

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2022/00242

In the matter between:

JAN BENEDICKTUS FREDERICKS

APPLICANT

and

THE PROSECUTOR-GENERAL

1st RESPONDENT

MAGISTRATE KAMBINDA

2nd RESPONDENT

INSPECTOR-GENERAL SEBASTIAN NDEITUNGA

3rd RESPONDENT

Neutral citation: *Fredericks v The Prosecutor-General* (HC-MD-CIV-MOT-REV-2022/00242) [2023] 637 (10 October 2023)

Coram: PRINSLOO J

Heard: 31 July 2023

Delivered: 10 October 2023

Flynote: Review Application – Rule 76 – Magistrates court proceedings held in terms of s 32 (1) of the Prevention of Organised Crime Act 29 of 2004 (POCA)

Reviewing court finds no irregularity that may vitiate the proceedings – No merit in applicant's application – Review application dismissed.

Summary: The applicant before court filed an application in terms of rule 76 of the High Court Rules for this court to review the decision of the magistrates court proceedings, which were held at the Magisterial District of Gobabis, conducted in terms of s 32(1) of the Prevention of Organised Crime Act 29 of 2004 (POCA). The respondents oppose the relief sought by the applicant.

Held that a confiscation enquiry is civil in nature and not criminal in nature and from the record of proceedings, there is nothing that indicates that the court a quo was not alive to this fact. The applicant was referred to as the 'defendant' and not the accused, and the state was referred to as the 'applicant'.

Held that the confiscation application and enquiry were correctly authorised and instituted.

Held that there was sufficient explanation of the applicant's rights to legal representation because the applicant's rights were explained to him.

Held that the court does not find it inappropriate that these three cases were heard in one application, as all relevant records were produced in court, and the court has the power to consider all three cases in one confiscation application.

Held further that the court is entitled to look at the evidence that was presented in the criminal case in a confiscation application. There is therefore nothing amiss, with the procedure adopted in the confiscation application.

Held that the reliance by the applicant on s 83 of POCA in a confiscation application after he has already been found guilty has no basis. A confiscation enquiry is not subject to s 83 of POCA. The Inspector-General can give authorisation in appropriate cases, and the applicant's case is not one such case.

Held that the court in reviewing the record of proceedings in this matter, finds no irregularity that may vitiate the proceedings. There are no merits in the applicant's application, and it stands to be dismissed.

ORDER

1. The applicant's review application is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

PRINSLOO J:

Introduction

[1] Before this court is an application for review as envisaged in rule 76 of the High Court Rules. The application relates to specific lower court (magistrates court) proceedings, which were held at the Magisterial District of Gobabis, conducted in terms of s 32(1) of the Prevention of Organised Crime Act 29 of 2004 (POCA).

The parties

[2] The applicant is Jan Benedictus Fredericks, an adult male, currently serving sentence in the Windhoek Correctional Facility.

[3] The respondents cited are as follows:

3.1 The first respondent is the Prosecutor-General ('the PG'), appointed in terms of Article 88 of the Namibian Constitution with her office at Corporate House, JP Karuaihe Street, Windhoek.

3.2 The second respondent is Mr Davy Nambwe Kambinda ('Magistrate Kambinda'), a magistrate appointed in terms of the Magistrates Act 3 of 2003, stationed at Gobabis Magistrates Court. Magistrate Kambinda is cited in his capacity as the presiding magistrate in case GOB-CRM-1983/2019, which proceedings and decisions the applicant seeks to be reviewed and set aside.

3.3 The third respondent is the Inspector-General of the Namibian Police, Sebastian Ndeitunga, cited in his official capacity.

Background

[4] The applicant appeared before the Gobabis Magistrates Court in case numbers GOB-CRM-247/2019, GOB-CRM-1982/2019 and GOB-CRM-1983/2019. Under these case numbers, the applicant was charged and subsequently convicted of several counts of theft under false pretences and money laundering (contravening s 4(a) read with subsecs 1, 7 and 11 of POCA).

[5] The prosecuting authority filed an application on 3 August 2020 in support of a confiscation enquiry in terms of s 32(1)(a) of POCA to determine the benefits which were derived from the offences that the applicant was convicted of on 24 June 2020.

[6] The hearing of the application was postponed on several occasions and only commenced on 16 June 2021. The applicant was in attendance during the 16 June proceedings, and one witness testified and was cross-examined by the applicant. The hearing was adjourned and set to continue on 28 June 2021. However, the enquiry could not proceed on the said date as a result of the COVID-19 lockdown. After that, further postponements of the enquiry followed due to a number of reasons which are not relevant to the current proceedings.

[7] Eventually, on 26 April 2022, the matter served before the court again. The applicant was absent from court, and Magistrate Kambinda was informed that the applicant was unwilling to come to court and that the State would, given the opportunity, present evidence in his regard.

[8] On 27 April 2022, A/Comm John Robert Platt, the officer in charge of the Gobabis Correctional Facility, testified regarding the applicant's unwillingness to appear at court. After having heard the evidence of A/Comm Platt, the State applied that the proceedings continued in the absence of the applicant. Magistrate Kambinda, being satisfied that the applicant had no reason not to be at court, ordered that the matter proceed in the applicant's absence. The public prosecutor proceeded to call a witness named Inspector Gert Boois. Once the evidence of this witness was concluded, the matter was postponed to 28 April 2022 to allow the public prosecutor to file written submissions in support of the application.

[9] On 28 April 2022, having considered the evidence presented and the written submissions by the public prosecutor, Magistrate Kambinda made the following confiscation order: (I quote verbatim)

'THE COURT HAVING BEEN ASKED TO INSTITUTE AN ENQUIRY INTO ANY BENEFIT THE DEFENDANT MAY HAVE DERIVED FROM THE OFFENCE FOR WHICH HE WAS CONVICTED AND OTHER RELATED CRIMINAL ACTIVITIES,

AND SINCE THE WRITTEN AUTHORITY WAS OBTAINED TO INSTITUTE THE ENQUIRY;

AND HAVING ORDERED THAT THE ENQUIRY SHOULD BE HELD;

UPON BEING SATISFIED THAT THE DEFENDANT HAVE BENEFITTED FROM HIS OFFENCES AND RELATED CRIMINAL ACTIVITIES.

IT IS HEREBY ORDERED THAT:

1. In terms of section 32(2) of the Prevention of Organised Crime Act 29 of 2022 ("POCA"), the value of the benefit of the offence the defendant were found guilty of and/or he related criminal activities of the defendant is at least N\$54 033.32.
2. The Defendant's realizable property consists of the N\$30 910 in cash that was booked in as Exhibit at Mariental Police Station under Mariental CR 35/06/2017.
3. A confiscation order is made in the amount of N\$54 033.32.

4. The amount which might be realised in terms of section 32(6)(a)(ii) of the POCA is the N\$30 910.00 in cash (the confiscation amount).
5. This order is a civil judgment.'

[10] The applicant now seeks to review and set aside the proceedings and decisions of Magistrate Kambinda handed down on 28 April 2022.

Relief sought

[11] In his notice of motion dated 2 June 2022, the applicant seeks an order in the following terms:

- a) Review of the proceedings and the decision of Magistrate Kambinda to issue a confiscation order dated 28 April 2022 and
- b) The setting aside of the proceedings and decision pertaining to the issuing of the confiscation order.

Founding papers

[12] The applicant stated that the mainstay of his contentions would be in respect of the enquiry held in terms of s 32(1) of POCA. After the enquiry was finalised in his absence on 26 and 27 April 2022 in Gobabis Magistrates Court, and the judgment was delivered on 28 April 2022, the applicant received the judgment and confiscation order on 12 May 2022.

[13] The applicant stated that he was shocked to find that the matter was finalised in his absence, despite having phoned the public prosecutor, Faith Nyaungwa, on 26 and 27 April 2022, requesting the case to be postponed.

[14] The applicant stated that he was transferred from the Windhoek Correctional Facility, one week prior to the hearing date, to the Gobabis Correctional Facility to make a court appearance in case GOB-CRM-1983/2019, in which the enquiry was already partly heard. However, as a result of an incident that occurred during his period of detention in the Gobabis Correctional Facility, which caused him emotional

distress, he called the public prosecutor and explained why he was unable to attend court and requested a postponement.

[15] Due to the fact that the matter was finalised in his absence, the applicant requested the typed record of the proceedings and a copy of the judgment but was unable to secure a transcribed record. The applicant stated that he felt compelled to file the review application *in casu* as his constitutional rights have been infringed.

[16] The applicant further stated that evidence adduced during the court proceedings by A/Comm Platt, the Head of Security: Gobabis Correctional Facility that he (the applicant) refused to go to court was untruthful.

[17] The applicant further stated that a crucial witness, Inspector Gerson Boois, testified during the enquiry on 27 April 2022, and he was unable to cross-examine this witness regarding the funds that the State sought to confiscate. His inability to cross-examine Inspector Boois offends the *audi alteram partem* rule as well as his constitutional rights.

[18] The applicant is of the view that the enquiry proceedings were fraught with irregularities and hearsay, especially with reference to the evidence of the witness who testified on 16 June 2021. The applicant further raises the issue of how Magistrate Kambinda could find on a balance of probabilities that he (the applicant) benefited from his offences and related criminal activities, as no evidence in support of this finding was submitted to the court.

[19] The applicant further stated that there is an indication that three cases were applicable in this matter, i.e. GOB-CRM 247/2019, GOB-CRM 1982/2019 and GOB-CRM 1983/2019, however, as far as the applicant is concerned, none of the court records in these cases have been handed in as exhibits for the magistrate to make an informed decision that he benefited from these offences.

[20] The applicant submitted that the public prosecutor did not apply for a confiscation enquiry in all the cases but only in one. He further stated that in none of the cases had the confiscation enquiry been explained to him and further questioned how the cases could have been considered together if some matters occurred in

September of 2017. The applicant further stated that under s 32(6) of POCA, there was no restraint order to be realised and that the order must not exceed the value of the defendant's proceeds of the offences or related criminal activities.

[21] The further discrepancies, according to the applicant, were the following:

a) Non-compliance by the public prosecutor and the magistrate with s 32(7) of POCA, which provides that 'a court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if- (a) it is satisfied that that enquiry will unreasonably delay the proceedings in sentencing the accused, or (b) the public prosecutor applies to the court to first sentence the accused and the court is satisfied that it is reasonable and justifiable to do so in the circumstances'.

(b) Non-compliance with s 32(9) of POCA as no written authorisation from the Prosecutor-General had been handed into court, nor was such written authority brought to the attention of the applicant.

(c) Non-compliance with s 83 of POCA as no written authorisation of the Inspector-General authorising the police officers to investigate the matter was handed into court.

[22] The applicant submitted that the absence of these written authorities caused the enquiry conducted by Magistrate Kambinda to amount to a nullity, and the magistrate should have addressed it in his judgment. However, since it was not addressed, it shows a lack of fairness in the enquiry, resulting in prejudice to the applicant.

[23] The applicant concluded that Magistrate Kambinda could not have reached the conclusions that he did, and as a result, the magistrate's findings and the resulting order stands to be reviewed and set aside.

Answering papers

[24] Although all three respondents filed their notices of intention to oppose, only the Prosecutor-General filed answering papers.

[25] Ms Martha Imalwa deposed to the answering affidavit herein. She clarified that the enquiry in terms of s 32(1) of POCA, which is the subject of this application, pertained to three criminal cases and the applicant was the accused in all three cases, with case numbers GOB-CRM-1983/2019, GOB-CRM-1982/2019 and GOB-CRM-247/2019. All cases emanated from the Gobabis Magisterial District.

[26] Ms Imalwa explained that although the facts of each matter were different the process followed after conviction was the same:

a) *GOB-CRM-1983/2019*

i) Case number GOB-CRM-1983/2019 pertained to Gobabis CR 30/08/2018. In this instance, the applicant was charged with one count of theft by false pretences and one count of money laundering (contravening s 4(a) read with subsecs 1, 7 and 11 of POCA, as amended). On 24 June 2020, the applicant pleaded guilty to both counts and was found guilty as charged on the same date. During questioning by the court in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977, the applicant admitted to receiving N\$39 500 from the complainant. The applicant admitted that the said money was deposited into his bank account at his request. After the applicant was convicted on the two counts, the matter was postponed to 25 June 2020 for 'Record (Previous Convictions) and Sentence'.

b) *GOB-CRM-1982/2019*

ii) Case number GOB-CRM-1982/2019 pertained to Gobabis CR 37/06/2018. In this instance, the applicant was charged with one count of fraud and one count of money laundering (contravening s 4(a) read with subsecs 1, 7 and 11 of POCA, as amended). On 24 June 2020, the applicant pleaded guilty to the charges and was convicted on the same date. During questioning by the court in terms of s 112(1)(b) of the CPA in respect of the count of fraud, the applicant admitted that the incident occurred on 13 July 2018. The applicant further admitted to having received N\$13 250 from the complainant. After the applicant was convicted on the two counts, the matter was postponed to 25 June 2020 for 'Record (Previous Convictions) and Sentence'.

c) *GOB-CRM-247/2019*

iii) Case number GOB-CRM-247/2019 pertained to Gobabis Police Station CR 02/02/2019, in which the applicant was charged with theft by false pretences. The applicant pleaded guilty to the charge on 22 June 2020 and was convicted on the same date. During questioning by the court in terms of s 112(1)(b) of the CPA the applicant admitted the value of the items alleged in the charges and that he did not pay for the items. The matter was postponed to 24 June 2020 for sentence. After several postponements, the case was postponed to 3 August 2020 for sentencing and the s 32(1) POCA enquiry.

iv) In respect of all three cases, after several postponements, on 3 August 2020, the public prosecutor informed the court that the matter was for a s 32(1) of POCA enquiry and sentencing. She further stated that for the State to proceed with the said enquiry, it must obtain authorisation from the PG in terms of s 32 of POCA. The authorisation was obtained from the PG and submitted to the court. The court received the authorisation without any objection from the applicant. The applicant was eventually sentenced on 28 October 2020, and the enquiry in terms of s 32 of POCA was adjourned to 7 January 2021.

[27] According to Ms Imalwa, the confiscation enquiry was conducted under case number GOB-CRM-1983/2019 and commenced on 16 June 2021 before Magistrate Kambinda. Ms Imalwa submitted if one considers the case record it is clear that Magistrate Kambinda explained to the applicant that Ms Nangolo, the magistrate who convicted and sentenced him, had since resigned from the Magistracy and was not available to attend to the matter. Therefore, the case proceeded before another magistrate in terms of s 32(8) of POCA. There was no objection from the applicant. The public prosecutor called Sergeant Fred Emmanuel to testify in the matter. After this testimony, the case was postponed several times and for different reasons, and eventually continued on 26 April 2022.

[28] On 26 April 2022, the applicant was not present in court despite the fact that he was at the Gobabis Correctional Facility, where he was brought from the

Windhoek Correctional Facility for purposes of attending the continuation of the confiscation enquiry. The applicant called the public prosecutor that morning and indicated that he refused to attend court that day because some of his privileges in the Correctional Facility were suspended, including visitation. The matter was then postponed to the following day, i.e. 27 April 2022, for continuation of the enquiry.

[29] On 27 April 2022, the applicant still refused to go to court. The public prosecutor requested the attendance of the officer in charge of the Gobabis Correctional Facility A/Comm Platt for the purposes of informing the court as to why the applicant is not at court. In view of the testimony of A/Comm Platt and on an application by the public prosecutor, the court held that the matter should proceed in the absence of the applicant. The State called a further witness, Inspector Gert Boois.

[30] Ms Imalwa stated that during the course of the enquiry, documentary evidence, being the court proceedings for cases GOB-CRM-247/2019 and GOB-CRM-1982/2019, were handed in and became part of the record and were marked as exhibits. In addition thereto further documents were entered into evidence as exhibits, i.e. (a) the POL 10 (prisoner's property receipt indicating the amount of N\$30 910) was submitted into evidence as an exhibit 'C', (b) the applicant's bank statement for the period 15 August 2017 to 25 September 2017, (c) the 'Know Your Client' form together with a copy of the applicant's national identity document and (d) a statement under oath from a Standard Bank employee were marked exhibit 'D'. The applicant did not object to the documentary evidence becoming part of the record.

[31] According to Ms Imalwa, the benefit of N\$54 033.32 is the sum of the amounts benefitted by the applicant in the three criminal cases, namely, GOB-CRM-1982/2019, where the applicant benefitted N\$13 250 cash, GOB-CRM-1983/2019 where the applicant benefitted N\$39 500 and GOB-CRM-247/2019 where the applicant benefitted N\$1283.32. Magistrate Kambinda, accordingly, made a confiscation order in the amount of N\$54 033.32. The amount which could be realised in terms of s 32(6)(a)(ii) of the POCA was N\$30 910 in cash.

Discussion

[32] The review brought by the applicant relates to statutory prescribed proceedings. It relates to a confiscation enquiry authorised by Chapter 5, Part 3, s 32 of POCA. The nature of this enquiry is therefore one that finds both its procedural and substance in a statute, being POCA. The nature or type of this enquiry has been classified by s 18(1) of POCA as:

‘18(1) For the purposes of this Chapter, proceedings on application for a confiscation order, a restraint order or an anti-disposal order are civil proceedings and are not criminal proceedings.’ (my emphasis)

[33] In the Constitutional Court of the South African judgment of *S v Shaik*,¹ the nature of confiscation proceedings has been described as follows:

[22] It will be useful at this stage to briefly describe the scheme of criminal confiscation contemplated by the Act. Chapter 5 of the Act confers a power on a criminal court to make a confiscation order against a person who has been convicted of a crime where the court has found that the person has benefited from the crime.

[23] Once a person has been convicted, the prosecutor may apply for a confiscation order. In order for a confiscation order to be made, the court must find that the person convicted of the offence has derived a benefit from the offence of which he or she has been convicted or of any “criminal activity which the court finds to be sufficiently related” to that offence. The court may then make an order that the person pay to the state “any amount it considers appropriate”.

[24] 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 chapter 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. The mechanism of a civil judgment sounding in money may well have been selected by the legislature to avoid the difficulty of tracing particular assets which may have been the proceeds of crime and so to facilitate the recovery of the value of the proceeds.’

¹ *S v Shaik* 2008 (2) SA 165 (CC).

[34] Therefore, confiscation enquiries are civil proceedings and not criminal proceedings. Although these proceedings take place within an ongoing criminal trial (after conviction, before sentencing or after sentencing if the court deems it fit), the confiscation enquiry itself is classified as civil in nature.

[35] Therefore, a party approaching the High Court with a review as a result of an enquiry in terms of s 32 of POCA must satisfy the requirements of s 20 of the High Court Act 16 of 1990 and rule 76 of the Rules of the High Court. Section 20 reads as follows:

‘20 Grounds of review of proceedings of lower court

- (1) The grounds upon which the proceedings of any lower court may be brought under review before the High Court are-
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer; (c) gross irregularity in the proceedings;
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) Nothing in this section contained shall effect the provisions of any other law relating to the review of proceedings in lower courts.’

[36] It is also important to note that s 20 of the High Court Act is not restricted to what is contained in subsection (1). Subsection (2) allows that ‘the provisions of any other law relating to the review of proceedings in the lower court’ are also applicable. Subsection (2), thus, makes the ambit of s 20 wide rather than narrow. This proposition was adopted by this court in *Hellens v The Minister of Home Affairs and Others*.²

[37] The PG rejects the applicant’s review application. The trite principles applicable to review proceedings were reiterated by Liebenberg J in *Likoro v S*,³

² *Hellens v The Minister of Home Affairs and Others* (HC-MD-CIV-MOT-GEN-2020-00071) [2021] NAHCMD 300 (23 June 2021).

³ *Likoro v S* (CA 19 of 2016) [2017] NAHCMD 355 (8 December 2017) para 12.

wherein the learned Judge referred to *Ellis v Morgan; Ellis v Dessai*,⁴ wherein Mason J stated as follows:

‘But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.’ (See also *Coetser v Henning and Ente* NO 1926 TPD 401; *Hirschorn v Reich and Another* (1929) 50 NLR 314.)

The complaint need not, however, arise from mere high-handedness by the magistrate; a bona fide mistake which denies the accused a fair trial is also an irregularity. *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551. It must be stressed that in an appeal an appellant is confined to the four corners of the record, but in review proceedings the aggrieved party traverses matters not appearing on the record. *Schwartz v Goldschmid* 1914 TPD 122.’

[38] Therefore, although the record in this matter is not exemplary, it is sufficient for the purposes of this review application. The applicant’s grounds of review can be distilled from his founding affidavit as follows:

- (a) The case was held as a criminal matter and not a civil matter.
- (b) The applicant’s rights and the nature of the enquiry were not explained to him.
- (c) No written authorisation in terms of s 32(9) of POCA was handed to the court as required by the law.
- (d) The enquiry was finalised in the applicant’s absence on 26, 27 and 28 April 2022, causing prejudice to the applicant.
- (e) The applicant phoned the public prosecutor, Faith Nyaungwa on 26 and 27 April 2022, seeking a postponement, which was not granted.
- (f) That it is not clear how the magistrate could reach a decision and or how he was on a balance of probabilities satisfied that the applicant had benefited from his

⁴ *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581.

offences and related criminal activities if no proper documentary proof or evidence were handed in as exhibits.

(g) The principle of *audi alteram partem* and the hearsay rule was not observed by the court, and as such, the court accepted inadmissible evidence.

(h) No written authorisation in terms of s 83 of POCA was handed up in court.

(i) Although there is an indication that three cases were applicable in this matter, i.e. GOB-CRM-247/2019, GOB-CRM-1982/2019 and GOB-CRM-1983/2019, none of these records have been handed in as exhibits in terms of which the magistrate could make the relevant findings and the confiscation order.

[39] As already stated, a confiscation enquiry is civil in nature and not criminal in nature. From the record of proceedings, nothing indicates that the court a quo was not alive to this fact. It also does not show that the court conducted the proceedings as criminal proceedings as opposed to civil proceedings. The applicant was referred to as the 'defendant' and not the accused, and the State was referred to as the 'applicant'. Therefore, the point raised by the applicant in relation to the nature of proceedings does not need to be belaboured any further.

[40] It is further worth noting that under case number GOB-CRM 1983/2019, on 25 July 2020 after his conviction on a charge of theft under false pretences, the applicant in the court a quo indicated his willingness to compensate the complainant the amount of money that he (the applicant) stole. The applicant sought time to make arrangements with his family to effect this compensation to the complainant. This type of compensation is the nature that is envisaged in s 32(3) of POCA. The record does not have any further details as to what became of this undertaking by the applicant at the time. None of the parties addressed this aspect. Therefore, at the very least, what is contemplated by s 32 of POCA showed its face on 25 July 2020. It is an indication that the parties were alive to this fact (confiscation) at that stage already.

[41] As a result of the applicant's undertaking, the matter was postponed to 13 July 2020 for sentencing. On 13 July 2020, again, it was intimated by the public prosecutor that the applicant has to pay some funds to the complainant, and a letter to the prison official was requested. No further details were provided in the court a quo or in this review application as to what became of this arrangement. For the first time on 13 July 2020, the public prosecutor indicated that the State intends to file a s 32(1) POCA application. Consequently, the matter was postponed to 30 July 2020 for sentencing. On 30 July 2020, the accused was absent from court as he was not brought from Windhoek. As a result, the matter was remanded to 3 August 2020.

[42] On 3 August 2020, the public prosecutor indicated that the matter was on the roll for s 32(1) of POCA enquiry and for sentencing. The public prosecutor further stated that for the s 32(1) of POCA enquiry to take place, it is imperative that there should be authorisation in terms of s 32 and sought permission from the court to hand in the authorisation. As a result, the court a quo enquired from the applicant if he had any objection to the handing in of the authorisation, to which the applicant did not object. As a result, authorisation was accepted by the court a quo as such and was marked as exhibit 'A' to the record. It should be noted that the authorisation is related to all three cases concerned. The court a quo then postponed the matter for sentencing, and on 28 October 2020 after the applicant was sentenced, the matter was further postponed for the s 32(1) POCA enquiry to 7 January 2021, and the court directed that oral evidence be led.

[43] As I have stated above, s 32 has set both the procedure and substance of the enquiry. The authorisation by the Prosecutor-General that the public prosecutor handed up to the court is a requirement set by s 32(9) of POCA, which specifies that 'an application referred to in subsec (1) must not be made without the written authority of the Prosecutor-General, but the Prosecutor-General may if he or she deems it appropriate, give that authority after an application has been made but before the court makes the confiscation order'. This position was further clarified by Miller AJ in *Ex parte: Prosecutor- General* (POCA 11 of 2011),⁵ where he held in paragraph 20 that:

⁵ *Ex parte: Prosecutor- General* (POCA 11 of 2011) [2011] NAHC 355 (2 December 2011).

[20] In contrast Part 3 of Chapter 5 of POCA which deals with confiscation orders contains express provisions to the effect that a public prosecutor may with the written consent of the Prosecutor-General apply for a confiscation order. (Section 32 and Section 33 of POCA), It is noteworthy that POCA provides that the public prosecutor is not authorized to bring an application by virtue of the general delegation to prosecute granted by the Prosecutor-General in terms of Article 88 (2)(d) of the Constitution. The prosecutor requires instead a separate and distinct written authorization in respect of each application.'

[44] Based on the above, I find that the application and enquiry were correctly authorised and instituted.

[45] The court a quo further had a discretion to hear the enquiry before or after sentencing. This discretion is provided for in s 32(7) of POCA, which holds that:

'A court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if (a) it is satisfied that that enquiry will unreasonably delay the proceedings in sentencing the accused; or (b) the public prosecutor applies to the court to first sentence the accused and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.'

[46] For this reason, I further find that the court a quo was entitled to and also correct in ordering that the enquiry be held at a later stage. The court is further authorised to order the leading of further evidence if deemed fit. Subsection (10)(a) (ii) of s 32 of POCA specifically states that:

'A court before which proceedings under this section are pending may (a) in considering an application under subsection (1)(i) hear any further oral evidence or receive any other evidence which the court deems fit.'

[47] The conviction and sentence were concluded before Magistrate Aina Nangolo. The confiscation enquiry commenced before another magistrate, Magistrate. Kambinda. When the proceedings commenced, Magistrate Kambinda was alive to this fact and informed the parties that Magistrate Nangolo had left the Magistracy and was no longer available. He then indicated that the proceedings would commence in accordance with s 32(8) of POCA, which authorises another judicial

officer to proceed with the matter. I, therefore, find that there is nothing that prevented Magistrate Kambinda from proceeding with the enquiry.

[48] The applicant's rights to legal representation were also explained on 16 June 2021 by Magistrate Kambinda. The applicant elected to represent himself. I, therefore, find it strange that the applicant stated that his rights were not explained to him. In fact, on 23 August 2020, when the enquiry was scheduled to continue, the applicant indicated that he intended to apply for legal aid. The matter was postponed for this purpose.

[49] There was sufficient explanation of the applicant's rights to legal representation because the applicant subsequently exercised that right. I need not address whether it will be a ground of review if a defendant's rights to legal representation have not been explained to him in civil proceedings, *vis a vis* a failure to explain the accused rights in criminal proceedings.

[50] On the same date, 16 June 2021, the public prosecutor called the first witness, Sgt Immanuel. The applicant was present in court and participated in the proceedings. Through the witness, Sgt Immanuel, records of case numbers GOB-CRM-1982/2019 and GOB-CRM-247/2019 were also handed in and admitted as exhibit 'A' and exhibit 'B', respectively. The applicant was specifically asked if he has an objection to the handing in these records, and he did not object to same being handed up. Further records were also submitted, such as a POL10 marked exhibit 'C', without any objection from the applicant. The applicant's rights to cross-examination were also explained. The rights of the applicant to enable him to prepare for his defence were explained and he was alerted to disclose to the public prosecutor any documents in his possession that he intended to use. The record of proceedings in case number GOB-CRM-1983/2019 was not handed up, as the s 32 application was brought under this case number and is also the subject matter of this review.

[51] Section 32(1) of POCA states, 'whenever a defendant is convicted of an offence the court convicting the defendant may, on application of the public prosecutor, enquire into any benefit which the defendant may have derived from -

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; or
- (c) any criminal activity which the court finds to be sufficiently related to the offences, referred to in paragraph (a) or (b).'

[52] Section 32(1)(c) of POCA has extended the scope of the application of the section to not only the offence that one has been convicted of, but to any other criminal activity which the court finds to be sufficiently related to the offences that the applicant is convicted of. It is of course expected that there should be evidence to back up such criminal activity. In any event, in both GOB-CRM-1982/2019 and GOB-CRM-247/2019, it was specifically stated that a s 32(1) of POCA application will be made. What is important to note is that s 32(6) of POCA sets limits on the amount that the court can order to be confiscated.

[53] It provides that:

'(6) The amount that a court may order the defendant to pay to the State under subsection (2)-

- (a) may be realised from-
 - (i) the defendant's property which is subject to a restraint order; or
 - (ii) any other realisable property of the defendant, and
- (b) must not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with this Chapter.'

[54] Furthermore, the actual written application or notice in terms of s 32(1) of POCA, which the public prosecutor submitted to court with the authorisation, cites all case numbers involved in the confiscation application. Based on the above, I do not find it inappropriate that these three cases were heard in one application, as all relevant records were produced in court, and the court has the power to consider all

three cases in one confiscation application. The court is entitled to look at the evidence that was presented in the criminal case in a confiscation application. There is nothing amiss with the procedure adopted in the confiscation application. The reasoning in *Shaik supra* further fortifies my position.

[55] On 16 June 2021, the matter was further postponed to 28 June 2021 to continue the enquiry. In the meantime, the applicant applied for legal aid, which resulted in further postponements. However, on 28 February 2022, when the matter came before court, the applicant informed the court a quo that he had cancelled the legal aid application and that he would represent himself. As a result, the matter was again postponed to 26 April 2022 for the continuation of the application. The applicant was absent in court when the case was called on 26 April 2022. This fact is common cause between both parties. The applicant advanced the reasons for his absence because he was emotionally stressed. The applicant alleged that the distress resulted from the fact that his cell was searched and a cell phone was recovered. The officials who searched the holding cell apparently alleged that the cell phone recovered belonged to the applicant, and this fact infuriated the applicant. As a result of this anger, he refused to go to court for the continuation of the confiscation enquiry.

[56] It is not clear why the applicant's anger was directed to court or toward the application. The officials at the correctional facility or whatever happens at the correctional facility have no bearing on the confiscation application. As a result of the applicant's refusal to attend court, the matter was postponed to the following day, 27 April 2022, for continuation, in the hope that the applicant will come to his senses and attend court. The applicant, however, persisted in his refusal and again refused to go to court. Evidence from A/Comm Platt, the officer in charge of the Gobabis Correctional Facility, had to be led in an application brought by the State to continue with the proceedings in the absence of the applicant. The application was granted by the court a quo and correctly so, in my view.

[57] The applicant now complains in this review proceedings that he has not been afforded the opportunity to be heard. This argument by the applicant is unsound. Firstly, the *audi alteram partem* principle was exercised in the applicant's favour on

26 April 2022, when the applicant did not appear in court on his own refusal. Then again, on 27 April 2022, when the applicant was expected to be in court. Due to the fault of no one but the applicant himself, he refused to attend court because he was accused of having a cell phone in the holding cell. I must pause and hasten to state that if one has regard to the applicant's admissions in the s 112(b) admissions he made when he pleaded guilty to all the offences, the offences that the applicant was convicted of were all committed while using a cell phone, while the applicant was in the cells. He obviously tended to keep and use a cell phone to commit offences and defraud unsuspecting innocent parties while in custody. For the applicant to now cry foul to such an extent that he refuses to go to court and threatens to cause chaos if he is taken to court is beyond comprehension.

[58] The reliance by the applicant on s 83 of POCA in a confiscation application after he has already been found guilty also has no basis. A confiscation enquiry is not subject to s 83 of POCA. The Inspector-General can give authorisation in appropriate cases. The applicant's case is not one such case. I need not take this point any further.

[59] As stated in the preceding paragraphs, reviews are not about whether the judgment or outcome is correct. It is concerned with whether the presiding officer committed any irregularity during the proceedings. In reviewing the record of proceedings in this matter, I find no such irregularity that may vitiate the proceedings. There are no merits in the applicant's application, and it stands to be dismissed.

Costs

[60] As a general rule, costs should be awarded to the successful party. However, the applicant is a lay litigant and an inmate at that, currently serving long-term imprisonment and has done so since 2012. I, therefore, decided against granting a cost order against the applicant.

[61] In light of the foregoing, the application for review must fail, and the following order is made:

1. The applicant's review application is dismissed.

2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

JS Prinsloo
Judge

APPEARANCES:

APPLICANT:

J B Fredericks

In person

Windhoek

1st to 3rd RESPONDENTS:

C Piccanin

Office of the Government Attorney

Windhoek