

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Number: HC-MD-CIV-MOT-POCA-2022/00487

Interlocutory case number: INT-HC-RECOD-2023/00481

In matter between:

MAREN BRYNARD DE KLERK

APPLICANT

and

THE PROSECUTOR – GENERAL

FIRST RESPONDENT

CELAX INVESTMENT (PTY) LTD

SECOND RESPONDENT

**THE CURATOR BONIS OF DE KLERK,
HORN & COETZEE LEGAL PRACTITIONERS
INC (PTY) LTD**

THIRD RESPONDENT

Neutral citation: *De Klerk v The Prosecutor-General* (HC-MD-CIV-MOT-POCA-2022/00487) [2024] NAHCMD 247 (24 May 2024)

Coram: UEITELE J

Heard 04 April 2024

Delivered: 24 May 2024

Flynote: Legislation — Prevention of Organised Crime Act 29 of 2004 (POCA) — Warrant of Arrest — Rescission of the order preserving the property — Section 99 of POCA — A person who may be classified as a fugitive from justice may not participate in any proceedings under chapter 5 and 6 of POCA for as long as he or she remains a fugitive from justice.

Summary: On 18 October 2022, the first respondent, on an ex parte basis, approached this court by way of notice of motion seeking, amongst other, a preservation of property order as contemplated in s 51 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The Court, amongst other orders, ordered that an amount of N\$4 681 518,28 in the Bank Windhoek account number NPD 3001930059 in the name of De Klerk, Horn and Coetzee Legal Practitioners Inc. (Pty) Ltd 2017/00 Trust and an amount of N\$1 870 941,54 in Nedbank account number 11000055095 held in the name of Mr de Klerk, be preserved. The Court further granted the Prosecutor General leave to serve the preservation order on Mr de Klerk and Celax Investment (Pty) Ltd, by way of substituted service.

When the first respondent approached this Court seeking a preservation of property order, she premised the application on the basis that there are reasonable grounds to believe that the properties sought to be preserved are the proceeds of unlawful activities, namely: fraud, alternatively theft under false pretences; corrupt activities in contravention of the Anti-Corruption Act;¹ money laundering offences in contravention of sections 4, 5 and 6 of POCA and racketeering offences in contravention of s 2(1) of POCA.

On 15 December 2022, the first respondent served the Court Order of 02 December 2022 (the preservation order) through electronic mail on both Mr de Klerk and Celax Investment (Pty) Ltd. Approximately three months after the preservation order was served on Mr de Klerk, he (that is de Klerk) on 29 March 2023, launched an application to rescind the preservation order of 02

¹ Anti-Corruption Act 8 of 2003.

December 2022 and to be granted leave to file an affidavit contemplated under s 52(3) of POCA. It is this application which is the subject of this ruling.

Held that: section 99 identifies two classes of persons. The first class of persons identified by the section is a person who has been summoned or warned to appear in Court on a specific date or otherwise made aware that he or she has to appear in Court on a specific date and failed to appear in Court on that date. The second class of persons identified is a person in respect of whom a warrant for his or her arrest has been issued and whose attendance in Court cannot be secured despite all reasonable steps having been taken to execute the warrant. In addition to identifying the classes of persons, the section prohibits a person who falls in any of the two identified classes to participate in proceedings under chapter 5 or chapter 6 of the POCA.

Held that: the general principle is that, unless the contrary is expressly enacted or so plainly implied, the Courts must give effect to it, legislation is applicable only to persons in the country or doing business in the country in a way that subjects the person to local jurisdiction. Extraterritorially effective jurisdiction is possible if the terms of the legislation cannot effectually be applied or its purpose cannot be achieved, unless it has extraterritorial effects or the legislation gives effect to a policy that the particular legislature must have intended to apply beyond the borders of the country.

Held that: chapter 6 of POCA (which consists of sections 50 to 73) provides for a two-stage procedure for the forfeiture of proceeds of unlawful activities. The two stages are complex and tightly intertwined, both as a matter of process and substance.

Held further that: the High Court cannot simply ignore an Act of Parliament and place reliance directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.

ORDER

1. Mr Maren Brynard De Klerk is a person falling under the class of persons identified under s 99, who are prohibited from participating in proceedings under chapter 5 or 6 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004).
2. Mr Maren Brynard De Klerk's application for the rescission of the preservation order granted on 02 December 2022 and leave to file a section 52(3) of POCA affidavit is struck.
3. The applicant, Maren Brynard De Klerk must pay the Prosecutor General's costs of this application.
4. The matter is removed from the roll and regarded as finalised.

RULING

UEITELE J:Introduction

[1] The applicant, Maren Brynard de Klerk (Mr de Klerk), was until January 2020 in practice as a legal practitioner in Windhoek in the firm or style of De Klerk, Horn & Coetzee Incorporated (DHC Inc). During January 2020, Mr de Klerk left Namibia and has since not returned.

[2] On 02 December 2022, this Court granted a final preservation of property order in terms of s 51 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The Court, amongst others, ordered that an amount of N\$4 681 518,28 in the Bank Windhoek account number NPD 3001930059 in the name of De Klerk, Horn and Coetzee Legal Practitioners Inc (DHC) 2017/00 Trust and an amount of N\$1 870 941,54 in Nedbank account number 11000055095 held in the name of Mr de Klerk, be preserved. The Court further granted the Prosecutor General leave to serve the preservation order on Mr de Klerk and Celax Investment (Pty) Ltd, by way of substituted service.

[3] On 15 December 2022, the Prosecutor General served the Court Order of 02 December 2022 (the preservation order) through electronic mail on both Mr de Klerk and Celax Investment (Pty) Ltd. Approximately three months after the preservation order was served on Mr de Klerk, he (that is de Klerk) on 29 March 2023, launched an application to rescind the preservation order of 02 December 2022 and to be granted leave to file an affidavit contemplated under s 52(3) of POCA. It is this application which is the subject of this ruling.

Background

[4] It is necessary for the reader to place the matter and the present application in proper perspective. Most of the issues giving rise to the application is largely common cause.

[5] During November 2019, the Namibian public was consumed by certain revelations relating to the fishing industry in Namibia. The revelations were produced by WikiLeaks and aired on Al Jazeera. Allegations which suggest impropriety, including alleged acts of bribery and corruption, money laundering and other alleged crimes were aired and widely disseminated in Namibia. Certain individuals were arrested in the aftermath of the WikiLeaks revelations. The entire scenario has since been colloquially referred to in Namibia as the 'Fishrot scandal'.

[6] On 17 January 2020, Mr de Klerk, in respect of whom allegations circulated that he also participated in the 'Fishrot scandal', after he, on 15 and 16 January 2020, gave a statement to the Namibian Police and the Anti-Corruption Commission respectively, left Namibia and has been out of this Republic since then. He does not disclose his whereabouts and even the Court is in the dark as to where exactly he is. The affidavit in support of the rescission application appears to have been commissioned in Kwazulu Natal whereas in his affidavit he appears to intimate that he is in the Western Cape.

[7] On 29 April 2021, the Prosecutor General applied, under s 43 of the Criminal Procedure Act 51 of 1977, to the Magistrate's Court of Windhoek for a warrant for the apprehension of Mr de Klerk. The warrant for the arrest of Mr de Klerk was made on the strength of criminal charges relating to racketeering, contraventions of POCA and fraud levelled against Mr de Klerk. On the same day (that is on 29 April 2021) a Magistrate of the Magistrate's Court of Windhoek issued a warrant of arrest and ordered any peace officer empowered by law, to execute criminal warrants to, upon sight of Mr de Klerk, apprehend or detain him and to bring him before the High Court of Namibia (Main Division) to be examined and to answer to the charges levelled against him.

[8] On 19 May 2021, the Minister of Justice in Namibia addressed an extradition request to the Minister responsible for Justice and Correctional Services in South Africa for the surrender of Mr de Klerk from the Republic of South Africa to the Republic of Namibia. The request for the extradition of Mr de Klerk was based on s 4(1) of the South African Extradition Act 67 of 1962, as amended. The purpose for the extradition request was stated to be for prosecuting him on the criminal charges levelled against him in the Republic of Namibia. The proceedings for the extradition of Mr de Klerk are still pending in the South African Courts.

[9] On 18 October 2022, that is approximately two years after the 'Fishrot scandal' exploded, the Prosecutor General, on an *ex parte* basis, launched an application in this Court under s 51, Chapter 6 of POCA to preserve certain

properties being an amount of N\$4 681 518,28 in a Bank Windhoek account number NPD-3001930059 held in the name of De Klerk, Horn and Coetzee Legal Practitioners Inc 2017/00 Trust and an amount N\$1 870 941,54 in a Nedbank account number 11000055095 held in the name of Mr de Klerk (the preservation application).

[10] In the preservation application the Prosecutor General made the allegations that a scheme was hedged by certain individuals to unlawfully sell off state fishing quotas through a company known as Fishcor. The Prosecutor General alleged that, in order for the individuals and entities to unlawfully receive the payments for the selling off the state fishing quotas, Mr de Klerk was approached to allow DHC Inc's trust account to be used as conduit to receive and pay moneys from the sale of the fishing quotas. The Prosecutor General furthermore alleged that Mr de Klerk consented to allow DHC Inc's trust account to receive moneys from, amongst other companies, Fishcor and to pay the moneys so received to identified individuals, entities and companies.

[11] The Prosecutor General further alleged that Mr de Klerk was also instructed to create a special purposes vehicle, by means of a private company, of which he would be the nominee shareholder and director on behalf of two of the persons who are accused persons in the 'Fishrot scandal'. The company so created was Celax Investments Number One (Pty) Ltd (Celax Investments).

[12] The Prosecutor General furthermore alleged that Mr de Klerk made use of Celax Investments on the instructions of the two accused persons and acted as their intermediary to receive funds from different companies and entities, and to further distribute the funds to persons involved in the fraudulent scheme or to their entities and other beneficiaries. It is the Prosecutor General's allegations that by means of this *modus operandi*, an amount of approximately N\$81 880 500 was paid to DHC Inc's trust account and was from that trust account paid directly to Celax Investments and distributed to the different individuals, companies and entities.

[13] The Prosecutor General further alleged that the amounts of N\$4 681 518,28 held at Bank Windhoek in the name DHC Inc Trust Account and the amount of N\$1 870 941,54 in the Nedbank account number 11000055095 held in the name of Mr de Klerk are the balances left from the N\$81 880 500. It is on that basis that she applied for the preservation of those amounts.

[14] On 28 October 2022, this Court issued a rule nisi preserving the property. The Court furthermore ordered in para 4 of that order, that the Prosecutor General effect service of the preservation of property order and the application on Mr de Klerk and the *curator bonis* of DHC Inc, and in terms of s 52(1)(b) of POCA cause notice of this order (that is the order of 28 October 2023) to be published in the *Government Gazette* as soon as practicable after the final preservation of property order is granted.

[15] On 03 November 2022, the order issued on 28 October 2022 was varied. The effect of the Varied Order was to delete para 4, which directed the Prosecutor General to effect service of the preservation of property order and the application on Mr de Klerk and the *curator bonis* of DHC Inc, and to, in terms of s 52(1)(b) of POCA, cause notice of the order to be published in the *Government Gazette*. In the Varied Order paragraphs 8 and 9 read as follows:

‘8. Once the provisional preservation of property order is confirmed, prayers 9 -13 will come into effect.

9. The applicant (that is the Prosecutor General) must:

9.1. Effect service of the preservation of property order and the application on Mr Maren De Klerk, Celax Investments Number One (Pty) Ltd and the *curator bonis* of DHC Inc.

9.2. In terms of section 52 (1) (b) cause notice of this order, in the form set out in Annexure A and Annexure B hereto, to be published in the *Government Gazette* as soon as practicable after the final preservation of property order is granted.’

[16] During November 2022, the Prosecutor General attempted to serve the provisional preservation of property order and the rule nisi on Mr de Klerk. She was, however, unsuccessful in her attempts. She, as a result, approached this Court and applied for leave to serve the final preservation order on Mr de Klerk by way of substituted service, which leave this Court granted. It is in line with the leave granted by this Court that Mr de Klerk was served with the final preservation order on 15 December 2023 through email.

The rescission application

[17] I indicated earlier in this judgment that on 29 March 2023, de Klerk approached this Court and applied, under s 58 of POCA for the rescission of the order preserving the property. Mr de Klerk grounds his application on his contention that this Court, on 28 October 2022, erred when it did not order that the provisional preservation order of 28 October 2022 be served on him. He further contends that the Court prematurely confirmed the rule nisi on 02 December 2022, because by that date (02 December 2022) the provisional preservation order had not yet been served on him. He further attributes his failure to comply with s 52(3) of POCA on the fact that he was not served with the order of 28 October 2022 or the Varied Order for that matter.

[18] The Prosecutor General opposed the rescission application. She opposed it on basically three grounds. The first ground of her opposition is based on s 99 of POCA, which provides that a person who may be classified as a fugitive from justice may not participate in any proceedings under chapter 5 and 6 of POCA for as long as he or she remains a fugitive from justice. The second ground of her opposition is based on s 52(3), whereby she contends that Mr de Klerk failed to file a notice in terms of s 52(3) as required by POCA and he therefore lacks the necessary locus standi to institute proceedings under s 58. The third ground is her contention that, under the Varied Order of 28 October 2022, the obligation to serve the preservation order and the application for a preservation order only arises once the provisional preservation order and the rule nisi are confirmed.

[19] If the Prosecutor General's contention that Mr de Klerk is, in terms of s 99 of POCA, barred from participating in the proceedings under chapters 5 or 6 of POCA is good, then that will be the end of Mr de Klerk's application for rescission. For that reason, I will proceed to consider the question of whether or not Mr de Klerk is a person contemplated under s 99 of POCA.

Section 99 of the POCA

[20] Section 99 of the POCA deals with persons who are prohibited from participating in proceedings under chapters 5 or 6 of the POCA. This section states that:

'99 Fugitives precluded from participating in proceedings.

A person –

(a) who has been summoned or warned to appear in court on a specific date or otherwise made aware that he or she has to appear in court on a specific date and failed to appear in court on that date; or

(b) in respect of whom a warrant for his or her arrest has been issued and whose attendance in court cannot be secured in spite of all reasonable steps having been taken to execute the warrant, must not participate in any proceedings under Chapter 5 or 6 for as long as he or she continues to fail to appear in court or that warrant for arrest remains in force and unexecuted.'

[21] Section 99 identifies two classes of persons. The first class of persons identified by the section is, a person who has been summoned or warned to appear in Court on a specific date or otherwise made aware that he or she has to appear in Court on a specific date and failed to appear in Court on that date. The second class of persons identified is, a person in respect of whom a warrant for his or her arrest has been issued and whose attendance in Court cannot be secured, despite all reasonable steps having been taken to execute the warrant. In addition to identifying the classes of persons, the section

prohibits a person who falls in any of the two identified classes to participate in proceedings under chapter 5 or chapter 6 of POCA.

[22] There are thus two questions that need to be answered in this matter. The first question is whether Mr de Klerk is a person falling under the classes identified in s 99. The second question being whether Mr de Klerk's rescission application amounts to a proceeding under chapter 5 or 6 of the POCA. Counsel for the Prosecutor General argued that, Mr de Klerk is a person falling under the class of persons contemplated under s 99. Counsel for Mr de Klerk, on the other hand, argued that Mr de Klerk is not a person falling under the classes identified in s 99. Counsel furthermore argued that Mr de Klerk's application is not a proceeding as contemplated in s 99.

Does Mr de Klerk fall under a class of persons identified under s 99?

[23] In his founding affidavit, Mr de Klerk states that he cannot disclose his current whereabouts because his life is in danger and has been in danger for the past three years. He alleges that he has been under immense pressure. For instance, during or about December 2019, the compliance officer of DHC Inc, Ms Celest Coetzee allegedly received an SMS from an unknown number, which stated: "Maren can run, but he cannot hide". He interpreted this SMS to be a clear, present and direct threat to his personal safety.

[24] He states that after his arrival in South Africa on 17 January 2020, he became more stressed about the whole situation and he started having heightened fears about his personal safety. Due to his extreme anxiety and major depression, he was, on 25 January 2020, admitted to the West Beach Clinic in South Africa for observation and treatment. He was then diagnosed with severe depression and also with severe post-traumatic stress disorder.

[25] He continued and stated that the location of his hospitalization, at the time, was not known beyond his immediate family. He was due to be released from the Clinic on 14 February 2020 at approximately 12h00. At approximately 10h00 that day, a nursing sister at the Clinic informed him that three males at

the reception who presented themselves as “police officials” were looking for him. They indicated that they were from “Crime Intelligence” and that they were there to “take him”. They did not show their appointment certificates or identify themselves in person to the staff at the Clinic. No documentation, such as a Warrant of Arrest, was produced to the staff at the Clinic. The Clinic staff accordingly, refused to release him and the Psychiatrist and the nursing sister indicated to the “police officials” that his treatment had been extended for at least five more days.

[26] He states that, with the assistance of his legal representatives, he established that the three persons who alleged that they were “police officials” were not from the local Provincial Crime Intelligence Unit operating in the Western Cape. This indicated to him that the people that were looking for him were indeed not South African Police Officials but instead rogue agents sent to either abduct or kill or both abduct and kill him. He states that he believes that the three men had the clear intention of kidnapping him and ultimately, kill him to prevent him from revealing any of the evidence in his possession or testifying in the “Fishrot” case. He states that this is the primary reason why he has not returned to Namibia.

[27] He deposed that, should he return to Namibia, he fears that he could be physically harmed or even killed. He further deposes that he is not hiding from Court but is literally hiding to protect his own life. He states that he has no choice but to hide since he believes that he cannot be protected by either the Anti-Corruption Commission, the Namibian Police or the Prosecutor General. He furthermore deposed that, during the year 2021, he was informed by persons, whose names he cannot disclose because their careers as Intelligence Officers would be severely compromised, that a “HIT” was ordered on his life.

[28] He states that he is intently aware of the powerful forces at play in the ‘Fishrot scandal’. He further states that he has either directly or indirectly implicated a number of key accused and other persons in the “Fishrot” criminal matter. He states that he still continues to fear for his life and frequently has to

rotate between residences to protect his life and safety. He states that the reality is further that he has never been given any insurance by either the Anti-Corruption Commission or the Prosecutor General's Office that his safety would be secured, if he returns to Namibia. He states that this clearly distinguishes him from a mere fugitive from justice who tries to escape the jurisdiction of the Court.

[29] In para 10 of her answering affidavit to Mr de Klerk's affidavit in support of his application for the rescission of the preservation order, the Prosecutor General contends that it is undisputed that on 21 April 2021, a warrant for the arrest of Mr de Klerk was issued out of the Windhoek Magistrate's Court, which remains unexecuted. She accordingly submitted that Mr de Klerk meets all the attributes of a person identified in s 99(b) of the POCA and is thus, de Klerk is a person contemplated under s 99. Accordingly, de Klerk is a fugitive from justice for the purpose of s 99 of the POCA.

[30] Mr de Klerk, in his replying affidavit, contends that the Prosecutor General's interpretation of s 99 is constitutionally offensive. He relies on the reasons that he set out in his founding affidavit as the reasons why he remains outside the jurisdiction of this Court. He furthermore reasoned that on 01 June 2023, he was arrested by members of the South African Police Service (SAPS) pursuant to the execution of a warrant for his arrest issued by the Magistrates Court in Paarl² on or about 01 February 2022 in terms of s 5 (1)(b) of the South African Extradition Act 67 of 1962. He continued and reasoned that following his arrest, he appeared in the Paarl Magistrates Court on 2 June 2023 and applied to be released on bail. He states that he was granted bail on certain conditions, which conditions he complies with.

[31] Mr de Klerk furthermore reasoned that, by virtue of the warrant for his arrest, the filing of an indictment in which he is listed as an accused person; the application for his extradition and the subsequent granting of bail to him, he has the requisite *locus standi* to move the application for rescission and more importantly, since he has submitted himself to the juristic process initiated by

² Paarl is a Town situated in the Western Cape Province of South Africa.

the Prosecutor General, there can be no scintilla of doubt in law that he can no longer be regarded as a fugitive.

[32] Mr de Klerk's reasoning is flawed for one simple reason. There is a general principle that, unless the contrary is expressly enacted or so plainly implied, the Courts must give effect to it, legislation is applicable only to persons in the country or doing business in the country in a way that subjects the person to local jurisdiction. Extraterritorially effective jurisdiction is possible if the terms of the legislation cannot effectually be applied or its purpose cannot be achieved, unless it has extraterritorial effects or the legislation gives effect to a policy that the particular legislature must have intended to apply beyond the borders of the country.³

[33] The warrant for the arrest of Mr de Klerk was issued by the Windhoek Magistrate's Court in Namibia, under the Criminal Procedure Act. The attendance of Mr de Klerk in a Court that cannot be secured, is his attendance in a Namibian Court. The warrant for the arrest of Mr de Klerk that was executed on 02 June 2023, is a warrant that was issued by a foreign Court and not the warrant of arrest issued out of the Windhoek Magistrates Court on 29 April 2021. Accordingly, the attendance of Mr de Klerk was in a foreign Court and not in a Namibian court.

[34] I agree with the submission by counsel for the Prosecutor General that the reference to "court" in s 99 of the POCA can only be interpreted to relate to the appearance of the person in the Court that issued the warrant of arrest and that court must be a Namibian Court. In fact, the warrant of arrest which is attached to the Prosecutor General's answering affidavit specifically commands, any peace officer who is empowered to execute criminal warrants, to apprehend or arrest and detain Mr de Klerk and bring him before the High Court of Namibia (Main Division).

³ See the English case of *R v Secretary of State for the Home Department* [2023] UKSC 23.

[35] I have regard to the reasons advanced by Mr de Klerk as to why he has remained outside the jurisdiction of this Court but those reasons are unsubstantiated by objective facts. What is telling about the reasons is the silence of Mr de Klerk in both his founding and replying affidavits. As regards his extradition proceedings, he says nothing about those proceeding. He does not inform the Court why he opposes his extradition to Namibia. His reasons also do not reveal why South Africa or such other country for that matter is presumed to be a better safe haven than Namibia. He does not disclose the efforts he has made to ensure that his life will be protected, if he returned to Namibia. He does further not disclose the facts on which his belief that the security agencies (ACC, NAMPOL, and the PG) are incapable of securing his safety, if he is to return to Namibia.

[36] The wording of s 99 is relatively straight forward, in that it provides that a person in respect of whom a warrant of arrest is issued, and the warrant remains unexecuted, that person cannot participate in the proceedings under chapters 5 or 6 of POCA for as long as the warrant remains unexecuted. I therefore find that, because the warrant for the arrest of Mr de Klerk was issued by a Namibian Court (the Windhoek Magistrates Court) remains unexecuted, Mr de Klerk is a person falling within a class of persons contemplated in s 99(b) of POCA. He is a person in respect of whom a warrant of arrest has been issued and whose attendance in the High Court of Namibia (Main Division) cannot be secured despite all reasonable steps taken to execute the warrant.

Is Mr de Klerk's application for rescission, proceedings as contemplated under s 99?

[37] The second question that I must consider is whether the rescission and condonation relief sought by Mr de Klerk are proceedings as contemplated under s 99 of POCA. Counsel for Mr de Klerk argued that s 52(6)(b) precludes participation in forfeiture proceedings while s 60(4)(b) permits a Court to regulate further participation in proceedings concerning forfeiture. Counsel continued and argued that because both ss 58(4)(b) and 60(1) do not make

those sections subservient to s 99, a textual, contextual and purposive reading of s 99 points to a construction that the reference to “proceedings” is reference to participation in proceedings relating to confiscation and forfeiture applications only.

[38] In *Prosecutor General v Kamunguma*,⁴ the Supreme Court held that Chapter 6 of the POCA (which consists of ss 50 to 73) provides for a two-stage procedure for the forfeiture of proceeds of unlawful activities. The two stages are complex and tightly intertwined, both as a matter of process and substance. Section 51(1) of the POCA empowers the Prosecutor General to apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

[39] Section 51(2) of the POCA requires of the Prosecutor General to prove that the property sought to be preserved is either the proceeds of unlawful activities or an instrumentality of an offence specified in schedule 1 to the POCA. The High Court must grant the order if it is satisfied that there are 'reasonable grounds' for the making of the order. After a preservation of property order has been granted, the Prosecutor General must serve it on any party known to her to have an interest in the preserved property and publish the notice of the order in the *Government Gazette*.⁵

[40] Section 52(3) of the POCA requires of any person who has an interest in the preserved property (preserved in terms of s 51) to give notice of his or her intention to oppose the making of a forfeiture order. This must be done within 21 days after the notice of the preservation order has been given to the person concerned or 21 days after the notice has been published in the *Government Gazette*.⁶ If the person referred to s 52(3) has not given a notice in terms of s 52(3) or the notice is not accompanied by an affidavit as required by s 52(5), then such person is not entitled to receive notice of the application

⁴ *Prosecutor-General v Kamunguma and Another* 2019 (3) NR 651 (SC).

⁵ Section 52(1)(a) and (b).

⁶ Section 52(4)(b).

for a forfeiture of property order in terms of s 59(2) and is therefore not entitled to participate in the forfeiture proceedings.⁷

[41] Section 60 of the POCA provides for an exception to the provision that a person, who has not given a s 52(3) notice, may not participate in the forfeiture proceedings. That section provides that this Court may condone the failure of a person to give a s 52(3) notice and grant such person leave to participate in the forfeiture proceedings, if the court is satisfied on good cause shown that the person was unaware of the preservation of property order or that it was impossible for him or her to give notice in terms of s 52(3) and has an interest in the property, which is subject to the preservation of property order.

[42] The Concise Oxford English Dictionary defines 'proceedings' as an event or series of activities with a set procedure. It continues and states that in law the term 'proceedings' refers to action taken in a Court to settle a dispute. It will therefore be fair to state that the term proceedings refers to any procedural means of seeking redress from a Court or tribunal; the regular progression of a lawsuit or a legal action.

[43] Having regard to the definition of the term proceedings, it is clear that s 99 is intended to be broader than ss 52(6), 58(4) and 60. Section 52(6) is limited in its operation to disentitle a person from receiving a notice for forfeiture proceedings, s 58(4) only identifies the persons who may apply for the variation or rescission of a preservation order and s 60 empowers the court to condone the failure of a person to give notice as contemplated in s 52(3) of the POCA.

[44] The three sections (that is ss 52(6), 58(4) and 60) are therefore activity specific, whereas s 99 is broader and disentitles a person from participating in all activities relating to the preservation and forfeiture of properties including the activities mentioned in those three sections. I therefore find that, there is no

⁷ Section 52(6).

substance in the argument that a rescission application under s 58 is not a proceeding as contemplated under s 99 of the POCA.

[45] Counsel for the applicant invited this court to, in the event that it finds that the rescission application amounts to 'participation in proceedings' for the purpose of s 99, of its own motion consider, and on the available uncontested facts, grant the rescission relief.

[46] In *Prosecutor-General and Others v Assegaai and Others*,⁸ this court relying on the South African Constitutional Court's decision of *Phillips and Others v National Director of Public Prosecutions*,⁹ reasoned that the High Court cannot simply ignore an Act of Parliament and place reliance directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law. The Court furthermore expressed its doubt whether the inherent jurisdiction of the Court is such that it empowers a Judge of the High Court to make orders which negate the unambiguous expression of the legislative will.

[47] For those reasons, I cannot accede to counsel's invitation for the simple reason that s 99 does not confer upon this Court a discretion to allow a person contemplated under s 99 to participate in the proceedings, including seeking the relief he seeks, for as long as the warrant for his arrest remains unexecuted. To do so would be negating the unambiguous expression of the legislative will.

Costs

[48] The ordinary rule that applies in matters of costs is trite. The costs follow the event. It is obvious in this matter that the Prosecutor General was successful in her opposition of the rescission application. There is, in the circumstances, no reason why the ordinary rule must not apply in this case.

Order

⁸ *Prosecutor-General and Others v Assegaai and Others* 2020 (1) NR 25 (HC).

⁹ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC).

[49] For the reasons and conclusions set out in this judgment, I make the following orders:

1. Mr Maren Brynard De Klerk is a person falling under the class of persons identified under s 99, who are prohibited from participating in proceedings under chapter 5 or 6 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004).
2. Mr Maren Brynard De Klerk's application for the rescission of the preservation order granted on 02 December 2022 and leave to file a section 52(3) of POCA affidavit is struck.
3. The applicant, Maren Brynard De Klerk must pay the Prosecutor General's costs of this application.
4. The matter is removed from the roll and regarded as finalised.

S F I Ueitele
Judge

APPEARANCES:

APPLICANT:

J Diedericks
Instructed by P D Theron & Associates,
Windhoek

1ST RESPONDENT:

M Boonzaier
Instructed by Office of the Prosecutor General,
Windhoek

2nd and 3rd RESPONDENTS:

No appearance.