REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no**:** HC-MD-CIV-MOT-POCA-2020/00429

In the matter between:

THE PROSECUTOR-GENERAL **APPLICANT**

and

RICARDO JORGE GUSTAVO	**1ST DEFENDANT**
TAMSON TANGENI HATUIKULIPI	**2ND DEFENDANT**
JAMES NEPENDA HATUIKULIPI	**3RD DEFENDANT**
SACKEUS EDWARDS TWELITYAAMENA SHANGHALA	**4TH DEFENDANT**
BERNARDT MARTIN ESAU	**5TH DEFENDANT**
PIUS NATANGWE MWATELULO	**6TH DEFENDANT**
NAMGOMAR PESCA NAMIBIA (PTY) LTD	**7TH DEFENDANT**
ERONGO CLEARING AND FORWARDING CLOSE CORPORATION	**8TH DEFENDANT**
JTH TRADING CLOSE CORPORATION	**9TH DEFENDANT**
GREYGUARD INVESTMENTS CLOSE CORPORATION	**10TH DEFENDANT**
OTUAFIKA LOGISTICS CLOSE CORPORATION	**11TH DEFENDANT**

OTUAFIKA INVESTMENTS CLOSE CORPORATION	**12TH DEFENDANT**
FITTY ENTERTAINMENT CLOSE CORPORATION	**13TH DEFENDANT**
TRUSTEES OF CAMBADARA TRUST	**14TH DEFENDANT**
OLEA INVESTMENTS NUMBER NINE CLOSE CORPORATION	**15TH DEFENDANT**
TRUSTEES OF OMHOLO TRUST	
T 118/11BMAREN DE KELRK	**16TH DEFENDANT**
ESJA HOLDING (PTY) LTD	**17TH DEFENDANT**
MERMARIA SEAFOOD (PTY) LTD	**18TH DEFENDANT**
SAGA SEAFOOD (PTY) LTD	**19TH DEFENDANT**
HEINASTE INVESTMENT (NAMIBIA) (PTY) LTD	**20TH DEFENDANT**
SAGA INVESTMENT (PTY) LTD	**21ST DEFENDANT**
ESJA INVESTMENT (PTY) LTD	**22ND DEFENDANT**

and

JOHANNA NDAPANDULA HATUIKULIPI	**1ST RESPONDENT**
SWAMMA ESAU	**2ND RESPONDENT**
AL INVESTMENTS NO FIVE CLOSE CORPORATION	**3RD RESPONDENT**
OHOLO TRADING CLOSE CORPORATION	**4TH RESPONDENT**
GWAANIILONGA INVESTMENTS (PTY) LTD	**5TH RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LIMITED	**6TH RESPONDENT**

Neutral Citation*:* *The Prosecutor-General v Gustavo* (HC-MD-CIV-MOT-POCA-2020/00429) [2023] NAHCMD 274 (17 May 2023)

CORAM: SIBEYA J

Heard: **30 January 2023**

Delivered: **17 May 2023**

Flynote: Prevention of Organised Crime Act 29 of 2004 (POCA) – Application for a restraint order – Requirements for a restraint order – Confiscation order – Interpretation

of section 83 in respect of the provisions of Chapter 5 and 6 of POCA – Application for a restraint order granted.

Summary: On 13 November 2020, this court, after hearing an *ex parte* application for a provisional restraint order in terms of the Prevention of Organised Crime Act 24 of 2004 ("POCA"),[1] in camera, brought by the Prosecutor-General (PG), granted an *ex parte* provisional restraint order as per annexure "X"[2] "the restraint order". The said restraint order prohibits the defendants, respondents and any other person with knowledge of the order from dealing in any manner with the realisable property.

The restraint order called upon the defendants and respondents to show cause why it should not be made final. It is the application by the PG to confirm the *rule nisi* and make the provisional restraint order final against the first to the sixth, and the eighth to the 16th defendants and the respondents (the defendants), that this court is seized with. The defendants contended that the PG failed to comply with s 83 of POCA, in that the investigation on which the PG based her application for a restraint order were not carried out by an authorised member of the police. As a result, so contended the defendants, the application by the PG is null and void. The PG argued that she is not restricted to only approach the court for purposes of an application for a restraint order based on the investigation carried out under the authority of s 83 of POCA.

Held: Restraint orders are intended to preserve assets for future possible confiscation proceedings.

Held that: s 83 empowers the police to assist the PG in applications to be brought in terms of chapter 5 and 6 of POCA.

Held further that: Section 83 does not restrict the powers of the PG which are set out in Art 88 of the Constitution, to the contrary it empowers the police to carry out investigation of offences created under POCA.

[1] Section 25.
[2] Annexure X is the draft restraint order.

Held: It will defeat the purpose of POCA to interpret s 83 as limiting the powers of the PG to the extent that she can only institute and conduct proceedings under chapter 5 and 6 only after the Inspector-General of Police has issued a written authority in terms on s 83.

Held that: The PG's application based on the evidence contained in the affidavits and annexures filed in support thereto, proved that a prosecution was instituted and is pending against the defendants, that there are reasonable grounds for believing that a confiscation order may be made against the defendants. The application succeeds.

ORDER

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1. The *rule nisi* issued on 13 November 2020 as against the first to sixth and the eighth to sixteenth defendants and the first to fifth respondents, is confirmed.

2. The first to sixth and eighth to sixteenth defendants and first to fifth respondents must pay the Prosecutor-General's costs, jointly and severally, the one paying the other to be absolved, which costs include the costs of one instructing and two instructed counsel and such costs are not subject to rule 32(11).

3. The restraint application brought by the Prosecutor-General against the first to sixth and eighth to sixteenth defendants and the first to fifth respondents is regarded as finalised.

RULING

SIBEYA J:

Introduction

[1] The United Nations Office for Drugs and Crime (UNODC) through the Education for Justice (E4J) initiative on Organised crime,[3] in its quest to determine what constitutes 'organised crime' and while appreciating the difficulty of defining such words, stated the following:

'The most obvious distinction between organized crime and other forms of criminal conduct is that it is "organized." In general terms, it does not include random, unplanned, individual criminal acts. Instead, it focuses exclusively on planned, rational acts that reflect the effort of groups of individuals. Several efforts have been made to elicit common elements to describe and define organized crime with greater specificity.

A list of all the crimes committed by organized criminal groups would be outdated quickly as social, political and technological changes result in changing opportunities for crime in different locations. Therefore, the unit of analysis in most definitions is not the offence but the offender: an organized criminal group. A better understanding of the nature of these groups will help in developing more effective responses to them.

There are many definitions of organized crime. Analysis reveals that several characteristics of organized crime are common among these definitions. These characteristics include the purpose of organized crime to financially profit through crime. Organized crime mainly responds to public demand for services. Corruption is an enabler that protects organized crime operations. Sometimes intimidation, threats and/or force are also needed to protect those operations. These elements comprise organized crime as a continuing criminal enterprise.'

[2] Namibia, in alignment to accepted international standards, and in appreciation of the inadequate available statutes and the traditional common law offences, enacted several legislations to combat organised crime and corruption, which are sophisticated crimes that are not foreign to our country.

The application

[3] The United Nations Office for Drugs and Crime (UNODC): The Education for Justice (E4J) initiative on Organised crime, a module published in April 2018.

[3] The Prosecutor-General (PG) applies for a restraint order against the defendants and the respondents in terms of ss 24 and 25 of the Prevention of Organised Crime Act ('POCA').[4]

[4] On 13 November 2020, on the *ex parte* application of the PG, this court granted a provisional restraint order against the first to sixteenth defendants and the respondents, and issued a *rule nisi* calling upon the first to sixteenth defendants and the respondents to show cause why the restraint order should not be confirmed. Effectively, the order sought is confirmation of the *rule nisi* and the provisional order to restrain the first to sixth and the eighth to sixteenth defendants and the respondents from dealing in any way whatsoever with the property restrained as a result of the provisional restraint order granted in terms of s 25 of POCA.

[5] All the defendants[5] and respondents entered their appearance to oppose the confirmation of the provisional restraint order, except the seventh defendant.

[6] After hearing arguments from Ms Boonzaier who appeared for the PG, the court on 25 August 2021, confirmed the restraint order issued against the seventh defendant, Namgomar Pescar (Namibia) (Pty) Ltd ('Namgomar Namibia').

[7] No provisional restraint order was sought by the PG against the seventeenth to the twenty-second defendants. The hearing of her application for a restraint order against the seventeenth to the twenty-second defendants is pending exchange of pleadings and is thus to be heard at a future date.

[8] The present application is, therefore, live between the PG and the first to sixth and the eighth to sixteenth defendants, and the first to fifth respondents. The first to

[4] Prevention of Organised Crime Act 29 of 2004.

[5] Section 17(1) of POCA defines a defendant as 'a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 24(1)(b)'. Section 24(1)(b) refers to a person against whom a court is satisfied that he or she is about to be charged with an offence; and that it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person.

sixth and the eighth to sixteenth defendants shall, thus, be referred to as 'the defendants' while the first to fifth respondents shall be referred to as 'the respondents'. No reference will be made to the sixth respondent against whom no relief is sought by the PG but was joined by the court, on its application, for the interest that it may have in the matter. Where specific reference is made to a particular party, such party shall be named as cited in the judgment.

Background

[9] I hold the view that, considering the voluminous nature of the application papers, the number of persons cited in the application and the complexity of the issues involved, it will be prudent to provide a summarised background to the matter particularly where I deal with the evidence presented in the application. I shall do so at a later stage.

Requirements for a restraint order

[10] Sections 24(1)*(a)* and 25(2) of POCA set out the requirements to be met by the PG for a restraint order to be issued. The said provisions provide that the court must make a restraint order if it is satisfied that the facts appear on the face of it, from the application, that:

(a) a prosecution for an offence has been instituted against the defendant;

(b) there are reasonable grounds for believing that a confiscation order may be made against the defendant;

(c) The proceedings against the defendant have not been concluded.

[11] In *casu*, the defendants have been charged with several offences and the criminal proceedings have not been concluded. The said offences are listed as 'offences' in Schedule 1 of POCA.

[12] What remains for determination by the court is, therefore, whether or not it appears on the face of it, the application, that there are reasonable grounds for believing that a confiscation order may be made against the defendants. The moment that the above requirements are satisfied, the court must make a restraint order having immediate effect.

[13] This court in *Lameck and Another v President of the Republic of Namibia and Others,*[6] remarked as follows regarding asset forfeiture:

'[62] Asset forfeiture is dealt with in Ch 5 of POCA. That chapter is entitled 'confiscation of benefits of crime'. It essentially provides for the court to inquire into benefits an accused may have derived from an offence after being convicted of a criminal offence. This would arise by way of an application on the part of the prosecutor. In the event of the court finding that the accused had benefited from a crime or criminal activity sufficiently related to the offence, then the court is authorised to make a confiscation order against the person convicted for the payment to the State of any amount which the court considers appropriate.'

[14] The court in *Lameck (supra)*, cited with approval passages from *S v Shaik*[7] where the following was stated by O'Regan ADCJ:

'in my view, this submission is based on a misconception of the section. As described in paragraph 25 above, section 12 (3) provides that a person will have benefited from unlawful activities if he or she has received or retained any proceeds of unlawful activities. It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in section 18, for that concept is based on the definition of proceeds of unlawful activities. That definition goes far beyond the limited definition proposed by the appellants. Proceeds is broadly defined to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity. A further difficulty with the appellants' argument is to be found in section 18(2). That section expressly contemplates that

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[6] *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC) 272 para 62.
[7] *S v Shaik* 2008 (2) SA 208 (CC) para 32 read with 60.

are confiscation order may be made in respect of any property that falls within the broader definition, and it's not limited to a net amount.'

[15] Smuts J, while discussing the purpose of Chapter 5 of POCA in *Lameck (supra)* proceeded to state as follows at paras 72-47:

'[72] The reasoning underpinning this approach was reaffirmed by that court in *Falk v National Director of Public Prosecutions* where it held:

"The primary purpose of Ch 5 of POCA is not punitive, but to ensure that no person benefits from his or her wrongdoing. Its secondary purpose is to promote general crime deterrence and prevention by depriving people of ill-gotten gains."

[73] Mr Trengove also referred to the approach adopted by the South African High Court in *National Director of Public Prosecutions v Phillips*[8] where that court stated:[9]

"The mere fact that an application for a confiscation order follows upon a criminal conviction and culminates in a judgment against the defendant for payment to the state of an amount based on the benefit he has derived from his crimes is not sufficient in itself to constitute the proceedings criminal and to render the confiscation order criminal punishment. . . ."

[74] This approach also accords with the characterisation of an order obtained in such proceedings as a civil judgment by O'Regan ADCJ in *Shaik* in her discussion of confiscation orders in the scheme of that legislation:

"A confiscation order is a civil judgment for payment to the State of an amount of money determined by the court and is made by the court in addition to a criminal sentence. Before going further, it is important to emphasise that the order that a court may make in terms of Ch 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the State, even though it is ordinarily referred to as a "confiscation order" and shall be throughout this judgment . . . ."'

[8] *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) (2001 (2) SACR 542).
[9] At para 24.

[16] The definition of 'proceeds of unlawful activities' in our POCA expressly includes property mingled with property which is proceeds of unlawful activity. This definition is far wider that the definition of proceeds of unlawful activities provided for in the South African Prevention of Organised Crime Act 121 of 1998.

[17] It is clear from POCA that one of its objectives is to ensure that no person benefits from his or her wrongdoing. While zooming in on corruption, O'Regan ADCJ in *Shaik (supra)* remarked that:

'[73] … The United Nations Convention Against Corruption points to the close relationship between corruption and organised crime in identical terms… Article 31 of that Convention requires States Parties to legislate to provide for confiscation of the proceeds of crime or property the value of which corresponds to that of such proceeds "to the greatest extent possible", and "proceeds" is also defined broadly in the Convention to include "property derived from or obtained, directly or indirectly, through the commission of an offence".

[74] Article 16 of the African Union Convention on Prevention and Combating Corruption requires States Parties to enact legislation to enable the confiscation of the proceeds of offences of corruption…

[75] In the light of the above, it is clear that corruption is a serious crime which is potentially harmful to our most important constitutional values. Moreover, it is clear that was both our parliament and the international community recognise the close links between corruption and organised crime. In the circumstances, it seems to me that corruption is one of the offences closely related to the purposes of the Act and a court should bear this in mind when determining the appropriate amount contemplated in S 18 of the act.'

[18] Namibia ratified the above Conventions. Namibia is, over and above other purposes of enacting POCA, duty-bound to ensure that it has necessary legislations in place to regulate confiscation of proceeds of unlawful activities. It follows from the above, therefore, that the purpose of chapter 5 of POCA is to ensure that a convicted criminal does not enjoy the fruits of his or her crime (this serves other purposes of deterrence and the crime prevention).

[19] A restraint order, on the other hand, serves to preserve property pending the finalisation of criminal proceedings against the defendants so that the concerned property is available to be realised in order to satisfy a confiscation order which may be made by a court.

[20] The Supreme Court of Appeal of South Africa, while considering the requirement for a restraint order that there must be reasonable grounds for believing that the confiscation order may be made said the following in *NDPP v Rautenbach*,[10]:

'[27] …It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other and unlawful activity. What is required is only that it must appear to the court on the reasonable grounds that there might be a conviction and the confiscation order. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's pinion… it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that the court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the court is properly seized of its discretion, it is not open to the court to frustrate those criteria when it purports to exercise its discretion…'

[21] In *Prosecutor-General v Lameck and Others*,[11] the court stated that a *prima facie* case does not require one to evaluate each and every inference that can be drawn from the available evidence. It further stated that:

'Thus in proceedings such as the present where a diversity of facts justify different inferences to be drawn, some of which could establish the appellant's case, the court should not

[10] *NDPP v Rautenbach* 2005 (4) SA 603 (SCA) para 27.
[11] *Prosecutor-General v Lameck and Others* 2009 (2) NR 738 (HC) para 22.

pause to consider the value and persuasiveness of each and every inference that can be drawn but should only confine its attention to the fact or question whether one of the possible inferences to be drawn is in favour of the plaintiff in order to determine whether a *prima facie* case has been established or not.'

Criminal Proceedings

[22] At the time of the filing of the application on 2 November 2020, criminal proceedings were already instituted and, therefore, pending against the first to the sixth defendants. In the founding affidavit deposed by the Prosecutor-General (PG), she stated that the seventh to the sixteenth defendants will be joined to the prosecution.[12] The seventh to the sixteen defendants have since been charged as per her decision of 4 February 2021.[13]

[23] The defendants have been charged with, *inter alia*, the following offences:

(a) Fraud;

(b) Corruption under ss 33, 34 and 43 of the Anti-Corruption Act 8 of 2008 ('the ACA');

(c) Money-laundering under ss 4 and 5 of POCA;

(d) Racketeering under s 2 of POCA.[14]

[24] It is, therefore, common cause that the defendants are subject to criminal proceedings pending in the High Court.

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[12] Founding Affidavit p 79 paras 52.1-52.2.
[13] The PG's decision, Annexure J-3 to the Answering Affidavit of the 17th to the 22nd defendants p 7039-7047.
[14]

[25] The PG alleges that between 2011 and 2019, the defendants devised and actioned a corrupt scheme where they obtained the allocation of fishing quotas in the Namibian waters in favour of Namgomar Namibia beyond the processes provided for in the Marine Resources Act 27 of 2000 ('the MRA'). This, the defendants did for the benefit of the Icelandic fishing company, Samherji HF, and its subsidiaries ('Samherji').

[26] It is alleged further that, in tit-for-tat, Samherji made payments to two high ranked officials and well-connected politicians, the fifth defendant, Mr Bernardt Esau (the then Minister of Fisheries) and the fourth defendant, Mr Sackeus Shanghala (the then Chairperson of Law Reform and Development Commission). Mr Shanghala was subsequently appointed as the Attorney-General and later as the Minister of Justice. It is further alleged that the payments were to induce Mr Esau to allocate fishing quotas to Namgomar Namibia, and eventually Samherji under the guise of a purported fisheries agreement concluded in terms of s 35 of the MRA.[15] The said provision allows for the allocation of fishing quotas to a nominated company that is not a rights holder as stated in the MRA.

[27] The PG further alleges that the aforesaid payments were made inside and outside Namibia, disguised as consultancy and other professional fees. Several entities were utilised as conduits to channel payments to the main role players in Namibia. It is alleged that, other than facilitating the corrupt allocation of fishing quotas for the eventual benefit of Samherji, no services were rendered deserving of the payment of the alleged consultancy or other professional fees.

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[15] Section 35 provides that:

'(1) The President may enter into a fisheries agreement with a member country of the Southern African Development Community, providing for such country to harvest marine resources in Namibian waters.

(2) A person nominated by the responsible authorities of a party to a fisheries agreement shall be entitled to apply for a quota under section 39 and a licence under section 40 as though he or she were the holder of a right.

(3) Every quota allocated and every licence issued to a person entitled under subsection (2) shall be subject to such quantitative or other limits which a fisheries agreement may specify as well as to all other provisions of this Act.'

The evidence

[28] The MRA provides for the conservation of the marine ecosystem and the responsible utilisation of conservation, protection and promotion of marine resources on a sustainable basis and provides for the control over marine resources, including harvesting marine resources. Only rights holders may be allocated fishing quotas for a specified period of time.

[29] The affidavits together with annexures thereto filed in support of the restraint application set out the evidence addressed herein below. The Namibian fisheries is a competitive field and Samherji sought to get involved in 2011.

[30] Mr Johannes Stefansson, the then Managing Director of Samherji from 2012 to 2016, provided an affidavit to the Anti-Corruption Commission ('the ACC') regarding the alleged corrupt scheme involving Samherji

[31] The second defendant, Mr Tamson Hatuikulipi, the son-in-law of Mr Esau, got involved and was introduced to Mr Stefansson and other managers of Samherji. It was intimated that through Mr Tamson Hatuikulipi, Samherji could be granted fishing quotas in the Namibian waters. Mr Tamson Hatuikulipi introduced Samherji to his cousin, the third defendant, Mr James Hatuikulipi, the then Managing Director of Investec Asset Management. In September 2014, Mr Esau appointed Mr James Hatuikulipi as the Chairperson of the Board of Directors of the Namibia Fishing Corporation of Namibia ('Fishcor'). Mr James Hatuikupili later introduced Samherji to Mr Shanghala.

[32] Several meetings were convened in 2011, which mostly occurred at the residence of Mr James Hatuikulipi, where the strategy of Samherji's participation in the Namibian fishing sector was mapped out. These meetings were attended to by Mr Stefansson on behalf of Samherji, and Mr Tamson Hatuikulipi, Mr James Hatuikulipi and at times; Mr Shanghala.

[33] According to Mr Stefansson, key issues were identified and set out in a draft memorandum of understanding which, Mr Stefansson provided to the Namibian authorities, and they include:

(a) That Samherji, Mr Tamson Hatuikulipi and other players would work together to ensure that Samherji is allocated fish quotas of horse mackerel;

(b) That Samherji would bring the fishing vessel and experience while Mr Tamson Hatuikulipi and other persons would arrange for the allocation of the fish quotas.

[34] In December 2011, the Ministry of Fisheries announced the allocation of long term fishing rights together with a quota allocation for the following season. The announcement was to harvest horse mackerel and other species for commercial purposes. The allocation rights were granted for a period of seven years to end in December 2018. The quotas were allocated to rights holders annually.

[35] Mr Daniel Malherbe, the legal advisor for Samherji, deposed to an affidavit and stated, *inter alia*, that Samherji through its Namibian subsidiary, Mermaria Seafood, the eighteenth defendant, sought to enter into several joint ventures with several new and successful rights holders in order to catch their horse mackerel quotas. Samherji sought to enter into joint ventures with fish rights holders granted first quotas. Samherji aimed to secure about 30 000 Mt of fish quota or joint venture agreements with three parties (new entrants) in order to justify the employment of one factory stern trawler fishing vessel to catch horse mackerel of such rights holders.

[36] The vessel that entered the Namibian waters in 2013 under several agreements concluded between Samherji's subsidiaries and three new entrants (joint ventures), is M/V Heinaste. M/V Heinaste is amongst the vessels utilised to perpetuate the corrupt scheme.

[37] Section 32 of the MRA provides that:

‘(1) Except as may be otherwise provided under this Act, no person shall in Namibia or in Namibian waters harvest any marine resource for commercial purposes, except under a right, an extraordinary right or a fisheries agreement.

(2) In the case of a marine resource which has been made subject to a quota, no person shall in Namibia or in Namibian waters harvest such a resource for commercial purposes, except in terms of a quota or of permitted by-catch under a right, an extraordinary right or a fisheries agreement…’

[38] Samherji was neither a rights holder nor was there a possibility that its new application for rights holder could be legally entertained as fishing rights holders were granted a seven year period with fishing quotas allocated to the rights holders annually. Samherji needed more fish, but it would not qualify to acquire more fish as it was not a rights holder.

[39] The key players, who appear from the papers to be Mr Shanghala, Mr James Hatuikulipi and Mr Esau, devised a scheme where a fisheries agreement would be concluded in terms of s 35 of the MRA. Section 35 provides that:

‘(1) The President may enter into a fisheries agreement with a member country of the Southern African Development Community, providing for such country to harvest marine resources in Namibian waters.

(2) A person nominated by the responsible authorities of a party to a fisheries agreement shall be entitled to apply for a quota under section 39 and a licence under section 40 as though he or she were the holder of a right.

(3) Every quota allocated and every licence issued to a person entitled under subsection (2) shall be subject to such quantitative or other limits which a fisheries agreement may specify as well as to all other provisions of this Act.’

[40] The agreement concluded under s 35 of the MRA would entitle a nominee of the parties to apply for a fish quota as though he, she or it were a rights holder. This would

allow the Minister of Fisheries, to allocate additional fish quota to an entity nominated by the parties to the agreement, even if such entity is not a rights holder. The SADC member state identified for an agreement in terms of s 35 was Angola.

The fisheries agreement

[41] Several meetings were convened between the Namibian, Angolan and Icelandic role players.

[42] On 25 July 2013, a meeting was convened in Angola between Mr Esau and his Angolan counterpart, Ms Victoria De Barros Neto. The Ministers of Fisheries agreed to intensify their respective countries' co-operation to improve the livelihood of their communities, ensure food security, reduce poverty and eradicate hunger.

[43] On 18 September 2013, Mr Shanghala accompanied by Mr Stefansson met Ms Neto in Angola. Mr Stefansson deposed that it became clear at the meeting that it was crucial that Samherji required a bilateral fishing agreement in order to be allocated a fish quota in Namibian waters. The minutes of the said meeting provide, *inter alia*, that:

(a) Angola and Namibia will have a joint venture company representing their interests and they opted for the Angolan entity, Namgomar Pesca S.A;

(b) A special purposes vehicle would be established to own the joint venture company;

(c) On the side of Namibia, the joint venture would be attended to by Mr James Hatuikulipi, Mr Tamson Hatuikulipi and a colleague of Mr James Hatuikulipi at Investec, the first defendant, Mr Gustavo;

(d) On the side of Angola, the representatives were Mr Santos, the Chairperson of the Board of Fundo de Apoio ao Desenvolvimento da Industria Pesqueira e da Aquicultura' of Angola, and Mr Barros, the son of Ms Neto;

(e) The joint venture company will procure the services of Samherji's vessels;

(f) The Namibian authorities will present a finalised co-operation agreement for the consideration by the Angolan authorities and the agreement will be the basis on which a fishing quota will be issued to the joint venture in terms of s 35 of the MRA;

(g) The two concerned Ministers will sign the agreement by delegation of powers on behalf of their Presidents;

(h) The Namibian authorities will agree to the allocation of a minimum quota of 10 000 Mt for the 2014 season.

[44] At all material times Mr Gustavo acted for Namgomar Pesca S.A. The affidavits filed of record shows that investigation revealed that, except for reservation of name at the Registrar of Companies in Angola, Namgomar Pesca S.A was never properly incorporated.

[45] On 20 October 2013, Mr Esau requested the then Attorney-General, Dr Albert Kawana, to scrutinise the draft cooperation agreement. Subsequently thereafter, Dr Kawana was informed that Angola preferred a non-binding memorandum of understanding (MOU). Dr Kawana endorsed the document and returned it to Mr Esau in December 2013.

[46] On 18 December 2013, on the letterhead of Namgomar Pescar S.A, Mr Gustavo wrote to Mr Shanghala and Mr Santos, stating that Namgomar Pescar S.A was owned

by Namibians and Angolans, that it had teamed up with Samherji, and that they were committed to the objective of ensuring food security.

[47] In turn, Mr Shanghala and Mr Santos wrote a formal letter to the two Ministers of Fisheries regarding the alleged business cooperation between the two countries and stated, *inter alia*, that:

(a) Namgomar Pescar S.A was nominated as the business enterprise to represent the interest of both countries;

(b) A technical services agreement was established between Namgomar Pescar S.A and Samherji, a company with an industry-leading reputation that will capacitate Namgomar Pescar S.A.

[48] On 18 December 2013, Esja Holdings, the seventeenth defendant and Smaherji's subsidiary in Namibia, entered into a memorandum of understanding where they agreed to cooperate in fishing in Angolan and Namibian waters.

[49] On 1 January 2014, another of Samherji's subsidiaries in Namibia, the eighteenth defendant, Mermaria Seafood (Pty) Ltd, entered into a purported consultancy agreement with the eighth defendant, Erongo Clearing and Forwarding CC, where Mr Tamson Hatuikulipi holds 100 per cent member's interest. Mr Stefansson who is part of the signatories to the purported agreement stated that:

(a) The agreement constituted a dummy agreement;

(b) The purpose of the agreement was to disguise the payment of bribes to Mr Tamson Hatuikulipi and other key players, whom he understood to include Mr Esau, in exchange for securing fish quotas for Samherji;

(c) Although invoices for consultancy services were received from Erongo Clearing, no such services were rendered by Erongo Clearing to Mermaria Seafood.

[50] JTH Trading CC, the ninth defendant, another entity for Mr Tamson Hatuikulipi entered into a purported consultancy agreement with Samherji, as per Mr Stefansson, to cover the payments to be made to JTH. The PG contends that investigation revealed that the invoices for purported consultancy services issued by both Erongo Clearing and JTH are almost identical for the same work. All allegedly constituting a sham.

[51] On 30 March 2014, Mr Gustavo acquired a Namibian shelf company, Paw Prints Investments, where he was the sole director.

[52] On 18 June 2014, Mr Esau accompanied by Mr Shanghala, travelled to Angola and signed an MOU between Angola and Namibia. It appears from the MOU that its main objective is to strengthen the bilateral communications, co-operation and collaboration in matters of marine capture fisheries, inland fisheries and aquaculture, in conformity with the respective laws and policies of the respective countries.

[53] On 27 June 2014, the Permanent Secretary of the Ministry of Fisheries (the PS) wrote to Paw Prints Investment and/or Namgomar Pesca informing them that the Minister of Fisheries nominated them to apply for a horse mackerel quota in terms of s 35(2) of the MRA and that the validity of the nomination is guided by the MOU.

[54] It was only on 3 July 2014, that a formal correspondence was received from Ms Neto, nominating a joint venture between Namgomar Pesca S.A and a Namibian company Namgomar Pesca (Pty) Ltd, the seventh defendant, for purposes of s 35 of the MRA.

[55] On 7 July 2014, the PS wrote to Namgomar Pesca S.A stating that the Minister of Fisheries, Mr Esau, allocated a horse mackerel quota of 7 000 Mt to it as part of the Namibia-Angola Bilateral Agreement.

[56] On the same day, 7 July 2014, Mr Esau wrote to Ms Neto and informed her that that he had allocated 7 000 Mt of horse mackerel quota to Paw Print Investment t/a Namgomar Pesca Namibia (Pty) Ltd, registration number 2014/0304.

[57] The PG contends that investigations revealed that Namgomar Namibia is wholly owned by Namgomar Pesca Limitada, an Angolan Company. The beneficial owners of Namgomar Pesca Limitada are: Mr Santos and Mr Domingos Fernandes De Barros Neto, the husband to Ms Neto. The financial statements of Namgomar Namibia, however, reveals that Mr Gustavo, the first defendant was a shareholder.

[58] During July 2014, according to Mr Stefansson, Mr James Hatuikulipi demanded payment of N$5 million to be paid to high-ranking politicians including Mr Esau in order to drive the scheme through. An invoice dated 21 July 2014 was prepared for the amount of N$5 million. Mr Stefansson deposed that this amount was paid from the Bank account of Mermaria Seafood to Erongo Clearing and Forwarding.

[59] In August 2014, Messrs James Hatuikulipi, Tamson Hatuikulipi, Shanghala and Gustavo travelled to Iceland in order to meet the management of Samherji. Mr Stefansson deposed further that, at the meetings, it was agreed that:

(a) 75 per cent of the real usage fee for the Namgomar quota will be paid from a Samherji company in Cyprus, Esja Seafood, to Tandavala Investment Limited (Tandavala Invest), a company in the United Arab Emirates, Dubai where Mr James Hatuikulipi is the sole director and sole shareholder;

(b) Mr James Hatuikulipi would then distribute the money further;

(c) The remaining 25 per cent would be paid to Namgomar Namibia where a Samherji subsidiary would exploit Namgomar Namibia’s quota.

[60] At the meetings in Iceland, Mr Shanghala made a presentation setting out how the allocation of fish quota to Namgomar Namibia was made possible through the MOU. The presentation provides, *inter alia*, that:

> 'We need to ensure that in Angola & Namibia, even if government/minister changes, there will be no need to touch the arrangement, but to ensure that quota *(sic)* is issued…
>
> The opportunity we have in Angola and Namibia is not available to everyone & before everyone wakes up, we need to move & make impact *(sic)*. This will protect both Ministers.'

[61] More than a year after being signed, on 17 July 2015, the MOU was published in the Government Gazette as a fisheries agreement contemplated in s 35 of the MRA. Mr Esau informed the Minister of Justice and Attorney-General, Dr Kawana, that the MOU was a fisheries agreement which required to be published in terms of s 36 of the MRA.

[62] In December 2014, the Namgomar Pesca S.A was informed that Mr Esau allocated it with a horse mackerel quota of 8 000 Mt for the 2015 fishing season in accordance with the MOU.

[63] On 30 May 2015, Namgomar Pesca S.A was informed that Mr Esau allocated it with a horse mackerel quota of 10 000 Mt for that season as per the MOU.

[64] On 17 June 2017, Namgomar Pesca S.A was informed that Mr. Esau allocated it with a horse mackerel quota of 8 000 Mt for that season as part of the MOU.

[65] On 6 November 2017, Namgomar Pesca S.A was informed that Mr Esau allocated it with an additional horse mackerel quota of 2 000 Mt for that season as per the MOU

[66] On 22 February 2018, Namgomar Pesca S.A was informed that Mr Esau allocated it with a horse mackerel quota of 10 000 Mt as per the MOU.

[67] On 28 December 2018, Namgomar Pesca S.A was informed that Mr Esau allocated it with a horse mackerel quota of 5 000 Mt for the 2019 fishing season as part of the MOU.

[68] Mr Andreas Kanyangela deposed to a detailed affidavit in support of the application by the PG. Mr Kanyangela stated that Samherji used their vessels to exploit the quotas. Samherji sold their horse mackerel during the period of 2012 to 2019 at the average price of N$10 950 per Mt. The PG estimates that a total of at least 50 000 Mt of horse mackerel was allocated to Samherji, which at a price of N$10 950 per Mt equals N$547 500 000.

[69] Mr Stefansson deposed further, in his affidavit, that the usage fees for the fishing seasons from 2014 to 2018 paid to the key players in Namibia through entities under the control of Mr James Hatuikulipi, Mr Tamson Hatuikulipi and Mr Gustavo, ranged between N$2 300 to N$2 800 per Mt.

[70] Mr Kanyangela supported by Ms Selma Kalumbu deposed to an affidavit stating that between 2014 and 2019, the amount of N$38 631 077,48 was paid to Namgomar Namibia from Mermaria Seafood, Esja Investments and Saga Seafood, all subsidiaries of Samherji, under the formal catching agreement. This is an agreement that was set up in Iceland between Namgomar Namibia and the Namibian subsidiary of Samherji, Esja Holding for Namgomar Namibia's horse mackerel quota. Mr Gustavo signed for Namgomar Namibia and Mr Stefansson signed as a witness. Mr Juliusson signed for Esja Holding in Cyprus.

[71] The bank statements reveals that between 2014 and 2019, Erongo Clearing received an amount of N$29 680 500 from Mermaria Seafood.

[72] The bank statements further reveal that JTH Trading received a total amount of N$27 356 287,40 from Mermaria Seafood between January 2016 and December 2017. Between March 2018 and September 2019, JTH Trading received a total amount of N$20 786 250 from Saga Seafood.

[73] Between 2017 and 2019, Noa Pelagic Limited, a subsidiary of Samherji paid a total amount of USD569 000 to Tandavala Investment, a company where Mr James Hatuikulipi is the sole director and shareholder registered in Dubai as alluded to hereinbefore.

[74] During the period of 2014 and 2016, Esja Seafood Limited, a subsidiary of Samherji paid a total amount of USD3 552 882,68 to Tandavala Invest in Dubai.

Payments to Namgomar and Mr Gustavo

[75] The bank statements for Namgomar Namibia, the seventh defendant, where Mr Gustavo was the sole director and its only employee, reveals that the total payments of N$ 38 631 077,48 received from Samherji subsidiaries were distributed as follows:

(a) N$ 14 852 097 paid to Mr Gustavo, the first defendant, including money paid to the contractor for renovations at Mr Gustavo's property;

(b) N$2 370 000 paid to Greyguard Investments CC, the tenth defendant (a close corporation where Mr James Hatuikulipi, the third defendant, is the sole member);

(c) N$400 000 paid to Erongo Clearing, the eighth defendant (a close corporation where Mr Tamson Hatuikulipi, the second defendant, is the sole member);

(d) N$12 150 000 paid to Otuafika Logistics CC, the eleventh defendant (a close corporation where Mr Pius Mwatelulo, the sixth defendant, is the sole member);

(e) N$2 250 000 paid to Otuafika Investments CC, the twelfth defendant (a close corporation where Mr Pius Mwatelulo, the sixth defendant, is the sole member).

Payments to Mr Tamson Hatuikulipi and his entities

[76] Mr Tamson Hatuikulipi is the sole member of Erongo Clearing and Forwarding CC; JTH Trading CC, the ninth defendant, and Fitty Entertainment CC, the thirteenth defendant. Erongo clearing received an amount of N$29 682 800 while JTH Trading received an amount of N$46 789 467,40 from Samherji, labelled as consultancy fees when no consultancy services were rendered.

[77] Mr Kanyangela and Ms Kalumbu deposed further that based on the supporting documents including bank statements, Mr Tamson Hatuikulipi received at least an amount of N$100 869 167,40 from Samherji and other Namibian role players. This includes money received through Erongo Clearing, JTH Trading and Fitty Entertainment.

Payments to Mr James Hatuikulipi and his entities

[78] Mr James Hatuikulipi through Tandavala Invest (investment) in Dubai, received the equivalent of about N$54 673 239 from Samherji subsidiaries.

[79] In Namibia, he received about N$58 205 073, comprising of payments to Camarada Trust in the amount of N$9 150 000; to Greyguard Investments CC in the amount of N$33 450 073,15; and Olea Investments Number Nine CC, the fifteenth defendant, in the amount of N$14 490 000.

Payments to Mr Shanghala and his entities

[80] Mr Shanghala made presentations of the scheme employed by the key players in this matter to the Angolan officials and to the Samherji. Both presentations demonstrate a ploy to obtain fish quotas from Namibia in what might be a corrupt manner.

[81] Mr James Hatuikulipi, through his entities and personal accounts made payments, from money received from Samherji to Olea Investments Number Nine CC where Mr Shanghala holds 50 per cent members' interest whist Mr James Hatuikulipi holds the other 50 per cent. Mr James Hatuikulipi made further payments to Omholo Trust, a family trust where Mr Shanghala is a beneficiary.

[82] Otuafika Investments paid for the improvements made at Farm Dixie, a farm owned by Olea Investments to the benefit of Mr Shanghala and Mr James Hatuikulipi.

[83] Mr Shanghala further received at least a total amount of N$25 265 000, through Olea Investments, at least N$14 490 000, through Omholo Trust, at least N$9 340 000, and through his personal accounts at least an amount of N$985 000.

Payments to Mr Esau

[84] Mr Esau benefited through improvements at his farm Dakota and through buying and selling cattle valued at about N$9 834 378,60.

[85] Mr Esau further had an amount of N$1 943 445 paid to a law firm De Klerk, Horn, Coetzee Inc in order to acquire land by a close corporation – Plot 51 Otjiwarongo CC, where together with his wife are the only members.

Payments to Mr Mwatelulo and his entities

[86] Mr Mwatelulo holds 100 per cent members' interest in both Otuafika Logistics CC and Otuafika Investments CC. Through Otuafika Investments he is said to have received an amount of N$2 250 000 from Namgomar Namibia which was immediately paid to Otuafika Logistics. Otuafika Investments is further said to have received an amount of N$12 150 000 from Namgomar Namibia.

[87] It appears from the bank statements that Otuafika Logistics made the following payments:

(a) N$3 135 000 to Erongo Clearing;

(b) N$7 593 073,15 to Greyguard Investments CC;

(c) N$1 370 000 to JTH Trading CC;

(d) N$4 490 000 to Olea Investments Number Nine CC;

(e) N$2 445 000 to Cambarada Trust;

(f) N$3 695 350 to Otuafika Investments CC;

(g) N$2 250 000 to Mr James Hatuikulipi;

(h) N$7 690 052 to Moller Construction, for work carried out on behalf of Olea Investments at Farm Dixie belonging to Mr Shanghala and Mr James Hatuikulipi.

[88] It appears, therefore, that Mr Mwatelulo received about N$18 165 000 through Otuafika Logistics CC and N$2 250 000 through Otuafika Investments CC.

Applicant's case

[89] It is the PG's case that the defendants were involved in a corrupt scheme to misrepresent that the MOU corruptly concluded between the two Ministers of Fisheries was a valid agreement in terms of s 35 of the MRA, whereby fish quotas may be allocated to non-rights holders and that the MOU was entered into for the benefit of the people of Angola and Namibia, whilst in fact it was concluded for the benefit of the

defendants and Samherji. It is further the PG's case that the Namibian fish quota was exploited through the said corrupt scheme to the prejudice of the Namibian people.

The defendants and respondents' case

[90] The defendants and respondents filed several answering affidavits. They hardly engaged the factual averments railed by the PG. They, Messrs Tamson Hatuikulipi, Esau, and associated persons and entities, and James Hatuikulipi, Shanghala, Mwetelulo, and persons and entities associated with them, filed notices in terms of rule 66(1) of the rules of this court. A party is entitled to file a rule 66(1)*(c)* notice and raise a point of law.

[91] The defendants and respondents raised several grounds on which the confirmation of the *rule nisi* sought by the PG is opposed, including the constitutional challenge to some of the provisions of POCA. Suffice to state that at the hearing, the issues for determination were narrowed down. The dominant issue raised by the defendants is that the PG's application for a restraint order is based on the investigation carried out by the ACC, particularly Mr Kanyangela who is not an authorised member in terms of s 83 of POCA, and therefore, making the said investigation, for purposes of the application for a restraint application, unlawful.

[92] The defendants contend in the rule 66(1)*(c)* notice filed, that Mr Kanyangela is not an authorised member contemplated in s 83. This is so, contends the defendants, as s 83 of POCA requires that an application under Chapter 5, including a restraint application, must be based on an investigation carried out by a member of the Police or an authorised member who is authorised in writing by the Inspector-General ('the IG'). The defendants state that the PG, in the face of the instructive provisions of s 83, was not entitled to rely on the investigations of the ACC, who are not members of the police, in her application for a restraint order. The main question for determination, therefore, is whether or not the PG can institute an application for a restraint order based on an investigation carried out by a member of the ACC who is not an authorised officer in terms of POCA.

[93] The defendants set out the factual basis for the legal point taken of non-compliance with s 83. Reference was made to the PG's affidavit filed in support of the application for a provisional restraint order, where she stated that:

> 'The applicant (the PG) will rely on the affidavits of Ms Olyvia Martha Imalwa (the PG) and Mr Andreas Kanyangela, and the annexures to those affidavits, in support of this application.'

[94] Mr Kanyangela stated in the supporting affidavit dated 28 October 2020, filed in support of the application for a restraint order in terms of s 25 of POCA, that he was one of the investigating officers in the criminal investigation conducted under two ACC dockets by the ACC, together with the Namibian Police (Nampol). The dockets concern investigations relating to corrupt practices, fraud, racketeering, money laundering, and other offences allegedly committed by the defendants.

[95] The members of the ACC were already investigating alleged corrupt practices regarding fishing quotas, when in August 2018, Nampol's Mr Jackie Seraun, informed them that Mr Stefansson had information regarding the payment of bribes. The defendants contend that the ACC carried out the entire investigation including that of POCA related offences, led by Mr Kanyangela.

[96] The basis of the defendants' notice in terms of rule 66(1)*(c)* is that the investigation for the purposes of the restraint application and the investigation for the purposes of the criminal charges against the defendants and possible conviction were not carried out according to law. This, the defendants argue, is premised on the fact that the investigation carried it out on which basis the present application for restraint order is premised does not comply with the s 83 of POCA.

[97] In reply to the rule 66(1)(c), the PG denies the assertion that in order to launch restraint proceedings, she may not rely on the investigations carried out by the ACC.

[98] Mr Soni, who appeared for the third, fourth, sixth, tenth, eleventh, twelfth, fourteenth, fifteenth, and sixteenth defendants, argued the principal position of all the defendants and of the respondents in this matter. Mr. Brockerhoff for the first defendant and Mr Beukes for the second, fifth, eighth, ninth and thirteenth defendants and the first to fifth respondents supported the arguments raised by Mr Soni. Mr. Brockerhoff and Mr Beukes, went further to supplement the arguments raised by Mr Soni. I shall revert to the said further arguments raised by Mr. Brockerhoff and Mr Beukes as the judgment and unfolds.

[99] Mr Soni argued that the restraint application by the PG is based on the findings of the investigation conducted by members of the ACC, in particular Mr Kanyangela. He argued further that Mr Kanyangela is not an authorised officer as provided for in s 83 of POCA. On this basis, Mr Soni argued, the application for restraint order brought by the PG, constitutes a nullity, and should be dismissed.

[100] Mr Soni argued that the restraint application by the PG is based on the findings of the investigation conducted by members of the ACC, in particular Mr Kanyangela.

[101] Mr Soni said that the question before court is whether or not the PG can lawfully bring an application for a restraint order based on an investigation by members of the ACC as opposed to authorised officers by the IG in terms of s 83. He argued further that officers of the ACC are empowered to investigate offences in terms of the Anti-Corruption Act 8 of 2003 (ACA) but they may not investigate for the purposes of an application to be brought in terms of chapters 5 and 6 of POCA.

[102] Mr Soni argued further that the PG is authorised, in terms of ss 24 and 25 to apply for a restraint order, section 51 to apply for preservation order, and section 59 of POCA to apply for a forfeiture order, and this is where s 83 applies. He argued further that parliament decided that the PG may prosecute crimes, but where she is to exercise powers created by ss 25, 51 and 59 of POCA, there must first be an investigation

carried out not by any police officer but by an officer authorised to do so by the IG in writing.

[103] Mr Soni further argued that s 83 was included in POCA in order to add a pair of eyes to the envisaged application for a restraint order. Literally, so it was argued, parliament intended that before the PG applies for a restraint order the IG must agree with it. When a question was posed by the court, that it appears from his arguments that the PG can act on whatever information she receives from any investigative organ, but whenever she intends to apply the provisions of chapters 5 or 6 of POCA then she must go through s 83, Mr Soni remarked that it may sound cumbersome but it will not be the first time that parliament anywhere in the world would enact a legislation that lawyers and judicial officers find not to be the best.

[104] Mr Soni, endorsed by Mr Brockerhoff and Mr Beukes, argued in conclusion that the application for a restraint order must fail for non-compliance with s 83.

[105] Mr Trengove argued contrariwise that the whole case of the defendants and the respondents of non-compliance with s 83 is irrelevant unless if on a proper interpretation the court finds that s 83 imposes a restriction on the powers of the PG and that she may only bring an application under chapter 5 on the basis of evidence gathered under s 83. Mr Trengove argued that the PG is not dependent on the IG to exercise her powers under POCA.

[106] Mr Trengove argued further that if the interpretation proposed by the defendants is correct, then the PG will only be restricted to POCA offences if she intends to apply for a restraint order and that cannot be what parliament intended. He concluded his arguments with the submission that s 83 does not restrict the PG in the exercise of her powers set out in chapter 5. He called on the court to uphold on the application.

Analysis

[107] As I stated hereinabove, the defendants and respondents did not engage the factual averments alleged by the PG strictly speaking. To the contrary, the defendants and the respondents as they are entitled to do, opted to challenge the application for a restraint order by raising a point of law. The point of law is the non-compliance with section 83 of POCA.

[108] The defendants, in their answering papers, further challenged the PG's application on the basis that the initial application for a provisional restraint order was not urgent, and further raised constitutional challenges to some of the provisions of POCA. Suffice to state that the constitutional challenges were abandoned by the defendants and the respondents.

[109] The defendants and the respondents during the oral hearing abandoned all other grounds of opposition raised and relied only on the basis that the investigation on which this application was brought violated s 83 of POCA. Mr Soni, supported by Mr Brockerhoff and Mr Beukes, argued that the PG's application stands or falls by the interpretation and application of s 83 to the matter. For what it's worth, I find that there is nothing untoward with the manner in which the PG launched her application, regarding the complaint of urgency, as it in compliance with the provisions of POCA.

[110] The offences on which Chapter 5 proceedings may be invoked are offences stipulated in Schedule 1 of POCA and they include the offences that the defendants are charged with.

[111] Not only direct benefits derived from the commission of crime may be liable to a confiscation order. Section 17(3) of POCA reads as follows:

'For the purposes of this Chapter, a person has benefitted from the commission of an offence or related criminal activity if he or she has at any time, whether before or after the

commencement of this Act, received or retained any proceeds of an offence or related criminal activity, whether or not that person is still in possession of those proceeds of an offence or related criminal activity subsequent to having received or retained those proceeds.'

[112] Proceeds of unlawful activities, is defined in s 1 of POCA as:

'any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and incudes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity'

[113] It is apparent from the above provisions that proceeds includes both property received directly or indirectly as well as property mingled with proceeds of unlawful activities. I find that the above opposition to the application for a restraint order raised on the basis of indirect benefit lacks merit.

[114] The defendants further complained about the broadness of the restraint order sought by the PG. Except for the mere say so, nothing of significance was attached to such contention and this issue was not pursued in arguments. In as far as the argument by Mr Beukes goes that the order affects some of the defendants' pension fund and, therefore, offends s 37A(1)*(a)* of the Pension Funds Act, 24 of 1965, goes. Until when a pension fund benefit becomes payable it remains an asset of the Fund and cannot form part of the defendant's realisable property.[16] The protection afforded by s 37A(1) falls away the moment that the benefit is paid out by the Fund. I find that the argument raised, therefore, offers no assistance to the defendants in their opposition to the restraint application and it falls to be dismissed.

[115] I further find, on a *prima facie* basis, that the MOU entered into between the two Ministers of Fisheries does not constitute an agreement contemplated in s 35 of the MRA. An MOU is not an agreement with legal consequences. An MOU, as in the

[16] *Sentinel Retirement Fund v Masoanganye* (1003/2017) [2018] ZASCA 126 (27 September 2018) para 14.

present matter, has no binding force and the parties intended as much when they agreed to sign a non-binding MOU. This is far from an agreement envisaged in s 35 of the MRA. My *prima facie* view, based on the evidence appearing in the affidavits and documents filed of record, is that the MOU was a ploy to realise the corrupt scheme and to see its fruition.

[116] I further find that the PG has established that the respondents received affected gifts, as defined by POCA, from the defendants, and no case was advanced by the respondents to ward off the evidence provided by the PG to that effect.

[117] For avoidance of doubt, I find that, based on the factual averments raised by the PG in her founding affidavit, the replying affidavit, the supporting affidavits of Mr Kanyangela, Mr Stefansson, Ms Kalumbu and annexures attached thereto, together with other evidence filed of record by the PG and considering that the defendants and respondents have literally left the bulk of such averments undisputed, there is evidence on record on which it can be concluded that there are reasonable grounds for believing that a confiscation order may be made against the defendants.

[118] If, however, I find that the defendants' interpretation of s 83 is correct, then the application for a restraint order must be dismissed despite the availability of the evidence supporting the restraint application. In the event, however, that I am to find in favour of the PG's interpretation of s 83, then it follows that the application must succeed.

[119] Considering that at the heart of the dispute between the parties is the meaning of section 83 of POCA, I find it prudent to quote the whole section, and I do so below:

'83(1) whenever the inspector-general of police has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to that alleged offence, he or she may, prior to

the institution of any civil or criminal proceeding, and written authority, direct a particular member of the police to investigate a specific offence.

(2) The member of the police authorised in terms of subsection (1), or any other authorised member of the police may-

(a) exercise any power under any law relating to the investigation of crime and the obtaining of evidence in the course of an investigation, for the purpose of enabling the prosecutor-General to institute and conduct proceedings in terms of chapter 5 and 6 of this Act; and

(3) service any document for which service is required in terms of this Act.'

[120] What is the meaning of the above provision and its application to a restraint order sought, is the question that this court is seized with. As stated, Mr Soni argued that the PG must comply with the above section before she can apply for a restraint order. Mr Trengove argued the contrary.

[121] In getting to the meaning of the above provision, this court is guided by the established rules of interpretation. Wallis JA in *Natal Joint Municipal Pension Fund V Endumeni Municipality*[17] said the following at para 18:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the

[17] *Natal Joint Municipal Pension Fund V Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation… The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[122] In *Total Namibia v OBM Engineering and Petroleum Distributors*,[18] the Supreme Court remarked as follows at para 19:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

[121] In my view, the reading of s 83 commences by stating that, whenever the IG has reason to believe, and it makes no mention, in the opening paragraph at least, of the PG. The PG appears in s 83(2), where it provides that an authorised member of the police may investigate a crime and of obtain information for the purpose of enabling the PG to institute and conduct Proceedings in terms of chapters 5 and 6 of POCA.

[123] From the reading of s 83, it appears to me that the provision was made in order to regulate the affairs of the police. This is because the provision sets out, expressly, the duties of the police for purposes of an investigation for proceedings envisaged in terms of chapters 5 and 6. I find that, nowhere in s 83 does the legislation restrict, or at the very least, prescribe the powers to be exercised by the PG.

[124] The powers and functions of the PG are set out in Art 88 of the Namibian constitution, and they are:

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[18] *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) para 19.

'(a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;

(b) to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;

(c) to perform all functions relating to the exercise of such powers…

(e) to perform all such other functions as may be assigned to him or her in terms of any other law.'

[125] Section 83 is a tool provided to the police. It does not say that the PG may only bring in application under chapters 5 and 6 within the ambit of its provision. Section 83 does not state further that the PG may not bring an application under chapters 5 and 6 on any other evidence other than the evidence collected by the police acting under the said s 83. I, therefore, find that the interpretation accorded to s 83 by Mr Soni cannot be correct, as adopting such an interpretation will, in my view, constitute over broadening the meaning of s 83 as opposed to what was intended by the legislature. I further hold the view such interpretation will lead to absurdity.

[126] Section 83(1), in my view, empowers the police to investigate offences created by POCA on written authorisation by the IG. Section 83(2) authorises the police to carry out investigation and obtain information for purposes of enabling the PG to institute and conduct proceedings in terms of chapters 5 and 6 of POCA. It follows from the above that s 83 is a tool devised to aid the police in their investigation, to investigate POCA crimes, and obtain information which can enable the PG to bring an application under chapters 5 and 6. The ordinary meaning of the word 'enable' which is used in the concerned provision means, as per the English dictionary 11th edition 'assist'. Enable, therefore, does not mean create authority to do so but means 'assist'. In my view, the PG does not require the permission or consent of the IG in order to bring an application under chapters 5 or 6 of POCA.

[127] I further find that s 83 does not mean that without the assistance of the police, the PG is not competent to bring an application under chapters 5 and 6.

[128] The reason why the interpretation preferred by the defendants is untenable is because s 83 authorises the police to investigate offences under POCA. It follows, therefore, that on their interpretation, applications under chapters 5 and 6 can only be brought in respect of offences created by POCA. This, in my view, goes against the whole purpose of POCA, which includes, *inter alia*, to provide for the recovery of proceeds of unlawful activities, and to provide for the forfeiture of assets that have been used to commit an offence or assets that are proceeds of unlawful activities. The definition of 'unlawful activities' referred to hereinabove, includes "any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law in Namibia.' Surely, from the reading of the definition of unlawful activity it should now be clear to all that the intention of the legislature was to ensure that chapters 5 and 6 apply to any unlawful activity and is, therefore, not limited only to offences under POCA.

[129] I, therefore, find that s 83 of POCA does not reduce, by any measure, the authority of the PG to institute and conduct the proceedings in terms of chapters 5 and 6 of POCA.

Conclusion

[130] In my view, the defendants' defence of the PG's non-compliance with s 83 of POCA, the result of which should nullify the application for a restraint order, lacks merit and falls to be dismissed.

[131] In view of the foregoing findings and conclusions stated above, I find that the PG succeeded to prove that a prosecution was instituted and is pending against the

defendants, and that there are reasonable grounds for believing that a confiscation order may be made against the defendants.

Costs

[132] It is settled law that costs follow the result. The PG succeeded in her application for a restraint order and, therefore, should be awarded costs. Given the complexities of the matters involved, I hold the view that this is a matter where the employment of two instructed legal practitioners is justified, but not more than that.

[133] In my further view, rule 32(11) of the rules of this court finds no application as this is not an interlocutory application. Even if it was an interlocutory application, the nature of the issues involves and the amount of work required to be engaged justifies an award for costs beyond the threshold provided for in rule 32(11).

Order

[134] In view of the foregoing findings and conclusions, I make the following order:

1. The *rule nisi* issued on 13 November 2020 as against the first to sixth and the eighth to sixteenth defendants and the first to fifth respondents, is confirmed.

2. The first to sixth and eighth to sixteenth defendants and first to fifth respondents must pay the Prosecutor-General's costs, jointly and severally, the one paying the other to be absolved, which costs include the costs of one instructing and two instructed counsel and such costs are not subject to rule 32(11).

3. The restraint application brought by the Prosecutor-General against the first to sixth and eighth to sixteenth defendants and the first to fifth respondents is regarded as finalised.

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O S Sibeya

Judge

APPEARANCES

APPLICANT:	W TRENGOVE, SC Assisted by K S Saller and Dr. S. Akweenda Instructed by the Office of the Government Attorney
1ST DEFENDANT:	T BROCKERHOFF Of Brockerhoff & Associates
2ND, 5TH, 8TH, 9TH, 13TH DEFENDANTS AND THE RESPONDENTS:	F BEUKES Of Metcalf Beukes Attorneys
3RD, 4TH, 6TH, 10TH, 11TH, 12TH, 14TH, 15TH AND 16TH DEFENDANTS:	V SONI, SC Assisted by R Kurtz Instructed by Murorua Kurts Kasper Inc