

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTIVE 61**

HC-MD-CIV-MOT-POCA-2018/00215

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

SILENCE CHIRADZA

RESPONDENT

Neutral Citation: *The Prosecutor-General v Chiradza* (HC-MD-CIV-MOT-POCA-2018/00215) [2019] NAHCMD 167 (24 May 2019)

CORAM: MASUKU J

Heard: 16 May 2019

Delivered: 24 May 2019

ORDER

1. The properties which are presently subject to a preservation of property order granted by this Honourable Court under the above case number on 6 August 2018, namely:
 - 1.1. A Maroon Toyota Corolla 1.6 with chassis number: AHTLB56E203041254, Engine number: 1ZRU190972 and vehicle registration number RVX998H and License number N26076WB, registered in the name of Silence Chiradza (“the Toyota”); and
 - 1.2. A cash amount of N\$12 800 (“the cash”), held at the Kuisebmond Police Station under POL7/62/2017, herein collectively referred to as “the properties”, be forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 (“POCA”).

2. The properties are to remain under the control and supervision of Warrant Officer Joel Shikongo (“W/O Shikongo”) of the Commercial Crime Investigation Unit: Anti Money Laundering & Combating of financing and Terrorism: Asset Recovery Subdivision: The Namibian Police Force (“Nampol”) in Windhoek, in whose control the properties are under the preservation order, and in W/O Shikongo’s absence Detective Inspector Johan Nico Green (“Insp. Green”) or any authorised member of the Commercial Crime Investigation Unit: Anti-Money Laundering & Combating of Financing and Terrorism: Asset Recovery Sub-Division, until the expiration of the statutory periods as set out in section 61 (8) of POCA.

3. W/O Shikongo or in his absence, Insp. Green or any authorised member of Commercial Crime Investigation Unit: Anti-Money Laundering & Combating of Financing and Terrorism: Asset Recovery Sub-Division is directed to:
 - 3.1. Pay the cash amount of N\$12 800 held at the Kuisebmond Police Station under POL7/62/2017 into the Asset Recovery Account:
Ministry of Justice –POCA
Standard Bank account number 589245309
Branch Code: 08237200.

- 3.2. Sell the Toyota by way of public auction to an amount not less than the market value and to pay the proceeds of such sale into the Asset Recovery Account indicated above.
4. Any person whose interest concerned is affected by the forfeiture order, may within 15 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the Court.
5. This order must be published in the Government Gazette as soon as practicable after it is made.
6. Prayers 1 and 3 will not take effect before 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of POCA or an appeal has been disposed of.
7. The matter is removed from the roll and is regarded as finalised.

REASONS FOR THE ORDER

MASUKU J:

[1] Applicant is the Prosecutor General of Namibia who on 6 August 2018 received a Preservation of Property Order against the respondent in terms of s 51 of the Prevention of Organised Crime Act, 29 of 2004 "POCA".

[2] The following were, inter alia, the terms of the Preservation Order:

'A preservation of property order as contemplated by section 51 of the Prevention of Organised Crime Act 29 of 2004 ("POCA") is granted in respect of:

1.1 A Maroon Toyota Corolla 1.6 with chassis number: AHTLB56E203041254, Engine number: 1ZRU190972, vehicle registration number RVX998H and License number N26076WB, registered in the name of Silence Chiradza; and;

1.2 A cash amount of N\$12 800 held at the Kuisebmond Police Station under POL7/62/2017, herein referred to as "the properties".'

[3] Subsequent to the order in para 1 above, the applicant then launched the current proceedings. Before the court therefor, is an application for forfeiture of property brought in terms of s 59 of POCA which provides that:

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

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

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

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

(a) Oppose the making of the order; or

(b) Apply for an order –

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

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

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

[4] The respondent, in terms of s 52 (3) of POCA filed a notice to oppose outside the time frame of the 21 days provided for in s 52 (4) of POCA and as a result, he is not entitled to participate in the proceedings unless he applied for and was granted condonation. This has not been done. Notwithstanding this fact, the applicant in fairness still served a copy of the forfeiture application on 20 December 2018 personally on the respondent. The respondent was thus well aware of the intended application as well as

the hearing to be held on the granting of the forfeiture order but still failed to make an appearance at court for the hearing of the matter.

[5] The applicant contends that the properties sought to be forfeited are the proceeds of unlawful activities namely; theft, receiving and/or being found in possession of stolen property and money laundering offences. The reason for this contention being that respondent, was found in possession of various stolen items which were found in his motor vehicle as well as a cash amount of N\$12 800. The items found in his motor vehicle were immediately confiscated and it was found that they had been reported as stolen by various persons.¹ The said motor vehicle and the cash amount were also confiscated and these are the properties that are now being sought to be forfeited in this application.

[6] The applicant further contends that respondent is unemployed and there is no record of any business registered in his name. The motor vehicle in question was paid for in cash in the tune of N\$80 000 by respondent who claims that he got the money from a sale of land in Zimbabwe. The purported agreement of sale is attached to his irregularly filed opposing papers and indicates that he sold a piece of land for US\$8 000. The respondent alleges that he was paid US\$4 000 whilst in Zimbabwe and would be paid the remainder of the purchase price in Namibia. A search conducted at the Department of Customs however, has yielded no record of him declaring the purported amount upon his entry into Namibia.

[7] Although the court is not, strictly speaking, entitled to consider this, the respondent did advance some arguments in his belated opposing papers, particularly raising the concern as to why the applicant could not wait until the finalization of his pending criminal trial before proceeding with the forfeiture application. The applicant referred the court to s 50 of POCA where it is stated in very clear terms that proceedings under Chapter 6 of the Act are civil and not criminal in nature and therefore, these proceedings are not determinable by the outcome of the criminal proceedings. It

¹ P 10 -14 of Applicant's Founding Affidavit.

is thus not necessary to dispose of the criminal proceedings before a forfeiture order can be applied for and granted.

[8] He further argued that the properties in question were not proceeds of unlawful activities or an instrumentality of money laundering offences and were as a result, not subject to a forfeiture order. He refers to an agreement filed by him between him and a certain purchaser about a purported sale as made reference to in para 6 above as being the source of the money he used in purchasing the vehicle.

[9] The applicant, in her address, alluded to the court that the present application since it is unopposed and there is no application for condonation brought by respondent, this court can grant a forfeiture order by default.² The court is in the circumstances, inclined to adopt this position.

[10] With regard being had to the provisions of s 64 (3) of POCA which provides that 'the absence of a person whose interest in a property may be affected by the forfeiture order does not prevent the High Court from making the order', and for the discussion in the preceding paragraphs, this court finds that it is prudent, in the circumstances, to grant the forfeiture order as prayed for by the applicant.

[11] In the premises, the court makes the following order:

1. The properties which are presently subject to a preservation of property order granted by this Honourable Court under the above case number on 6 August 2018, namely:
 - 1.1. A Maroon Toyota Corolla 1.6 with chassis number: AHTLB56E203041254, Engine number: 1ZRU190972 and vehicle registration number RVX998H and License number N26076WB, registered in the name of Silence Chiradza ("the Toyota"); and

² S 64 of POCA.

- 1.2. A cash amount of N\$12 800 (“the cash”), held at the Kuisebmond Police Station under POL7/62/2017, herein collectively referred to as “the properties”, be forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 (“POCA”).
2. The properties are to remain under the control and supervision of Warrant Officer Joel Shikongo (“W/O Shikongo”) of the Commercial Crime Investigation Unit: Anti Money Laundering & Combating of financing and Terrorism: Asset Recovery Subdivision: The Namibian Police Force (“Nampol”) in Windhoek, in whose control the properties are under the preservation order, and in W/O Shikongo’s absence Detective Inspector Johan Nico Green (“Insp. Green”) or any authorised member of the Commercial Crime Investigation Unit: Anti-Money Laundering & Combating of Financing and Terrorism: Asset Recovery Sub-Division, until the expiration of the statutory periods as set out in section 61 (8) of POCA.
3. W/O Shikongo or in his absence, Insp. Green or any authorised member of Commercial Crime Investigation Unit: Anti-Money Laundering & Combating of Financing and Terrorism: Asset Recovery Sub-Division is directed to:
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4. Any person whose interest concerned is affected by the forfeiture order, may within 15 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the Court.
5. This order must be published in the Government Gazette as soon as practicable after it is made.

6. Prayers 1 and 3 will not take effect before 30 days after the notice of this order was published in the Government Gazette or before an application in terms of section 65 of POCA or an appeal has been disposed of.

7. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: Ms. L. Angula
Of the Office of the Prosecutor-General

RESPONDENT: No appearance