

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

HC-MD-CIV-MOT-POCA-2018/00299

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

JESAYA KANGANDJO

RESPONDENT

Neutral Citation: *The Prosecutor-General v Jesaya Kangandjo* (HC-MD-CIV-MOT-POCA-2018/00299) [2020] NAHCMD 67 (27 February 2020)

Coram: MASUKU J

Heard on: 30 October 2019

Delivered on: 27 February 2020

Flynote: Civil procedure – application for condonation - Legislation – Prevention of Organised Crime Act, 2004 – forfeiture of property – section 59 of POCA – Application

for exclusion of interest - section 63 – considerations to be taken into account – statutory interpretation – Meaning of the words ‘on a balance of probabilities’ defined.

Summary: Two applications served before court in relation to property that had been preserved in terms of POCA. The applicant applied for the forfeiture of the property, being the positive balance in a bank account, which belonged to a club called Kotokeni Investments Club, whose members formed a partnership to assist each other in difficult times by borrowing from the funds deposited by the members periodically. One of the members, deposited an amount of N\$ 40 000 into the account and which amount was proceeds of crime. A preservation order was issued without being opposed and on the strength of which a forfeiture order was applied for and granted. The chairperson of the Club applied in terms of s 63, at forfeiture stage, for exclusion of its interests in the property in question, namely, the amount that had been in the account before the deposit of the tainted money. The PG opposed the application for exclusion of interests on the basis of the principle of mingling.

Held: the respondent had made a case for the granting of the application for condonation of the late filing of the heads of argument. In this regard, the court held that it would be unfair to punish the respondent for the failings of his legal practitioners, considering also the importance of the issue to be decided.

Held that: the respondent’s legal practitioners were at fault for the delay and that in the circumstances, it would be proper for costs *de bonis propriis* to be ordered against them in respect of the condonation application, which the PG was within her rights to oppose in the circumstances.

Held further that: POCA is a piece of legislation that in instances, serves to diminish the rights of persons and must for that reason, be interpreted narrowly in favour of the right-holder.

Held: that a party seeking the exclusion of interest had to show on a balance of probabilities that (a) he or she acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of the interests; and (b) that when the applicant acquired the interest concerned after the commencement of POCA, he or she had no reasonable grounds to suspect that the property in question and in which the interest is held, had reasonable grounds to

suspect that the property in which the interest is held is the proceeds of unlawful activities.

Held that: the words 'on a balance of probability', employed in the legislation, mean that 'it must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged.'

Held further that: the members of the Club had the account operating from around 2010 and there was no reasonable basis for them to suspect that their member had obtained the money deposited into the account from unlawful activity.

Held that: the explanation proffered by the respondent about how the money in the account was raised, before the tainted deposit, appears on a balance of probabilities, to be true, regard had to the partnership agreement, the small amount of deposit and the sporadic nature of the deposits.

Held further that: POCA plays a pivotal role in combating crime but would have potentially debilitating and abusive effects if not interpreted in accordance with the rights and values protected in the Constitution.

The application for forfeiture of the amount deposited by the errant member was granted and the application for exclusion of interest, was granted with costs.

ORDER

1. The application for condonation of the late filing of the heads of argument on behalf of the Respondent, is hereby granted.
2. The Respondent's Legal Practitioners are ordered to pay the costs of the application for condonation *de bonis propriis*.
3. The property which is presently subject to a preservation of property order granted by this Honourable Court under the above case number on 30 August 2018, namely: the positive balance, with the express exclusion of the positive

balance of N\$20 629, in First National Bank Cheque Account number 62241595753 held in the name of Kotokeni Investments Club (“the property”), be and is hereby forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 (“POCA”).

4. The property is to remain under the control and supervision of Warrant Officer Daniel Lilata (“W/O Lilata”) 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 property is under the preservation order, and in W/O Lilata’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.

5. W/O Lilata 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:

5.1 To pay the positive balance with the exclusion of the positive balance of N\$20 629 in First National Bank Cheque Account number 62241595753 held in the name of Kotokeni Investments Club into the Asset Recovery Account:

Ministry of Justice –POCA

Standard Bank account number 589245309

Branch Code: 08237200

6. 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.

7. This order must be published in the Government Gazette as soon as practicable after it is made.
8. Prayers 1 and 3 will not take effect before a period of thirty (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.
9. The Applicant is ordered to pay the costs of opposing the Section 63 application.
10. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

Introduction

[1] There are, presently, two applications that serve before this court *pari passu*.

[2] The first is a forfeiture of property order, applied for by the Prosecutor-General in this matter. The second application is an application by the respondent, Mr. Jesaya Kangandjo, for the exclusion of a certain amount from the forfeiture order, in terms of s 63 of the Prevention of Organised Crime Act, 2004, ('the Act', or 'POCA').

Background

[3] On 30 August 2018, the applicant obtained an order for the preservation of property. The order reads as follows:

'A preservation of property order as contemplated by section 51 of POCA granted in respect of the positive balance in the First National Bank Cheque Account number 62241595753 held in the name of Kotokeni Investments Club, herein referred to as the "property".'

[4] The order was issued against the property of Kotokeni Investments Club, the applicant contending in the said application that the properties sought to be forfeited are the proceeds of unlawful activities in that one of the members of the aforementioned partnership, Mr. Thomas Valomboleni, being a sole member of Netcare CC, through a misrepresentation intentionally submitted payment requests to the Roman Catholic Church ("The Church") on behalf of Netcare CC. These payment requests submitted by Mr. Thomas were presented to make the Church believe that Netcare CC supplied medical supplies to it and thus, needed to be paid for the services purportedly rendered.

[5] Subsequent to the granting of the order quoted above, the applicant then launched the current proceedings. Before the court therefor, is an application for forfeiture of the said property which is 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.'

[6] The respondent, despite service, as is required by s 52 (3) of POCA, did not file a notice to oppose either the preservation or forfeiture of property applications, respectively. The respondent, however, and in terms of s 59 (4) (b) (i) of POCA, brought an application for the exclusion of certain interests in the property sought to be declared forfeited. Also serving before this court therefore, is an application by the respondent for an order excluding the amount of N\$ 20 629 from the forfeiture order.

[7] The applicant, in her address, alluded to the fact that the present application for forfeiture is unopposed, and that it would only be proper that this court grants a forfeiture order by default as provided for in terms of s 64 of POCA.

[8] I have considered the applicant's application for forfeiture and the papers on which it is predicated and I have formed the considered view that the application fully conforms to the requirements of s 64 of POCA. I note also, that the respondent, despite service, did not oppose the granting of the forfeiture application. The court is in the circumstances, inclined to adopt this position as far as the undisputed amount of N\$40 000 is concerned.

Application for condonation

[9] At the commencement of the hearing, the respondent filed an application for the condonation of his late filing of the heads of argument. The reason proffered for the delay was that the legal practitioner, who had been handling the matter for the respondent, left the office of the respondent's legal practitioners of record and efforts to obtain a confirmatory affidavit explaining the delay could not be obtained from him. The respondent did explain the delay and also alleged that he had reasonable prospects of success.

[10] I am of the view that the application for condonation should succeed on account of the importance of the matter and the allegation that the respondent has reasonable prospects of success, an allegation that will be proved or disproved shortly, as the

judgment unfolds. I should, having said this, decry the behaviour of the respondent's previous legal practitioner, who appears to have refused to co-operate in the filing of the affidavit in support of the application for condonation. The reason why he would not have filed the papers is exclusively within his knowledge and the respondent and his new legal practitioner did not have the facts at their disposal. It is totally unfair to leave clients such as the respondent, in the lurch in such cases.

[11] I am of the view that the applicant was well within her rights to oppose the application for condonation as the delay was long and there was no proper explanation proffered for some time. In the premises, I form the view that the application for condonation should succeed and the respondent's legal practitioners are to pay the costs occasioned by this application. I say this for the reason that it would be eminently unfair to saddle the respondent with an order for costs when he has not in anyway contributed to the delay sought to be explained.

Application for exclusion

[12] The court is thus left with only one determination to make and it is the following: whether the amount of N\$20 629 should be excluded from the forfeiture order in terms of s 63 of POCA?

[13] It is important to note that the respondent cited above, stated on oath that he forms part of a group of partners of Kotokeni Investments Club and that he represents the rest of the partners, except for Mr. Thomas Valomboleni, in these proceedings. This is so, he states, is because he is the chairperson of the partnership, a position hotly contested by the applicant as not being legally possible. The respondent argues to the contrary.

[14] The applicant, for her part, contends that due to this misrepresentation referred to in paragraph four above, the Church was induced into making payments of N\$ 8 000 000 into Netcare's account held in favour of Mr. Thomas, to its actual prejudice and,

after payment of this money was effected, Mr. Thomas proceeded to transfer an amount of N\$40 000 into Kotokeni Investments Club's bank account.

[15] The applicant thus argues that Mr. Thomas had no legal right to receive this money and transfer it to the aforementioned account. Furthermore, the applicant argues that the amount so deposited mingled with the positive balance in Kotokeni Investments Club's bank account on the date the deposit was made and, as a result of which the entire balance is tainted, so to speak, and ought to be forfeited in terms of POCA.

[16] The applicant further argued that due to the absence of any documentary proof as to where the other money or positive balance in the account came from or was generated, is reason enough to declare it as being proceeds of unlawful activities, theft, fraud and/or money laundering by its mere "mingling".

[17] The respondent, for his part, argued that the property in question, that is the amount of N\$ 20 629 that is said to have mingled with the amount of N\$40 000, was not proceeds of unlawful activities or an instrumentality of money laundering offences and is as a result, not subject to a forfeiture order. The respondent refers to a partnership agreement between himself (as chairperson) as well as other members of Kotokeni Investments Club, wherein it was agreed that each member would make a deposit of not less than N\$100 on a monthly basis. It suffices to note that this account has been in existence since 2010.

[18] Section 63 of POCA provides, under sub-section 1, that this court may, when it makes a forfeiture order, make an order excluding certain interests in property, which are subject to the order, from the operation of the order.

[19] The said provision reads as follows:¹

¹ S 63 (2) (a) (b) of the Prevention of Organised Crime Act 29 of 2004.

'(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order -
if her

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.'

[20] Broadly stated, in terms of this provision, it would appear that an applicant for exclusion of interest would succeed if he or she shows on a balance of probability that (a) he or she acquired the property forming subject matter of the order legally or for a consideration; and (b) where the applicant had acquired the interest concerned after the commencement of POCA, he or she had no reasonable grounds to suspect that the property in question is the proceeds of unlawful activities.

[21] The question that the court will have to determine in due course, is whether the respondent, in this matter, has met both of the requirements mentioned in s 63 above. The applicant argued vociferously that the respondent failed to meet the requirements of the said provision and that for that reason, the application for exclusion should fail.

[22] The respondent, for his part, argued that the partners were not profiled as to how they received or generated their income, let alone where they find money to make contributions. According to the respondent, it was not the scheme of operation of the partnership and his position as chairperson, to enquire where each of the partners got the money that each contributed to the partnership. In essence therefore, the rest of the partners could not have known that the money deposited by Mr. Thomas was from unlawful activities.

[23] It was the respondent's further argument that the contested amount, with the exclusion of that deposited by Mr. Thomas, was generated legally from various sources

of income and that the members have, on a balance of probabilities, satisfied the requisites of the aforementioned section.

[24] The applicant, in dealing with this particular issue, argued that the proper approach was for the individual members of the partnership to state on oath where they work if they do and to state where they obtained the money that they contributed to the partnership. It was only if they did so, so the argument ran, that they could possibly show the court, on a balance of probabilities that the money they contributed to the account, was not the proceeds of unlawful activities.

[25] I am of the considered view that the applicant is correct that that approach would have been the best and proper one in the circumstances. The question that confronts the court, is whether the fact that the other members did not file affidavits explaining their income, which they contributed to the partnership should, *ipso facto* result in the respondent having failed to meet the criteria set out by the Act in terms of application for exclusion?

[26] In this regard, I am of the considered view that it is imperative to define the words employed by the legislature in the relevant provision namely, 'on a balance of probabilities', as can be seen in s 63(2) above. A definition thereof, may go some way in clarifying whether the respondent managed to meet muster in this regard.

[27] In Hoffman,² the definition of the standard of proof the legislature imposed, was defined as follows, in terms of the terms set out by Lord Denning in *Miller v Minister of Pensions*³:

'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not.'

² L. H. Hoffman, The South African Law of Evidence, Butterworths, Durban, 1970, 2nd edition p365 -366.

³ [1947] 2 All ER 372 at p 374.

[28] In dealing with the standard further, the learned author also referred to *West Rand Estates Ltd v New Zealand Insurance Co. Ltd*,⁴ where the Appellate Division of South Africa stated the following:

'It is not a mere conjecture or slight probability that suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the onus on the other side to rebut it.'

[29] The question to be answered in view of the argument raised by both parties is this: can it be said, from the allegations by the respondent, on whom the onus rests in this regard, that what the respondent states on oath is the position in this case, is more probable than not?

[30] I am of the considered view that the respondent, has met the threshold in this regard. I say so because firstly, the partnership account in issue, has been in existence, since the year 2010. There is no evidence that any questions have previously been raised about the legality or propriety of the account or of the holders thereof. Furthermore, the amounts which were, on the respondent's version contributed, which the applicant, is unable to contest, were meagre and seem to have been deposited sporadically.

[31] I am of the considered view that in the court deciding, in such cases, whether the party on whom the onus rests, has met the threshold, the amounts deposited at each time, the regularity with which the amounts are deposited, or withdrawn, where applicable, may go some way in answering the all-important question. In the normal course of criminal endeavour, amounts which are the subject of money laundering and such other offences, are usually huge amounts that would, even with the bank, where concerned, arouse a suspicion as to the source and its legality. It is such large amounts, reasonably suspected to be connected to criminal activities, that POCA was primarily designed to deal with and to have eventually forfeited to the State.

⁴ 1925 AD 245 at p. 263, per Kotze JA.

[32] In the instant case, the respondent's case that the and his friends had a partnership cannot be gainsaid and having regard to the manner in which the account was operated, it is quite conceivable, on the balance, that the respondent's version passes muster, on the probabilities. This, in my view, should lead to a conclusion that the respondent has discharged the onus thrust upon him.

[33] It must also be taken into account that pieces of legislation that serve to diminish the rights of persons, including the right to property, must be restrictively interpreted in favour of the right-holder. In the instant case, there is no indication that the partnership was engaged in any illegal activity, which would explain its positive balance in the Bank. The respondent states on oath that the amount deposited, was from the contributions of members. There is no reasonable basis for concluding that the amounts deposited, in view of the fact that they were measly, could or were likely to be the proceeds of unlawful activity, as stated earlier.

[34] Turning to the latter part of s 63 (2)(b), I am also of the considered view, on the facts, that there is no evidence that suggests that the partners of the Club knew or had reasonable grounds to believe that the amount deposited by Mr. Thomas was the proceeds of unlawful activities. I accordingly find that the respondent has met both the jurisdictional requirements of s 63(2) above.

[35] As I draw to a close, it is important to underscore a point made earlier about POCA. It can be conveyed no better than the sentiments expressed by Van Der Westhuizen J in *Fraser v Absa Bank Ltd*,⁵ where the learned Judge, writing for the majority of the Constitutional Court of South Africa, said:

'POCA plays a legitimate and important role in combating crime. It could however also have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in the Constitution. Moreover, it is relatively new in the statute book and there is not an abundance of jurisprudence to enlighten and guide its interpretation and application.'

⁵ 2007 (3) SA 484 (CC), p 503, para 46, D-E.

[36] It is in an attempt to bring the scales between combating crime, on the one hand, and preserving rights protected under the Constitution, on the other, that the court has attempted to reach some equilibrium in the instant matter. In this regard, the court found that the case of the respondent in the exclusion of interest, meets muster.

[37] It would smack of a high degree of injustice, if persons in the position of the respondent and his partners, were to lose their property in the circumstances that are attendant to this matter. This would especially be so if the evidence before court does not show, on a balance of probabilities, that on reasonable grounds, their knowledge, participation or suspicion, for that matter, that the amount in question, was the proceeds of unlawful activity, cannot be excluded.

Conclusion

[38] This court finds that the respondent has shown, on a balance of probabilities, that the contested amount of N\$20 629 was not obtained illegally and that the members of the partnership had no reason to believe that the amount of N\$40 000 deposited by Mr. Thomas was from proceeds of unlawful activities.

Order

[38] Based on the foregoing, the court makes the following order:

1. The application for condonation of the late filing of the heads of argument on behalf of the Respondent, is hereby granted.
2. The Respondent's Legal Practitioners are ordered to pay the costs of the application for condonation *de bonis propriis*.
3. The property which is presently subject to a preservation of property order granted by this Honourable Court under the above case number on 30 August

2018, namely: the positive balance, with the express exclusion of the positive balance of N\$20 629, in First National Bank Cheque Account number 62241595753 held in the name of Kotokeni Investments Club (“the property”), be and is hereby forfeited to the State in terms of section 61 of the Prevention of Organised Crime Act, 29 of 2004 (“POCA”).

4. The property is to remain under the control and supervision of Warrant Officer Daniel Lilata (“W/O Lilata”) 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 property is under the preservation order, and in W/O Lilata’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.

5. W/O Lilata 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:

5.1 To pay the positive balance with the exclusion of the positive balance of N\$20 629 in First National Bank Cheque Account number 62241595753 held in the name of Kotokeni Investments Club into the Asset Recovery Account:

Ministry of Justice –POCA

Standard Bank account number 589245309

Branch Code: 08237200

6. 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.

7. This order must be published in the Government Gazette as soon as practicable after it is made.
8. Prayers 1 and 3 will not take effect before a period of thirty (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.
9. The Applicant is ordered to pay the costs of opposing the Section 63 application.
10. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: H. Hamunyela
Of the Office of the Prosecutor-General

RESPONDENT: H. Engelbrecht
Of FB Law Chambers, Windhoek.