



REPORTABLE

CASE NO: SA 25 / 2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between

PROSECUTOR-GENERAL

Appellant

and

ONESMUS NGHITUMU TAAPOPI

Respondent

Coram: SMUTS JA, CHOMBA AJA and MOKGORO AJA

Heard: 5 October 2016

Delivered: 19 June 2017

Summary: The respondent had enquired from the Namibian Defence Force (NDF) about the possibility in providing accommodation services to the NDF, as he had indicated that he 'had a guest house' that could be utilised for such purposes. Having been invited to do so, he submitted a quote in the amount of N\$2 652 810, which was accepted.

After submitting the said documents, later on inquiry the Ministry of Trade and Industry confirmed that the close corporation was instead, registered in the name of the respondent's mother, Mrs Eunike Hamutenya, but by then, the payment had already been made into his Standard Bank account.

On 18 September 2014, it turned out that an electronic payment in the amount of N\$1 061 124 had been made from the Government of Namibia State account for the Ministry of Defence into a Standard Bank account held in the name of Sydney Hassan & Sons Trading CC. A day later, on 19 September 2014, a cheque for N\$800 000 with reference as 'salary', was electronically transferred into a First National Bank account held in the name of Tulinane P S Hiskia, who turned out to be the respondent's minor son. On that same day, a cheque for N\$250 000 was cashed on the Standard Bank account of the CC, with a positive balance of only N\$1491,15 remaining.

Having approached the High Court to be heard on an urgent basis, the Prosecutor-General (the PG), on 10 October 2014, obtained a provisional preservation of property order, on an *ex parte* in respect of the positive balance of N\$800 000 on the First National Bank account which was in the respondent's minor son's name and in terms of s 51(2) of the Prevention of Organised Crime Act, 29 of 2004 (POCA).

On the return date, the respondent, *in limine*, raised a procedural defence that the *rule nisi* must be discharged in that the appellant had failed to comply with the mandatory provisions of reg 7(b) read with s 91(1) and (2) and s 100 of the POCA.

Regulation 7 requires that applications under several sections in the Act including s 51 should be brought on 7 days' notice to a respondent or any other person who may require notice.

Having reconsidered the issues including the requirements for such an application, the High Court upheld the procedural point and discharged the *rule nisi*, refusing to confirm the provisional order. Principally, the court's basis for the refusal was that the PG had not complied with the prescribed procedures stipulated in reg 7 of the POCA.

Following the decision in *Uuyuni*, the Supreme Court held that the approach to the interpretation of the relationship between ss 51(2), 91(2) and reg 7(b) should indeed be that the regulation would not apply in the case of the s 51(2) application. If it held otherwise, this would be in direct conflict with the *dictum* in *Uuyuni* which remains the authority regarding the *ex parte* nature of the application for a property preservation order in terms of s 51(2) of the POCA.

The Supreme Court was of the view that reasonable grounds had been shown for the belief that the property, being the positive balance in the First National Bank account of the respondent's minor son, had constituted the proceeds of unlawful activities, in particular, fraud and money laundering. The test in s 51(2) had therefore been met and once this is the case, it is peremptory that an order for the preservation of property be granted.

In the result, the appeal against the order of the High Court is upheld. Based on the findings and the conclusion arrived at in this matter, the costs in this case must follow the result.

APPEAL JUDGMENT

MOKGORO AJA (SMUTS JA and CHOMBA AJA concurring):

Introduction

[1] This matter is an appeal against the order of the High Court upholding an objection *in limine* to the granting of an *ex parte* application for a property preservation order in terms of s 51(2) of the Prevention of Organised Crime Act, 29 of 2004 (the POCA), without the seven-day notice required in reg 7(b) of the POCA Regulations (reg 7(b)).

[2] The appellant is the Prosecutor-General (the PG) and the respondent is Mr Onesmus Nghitumu Taapopi, the sole member of Sydney Hassan and Sons CC (the CC), who had, in the High Court, opposed the granting of the preservation order, not only on its merits but particularly on the basis of the procedural objection raised *in limine* as outlined above.

[3] The property concerned in this matter is a positive balance in a First National Bank account held in the name of Tulinane P S Hiskia (the property).

[4] The PG appeals against the whole of the High Court's judgment, asserting that the *rule nisi* should have been confirmed on the return date in that the *ex parte* application for the property preservation order had met the requirements of s 51(2) of the POCA. Thus, according to the PG, the High Court erred in upholding the *in limine* objection to the *rule nisi* on the basis that the seven-day notice requirement in reg 7(b) had not been met.

Factual background

[5] The respondent had enquired from the Namibian Defence Force (the NDF) about possible procurement opportunities to provide accommodation services to the NDF after, as was said, he indicated that he 'had a guest house', believed to be called Ace's Guest House. Having been invited to do so, he submitted a quote in the amount of N\$2 652 810, which was accepted. He then submitted an invoice in August 2014 for a 40% upfront payment which was not immediately paid as the quote apparently got lost. In an attempt to facilitate the payment process, the respondent was requested to submit his identity document (the ID), a letter from the bank confirming his account number and another confirming his ownership of the CC. In response to the latter request, the respondent submitted the founding papers of the CC. Later, on inquiry, the Ministry of Trade and Industry confirmed that the CC was instead registered in the name of the respondent's mother, Mrs Eunike Hamutenya, but by then the payment had already been made into his Standard Bank account.

[6] It turned out that on 18 September 2014, an electronic payment in the amount of N\$1 061 124 had been made from the Government of Namibia State

account for the Ministry of Defence into a Standard Bank account held in the name of Sydney Hassan & Sons Trading CC (the Standard Bank account).

[7] A day later, on 19 September 2014, a cheque for N\$800 000 with reference 'salary', was electronically transferred into a First National Bank account held in the name of Tulinane PS Hiskia, who turned out to be the respondent's minor son. On that same day of 19 September 2014, a cheque for N\$250 000 was cashed on the Standard Bank account of the CC, with a positive balance of only N\$1491,15 remaining. The NDF later confirmed that the payment into the Standard Bank account of the CC, as stated above, had been made representing 40% of the amount of N\$2 652 810 quoted for the provision of accommodation services requested by the NDF.

[8] On request by the director of the Ministry of Finance for details of the quotation, an enquiry at Ace's Guest House revealed that the respondent did not own the guest house. It was in fact owned by Mr Rodgers Kiyonga Ddungu who lives permanently in the United States of America. The latter was the owner of Lindrie Properties CC which traded as Ace's Guest House. The respondent, it turned out, was a regular client of the guest house and often brought clients to the guest house.

[9] An interview by the Anti-Corruption Committee (the ACC) of a Mr Ssendi Joseph (Mr Joseph), who claimed to represent the owner of the guest house, showed that in July 2014, the respondent had asked for a quote for 17 guests' accommodation over one year, running from 20 July 2014 to 20 July 2015. The

quote, amounting to N\$2 653 560, was provided on 4 July 2014. The owner, on learning that the 17 guests were NDF student soldiers, was not willing to accommodate 17 student soldiers for a year without the upfront payment of the total amount quoted.

[10] On 19 July 2014, the respondent obtained booked accommodation at the guest house for N\$450 per room for 15 guests, who he only later revealed to be the same NDF student soldiers for whom he had previously negotiated accommodation. The respondent indicated that he had nowhere else to accommodate them after he had 'won' the tender from the NDF. On 20 July 2014, the booking having been accepted, 16 NDF student soldiers were accommodated at the guest house. The respondent paid N\$84 000, bought 4 beds and a geyser, paid for water and some plumbing work done. He was then left with an outstanding amount of N\$184 400.

[11] In view of the NDF's refusal to make any further payments to the respondent, he did not make any further payments to the guest house.

[12] Investigations conducted by the ACC established that the respondent opened the Standard Bank account for the CC in March 2014. The documents he had submitted to Standard Bank, the Ministry of Trade and Industry and the NDF at the time falsely stated that he was the sole member of the CC. At that time, the sole member of the CC, as already mentioned, was the respondent's mother, Mrs Eunike Hamutenya, who confirmed that she had given the respondent authority to alter the CC registration from her name into the name of the respondent.

Respondent, nevertheless, thus became a sole member of the CC only on 9 September 2014.

[13] Regarding the invoices the respondent submitted to the NDF, a number of discrepancies had emerged: the address of the CC provided to the NDF was that of the guest house, the VAT registration numbers for invoices AGHO35-01 for N\$943 488 and AGH035-2 for N\$117 636 both dated 8 July 2014 had the same VAT registration number as the invoice AGH035 provided to the NDF by Ace's Guest house. Further, the invoices submitted by the respondent on 18 September 2014 after he had altered the CC with his own name had VAT registration number 6303847015 which was different from the first set of VAT registration numbers and so too were the post box addresses he provided before and after the registration changes.

[14] As for the Standard Bank and First National Bank accounts, information analysed by the ACC showed that the amount of N\$1 061 124 was then deposited by the NDF on 18 September 2014. The positive balance on 10 September 2014 was N\$34,15. An amount of N\$800 000 referenced simply as 'salary' was transferred from this account to an FNB account held in the name of the respondent's minor son and referenced in that account as 'school benefit'. Prior to this deposit, the balance in the son's FNB account had been N\$458,70. By 23 September 2014, subsequent to other activities on the Standard Bank account, the balance remaining was N\$1 491,15.

[15] Further information from the Receiver of Revenue was that the respondent's CC only registered for VAT on 1 October 2014 and was not registered for tax at all.

[16] Having approached the High Court to be heard on an urgent basis, the PG, on 10 October 2014, sought a provisional preservation of property order *ex parte* against the respondent on the positive balance of N\$800 000 on the FNB account which was in his minor son's name and in terms of s 51(2) of the POCA, which order was granted. On the return date, the respondent, *in limine*, raised the procedural defence that the *rule nisi* must be discharged in that the appellant had failed to comply with the mandatory provisions of reg 7(b) read with s 91(1) and (2) and s 100 of the POCA.

[17] Having reconsidered the issues including the requirements for such an application, the court however discharged the *rule nisi*, refusing to confirm the provisional order. Principally, the court's basis for the refusal was that the PG had not complied with the prescribed procedures stipulated in reg 7 of the POCA. The PG, it was held, had failed to meet the seven day notice requirement in reg 7(b) and neither did she meet those in s 91 which permit her to dispense with the seven-day notice if, on application, the court grants the s 91 dispensation.

[18] Therefore the court did not consider and decide the merits of the case against the respondent in respect of the issue whether there are reasonable grounds that the property in question constituted the proceeds of crime in terms of

s 51(2) of the POCA and whether, therefore, a property preservation order must be granted.

The appellant's submissions

[19] The PG submits that the High Court erred in upholding the respondent's objection to the granting of the provisional order raised *in limine*. First, based on the interpretation of s 51 of the POCA, the PG contends that s 51(1) permits her to apply for a property preservation order once the requirements of s 51(2) had been met. Following the decision of this court in *Prosecutor-General v Uuyuni*¹, the High Court must, she contends, make the preservation order on an *ex parte* basis. In *Uuyuni*, the court held that s 51(2) clearly provides that *ex parte* applications

'must be granted without notice to any other person or the adduction of any further evidence from any other person'.²

[20] It is the contention of the PG that s 91(1) of the POCA provides that every application in terms of ss 25, 43, 51, 59 and 64 is required to be made in accordance with the process prescribed in reg 7(b). However, that is subject to s 91(2), (3) and (4) of the POCA. One of the reg 7(b) requirements, she contends is a notice of at least seven days to be given to a respondent and any other person to be served. Indeed, the seven day notice is mandatory, she contends, unless the High Court grants leave for a shorter notice to be served.³

¹ (SA 20-2013) [2015] NASC (2 July 2015) para 31.

² *Id* para 31.

³ See reg 7(b).

[21] As had been determined in *Uuyuni*, she argues, this court has confirmed that a s 51(2) application for a property preservation order must be made *ex parte*, in which, as a defining feature, there is no respondent.⁴

[22] Because an *ex parte* application by definition does not have respondents and s 51 does not require service on any other person, reg 7(b), the PG concludes, does not apply in the case of a s 51(2) *ex parte* application for a property preservation order. For that reason, there is no conflict between s 51(2) and reg 7(b). Thus the PG concludes, in this matter, an *ex parte* application was proper. Further, the PG contends there was, accordingly, no basis to apply to the High Court to dispense with the reg 7(b) notice.

[23] The PG has an alternative argument. She contends that even if reg 7 did apply, it would be *ultra vires* as the Minister lacks the authority to make a regulation which contradicts parliamentary enabling legislation. Regulations, the PG submits, must be interpreted *intra vires* their enabling legislation to preserve their validity but only when it is reasonable to do so. The reasonable interpretation which reg 7(b) must be given to preserve its validity, she concludes, is that it does not apply to s 51(2) *ex parte* applications. Any alternative interpretation would be unreasonable and would render it invalid. For that reason, the PG argues, the decision of the High Court that she had to apply for a s 91(2) order exempting her from the reg 7(b) seven-day notice as a requirement for a s 51(2) *ex parte* property preservation order was, therefore, incorrect.

⁴ *Id* n 1.

[24] Thus, the proper interpretation of the applicable legislation, the PG concludes, is that reg 7(b) does not apply as a requirement of s 51(2). For that reason, she was well within her rights to apply *ex parte* for a s 51(2) property preservation order without the reg 7(b) seven-day notice. And, in view of the non-application of reg 7(b), there was also no need for a s 91(2) application for exemption from the notice requirements of reg 7(b).

[25] If the High Court's interpretation were permitted to stand, the statutory right of the PG to proceed *ex parte* in an application for a property preservation order would have to be sought not in s 51(2), as was held in *Uuyuni*, but in s 91. In this case, argued the PG, the error of the High Court was to lose sight of the fact that reg 7(b) is subordinate legislation to s 51(2) and cannot be interpreted to vary its legislative authority as if together, they are one piece of legislation. The section must first be interpreted. And if the regulation purports to alter the interpretation of the section, it must be rendered invalid.

[26] The High Court's concern that any other interpretation of reg 7(b) would make inroads into the respondent's fair trial and common law rights, the PG submits, is misplaced. The purpose of the *ex parte* order is merely provisional, preventing the property from being disposed of before the legal proceedings take effect. So too are the *audi alteram partem* rights reserved for the application of a final order, a reasoning previously endorsed by the same High Court in *Shalli v Attorney-General & another*.⁵

⁵ (POCA 9/2011) [2013] NAHCMD 5 (16 January 2013).

[27] The PG had an alternative prayer in the event that the High Court's interpretation is found to be correct and it is this: an application was sought for the failure to comply with the Rules of Court if the PG was required to make a s 91(2) application, dispensing with the prescribed requirement for an application in terms of s 51. Thus, the non-compliance with reg 7(b) would, in any case, be covered, should, if so required, the exemption to comply with the regulation have been granted. Therefore, argues the PG, the High Court should have decided in her favour even on its own interpretation of the relevant legislation.

[28] Thus, she contends, the High Court, on either basis, ought to have considered and decided the merits of the application for a provisional property preservation order.

[29] Thus, submitted the PG, should this court dismiss the respondent's point *in limine*, it would be necessary to determine and decide the merits of the provisional property preservation order.

[30] In that regard, the PG further submits the applicable test in an application for a preservation order under s 51(2) of the POCA is that, based on the relevant facts, there are reasonable grounds to believe that the property in question is an instrumentality of unlawful activities or of an offence referred to in schedule 1 to the POCA, even where the facts are in dispute.

[31] Once the evidence, disputed or not, provides reasonable grounds for the belief, the test in s 51(2) is met and the court must grant the preservation of

property order. Thus, the PG argues further, because s 51(2) makes the granting of the order peremptory once a reasonable belief exists, the court must grant the property preservation order. Therefore, argues the PG, the court exercises no discretion in granting the order and must confirm the *rule nisi*.

[32] In the present case, submits the PG, it is for this court to determine whether, based on the evidence filed by the return date, there are reasonable grounds to believe that the N\$800 000 is the proceeds of crime or unlawful activities. Should this court make an affirmative finding in that regard, it would have no discretion to exercise but to grant the preservation of property order. The founding papers, the PG submits, do establish that there are reasonable grounds to believe that the N\$800 000 is the proceeds of the crime of fraud and money laundering listed in schedule 1. The court must, for that reason, consider the merits and confirm the preservation of property order.

The respondent's submissions

[33] The respondent takes a different view of the issues which are up for decision in this court. He essentially characterises the High Court's decision to discharge the *rule nisi* for non-compliance with reg 7 in the context of ss 91 and 100 of the POCA as discretionary. He thus questions whether a discretionary order is appealable and if so, whether the appeal may proceed without leave of the High Court.

[34] It is the respondent's argument that, based on the fact that the PG did not comply with the procedures prescribed under s 91 and reg 7 of the POCA, the

High Court, in exercising its discretion, refused to confirm the provisional order. That being the case, he asserts, the PG is appealing against a discretionary decision (based on the determination of facts) and that, in terms of settled law, makes the power of this court to interfere on appeal strictly circumscribed.

[35] He further questions whether the PG may 'attack' reg 7 collaterally without joining the Minister of Justice (who is the executive authority responsible for creating the regulations) and without impugning reg 7(b).

[36] Further, submits on the basis that the High Court has as yet not decided the merits of the preservation order in terms of s 51(2) of the POCA, nor whether the property constitutes proceeds or instrumentalities of a crime or unlawful activities, these issues are not *res judicata* before the High Court and therefore not ripe for an appeal before this court. In any case, he contends, the appeal could not proceed without leave of the High Court. Consequently, he further contends, the appeal must be struck from the court's roll.

[37] On the question whether this court may proceed with the determination of the property preservation order on the assumption that the High Court had erred in upholding the *rule nisi*, it is the submission of the respondent that this Court cannot do so, as the power to make preservation orders in terms of s 51(2) is that of the High Court. Thus, he contends, the question regarding the determination of the preservation order must be remitted to the High Court for further determination there as the court of first instance. In view of the apex nature of this court, it is

indeed primarily not a court of first instance but that of appeal and therefore of ultimate resort.

[38] Relying on *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others*⁶, the respondent contends that this court, being a forum of last resort, must be slow to decide matters as if it is a court of first instance. A court of first instance is, in its procedures, structured such that parties are given ample opportunity to make their arguments and in certain circumstances subject the disputes between the parties to oral evidence where if necessary the court can make credibility findings. On that basis, concludes the respondent, it would be inappropriate for this court, whose procedures are not suitably structured, to finally determine whether the property preservation order should be granted.

[39] Anyway, his argument proceeds in the alternative, even if the court may decide the merits of the property preservation order, a case has not been made out for the order to be granted. That is so, he contends, because the test for granting a s 51(2) order is whether an opposing affidavit had been filed. The court may thus grant the order where there is no such affidavit. In that event, the court will be entitled to apply the *Plascon-Evans* rule and grant the order once the s 51(2) prerequisites have been met. In this case, however, the respondent concludes, based on the fact of the filing of the opposing affidavit, this court must hear the respondent before determining whether the application for the property preservation order in terms of s 51(2) may be granted.

⁶ 2010 (2) NR 487 (SC).

[40] However, the argument proceeds, the High Court was correct in its refusal to grant the *ex parte* application for the property preservation order, determining that the reg 7(b) notice had not been complied with, thus refusing to confirm the provisional order and upholding the respondent's *point in limine*. It is the further submission of the respondent that the High Court order refusing to confirm the provisional order is not *res judicata* of the issues, opposing the submission of the PG in that regard. For that reason too, the argument goes, the order of the High Court is not appealable in this court.

[41] Before proceeding to determine whether reg 7(b) is a requirement in the s 51(2) application, it is necessary to dispose of two preliminary arguments raised by the respondent in this court.

Whether the High Court order is appealable before this court

[42] The contention of the respondent is that the order of the High Court is not appealable before this court in that the merits of the case had not yet been dealt with by the High Court for decision. The PG, however, submitted that the appeal is proper here, arguing that the decision of the High Court in respect of the provisional order is final and ripe for appeal in this court.

[43] In *Zweni v Minister of Law and Order*⁷, the court laid down three factors that determine the appealability of a judgment or an order: it must be final, decisive of

⁷ 1993 (1) SA 523 (A) at 536A-B. See also, *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A).

the rights of the parties and must be dispositive of at least a substantial part of the relief claimed in the main case.⁸

[44] Applying those prerequisites with approval, the court in *IAE //Gams Data (Pty) Ltd & others v St Sebata Municipal Solutions (Pty) Ltd* distinguished between a court's decision in regard to an interim interdict and that in respect of a *rule nisi*. An interim interdict, it was held, was granted pending the finalisation of an action instituted by appellants and is therefore not permanent. It is an interim order by nature and not final and therefore does not meet the prerequisites for an appealable court order. There, the court therefore refused to grant leave to appeal against the interdict.⁹

[45] The court in *Phillips v National Director Public Prosecutions*¹⁰, citing *Zweni* with approval, held that a judgment or an order of a court in a *rule nisi*, based only on its finality, is appealable. Relying on the *Zweni* formulation, the court held that even though a final court order in a *rule nisi* may not comply with the other two *Zweni* factors, it is appealable merely because it has final effect.¹¹

[46] In this matter, the High Court's decision based on its interpretation of the requirements of s 51(2) of the POCA, in essence, was that the PG had not complied with the seven-day notice required in reg 7(b). That being the basis of the respondent's objection to the confirmation of the *rule nisi*, raised *in limine* on

⁸ *Cronshaw & another v Fidelity Guards Holdings* 1996 (3) SA 686 (A).

⁹ 2011 (1) NR 247 (HC).

¹⁰ 2006 (2) BCLR 274 (CC).

¹¹ This conclusion of the court was based on the *Zweni* formulation.

the return date, the High Court discharged the *rule nisi* and dismissed the application for the property preservation order. That interpretive decision was final and could not be altered by the court. It is that final decision or order which is the subject of appeal in this court and correctly so.¹² The appeal is therefore properly before this court.

[47] It was the submission of the respondent that should this court find that the order of the High Court was appealable, it could not be appealed against without leave from the High Court.

Whether the matter is properly before this court without leave to appeal

[48] Essentially, the PG appeals against the interpretation of the High Court that the seven-day notice required in reg 7(b) is a condition required to be met for a s 51(2) *ex parte* application for a property preservation order.

[49] Whereas the High Court held that the requirements of reg 7(b) had to be fulfilled before an *ex parte* application under s 51(2) is granted, it is the argument of the PG that the s 51(2) application is *ex parte* and the provisions of reg 7(b) do not apply for a property preservation order to be granted. For that reason, she contends before this court, reg 7(b) is not relevant for the purposes of a s 51(2) application. The appeal is therefore not against a discretionary decision of the High Court based merely on the facts of the case, as the respondent argues. Rather, it relates to a question of law based on the interpretation of reg 7(b) relative to the statutory requirements of s 51(2).

¹² See *Zweni* for the requirements of an appealable order of court. See also *Prosecutor-General v Uuyuni* (SA 20-2013) [2015] NASC (2 July 2015); *Knox D'Arcy & others* 1996 (4) SA 348.

[50] Further, with regard to leave to appeal against a provisional order in an *ex parte* application which is procedural in nature, in *Eric Knouwds N O (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea & another*¹³ the court discharged the provisional order which was procedural in nature but where it could be corrected by correction of the procedure in terms of rule 72(6) of the Rules of the High Court which provides:

'The court may refuse to make an order in an *ex parte* application but may grant leave to applicant to renew the application on the same papers supplemented by such further affidavits as the case or the court may require.'

In this court, the PG appeals the whole of the High Court judgment and does not aim to renew the *ex parte* application in terms of rule 72(6) of the Rules of the High Court, similar to the matters in *Knouwds* relied upon by the respondent. The issues for determination here are therefore distinguishable from those decided in the above cases.

[51] Besides, s 2 of the Supreme Court Act 15 of 1990 provides for the jurisdiction of the court to hear and determine all appeals from the High Court. The proceedings in this matter being of a civil nature,¹⁴ the PG duly filed notice to appeal the whole of the judgment of the High Court. It being final in effect, as I have already said, it was not an interlocutory application for the purpose of s 18(3) of the High Court Act, 1990, requiring leave to appeal. There being no cross

¹³ 2010 (2) NR 754 (SC). See also *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).

¹⁴ See s 50 of the POCA.

appeal, the respondent lodged his intention to oppose the appeal in terms of rule 11 of the Supreme Court Rules. Thus, this matter is properly before this court.

Whether reg 7(b) is a requirement in the application in terms of s 51(2) of the POCA

[52] On a proper analysis of the relevant provisions of the POCA, argued the PG, the High Court erred in granting the preservation of property order in terms of s 51(2) on the basis of non-compliance with the seven day notice under reg 7(b). Section 51(2), the PG further contends, applies *ex parte* and therefore requires no notice to be lodged within a stipulated time. The respondent, on the contrary, submitted that reg 7(b) read with s 91 of the POCA is peremptory and therefore the seven day notice must be complied with in any application under s 91(1) including the application for a property preservation order under s 51(2) of the POCA.

[53] These contentions indeed call for an analysis of the relevant provisions of the POCA. Section 51(2) in terms of which a property preservation order is applied for provides:

'51 Preservation of property orders

(1) The Prosecutor-General may 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.

(2) The High Court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or

adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is-

- (a) an instrumentality of an offence referred to in Schedule 1; or
- (b) the proceeds of unlawful activities

and the court is satisfied that the information shows on the face of it that there are reasonable grounds for that belief.

(3) When the High Court makes a preservation of property order, it must at the same time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order. (Our emphasis.)

(4) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court.'

[54] The application for a property preservation order is indeed *ex parte* as was held in *Uuyuni*. It therefore requires no notice to be given to any person nor with the addition of any evidence from any person as it lacks a responding party. Following *Uuyuni*, the High Court is therefore obliged to grant the order once the statutory requirements in s 51(2) have been met.

[55] It follows therefore that when s 91(1) of the POCA provides that applications under ss 25, 43, 51, 59 and 64 must be made 'in the prescribed manner', reference is to the seven-day notice in reg 7(b). The Regulation therefore makes it peremptory that notice of seven days be given to a respondent and any other person who might require service unless the High Court grants leave for

shorter notice. However, the regulation cannot be interpreted to apply in the case of a s 51(2) application because, in accordance to the *dictum* in *Uuyuni*, it is settled that the latter applications are *ex parte* which by definition have no respondents.

[56] Making a submission in opposition, the respondent makes the point that reg 7, which is prescribed under s 91, requires the seven-day notice to be given not only to the respondent in a s 51(2) application, but also to any other person affected or identified as a party. Should this court adopt the interpretation advanced by the PG, the argument goes, the provisions of s 91 which requires s 51(2) applications to be made in a 'prescribed manner' would be rendered superfluous.

[57] The PG's contention, however, is that based on *Uuyuni*, the application for a property preservation order must be made *ex parte*, where, by definition, there is no respondent.

[58] Following the decision in *Uuyuni*, the approach to the interpretation of the relationship between ss 51(2), 91(2) and reg 7(b) should indeed be that the regulation shall not be interpreted to apply in the case of the s 51(2) application. The reasoning that in order to approach the court *ex parte* it was imperative for the PG to invoke the provisions of s 91(2), referred in reg 7(b), cannot be correct. If that interpretation is correct it would indeed follow that the *ex parte* application would have to be provided for in s 91 and not in the current s 51(2). That would be in direct conflict with the *dictum* in *Uuyuni* which remains the authority regarding

the *ex parte* nature of the application for a property preservation order in terms of s 51(2) of the POCA. Besides, that interpretation would render s 51(2) superfluous.¹⁵

[59] This purposive and holistic approach to the interpretation of the relationship between s 51(2) and reg 7(b) is motivated by the objectives and the social context of the POCA. In *National Director of Public Prosecutions & another v Mohamed NO & others*, the South African Constitutional Court highlighted the serious and grave security threat that the growth of crime including organised crime, money laundering and racketeering have become almost impossible to solve world-wide given their covert nature.¹⁶ This state of affairs tended to overwhelm the efficacy of South Africa's statutory law and common law which both lagged far behind contemporary international measures specifically aimed at dealing effectively with those security challenges.

[60] The respondent's point would also elevate the subordinate legislative status of reg 7(b) equal to that of s 51(2), which is an enabling section of the POCA. It would indeed be contrary to a basic principle of the statutory interpretation, requiring that, where reasonably possible, regulations must be given an interpretation that renders them valid as against the enabling section of an Act. The principle thus requires that an interpretation which preserves the validity of reg 7(b) must be preferred.¹⁷ Thus, the interpretation proffered by the PG that reg 7(b) which requires a seven-day notice to be given to a respondent does not apply

¹⁵ *Prinsloo v Van Der Linde & another* 1997 (3) SA 1012 (CC).

¹⁶ 2003 (4) SA 1 (CC).

¹⁷ *Port Elizabeth Municipality v Uitenhage Municipality* 1971 (1) SA 724 (A) at 738B-D.

in the case where a property preservation order under s 51(2) is sought, must therefore be correct. For that reason, there can indeed be no conflict between s 51(2) and reg 7(b). The validity of the regulation must therefore remain intact and cannot here, be impugned.

[61] The High Court's concern that the interpretation proffered by the PG would undermine the respondent's fair trial rights protected under common law and in Art 12 of the Namibian Constitution was understandable. But the concern was not necessary at this stage of the processes created by the POCA.

[62] In *Shalli*,¹⁸ the court held that the fair trial rights of the affected party are not intended to be disposed of in a s 51(2) application but are merely preserved. That is so, the court held, in view of the fact that an *ex parte* order coupled with a *rule nisi* is provisional and may still be set aside on the return date on application by those affected by the order, an approach also adopted by the Constitutional Court of South Africa in *NDPP v Mohamed*.¹⁹

[63] The Court in the *NDPP v Mohammed* stated further:²⁰

'It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice.'

¹⁸ Id n 5

¹⁹ Id n 17. The reasoning in *Shalli* was adapted from that in *NDPP v Mohamed*.

²⁰ Id n 17 para 21.

[64] Indeed, as the court observed, the prevalence of these challenges can make a devastating impact on a young democracy where state resources are too overstretched to meet even the most basic human needs. Further, it is now internationally accepted that perpetrators of crime should be stripped of the proceeds of their criminal activities, the idea being to remove the incentive for crime, where the punishment for the crime is altogether a separate consideration. This approach to the fight against organised crime enacting the POCA has now been adopted, is similar to the position not only in South Africa and Namibia but also in the region and globally.²¹

[65] Having put to rest the fair trial concerns of the High Court, the conclusion is that the s 51(2) application for a property preservation order is an *ex parte* one. The application therefore does not make provision for an opportunity for a respondent or any affected party to be heard. Therefore no notice is required to be given to any person, nor is the adduction of evidence required from any person other than the applicant. The application is granted based only on the affidavit of the applicant giving sufficient information, establishing that the property concerned is an instrumentality of a schedule 1 offence²² or is the proceeds of unlawful activities generally. Accompanied by a *rule nisi*, as in this case, the effect of the property preservation order is that the right to be heard, protected in terms of Art 12 of the Constitution, is not disposed of. It is preserved until the return date when the respondent *must* be heard. Based on the facts and the surrounding

²¹ See Charles Goredema (ed); 'Confronting the Proceeds of Crime in Southern Africa: An Introspection', ISS Monograph Series; No132, May 2007.

²² See offences listed in schedule I of the POCA.

circumstances of the case, the respondent has an opportunity to present her or his case, persuading the court not to confirm the *rule nisi*.

The property preservation order

[66] Indeed, the High Court did not proceed to deal with the merits of the property preservation order following the appeal against the court's decision to uphold the respondent's procedural objections raised *in limine*. In that regard, it was the contention of the PG that, should this court uphold the appeal against the High Court judgment, it will have to deal with the merits. The respondent on the other hand submitted that this court, being an apex court which primarily hears appeals from the High Court, ought not to do so as a court of first instance.

[67] In terms of s 51(2)(g) of the POCA, the court must grant the property preservation order if the application is supported by an affidavit which shows sufficient information that the property which is the subject of the order is an instrumentality of an offence committed in schedule 1 or the proceeds of unlawful activity. The court must further be satisfied that the information shows on the face of it, that there are reasonable grounds for that belief. In that case, it is peremptory that the order be granted.

[68] Although, in this case as the PG contended, a *prima facie* case could be established to meet the reasonable belief test, an applicant need not go that far. It is sufficient merely to show that reasonable grounds exist to believe that the property concerned answers to the test in s 51(2) of the POCA, whether the evidence is disputed or not. However, as was held in *National Director of Public*

Prosecutions v Rautenbach & others, the evidence relied upon must not be false or unreasonable.²³

[69] Further, the court in *Prosecutor General v Xingping*, elucidating on the nature of the evidence relied upon to confirm the *rule nisi* and thus grant the property preservation order, held that:

*'If the requisites for the remedy set out in section 51 are met, then the preservation order is to be granted by confirming the rule nisi granted by this court, except possibly where there had been abuse of the process in [the] sense of the applicant not being bona fide or failing to make proper disclosure to this court in seeking the original rule nisi on an ex parte basis.'*²⁴

[70] In this case, the evidence that led to the award of the tender and the award of the tender itself are central to the case against the respondent and largely undisputed, and the case made in favour of the respondent is based on legal arguments. Those are questions of law and not of fact and had been fully traversed in the High Court. It is those questions of law which are now up for appeal in this court.

[71] Further, the respondent makes no allegations that the evidence relied upon in the case against him is fundamentally false; that there had been an abuse of process; that there was a lack of *bona fides* or there had been a failure to properly disclose any information in the application for the *rule nisi* to be confirmed.²⁵ In

²³ 2005 (4) SA 603 (SCA) at 614C-F. See also, *Prosecutor-General v Xingping* (POCA 4/2013) NAHCMD 300 (October 2013) and *Prosecutor-General v Kanime* 2013 (4) NR 1046 (HC).

²⁴ (POCA 4/2013) NAHCMD 300 (October 2013).

²⁵ *Prosecutor General v Xingping* (POCA 4/2013) NAHCMD 300 (October 2013).

other words, there remains no fundamental dispute of facts in this matter so far as it concerns the confirmation of the *rule nisi* and the granting of the property preservation order.

[72] Indeed the High Court did not deal with the merits of the confirmation of the *rule nisi* and there being no substantial dispute of fact remaining in that regard, the need to remit the matter back to the High Court was questioned. In *Teek v President of the Republic of Namibia & others*²⁶, this court was cognisant of the implications surrounding an apex court considering important constitutional issues as a court of first and last instance and made reference to the views of the Constitutional Court of South Africa in *Bruce & another v Fleecytex Johannesburg CC & others*²⁷, where it was held that:

'It is moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances, the losing party has an opportunity of challenging the reasoning in which the first judgment is based, and of considering and refining arguments previously raised in the light of such judgment.'²⁸

[73] That being the case, in circumstances where the Supreme Court is in the process of considering an application for leave to appeal, it is not contrary to the interests of justice to determine that this court is entitled to determine an issue

²⁶ 2015 (1) NR 58 (SC).

²⁷ 1998 (2) SA 1143 (CC) paras 8 and 29. See further, *Moloko & others v Minister of Home Affairs & another* 2009 (3) SA 649 (CC).

²⁸ *Id* para 8.

which arises for the first time during the course of an appeal, as was the case in *JS v LC & another*.²⁹ The same approach can be adopted where the issue had already been fully traversed in the High Court and there are no lingering questions of substance in dispute.

[74] Although the High Court did not determine the merits of the case, the questions regarding the confirmation of the *rule nisi* were well traversed. Although remitting the matter back to the High Court would generally be the proper approach in the context of the jurisdiction of courts, doing so in a constitutional dispensation where undue court delays are antithetical to the right of access to justice and moreover where remitting the matter in the particular circumstances of this case would be overly formal, favouring form before substance and undermining the interests of finality which must be a primary consideration in any proceedings before our courts.

[75] Mindful of the jurisdiction of this court as a court of appeal and of the fact that we must be circumspect in determining issues of fact and law as if it is a court of first instance thus usurping the role of the court of first instance, for the reasons stated above, it would not be in the interests of justice nor would it be just and equitable to insist on remitting the issue of the confirmation of the *rule nisi* to the High Court. In addition, the reluctance to remit the matter back to the High Court takes into account the balance of convenience, bringing the matter to finality, rather than deciding it piece-meal. The condition should only be that there would

²⁹ (SA 77/2014) [2016] NASC (19 August 2016).

be no law which precludes this court from granting the property preservation order and confirming the *rule nisi*.

The requirements for granting the property preservation order

[76] The question to respond to here is whether, based on the evidence before this court, there are reasonable grounds to believe that the property concerned, namely, the positive balance in the FNB account, is the proceeds of unlawful activities.

The POCA defines proceeds of unlawful activities as:

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

The POCA then proceeds to define 'unlawful activity' as 'any conduct which constitutes an offence or which contravenes any law'.

[77] The reasonable grounds for the belief must be determined from the evidence on affidavit before the court, on the return date, submitted in support of the *ex parte* application for the order. What would be reasonable grounds at this stage of the process would have to be based on factual evidence and not mere opinion showing that evidence might reasonably support a conviction and a resultant confiscation order.³⁰ As indicated earlier, no reliance shall be placed on

³⁰*National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA); 2001 (2) SACR at 712.

evidence that is manifestly false or plainly unreliable. If, therefore, the affidavits establish reasonable grounds to believe that the property meets the s 51(2) test, a court is obliged to grant the *ex parte* property preservation order.

[78] Here, although the respondent takes issue with some of the allegations against him, he does not dispute that the tender to provide accommodation to the NDF student soldiers had indeed been awarded to him. All that needs to be shown before this court therefore, is that the circumstances in which the tender was granted constitute reasonable grounds for this court to believe that the positive balance in the FNB bank account was proceeds of fraud and/or money laundering.³¹

Whether the property constitutes proceeds of fraud and/or money laundering

[79] Fraud being the unlawful and intentional misrepresentation causing actual or potential prejudice to another³², the founding affidavits in support of the confirmation of the property preservation order on the return date show that the respondent was not a member of the CC when he tendered for the accommodation services in respect of the NDF student soldiers in July 2014. At the relevant time, the CC was registered in the name of his mother, Mrs Eunike Hamutenya. Although as he contends, he did not say that he owned the CC, he did tender as though he was the sole member of the entity when at the relevant time, he was not a member at all, as the facts would show. This false impression he created played an important role in him obtaining the tender worth N\$2 653 560.

³¹ *Id* n 30.

³² See Joubert (ed), *The Law of South Africa (LAWSA)*, (2 ed), vol 6 para 306.

[80] Further, as appears from the facts of this case, the respondent also created the false impression that he was the owner of Ace's Guest house. When required to give his address on the invoices communicated to the NDF he instead provided the address of the guest house, thus perpetuating the false impression of his or the CC's ownership of the guest house. Defending his actions, saying that he used the guest house address in view of the fact that it was where the NDF student soldiers were to be accommodated was indeed not a plausible explanation.

[81] The owner of Ace's Guest house, Mr Rodgers Kinyonga Ddungu, and the manager, Mr Ssendi Joseph had at no time entered into an agreement with the respondent to accommodate the NDF student soldiers. The facts would further show that there was no contract or agreement between them for respondent to obtain the tender. He thus secured the tender based on his misrepresentation that he was the sole member of the CC which in turn owned Ace's Guest house.

[82] Throughout, the invoices furnished to the NDF reflect that the CC is registered for VAT which was not the case. More than once, the respondent used the VAT registration number of the guest house for purposes of the CC. The respondent admits as much, but contends that it is neither here nor there as no VAT was charged for the services anyway. That contention, however, misses the point. What it really showed was his misrepresentation of the CC's VAT status, again perpetuating the falsehood that the CC, of which he is the sole owner owns the guest house which he cited in the tender application as accommodation for the NDF student soldiers.

[83] The respondent might not have said in so many words that he owned the guest house. However, based on the facts of this case, he did tender to provide the required accommodation as if he was the owner of the guest house and acquired the tender having created that impression. At no stage did he correct or attempt to correct the false impression created. Further, at no stage did he submit and or contend that any of the evidence against him was false, nor that it was obtained through some or other unlawful procedures. Based on those falsehoods among others, the NDF awarded the tender in his favour to the value of N\$2 653 560.

[84] Concerning the money laundering allegations against the respondent, following the fraudulent acquisition of the tender, an amount of N\$1 061 124 was deposited by the NDF into the CC's Standard Bank account on 18 September 2014. By 23 September 2014, the balance on this account had swiftly reduced to N\$1 591,15: a day after the NDF amount was deposited into the CC's account, there was a cash withdrawal of N\$5000, a cheque cashed in the amount of N\$250 000 and N\$800 000 was transferred into the respondent's minor son's FNB account with the unlikely reference as 'salary'. There was generally no credible justification forthcoming for this substantial amount deposited into his minor son's personal bank account. Nor was there reasonable explanation for that amount of money itemised as 'salary'.

[85] When questioned, the respondent's reply was that, at the time of the transfer, Standard Bank was experiencing challenges in its systems which created

delays in the CC's payment processes. The existence of these 'problems' were, however, refuted under oath by the manager of the bank confirming that their system problems manifested only on 25 September 2014, days after the transfer of the N\$800 000. Besides, no explanation at all was provided for the 'salary' reference. Nor was any explanation provided for the necessity of the initial transfer into his minor son's FNB account when he also had a bank account at FNB. The inference of money laundering in regard to these activities is therefore unavoidable and reasonable to believe. Thus, here too, reasonable grounds exist to believe that the positive balance in the FNB account of the respondent's son was part of the proceeds of unlawful activities.

Conclusion

[86] Reasonable grounds have been shown for the belief that the property, being the positive balance in the FNB account of the respondent's minor son, had constituted the proceeds of unlawful activities, in particular, fraud and money laundering. The test in s 51(2) has therefore been met. In that case it is peremptory that an order for the preservation of property be granted.

[87] In the result, the appeal against the order of the High Court is upheld. Both parties contended for a costs order to be granted against each other. However, based on the findings and the conclusion arrived at in this matter, the costs in this case must follow the result.

Order

[88] It is ordered that:

1. The appeal is upheld with costs.

2. The order of the High Court is set aside and replaced with the following order:
 - 2.1 The *rule nisi* issued by High Court on 10 October 2014 is confirmed and the application for the preservation of property order is granted;

 - 2.2 The respondent is ordered to pay the costs of this application, including the costs of two counsel.

MOKGORO AJA

SMUTS JA

CHOMBA AJA

APPEARANCES

APPELLANT:

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Instructed by the Government Attorney

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