determination purportedly issued in terms of section 36 of the Financial Intelligence Act had in fact not been issued or published in the Government Gazette as required. The PG then decided to allow the preservation order to lapse. Thereafter the applicants' legal representatives sent a letter of demand to Bank Windhoek demanding that Bank Windhoek release their client's money.

On 24 May 2017, the PG filed a second application under case number POCA 8/2017 to obtain a second preservation of property order in respect of the same money held in first applicant's CFC account. The application was again brought *ex parte*. The application came before Usiku AJ on 26 May 2017 who granted the second preservation of property order.

On 7 June 2017, the applicants filed a notice to oppose the POCA 8/2017 application. The applicants also filed an application directed at Bank Windhoek, the Bank of Namibia and the PG for an order to release the money. Simultaneously with the application for

an order to release the money the applicants launched an urgent application in which they sought to anticipate the second preservation order and also sought an order to rescind the said preservation order.

The PG raised a point *in limine* that the applicants have no right to anticipate the preservation of property order in terms of Rule 72 in that there is no rule *nisi* and there is no return date; therefore Rule 72 is not applicable and finally that a preservation order is final.

The PG further submitted that there is nothing in POCA or any other statute which prevents the PG from applying for a new preservation order where the first preservation of property order has lapsed.

Held that that an *ex parte* order is provisional subject to it being set aside on application by a person affected by it; and that the right to anticipate an *ex parte* application order applies to POCA orders. Accordingly the applicants were entitled to anticipate the preservation order granted by the court on 26 May 2017 under case number POCA 8/2017.

Held that; there were no compelling reasons for the PG to have brought the second application for the second preservation order on an *ex parte* basis; therefore based on the history and the circumstances of that matter the PG inappropriately and incorrectly exercised her statutory discretion which negatively affected the applicants' rights to fair trial guaranteed by Article 12 of the Constitution.

Held that the PG committed a number of material non-disclosures both in respect of the first and the second applications for the preservation orders which compelled the court to set aside the second preservation of property order.

Held that the intention of the legislature to limit the validity of the preservation order to 120 days was to balance the respondent's constitutional right to property and the legitimate objects of POCA.

Held further that in cases where the PG has deliberately allowed a preservation order to lapse without approaching the court to have the order discharged or set aside the PG should not be allowed to obtain a second preservation order because to do so would make the statutory period of 120 days meaningless and unduly oppressive to the respondent.

ORDER

1. The preservation order granted on 26 May 2017 is hereby set aside.
2. The PG is to pay the applicants' costs of this application to anticipate and to rescind the preservation order under POCA 8/2017 such costs to include the costs of two instructed counsel and one instructing counsel.
3. The application is regarded as finalised and is removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] I have before me an application for the rescission of a preservation of property order granted by Usiku AJ (as he then was) in favour of the Prosecutor-General ('the PG') on 26 May 2017. The preservation order is in respect of the positive balance in the Foreign Custom Currency Account, ('the CFC account') held at Bank Windhoek in the name of the first applicant, Atlantic Ocean Management Group (Pty) Ltd ('Atlantic'). Atlantic is a Namibian registered company.

Background

[2] Messrs Alberto Iglesias Martinez (Mr Martinez) and Juan Jose Martinez Maqueira (Mr Maqueira) are equal shareholders and co-directors of Atlantic ('the directors'). Fish Spain is a Spanish company operating in Angolan waters. The other Spanish company is Rio Algar. I will refer to both Fish Spain and Rio Algar as 'the Spanish companies'. I will further refer to Atlantic and Fish Spain collectively as 'the applicants'.

[3] The Spanish companies and Sadino LDA (Sadino), an Angolan company, had concluded a charter agreement in terms of which it was agreed that Sadino would utilize vessels of the two Spanish companies to catch fish in Angolan waters. As a consideration, Sadino would pay the Spanish companies and would in addition carry all the costs arising from the operation of the vessels. However, subsequent to entering into the agreement, the Angolan government introduced foreign exchange regulations which restricted the export of foreign currency, making it difficult for Sadino to remit payment to the Spanish companies. As a result, the Spanish companies experienced a liquidity problem. At a certain stage the Spanish embassy in Angola intervened to try to help the Spanish companies.

[4] In order to address the problem, the Spanish companies instructed Mr Martinez and Mr Maqueira to explore market opportunities in Namibia in order to develop an alternative market for the Spanish companies in Namibia. The reliability of the Namibian banking system was one of the key considerations. To this end, Atlantic was registered

in Namibia, in which Mr Martinez and Mr Maqueira are equal shareholders and co-directors as stated earlier.

[5] According to the Memorandum of Association of Atlantic, its main business is manufacturing, distribution of produce, construction and marketing all commodities, rendering services, and investing in properties.

[6] During May 2016 the directors applied on behalf of Atlantic to open a CFC account at Bank Windhoek, at its branch at Walvis Bay.

[7] On 19 August 2016 the Bank of Namibia granted approval for the opening of the CFC account in the name of Atlantic through Bank Windhoek.

[8] Sadino then entered into an agreement with three of its Angolan clients, in terms whereof it was agreed that the clients would pay the purchase price for Sadino's fish in Namibia instead of paying same into Angolan banks; and that the money would be paid to the representatives of the Spanish companies being Mr Martinez and Mr Maqueira. The directors would in turn deposit the money into the CFC account, from which it would be transferred to Fish Spain.

[9] Pursuant to the agreement, a client of Sadino, one Raimando Domingos, paid the sum of USD 59,400.00 to Mr Martinez, which amount he in turn deposited into the CFC account on 16 November 2016. This money was transferred by Bank Windhoek to Spain without any problem.

[10] Thereafter on 17 November 2016 Mr Martinez deposited the total sum of USD 905,780 into the CFC account. The amount was made up of two payments received from Sadino's clients. A sum of USD 499,512 received from one Mrs Rosa Tangui Tandi and another sum of USD 500,014 received from one Mr Candido. Of that amount, Bank Windhoek charged one percent commission equal to USD 9,057.80. Mr Martinez then

decided to retain USD 10,000 in the account for incidentals and instructed Bank Windhoek to transfer USD 886,722.20 to Fish Spain's bank account in Spain.

[11] Thereafter on 19 November 2016 Bank Windhoek informed Mr Martinez that the transfer of USD 886,722.20 had been blocked by the compliance department of Bank Windhoek.

POCA 1/2017 application

[12] On 4 January 2017 the PG filed an urgent *ex parte* application which was set down for hearing on 5 January 2017 in which she sought a preservation of property order, the property being the positive balance of USD 886,722.20 in the CFC accounts of Atlantic held at Bank Windhoek. The application served before me. Having considered the papers filed of record and having heard counsel's submissions, I issued the preservation of property order on 5 January 2017.

[13] The facts relied upon by the PG in that application may be briefly summarised as follows: The positive balance in the CFC account held at Bank Windhoek in the name of Atlantic are the proceeds of unlawful activities, namely contravention of section 36(1) of the Financial Intelligence Act, No. 13 of 2012 ('the FIA Act'), in that the Financial Intelligence Centre ('FIC') has made a Determination No. 3 of 2016 ('the Determination') which stipulates that any money in excess of the sum of N\$ 100,000 must be declared to an officer of Customs and Excise at the port of entry into or at the port of departure from Namibia. In that connection, the PG contended that Atlantic had contravened the provisions of section 36 when it received the cash amounts of USD 59,400.00 and USD 905,780.00 respectively. The PG further pointed out that the Director of Customs and Excise had no record of any declaration made either in the name of Atlantic or the directors; and that the money was acquired from Angolan nationals. Accordingly, the PG alleged that Atlantic had committed an act of money laundering in contravention of section 4 of the Prevention of Organised Crime Act, No 29 of 2004, ('the POCA Act') by depositing the money in the CFC account. Furthermore,

it was alleged, that Mr Martinez, who deposited the money in the CFC account, knew, or ought to have known, that the money was the proceeds of a contravention of section 36 of the FIA Act; and finally, that the CFC account and the money in that account were instrumentality of the contravention of section 36 of the FIA Act.

[14] On 10 February 2017, the applicants filed a notice to oppose the preservation order in terms of section 51 of the POCA Act. Mr Maqueira deposed to the main opposing affidavit.

[15] On 28 April 2017, the PG through the Government Attorney, sent a letter to applicants' legal practitioners in which she conceded that she would not be able to obtain a forfeiture order in respect of the money in the CFC account. According to the PG it had 'emerged' and become common cause that the Determination, purportedly issued in terms of section 36 of the FIA Act, had in fact not been issued or published in the Government Gazette.

[16] Thereafter the PG decided to allow the preservation order to lapse by effluxion of time. On 20 May 2017, the preservation order lapsed after 120 days from the date it was published in the Government Gazette.

[17] On 22 May 2017, the applicants' legal practitioners sent a formal letter of demand to Bank Windhoek demanding that Bank Windhoek should release its funds, in the light of the fact that the preservation order which preserved the funds had lapsed.

POCA 8/2017 application

[18] On 24 May 2017, the PG caused a fresh POCA application, POCA 8/2017 for a preservation of property order to be issued and set it down for hearing on 26 May 2017. This application sought a second preservation of property order in respect of the same positive balance in Atlantic's CFC account. The application was again brought *ex parte*, notwithstanding the fact that the applicants had given notice of their intention to oppose

the first lapsed preservation of property order. It needs mentioning that, according to the papers that application was also brought in camera. Whether the application was indeed moved in camera is not possible to establish.

[19] New grounds were advanced for the contention that the money in the CFC account were, on reasonable grounds, proceeds of unlawful activities and that the CFC account constitutes an instrumentality of an offence.

[20] The application served before Usiku AJ (as he then was), who granted the order on 26 May 2017, ('the second preservation order'). It is this order that the applicants have anticipated and seek to have rescinded or set aside in this application.

Application by the applicants for an order to release the money

[21] On 2 June 2017, the applicants launched an urgent application against the PG, Bank Windhoek and the Bank of Namibia, in which they sought an order against Bank Windhoek to immediately release the money to Fish Spain in accordance with Atlantic's original instructions. The application was set down for hearing on 9 June 2017.

The applicants' notice of intention to oppose

[22] On 7 June 2017, the applicant filed a notice to oppose the POCA 8/2017 application. Essentially the notice was of their intention to oppose the making of a forfeiture of property order in respect of the money in the CFC account and in addition an application for the exclusion of their property from the preservation order in terms of section 52(4) read with Regulation 4(6) of the POCA Act. Section 52(4) provides that a person who has been served with a preservation order is required to serve the PG with notice to oppose within 21 days from date of service of the preservation of property order. The notice must *inter alia* contain a chosen address for delivery of further documents concerning further proceedings; the person must in addition indicate

whether he/she intends to oppose the making of the order or varying the operation of the order in respect of the property.

Application to anticipate and to rescind the second preservation of property order in POCA 8/2017

[23] Simultaneously with the application for an order to release the money the applicants launched an urgent application in which they sought to anticipate the second preservation order and also sought an order to rescind the said preservation order. Both applications were set down for hearing on the same day, namely, 9 June 2017. In response, the PG filed notices to oppose both applications for the release of the money and the application to anticipate the preservation order. It should be mentioned that it would appear that at the time when the applicants launched the application for an order to release the money they were not aware that the PG had already applied and obtained the second preservation of property order by means of the POCA 8/2017.

[24] On 9 June 2017, when both applications to anticipate and to rescind the preservation order were called, the PG sought a postponement. The applicants vehemently opposed the PG's application for a postponement. They did not, however, file opposing papers but argued the matter on the PG's papers.

[25] After hearing counsels' arguments, I granted a postponement and gave the PG one day to file her answering affidavit and one day to the applicants to file their replying affidavits and postponed the application to 15 June 2017 for hearing. The application for the release of the money was, so to speak, taken over by events. It was also postponed, for practical reasons, to the same day, ie 15 June 2017.

[26] Legal arguments were heard on 15 June 2017. Mr Heathcote, assisted by Mr Jacobs, appeared for the applicants. Mrs Boonzaier, appeared on behalf of the PG. Having heard counsels' arguments, I reserved judgment and postponed both applications to 6 September 2017, for delivery of judgment.

Point in limine: applicants have no right to anticipate the preservation order

[27] The PG raised a point *in limine* that the applicants have no right to anticipate the preservation of property order in terms of Rule 72 of this court; that the POCA section 51(2) application for the preservation of property order is not an application in terms of Rule 72 in that there is no rule *nisi* and there is no return date; therefore Rule 72 is not applicable. It was further submitted that a preservation order is final.

[28] Mrs Boonzaier contended further that the preservation of property order is 'interim but is not in any sense provisional'; that it is an order made to preserve the *status quo* and remains in force until the forfeiture application is decided. Counsel relied for this submission on the Supreme Court judgment in the *Prosecutor-General v Uuyini*¹ matter where the court held that the POCA section 51 is *ex parte* and does not make provision for a *rule nisi*. Counsel further submitted that the defence of the person who has interest in the property is only raised at the forfeiture stage. Furthermore, that a respondent can apply for the rescission or variation of the preservation order. However, a respondent does not have the right to anticipate the preservation order so the argument ran. Counsel therefore submitted that the applicants had adopted a wrong procedure and the application should therefore be dismissed.

[29] Mr Heathcote, on the other hand, submitted that the preservation order, while it is cast in final form, remains a provisional order, subject to the applicants' rights as envisaged in the Namibian Constitution and Rule 72(7) of the rules of this court to anticipate that order on 24-hour notice to the PG.

[30] It is common cause that the preservation order which forms the subject matter of that application was granted *ex parte*. The Full Court in the matter of the *Prosecutor General v Lameck*² had held that an order granted *ex parte* is by its very nature provisional, irrespective of the form it takes, subject to it being set aside on application

¹ (SA 20/2013) [2015] NASC 13 (2 July 2015)

² (POCA 1/2009) [2010] NAHC 2 (22 January 2010).

at the instance of a party affected by it. That view was further reinforced by the Full Bench of this court in the *Shalli v Attorney General*³ matter where the court held at par 36 that ‘*even in the absence of a rule nisi an order granted ex parte is provisional subject to being set aside by the person affected by it*’.

[31] A case in point for the support of the proposition that the applicants in this matter are entitled to anticipate a preservation order is the South African case of *National Director of Public Prosecution (NDPP) v Braun & Another*⁴ where a similar point *in limine* was raised by the NDPP in the context of Rule 6(12) and section 38 of South African POCA. Counsel for NDPP relied on the decisions of the *National Director of Public Prosecutions and Others*⁵ and *Phillips and Others v National Director of Public Prosecutions*⁶. The court, in rejecting the NDPP’s contention, pointed out that in the *Phillips* matter, the South African Supreme Court of Appeal held that interlocutory orders may be varied or rescinded by the court that granted them.

[32] The court held further that the powers granted in the POCA Act did not in any way limit a court’s jurisdiction to invoke the provisions of Rule 6(12)(c) which are equivalent to Rule 72(7) of our rules of court. Furthermore, that to hold otherwise would open the door to abuse of the right to approach the court *ex parte* and would undermine the *uberrima fides* rule – the utmost good faith. The court therefore held that the right to anticipate an *ex parte* order applies to POCA orders. I consider the exposition of the legal position by the SCA with regard to the status of the preservation order as persuasive and as giving recognition to the *audi* principle. Applying the principle to the facts of this matter, I reject the contention advanced on behalf of the PG that the applicants in this matter do not have the right to anticipate the preservation order and hold that the applicants are entitled to anticipate the preservation order granted by this court on 26 May 2017 under case number POCA 8/2017.

³ POCA 9/2011 [2013] NAHCMD 5 (16 January 2013).

⁴ 2007 (1) SA 189.

⁵ 2005 (5) SACR 360:1 All SA 635

⁶ 2006 (1) SA 505 (CC) (2006) 91) SACR 78 2006 BCLR 274)

[33] The point *in limine* is accordingly dismissed.

Propriety of bringing a second application for the preservation of the same property.

[34] The next issue for determination is whether it was appropriate for the PG to have brought the second application for the preservation of property order on an *ex parte* basis given the fact there had been a first application for the preservation of the same property order which was opposed by the applicant.

[35] In respect of this question, it was submitted on behalf of the PG that section 51(1) of the POCA Act provides that the PG ‘may’ apply to the High Court for a preservation order; that the section therefore has vested the PG with a discretion; that once the application is before court, the court has no discretion but to grant the preservation order subject only to being satisfied that there are reasonable grounds for the belief that the property is the proceeds of unlawful activities or is an instrumentality of an offence, without requiring that the notice of the application be given to any other person. Counsel relies for this submission on what was stated by the Supreme Court in the *Uuyuni* matter (*supra*) that ‘section 51(2) makes it plain that such applications must be granted without notice to any person or adduction of any further evidence from other person⁷’.

[36] Mr Heathcote for the applicants, on the other hand – correctly in my view – pointed out that the Supreme Court in the *Uuyuni* matter did not hold that all preservation applications must always be brought on an *ex parte* basis; that the *ratio* of the Supreme Court judgment in the *Uuyuni* matter is that it is not unconstitutional to obtain a preservation order on an *ex parte* basis and *in camera*.

[37] It is correct, as the Full Bench in *Shalli* (*supra*) bemoaned or expressed its view about the unfortunate situation whereby the legislature, instead of vesting the court with a discretion to determine in which matters notice to the affected party may be dispensed

⁷ *Uuyuni* para 31 (*supra*).

with, vested the discretion in the PG to decide if and when to bring the application for a preservation of property order on an *ex parte* basis. In my view, as in all matters where a discretion is vested upon a functionary, such as on the PG by the POCA Act, such discretion must be exercised fairly, reasonably, in the interest of justice and without caprice, malice or ulterior motive. This means that there is a heavy obligation on the PG to exercise such discretion for legitimate purpose and with utmost good faith. The court, being the independent umpire, is enjoined to ensure that the PG exercises her discretion with due regard to those requirements. If those requirements are not met or are trampled upon, the court is called upon to exercise its Constitutional duty to protect an affected party's fundamental rights to a fair process and to ensure that the property rights enshrined in the Constitution are not violated. The court in the *Shalli* matter ruled at para 36 that section 51(2) is not unconstitutional in so far as it states that the court 'must' grant the order because a court hearing an application brought *ex parte*, even if satisfied that the requisites for granting of a preservation of property order are established, can still issue a *rule nisi* in order to afford a person affected by the preservation order an opportunity to be heard on a return date and the affected person may even anticipate the return date.

[38] It follows therefore from the above, in my view, that in so far as the argument advanced on behalf of the PG appears to suggest that all preservation applications must always be brought on an *ex parte* basis, such argument is wrong in law and in principle. Such approach would amount to no exercise at all of discretion imposed upon the PG by section 51(1) of the Act. I am of the considered view that in each application the PG must demonstrate to the court on the papers that there is a legitimate reason for bringing the application *ex parte* and that she has exercised that discretion fairly and judiciously in deciding to bring the preservation application *ex parte* and without notice to the effected persons. It must be kept in mind that a decision to move an *ex parte* application is an exception to the rule because it violates the *audi alterem partem* rule.

[39] In the exercise of that discretion the PG has to bear in mind that the affected persons' right to a fair trial protected by Article 12 and property rights protected by

Article 16 of the Constitution are at stake. It is a decision which should not be lightly taken. *Ex parte* applications should not be the norm but should be sparingly resorted to, with facts justifying approaching the court on an *ex parte* basis. I am aware that in stating what I have just said I might be construed as going against the Supreme Court's *Uuyuni* judgment. But as Mr Heathcote pointed out, contrary to the popular understanding by those who appear on behalf of the PG, the *Uuyuni* judgment is not authority for the proposition that all POCA applications for the preservation orders are to be brought on an *ex parte* basis. The PG is vested with a discretion to decide whether the circumstances or facts of a particular case justify the bringing of the application on an *ex parte* basis or not. If the *Uuyuni* judgment is to be interpreted to mean that in all applications, regardless of the facts, are to be brought *ex parte*, such interpretation, in my respectful view, would be against the clear provisions of section 51(1) which enjoins the PG to exercise a discretion in deciding whether or not to bring the application, *ex parte*. Furthermore, if the *Uuyuni* judgment were to be so interpreted, it would mean, in my respectful view, that it overruled the decision of the court in the *Shalli* matter which ruled that a court has a discretion to issue a rule *nisi* in appropriate cases. This would further, in my respectful view, reopen the question about the constitutionality of section 51(2) in so far as it commands the court to issue the preservation order in all *ex parte* applications and therefore removes from the court the discretion to issue a rule *nisi* in appropriate cases.

[40] The PG advanced her reasons why she brought the second application on *ex parte* basis as follows:

- '22. Furthermore, I submit that the expressed provision made for *ex parte* proceedings under section 51(2) of POCA is based on the recognition by the Legislature that there is an inherent need to proceed without notice in applications for preservation orders. Further, that the structure of Chapter 6 of POCA as a whole is geared towards allowing in general for an initial *ex parte* order to secure assets that may be disposed of, with any opposition thereto being dealt with after this initial objective has been met.

23. Proceedings on notice to anyone with an interest in the property will lead to a delay of various months. During that time the State's interest in the property will be under someone else's control, and unprotected.
24. The parties interested in property of this nature inevitably have a powerful incentive to dissipate their property if they get notice of a pending application for its preservation.
25. In this specific case, the risk of dissipation is imminent. As the parties with interest have already demanded for the release of the money.
27. I submit that it will only be in unusual circumstances that an *ex parte* application for a preservation order will be inappropriate. My submission is that no such circumstances exist in this case and the preservation order serves only as an interim order. Shelfco Investment already requested the release of the funds despite being informed that there are reasonable grounds to believe that the money was imported illegally into Namibia.'

[41] Under the heading 'Background' of this judgment, I set out the historic factual background which preceded the PG's second application for the second preservation of property order in POCA 8/2017. From that background, the reader would know by now that in the first POCA 1/2017 application, the applicants had opposed the granting of the forfeiture order. In their opposing affidavit, they had set out facts why the forfeiture order should not be granted. Furthermore, the applicants' legal practitioners were already on record representing the applicants in that application. The PG's legal representative had been corresponding with the legal representatives for the applicants since the first preservation order was obtained.

[42] The first ground displays the misconception of '*entitlement*' by the PG to approach the court on an *ex parte* basis, regardless of the circumstances. Just because the POCA Act has made provision for an option to bring preservation application on *ex parte* basis does not mean that all applications for a preservation of property order are to be brought *ex parte*. As I have pointed out earlier in this judgment there is no such

entitlement. The PG is required in each case to undertake a process of evaluating the facts and the circumstances in order to decide whether or not to bring the application on an *ex parte* basis. Only after she has undertaken that process might she properly proceed to bring the application on an *ex parte* basis. It bears repeating: there is no automatic entitlement to bring each and every application for a preservation order on an *ex parte* basis.

[43] The PG is correct in saying that by providing for the option to bring an application on *ex parte* basis the legislature has thereby recognised the inherent need to proceed without notice in application for preservation orders. But as I have pointed out earlier, not in every, and all cases, is the PG is obliged to bring the application for the preservation order on an *ex parte* basis. The PG is required to undertake a process of evaluation of the peculiar or compelling circumstances impacting upon a particular matter and to make a value judgment whether the facts before the PG justify the bringing of the application on *ex parte* basis and to take into account the rights of the affected parties and the objectives of the POCA Act. The PG is under a legal obligation to justify to the court why notice should not be given to the persons who would otherwise be affected by the preservation order sought. The principle of *audi alterem partem* is fundamental in all open and democratic societies such as ours and must be observed at all times except in cases where there is a need not to in which case the court must be satisfied with the reasons advanced therefor.

[44] I next turn to the allegation that the proceedings on notice would result in delay for various months. This allegation, viewed against its historic background, is simply not true. The application could have been brought by way of a rule *nisi* in order to afford the respondents an opportunity to be heard in due course. It is for this reason that the court in the *Shalli* matter found that the applicant's right to fair trial was not infringed by section 51(2). In this present case, there had already been a previous similar application based on the same facts; the applicants had already revealed their defence, which was known to the PG. In my view, the fact that the PG changed the basis upon which the first application was premised did not materially change the scope of the dispute. The

basis of the PG's cause of action was in both applications that the money is the proceeds of unlawful activities and that the CFC account is an instrumentality of an offence. In my view, there is no merit in this ground for bringing the application *ex parte*. The PG has failed to exercise her discretion properly and fairly under the circumstances and particularly as far as it affected the applicants' right to fair trial.

[45] The further ground advanced by the PG for bringing the application *ex parte* is that the property would be dissipated if the application were to be brought in the normal course. The first thing to be noted is that this ground is couched in general terms. It is not specifically based on the facts of this present case, which were intimately within the knowledge of the PG. The applicants already had notice from the previous application for preservation of property order under POCA 1/2017. In my view, it would not have caused any harm or prejudice if the applicants were given notice of the second application for the preservation order. The money was safely secured with Bank Windhoek in the CFC account under the stringent provisions of the Exchange Control Regulations. In terms of the Exchange Control Regulations provisions, it is only Bank Windhoek which can transact on the account. The money could in those circumstances not be dissipated by the applicants as alleged. On the PG's own admission, she had sent a request to the Financial Intelligence Agency (FIC) to file or put a block on the CFC account. Furthermore, the PG knew that the FIC had complied with her request in that on her own version she knew that the block would only have expired on 6 June 2017. To allege against the background of those known facts and circumstances that the money would be dissipated by the applicants is both far-fetched and irrational. There is therefore no merit in this ground.

[46] The PG knew that the applicants were represented. According to the PG it was the applicants' legal practitioners who pointed out to her in a letter that the purported Determination upon which the PG erroneously relied to obtain the first preservation order, had not been gazetted.

[47] As to the alleged risk of dissipation of the money and the imminent risk posed by the demand for the release of the money made by applicants' legal practitioners, in my view this did not justify the bringing of the application without notice to the applicant. As pointed out earlier, the PG knew that the FIC had placed a block on the CFC account. Furthermore, on the PG's own admission the applicants' legal practitioners had indicated in their letter to the Government Attorney on 22 May 2017 that they would bring an application to court for an order to release the money. The impression created by the PG to the court that the applicants would, so to speak, simply run on Bank Windhoek and demand the release of their money is not supported by objective facts.

[48] In paragraph 27 of her affidavit the PG submits that only '*in unusual circumstance that an ex parte application will be inappropriate*'. In the first place, this assertion flies in the face of the contention that all cases preservation of property orders must be brought *ex parte*. As I have already demonstrated, in any event, the converse is the correct position: It is only in 'unusual circumstance' that the court must be approached *an ex parte*. 'Unusual', viewed against the prevailing compelling circumstances which justify approaching the court on an *ex parte* basis. The PG's submission that '*No such circumstances exist in this case and the preservation order serves only as an interim order*' therefore approaches the matter on wrong principle. I would have expected her to submit that such unusual circumstance exists in the present matter, justifying her to bring the application *ex parte* and without notice to the applicants. The remainder of the PG's reasons in this paragraph, namely, that the applicants have demanded the release of the money despite being informed that there was a reasonable ground to believe that the money was imported in the country illegally, is also is not tenable. As pointed out earlier, it was the applicants' legal practitioners who informed the PG that the purported Determination upon which the PG had relied for the contention that the money was brought into the country without a declaration pursuant to that Determination had not been gazetted. The applicants therefore knew that there was no reasonable ground for the PG to believe that the money was brought into Namibia illegally.

[49] In the context and in support of the contention that there had been a material non-disclosure on the part of the PG in POCA 1/2017 application, the applicants point out that they had been prejudiced by the PG's conduct when she deliberately decided to allow the first preservation order to expire simply to obtain a tactical advantage to move for a second preservation order. In my view, there is merit in the complaint. The PG's conduct seriously impaired and compromised the applicants' constitutional right to fair trial in that: the PG served the first preservation order on the applicant and called upon them to reveal their defence, and when the applicants did so the PG thereafter deliberately allowed the first order to lapse. Shortly thereafter, and without notice to the applicants, the PG approached the court and attached the papers containing the applicants' defence to her papers and extensively discredited the applicants' defence without the applicants being afforded an opportunity to be present and to articulate their defence. On that basis, the PG obtained the second preservation order. In my view the PG's conduct was unfair to the applicants. It follows in my view that the PG failed to exercise the discretion reposed in her in a fair even-handed and transparent manner.

[50] The cumulative effect of the foregoing findings is that there were no compelling reasons for the PG to have brought the second application for the second preservation order on an *ex parte* basis. It follows therefore in my view that the PG inappropriately and incorrectly exercised her statutory discretion which negatively affected the applicants' rights to fair trial guaranteed by Article 12 of the Constitution. For that reason, the second preservation order stands to be set aside.

Material non-disclosure by the PG

[51] The applicants alleged that the application for the second preservation of property order is riddled with material non-disclosures, and even misrepresentations. Therefore for those reasons, the same fate which befell the PG in the matter of the *Prosecutor-General v Lameck*⁸ must befall her in the present matter, so the argument runs.

⁸ 2010 (1) NR 156 (HC) at par 24 - 26

[52] It is now trite law that in a POCA application for a preservation of property order when the PG has decided to approach the court on an *ex parte* basis, she must make a full and frank disclosure of all the relevant and material information and facts and must be *bona fide*. If a breach of that obligation occurs it will result in the preservation of property order being set aside even if the non-disclosure was not wilful or *mala fide*. The court in the *Lameck* matter spelt out the position in this way:

'[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: 2010 (1) NR, p168.

- A (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.'

[25] The following *dictum* by Smallberger JA in *Trakman NO. v Livshitz and Others* merits consideration:

'It is trite law that in *ex parte* application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the Court's discretion, to the dismissal of the application

on that ground alone (see, for example, *Estate Logie v Priest* 1926 AD 312 at 323; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E - 350B).

[26] Trakman was decided in 1995 and is authority emanating from a high source, but it is not binding on this court. In any case, it certainly does not address the critical issue of why motion proceedings are, or ought to be, treated differently. I prefer the dictum of Le Roux J in *Schlesinger* supra, which was made in the context of *ex parte* motion proceedings. The rule about material non-disclosure seems, in my view, to have greater applicability in motion proceedings and, *a fortiori* in *ex parte* motion proceedings, in view of the fact that such matters are ordinarily decided solely on the papers without the benefit of cross-examination and, what is more, without the benefit of hearing the other party, which in itself offends the fair trial provisions of Art. 12 of the Namibian Constitution. That makes the *Schlesinger* proposition more in tune with the court's sense of justice.'

[53] In my view, the principles outlined above are applicable to the present matter.

[54] In support of the contention that there had been a material non-disclosure, the applicants advance the following reasons: On 18 November 2016, Mr Martinez instructed Bank Windhoek to transfer the funds to Fish Spain. According to the FIA Act provisions, a block on the funds is valid for 12 days. In the instant case the block was placed on the CFC account on 18 November 2016 and expired on 6 December 2016. By the time the PG moved for the second preservation order on 5 January 2017 there was no lawful basis to retain the money. The applicants therefore submit that the money was unlawfully retained between the periods 18 November 2016 to 4 January 2017. The PG did not disclose this fact to the court when she moved for the order on 5 January 2017. The applicants contend that she should have disclosed this crucial fact to the court.

[55] In response to these allegations the PG said that the block on the funds referred to as 'statutory intervention' was issued by the Director of the Financial Intelligence Centre and therefore has nothing to do with the PG's action to apply for the preservation

order of the money. Therefore, so argued the PG, the allegation that the money was retained without lawful basis is without any basis.

[56] As it can be observed, the PG did not deny the allegation, instead she advanced a justification why she did not disclose that fact to the court. The question is whether this fact was material and should have been disclosed to the court, and whether the money could still be lawfully retained after the first FIA statutory intervention had expired on 6 December 2016 – thus between the periods 18 November 2016 and 4 January 2017. I think it is fair to say that it has become common knowledge to the court through this POCA application that the PG and the FIC work hand in hand and co-operate and co-ordinate their activities and that the FIC's statutory intervention is important to the PG's applications for preservation orders. For instance, in the POCA 9/2017 application, which served before me on 9 August 2017, while I was writing this judgment, the ground for urgency advanced by the PG was that the matter was urgent because the statutory intervention which was placed on an account with a deposited balance on 21st July 2017 would expire on 7 August 2017 at 12h00 that day. The statutory intervention by the FIA appears to serve as a back-stop while the PG is preparing for the launching of an application for preservation of property order. This fact is in my view demonstrated in the second application for the preservation order. In that application, after the first order was allowed to lapse and lapsed on 20 May 2017, the PG says in paragraph 17 of her affidavit that on 22 May 2017 her office sent a request to the FIC in which she indicated that she intended to apply for a new preservation order on new grounds. The PG does not, unfortunately, say what the request was about. The only inference to be drawn is that the request was for the FIC to issue a statutory intervention. This request by the PG, as will appear later, is challenged by the applicants as unlawful.

[57] In my view that fact was material. It is not helpful or credible for the PG to simply say that the statutory block had nothing to do with her application. The statutory block had a vital bearing on her application. The PG was under both legal and ethical obligations to disclose that fact to the court. The money could only be lawfully retained either by a lawful order of this court or by the statutory intervention issued by the FIC in

terms of the FIC Act. Just as the PG informs the court that the matter is urgent because the statutory intervention is about to expire, it was also incumbent upon the PG to inform the court that the statutory intervention had expired. The only inference to be drawn, in my view, is that the reason why the PG did not inform the court was to avoid alerting the applicants that the money was free to be released. In my considered view this constitutes a material non-disclosure. What would the court have done had this fact been disclosed to the court, one would ask? The applicants assert that it would have shown to the court that the money was retained unlawfully. A further question is whether the application for the preservation order of the money was dependent upon the existence of the statutory intervention. Viewed in the context of the second application for the preservation, the existence of the statutory intervention appears to be important to the PG's application. Otherwise why had the PG, on her own version, sent the request to the FIC on 22 May 2017 to place the statutory intervention on the account before the second application was launched on 24 May 2017? In my view it was a material fact which should have been disclosed to the court. Failure to disclose that fact constitutes a material non-disclosure by the PG to the court.

[58] The applicants further submit that the request by the PG to FIC to issue a second statutory intervention was 'wholly misleading'. In this context, the applicants contend that section 42 of FIA Act does not contemplate such an intervention to be issued in terms of the FIA Act at the request of the PG. The applicants further contend that a second FIC cannot or should not be issued, because such intervention would have the effect that a party would be kept from its funds without judicial oversight for a period in excess of the prescribed 12 working days stipulated by the FIA Act. Finally, that such second intervention would amount to an abuse of process and an infringement of the applicants' rights in Articles 12 and 16 of the Constitution respectively.

[59] In their affidavits the applicants requested the PG to provide the court with correspondence exchanged amongst the PG, Bank Windhoek and FIC to demonstrate how the regulatory intervention was issued. In response to this challenge the PG stated that if the applicants were dissatisfied with the decision by the Director of the FIC to

issue the second intervention order, they were at liberty to approach the correct forum to challenge the action of the Director of FIC.

[60] Article 12 of the Constitution deals with a person's right to fair trial, whilst Article 16 guarantees a person's right to his or her property.

[61] The court in the *Lameck matter (supra)* had the following to say at para 35 with regard to the duty on the PG to disclose information in her possession:

[35] In the nature of things, in matters under POCA and in the exercise of her powers and duties under POCA, the PG must rely on information obtained from third parties – in this case it happened to be functionaries of the State. It cannot be emphasised enough that the powers under ss 24 and 25 are so invasive of people's constitutionally guaranteed rights and, potentially, their dignity and ultimately freedom, that this court must exact the highest standard of propriety from those whose interventions might affect those rights.'

[62] In my view, that sentiment applies with equal force in this matter. It was a reasonable request made by the applicants to the PG. Not only was the PG under a legal obligation to disclose the information to the applicants on the basis of their constitutional rights to fair trial, but further because of the PG's duty to the court as an officer of the court to be open and transparent to the court and disclose to the court all relevant information in her possession or within her knowledge. The PG does not say that there was no correspondence between her office and the Director of the FIC. Nor does she say she was not in possession of such correspondence nor has she cited any ground such as confidentiality as to why she could not disclose the correspondence. The applicant had laid a basis of why they contended that it was not lawful for the PG to instruct the FIC to issue the statutory intervention and why they needed the PG to disclose the correspondence. The PG simply refused to disclose the correspondence without any reason.

[63] The PG is not a stranger to being found wanting on non-disclosure of information to the court. In this context the Full Bench in the *Lameck* matter (*supra*) said the following at par 42 with regard to the duty by the PG in POCA matters to disclose information in the PG's possession which is favourable to the party whose property is sought to be restrained:

'Where the law allows, as it does in POCA, for the court to be asked effectively to denude people of the enjoyment of their property rights, even if temporarily, the courts expect to do so on the basis of full information being given to them, especially information that is potentially favourable to the person whose property is sought to be restrained. Invariably, applications under POCA will be sought without notice to affected persons. The consequences upon the lives of such persons flowing from such relief are bound to be drastic. The well-established common-law rule that full and frank disclosure must be made in *ex parte* applications therefore assumes even greater importance, particularly if regard is had to our constitutional Bill of Rights.'

[64] In the *Lameck* application the court was of the view that it was not sufficient to visit the non-disclosure with a punitive cost order, but the court went further to discharge the preservation of property order. In my view, the information requested by the applicants in the instant matter was not only requested by the applicants in the exercise of their constitutional right to fair trial but additionally the PG as an officer of the court was under an obligation to disclose each and every fact and circumstance which might influence the court in deciding whether or not to grant the relief prayed for. The PG has a legal duty and an obligation as an officer of the court to place before court all the relevant information at her disposal. This is so particularly in a situation like the POCA 1/2017 where the PG of her own volition approached the court on an *ex parte* basis and without notice to the applicants. It is neither helpful, nor appropriate, for the PG, especially where the PG is discharging an entrusted statutory discretion, to simply say that 'the applicants are at liberty to approach the correct forum'. Why not simply place the requested information before the court to enable the court to adjudicate the matter based on all relevant information available? Why require the applicants to approach the court to order the PG to disclose information in her possession? In my view, based on

the PG's response, it was inappropriate for the PG as a constitutionally established office to refuse to disclose the information requested by the opposing party for the court to properly adjudicate on the matter with full knowledge of relevant matters. The response was evidently grossly inappropriate both in law and ethically.

[65] In my view, the statutory duty of the PG under POCA towards the court is no less stringent. The South African court's remarks in the matter of *Reuters Group PLC & Others v Viljoen NO & Other*⁹ are appropriate and equally applicable to the duties of the PG when acting in POCA matters. The court expressed itself in the following words:

'I must also mention that the Court had an uneasy feeling that State counsel had misconceived his function. It appeared to the Court from the nature of his address and attitude that he regarded his role as that of an advocate representing his client. A prosecutor, however, stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth.

It is indeed a sad day when senior members of the prosecuting authority themselves make contradictory statements and mislead the Court.'

[66] In my view those sentiments are equally applicable to the present matter. The paramount duty of the PG is to assist the court in ascertaining the truth by revealing to the court all material information in her possession. In my considered view, the non-disclosure is fatal to the POCA 8/2017 application.

[67] The applicants further contend that that the PG committed a further material non-disclosure by not informing the court that Determination No. 3, upon which she relied to obtain the first preservation order, was not in force. In my view the PG's non-disclosure in this context is constituted in the fact that when the PG approached the court for the second preservation order she failed to disclose or fully explain to the court the circumstances and/or the reason why it was not first ascertained whether the

⁹ 2001 (2) SACR 519 (c).

Determination was in place before the application was moved – simply stated, to bluntly and honestly tell the court what went wrong. That is not explained.

[66] It is contended on behalf of the PG that the points raised in relation to POCA 1/2017 are irrelevant for consideration in the second application for the preservation of property order. I disagree with the submission.

[67] In the matter of the *President of the Republic of South Africa and Others v the South African Rugby Football Union and Others*¹⁰ the South African Constitutional Court observed at paragraph 133 as follows:

[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.'

[68] In my view those sentiments apply with equal force to the office of the PG in Namibia. It is for those very principles that the points raised in relation to the conduct of the PG in relation to the first application for the preservation order are relevant. The PG misled the court when she moved for the first preservation order. She did not show any contrition for her conduct when she moved the second order.

[69] In her founding affidavit, on the basis of which the PG obtained the second preservation of property order, the PG states that the first order was obtained on the basis that the Determination had been issued by the FIC and had also been published in the Gazette as required by the FIA Act, but it later 'emerged' that the Determination was not gazetted at all. The PG further went on to say that she was under the impression that the "*error in the preservation application can be amplified by setting out additional evidence in relation to the grounds advanced in the preservation application*

¹⁰ 2000 (1) SA 1 (CC) at par 60

in the second stage of the proceedings, namely the forfeiture application. I was, however, advised that the preservation order can still be set aside whilst there is an application for forfeiture pending which in effect will nullify the subsequent forfeiture application even if there are grounds in the forfeiture application justifying the granting of a forfeiture order'.

[70] When an *ex parte* application is moved, the court is entitled to accept and assume that the PG has meticulously researched the law, researched the legislation relied on; further, that the PG has considered relevant binding and persuasive authorities, and that when the PG in a POCA application states under oath or submissions are made on her behalf, they are reliable for the court to act on them without more.

[71] The law presumes that everybody knows the law. It is expected even more from the PG as an officer of this court to know the law upon which her application was predicated. The PG was under an obligation to the court, before she made a statement under oath that Determination 3 had been issued by the FIC, to make sure that such Determination had indeed been issued and gazetted before she moved for the first preservation of property order. The PG did not say on what basis she was under the impression or assumed that the Determination was in force at the time when she stated under oath to the court that it was in operation. She simply states in her affidavit that *'it, however later emerged that the determination was not gazetted in the government gazette'*. She does not explain to the court how and when it *'emerged'* that the Determination had not been gazetted. Had she ever read the gazette, and if so had she misread the gazette? The PG does not further explain to the court whether it was ever, if at all, established in the first instance, whether the Determination existed before the application was moved.

[72] In my view, the court which granted the first preservation order might have come to a different conclusion if all the facts were fully disclosed. I say so because the first preservation order was granted based on the statement by the PG under oath that the

Determination was in force. It turned out that the Determination was not in force. It was therefore incumbent upon the PG when she decided to bring the POCA application, *ex parte* and without notice to the affected persons, to make a full and frank disclosure of all material facts to the court and comply with the principles of *uberrima fides*. In such a situation the court is, so to speak, in the hands of the PG fully reliant on what the PG chooses to place before the court.

[73] In my view what exacerbated the effect of the non-disclosure is the fact that after the PG discovered that the first order was, in her own words, 'erroneously granted', she did not approach the court immediately or at all to apply to have the order discharged or set aside. In my view it was incumbent upon the PG, the moment she discovered that the first order was obtained on an invalid and non-existent Determination, to have immediately approached the court for an order to set aside the first preservation order. On the PG's own version she knew as early as 25 April 2017 that the first preservation order had been obtained on an 'erroneous' ground. This in effect means that the PG knew that the money was, since then, unlawfully retained under an order erroneously made based on her application made under oath. The money was so unlawfully retained until 20 May 2017 when the order lapsed. The PG says that on 28 April 2017 she instructed the Government Attorney to inform the applicants' legal representative that she would not be applying for a forfeiture order, due to the fact that the first preservation order had been erroneously obtained. However she failed to inform the court about this crucial fact until 24 May 2017, when she filed the application where she sought for the second preservation order.

[74] In her answering affidavit to the applicants' current application the PG put the blame on the applicants for not applying for the rescission of the order. She states: '*I also wish to point out that at no stage did the applicants, knowing that the order was obtained in error, apply for the rescission of the preservation order under POCA 1/2017*'. In my view, this is an extraordinary statement. As in the matter of Reuters (*supra*), the court must express its 'uneasy feeling' that the PG has misconceived her function and duty to the court. It appeared to the Court from that statement and tone

that the PG regarded her role as that of an advocate representing his or her client. I am of the view that it was the PG who was under obligation, in terms of both her constitutional and her ethical duty, to have approached the court and applied for the discharge or the setting aside of the order, which on her own admission was 'erroneously' granted. Yet the PG took no step to have the order set aside. The court which granted the first preservation order was, so to speak, kept in the dark until the order had been deliberately allowed to lapse. Thereafter the PG approached the court again without making full disclosure to court of the facts upon which she had made an error when the first order was applied for.

[75] It is trite law that a court order, even if erroneously issued or obtained, remains valid until set aside, and the actions taken under such order are presumed to be valid. As I have found earlier in this judgment, the first preservation order was an interim order. It could have been easily discharged at the request of the PG. Therefore, in my view the PG's decision not to have approached the court to ask for the discharge or the setting aside of the first preservation was clearly improper and therefore fatal.

[76] For the foregoing reasons I see no cogent reason why the second preservation of property order should not be set aside due to material non-disclosure on the part of the PG.

[77] In my considered view the second preservation order under POCA 8/2017 was tainted by serious and material non-disclosure and thus stands to be set aside for the reasons set out herein.

Was the PG entitled to apply for and obtain the second preservation order?

[78] The PG contends in the first place that she has the right to apply for as many *ex parte* preservation orders as she wants. In respect of this submission the PG relies on what happened in the matter of *National Director of Public Prosecutions v Camel Rock*

*Social Housing Institution and Others*¹¹. In that matter the first preservation order had expired despite repeated enquiries to the Government printer. The publication was only thereafter discovered, which necessitated an application for a second preservation order. It was submitted on behalf of the applicants that the POCA Act does not provide for repeated applications for preservation orders in respect of the same property. It was further submitted that the word 'expire' should be interpreted leniently to mean that once a preservation order has expired, no further order should be granted. The court rejected the argument. The court pointed out that there is no express provision in POCA which prevents the granting of a further preservation order. Furthermore, the interpretation contended on behalf of the respondents would render those entrusted with the implementation of POCA powerless, for example the dissipation of proceeds of unlawful activities. The court was of the view that in that in that case, which concerned a vast amount of public funds which had been misappropriated and which was meant for the benefit of low and middle income groups, the NDPP had fully and satisfactorily explained the reasons why the first order had expired and therefore granted the second preservation order.

[79] The facts in the *Camel Rock* matters are in my view distinguishable from the facts in the present matter. In my view the *Camel Rock* matter does not assist the PG. In that matter the reason for the expiry of the first order was satisfactorily explained. The failure of the publication of the first order was outside the control of the PG. In the current matter, the PG states in her founding affidavit in respect of the application for the second preservation order that she realised that she could not proceed with the forfeiture application based on an erroneously sought preservation order, and therefore decided to allow the first order to lapse and to apply for the second preservation order under POCA 8/2017. It was a deliberate act calculated to give her office a tactical advantage. She caused a letter to be addressed to the applicants' through the Government Attorney, advising that she would not apply for a forfeiture order based on the first preservation order. As pointed out earlier, she deliberately failed to approach

¹¹ Case Number 369/2013 delivered on 23 January 2014 Eastern Cape Division – Grahamstown.

the court to have the order set aside, lest she would have been met with a *res judicata* plea in the second application.

[80] In their affidavits the applicants attacked and criticised the PG's conduct in causing the first preservation order to lapse and pointed out the tactical effect of the PG tactical act. The applicants contended that the PG let the first order to lapse because she realised that that a material non-disclosure had taken place in the first application for the preservation order; that the PG knew that she would never have obtained a forfeiture order based on the erroneous facts upon which the first application for the preservation order was based. Furthermore, that that the PG knew that if she proceeded with the application for the forfeiture order, the preservation order would have been set aside and in such event the applicants would have been entitled to the release of their money. In addition, the applicants contend that if the first preservation of property order under POCA 1/2017 was dismissed, the PG would not have been able to bring the second application for the preservation of property under POCA 8/2017 because the latter would be based on the same facts and the matter would then be *res judicata*. The applicants therefore submit that the conduct of the PG to allow the preservation order to simply lapse amounted to an abuse of court process.

[81] I think there is merit in the applicants' submission that the PG would have been met with a *res judicata* plea had she proceeded with a second application before the first order had expired. It is however not necessary for me to make a finding in that respect. The remainder of the submissions with regard to the effect of the PG's tactical move are mostly common cause. There is no need to dwell on them.

[82] It is further submitted on behalf of the applicants that the conduct by the PG materially prejudiced the applicants for the following reasons: If the application for the forfeiture order in POCA 1/2017 was dismissed, even in the event that the PG had filed an appeal against the dismissal, the appeal would not have suspended the order dismissing the preservation order; the respondent would have been entitled to be put in position of the money again. Reliance for this proposition or submission is based on the

South African Supreme Court of Appeal judgment in the matter of *MFV Snow Delta Serva Shipping Ltd v Discount Tonnage Limited*¹². In that matter the court explained the effect of the dismissal of an interim order. The court pointed out that if an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is nothing that can be suspended; furthermore that the interim order has no independent existence but is conditional upon confirmation thereof by the same court.

[83] In this context, as pointed out earlier, instead of approaching the court and informing the court that that the interim preservation order had been granted on the basis of a non-existing determination and asking for the court to discharge their order, the PG deliberately did not inform the court and waited for the first order to lapse.

[84] The PG concedes that she would not have been able to obtain a forfeiture order in respect of the first preservation of property order under POCA 1/2017 and therefore deliberately decided to have the first preservation order expire. Furthermore, that she could not be expected to proceed with the forfeiture application where the underlying preservation order was of doubtful validity because of an irregularity. In this context Mrs Boonzaier argued that there is nothing in POCA or any other statute which prevents the PG from applying for a new preservation order where the earlier preservation order was vitiated by an error.

[85] In support of the above stance counsel referred the court to the matter of *National Director of Public Prosecution v Braun and Another*¹³. In that matter the NDPP had obtained a preservation order with the rule *nisi* on an *ex parte* basis. Before the rule *nisi* could be confirmed, the respondents brought an application for a reconsideration of the initial preservation order. The application was successful. The court finding that although the NDPP was entitled to bring the initial application on an *ex parte* basis, various material non-disclosures on the part of the NDPP had taken place which justified the court to set aside the initial preservation order.

¹² 2000 (4) SA 746 (SCA)

¹³ 2007 (4) SA 72 (C)

[86] After the first order was set aside, the NDPP brought a second application for a second preservation order. One of the issues the court was called upon to decide was whether the NDPP was entitled, after the discharge of the initial order, to issue a second preservation order. The court, in the course of considering this question, observed that it did not in principle see reasons why the NDPP should be barred from bringing the second application for a preservation order. It is on that statement that Mrs Boonzaier relied for her submission that the PG in this case was entitled to the second preservation order.

[87] In my view the mere fact that the court in the *Braun* matter did not or could not see the reasons in that particular matter, it cannot elevate that observation to a general principle, applicable to all cases. I am of the view, on a proper reading of the *Braun* judgment, that the considerations upon which the court observed that it could not see reason(s) why the NDPP could not bring a second application for preservation order were based on the consideration of whether the order was appealable and thus final. This is clear from the judgment, because before the court made the observation referred to by Counsel, the court stated as follows:

‘Having regard to the fact that the rule *nisi* previously discharged was a preservation order in terms of s 38 of the Act and, in other words, a precursor to the real relief sought, namely, a forfeiture order, and for the fact it was discharged for want of full disclosure in an *ex parte* application, I am of the view that the judgment lacks the second and third attributes for an appealable judgment or order. Those attributes are that the judgment or order must be definitive of the rights of the parties, and thirdly, it must have the effect of disposing of at least a substantial portion of the relief claim in the main proceedings. In my view, the applicant would have found it difficult, in the circumstances of the present matter, to have sought to appeal the judgment of Traverso DJP.’

[88] Mrs Boonzaier’s argument for the contention that the PG was entitled to a second preservation order is not premised on whether the first preservation order was appealable or not. Her contention, as I understand it, is based solely on the fact that

there is no prohibition in the POCA Act or other statute which prevents the PG from obtaining a second preservation order. In my view the mere fact there is no prohibition in the POCA Act or other statute which prevent the PG from bringing a second application for a preservation order does not mean that there are no other considerations which should be taken into account in order to decide whether or not the PG should be allowed to obtain the second preservation order on any stated facts. The appealability or otherwise of the order is not the issue in the present matter. For instance, in the *Camel Rock* matter *supra*, the consideration was the fact that the first order had lapsed due to miscommunication between the NDPP and the Government Printer. I will shortly revert to consider such other considerations.

[89] Just to round up Mrs Boonzaier's argument based on the *Braun* matter. In my judgment, the facts in the *Braun* matter are distinguishable from what happened in the present matter. In the *Braun* matter there was a rule *nisi* issued and served on the respondents; it was the respondents who brought an application for reconsideration of the first preservation order; and finally the second application for the preservation order was served on the respondents, who opposed the application. In the present matter the PG brought the application *ex parte* without notice to the applicants; there was no rule *nisi* issued and served on the applicants; and most importantly in the present case, despite PG's knowledge that the order was obtained on the basis of a non-existing statutory Determination, the PG did not approach the court to ask the court to discharge or have the order set aside, instead she deliberately allowed the order lapse. In other words, there was no intervention made until the first order had lapsed. The court in the *Braun* matter approached the issue on the basis of whether the first preservation order was appealable or not.

[90] For the forgoing reasons, I am of the considered view that the statement by the court referred in the *Braun* matter relied on by Mrs Boonzaier, is not a general principle for the proposition that in all cases the PG is entitled to bring a second application for a preservation order.

[91] Mrs Boonzaier further points out that applications for the second preservation orders were brought and orders were granted in both the *Uuyuni (supra)* and *Kanime* matters.

[92] What happened in the *Uuyuni* matter is neatly summarized by the Supreme Court in its judgment: in the *Uuyuni* matter the first preservation order was granted by the court on 5 August 2011. Thereafter the PG applied for the preservation order to be varied because of the incorrect description of the registration number of the motor vehicle, one of the properties which were the subject of the preservation order. The respondent opposed the application for variation of the order and at the same time counter-applied for an order declaring that the preservation order was a nullity on the ground that the application had been moved a person, who was not an admitted legal practitioner in Namibia. Both applications were placed on the roll for status hearing on 12 April 2012. On 11 April 2012 the PG filed a fresh application for a second preservation order, which order was granted. A day thereafter the PG withdrew her application for the forfeiture order.

[93] It would appear to me that in the *Uuyuni* matter the counter-application which was launched by the applicant amounted to an anticipatory application against the preservation. At the same time, the PG had filed an application for the forfeiture order. My conclusion in this regard is based on the statement by the court as recorded in the case's law report: '*the PG withdrew the application in case no 7/2011 for a forfeiture order*'. It would further appear to me that the events as unfolded in the *Uuyuni* matter are distinguishable from what happened in the instant matter. In the *Uuyuni* matter the second application was launched while the first preservation order was still in place. In the instant matter the first order was allowed to lapse before a second order was applied for and granted. Secondly, the fact that the legal practitioner who initially moved the first preservation order had not been admitted was disclosed to the court in the second application for the preservation order. In the current matter, as I have earlier found in this judgment, there have been a number of material non-disclosures on the part of the PG.

[94] In the *Kanime*¹⁴ matter, the first preservation order was granted under POCA 10/2011 on 7 October 2011. This preservation order was again moved by a person who had not been admitted as a legal practitioner in Namibia. On 2 December 2011 the court, in another POCA matter, POCA 8/2011, ruled that an appearance by a non-admitted legal practitioner was an irregularity which vitiated the proceedings. As a result of that ruling the PG allowed the preservation order in the *Kanime* matter under POCA 10/2011 to lapse on 24 March 2011. Thereafter the PG brought a second application for a preservation order, which was granted. The court observed that the PG had made a full disclosure of the preceding history in which the defences of the respondent were disclosed through the attachment of the respondent's answering papers filed in that case.

[95] It is to be noted that in the *Kanime* matter, as in the present matter, the PG allowed the preservation order to lapse, whereafter a second preservation order was applied for and granted. Furthermore in the *Kanime* matter, as pointed out in the preceding paragraph, the court noted that the PG had made a full disclosure, unlike in the instant matter where there have been a number of instances of material non-disclosure.

[96] In my view, the major distinguishing feature in both the *Uuyuni* and the *Kanime* matters from the instant matter is the fact that in neither matter was the issue raised of whether or not it was legally permissible for the PG to obtain a second preservation order. The issue was therefore not considered or decided in any of the two matters. The *Uuyuni* and *Kanime* matters are therefore not authorities for the proposition that the PG is in all matters entitled to obtain a second preservation order and will and for the mere asking. Other public policy considerations like the invasive effect of a preservation order on affected person's right to his or her property should enter the equation and the need not to allow abuse by moving one preservation order after another.

¹⁴ *Prosecutor-General v Kanime* 2013 (4) 1046

[97] It is further submitted on behalf of the applicants that the preservation order is an order in the *rem*; that in such a case the obligation is discharged upon '*invalidity extinction or discharge of the obligation itself whoever the debtor may be*'. Mr Heathcote submitted that the second order is not permissible when the first order has expired; that the expiry is exactly the same as an extinction or discharge of an obligation, as was observed by the court in the matter of *Standard Bank of SA Limited v SA Fire Equipment (Pty) Ltd and Another*¹⁵.

[98] In the view I take, it is not necessary for me to express a firm view on the question of whether an obligation is discharged by the first preservation order. Suffice it to say, it is an attractive view; if it is correct, it will make life easier for the respondents whose constitutionally protected property rights are severely affected by the second preservation order, especially if the PG is allowed to bring repeated and or multiple applications for preservation orders in respect of the same property, as contended on behalf of the PG.

[99] The question of whether the PG is in all cases allowed to apply for a second preservation order has been squarely raised before this court and it thus falls on this court to make a determination.

[100] It is correct that the POCA Act does not specifically prohibit the granting of a second preservation of property order when the first preservation order has lapsed after 120 days from the date of publication in the gazette. In his useful book on *Organised Crime and Proceeds of Crime Law in South Africa*, the learned author proposes at page 123 that in deciding whether to allow the PG to proceed with a forfeiture application on the basis of a second preservation application, the court should consider all the relevant circumstances; that if it appears that the PG was in default, the court may decline to entertain a second application for the preservation of property order. But if the circumstances show that the delay was not solely the fault of the PG and that the

¹⁵ 1984 (2) SA All SA 41 (C)

respondent will not be unduly prejudiced, the court should allow the second preservation order¹⁶.

[101] A convenient starting point is to interrogate the legislature's intention in restricting the validity of the preservation order to 120 days calculated from the date of publication of such order in the Government Gazette. I am of the view that the intention of the legislature to limit the validity of the preservation order to 120 days was to balance the respondent's constitutional right to property and the legitimate objects of POCA. Is the PG correct, as she contends that she is at liberty to bring as many applications for preservation orders in respect of the same property after she has allowed the previous preservation orders to lapse? I do not think so. In my view it is not be permissible for the PG, in all cases, to be issued with a second preservation order after the period of 120 days has expired, because to do so would render the statutory period of 120 days for the validity of the preservation order, meaningless and unduly oppressive to the respondent or affected persons.

[102] Quite apart from the danger that the PG's conduct in being granted repeated preservation orders in respect of the same property resulting in an abuse of the court process, it will also contravene the spirit of the 120 day limit. If the 120 day statutory limit on preservation orders is to have any meaning, the PG's ability to obtain a second preservation order must be limited. While future cases will have to illuminate the precise contours of such limitation, permitting a second order to stand, is certainly not appropriate in the instant matter. The PG has deliberately allowed an order she knew to be invalid to lapse without approaching the court to have the order set aside or discharged. Without such limitation, the PG would be able to preserve property indefinitely simply by obtaining one preservation order after another, letting it lapse and bringing a new application every time the previous preservation order has lapsed. To allow such conduct would subvert the intention of the legislature with regard to the 120-day limitation. In my respectful view, such was never the intention of the legislature in limiting the validity of the preservation order to 120 days.

¹⁶ Albert Kruger: Organised Crime and Proceeds of Crime Law in South Africa, Second Edition, Lexis Nexis, p 123

[103] In my respectful view, a second a preservation order may be permissible in limited circumstances: firstly when the PG had applied for the discharge of the first preservation order, say, for the reason that it had been erroneously obtained, and intends to obtain another order preservation order: and secondly when the respondent succeeds in having the first order rescinded and the PG thereafter brings a new application on substantially new grounds. However, even if a second order is permissible, it must still fall within the validity of the initial 120 days of the first preservation order. For instance, if in this case the PG had approached the court and disclosed that she had realized that the first order was erroneously obtained, the PG should have had an opportunity to bring a new, amended application. However, the application for the second order should have been brought within the original 120 days calculated from the date the first preservation order was published in the Government Gazette. I am of the view that by limiting the granting of a second order to occur within the original time period of 120 days would be in line with the legislative purpose of not unduly depriving the affected person access to his or her property beyond the 120 days. The third exception would obviously be where the circumstances for the lapsing of the first preservation order had been beyond the PG's control and had been fully and satisfactorily explained to the court.

[104] I therefore hold that in cases where the PG has deliberately allowed a preservation order to lapse without approaching the court to have the order set aside, as it happened in the POCA 1/2017, the PG is not allowed to obtain a second preservation order. Once the period of 120 days stipulated in section 53(1) of POCA Act, has expired, except in cases where the first preservation order had been either discharged, set aside or rescinded, it would not be permissible for the PG to obtain a second preservation order save under the third instance outlined in the preceding paragraph.

Conclusion

[105] To sum up, I have found firstly that there were no compelling reasons for the PG to have brought this application on an *ex parte* basis and without notice to the applicants and accordingly the PG inappropriately and incorrectly exercised her statutory discretion which negatively affected the applicants' right to a fair trial. Secondly, that the PG committed material non-disclosure both in POCA 1/2017 application when she failed to inform the court after she had discovered that the Determination upon which she had obtained the first preservation order was not in force, as well in POCA 8/2017 application when the second preservation order was applied for and granted, by not disclosing to the court the circumstances under which the first order was erroneously obtained. Thirdly and lastly, that it was not permissible for the PG to have applied for and be granted a second preservation order after she had deliberately allowed the first preservation order to lapse. For those reasons the second preservation order stands to be set aside and it is so ordered.

[106] In the light of the conclusion I have arrived at, it has become unnecessary for me to consider the merits.

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

1. The preservation of property order granted on 26 May 2017 is hereby set aside.
2. The PG is to pay the applicants' costs of this application to anticipate and to rescind the preservation order under POCA 8/2017, such costs to include the costs of one instructed counsel and one instructing counsel.
3. The application is regarded as finalised and is removed from the roll

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANTS:

R HEATHCOTE SC (with him J JACOBS)

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

RESPONDENT:

M G BOONZAIER

Of Government Attorney, Windhoek