



REPORTABLE

CASE NO: SA 22/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEW AFRICA DIMENSIONS CC

First Appellant

GERHARD SHILONGO

Second Appellant

ELIASER SHIKAGE

Third Appellant

and

PROSECUTOR-GENERAL

Respondent

Coram: SHIVUTE CJ, MAINGA JA and MOKGORO AJA

Heard: 10 July 2017

Delivered: 8 March 2018

Summary: This is an appeal against a judgment and order of the High Court, declaring certain property forfeited to the State in terms of the Prevention of Organised Crime Act 29 of 2004 (POCA). The forfeiture order was granted on the basis that the preserved property is the proceeds of unlawful activities in terms of POCA. The property in question consists of moveable assets belonging to the first appellant, and certain business establishments controlled by the second and third appellants.

On appeal, the appellants contended that the court *a quo* misdirected itself in concluding that the property concerned had been shown to be proceeds of unlawful activities. The appellants also argued that the approach to be adopted in resolving disputes of fact in this matter is that applied in action proceedings. Disputing the respondent's contention that the property in question is the proceeds of unlawful activities, the appellants contended that the items supplied to the Ministry of Agriculture, Water and Forestry (the Ministry) were not covered in the term tender awarded to an entity called Continental Spares CC (not party to this proceedings). The appellants argued further, that the items contracted by the appellants were granted exemption from the operation of the now repealed Tender Board Act, 1996. The appellants also submitted that the decisions of the officials of the ministry soliciting for quotations and awarding a tender to the first appellant were administrative in nature and as they had not been set aside in proceedings for judicial review, they remained valid.

On appeal *held* that the grounds raised in support of the appeal were without merit and the appeal was dismissed with costs. The court reasoned that, the allegations in support of the forfeiture order were made in motion proceedings and this being so, the contention by the appellants as to the principles applicable in resolving disputes of fact could not be correct. As to the alleged exemption by the Tender Board, the documentary evidence before court illustrated that the items supplied by the first appellant were not exempted by the legislation regulating the procurement of goods and services on behalf of the government nor was the decision to award the tender made by the body authorised to procure same on behalf of the government. The court further *held* that the engine types that were supplied by the first appellant to the ministry were the same engine types on the annual tender awarded to Continental Spares CC and provision of these similar engines by the first appellant to the ministry, not only undermined the agreement between Continental Spares CC and the government but was also prejudicial to the government in financial terms as the ministry paid more per engine supplied by the first appellant than it could have paid had the engines been supplied by Continental Spares CC.

As to costs, the court *held* that the unsupported allegations of abuse of process and of engaging in vexatious activities directed at the respondent as a repository

of public powers in exercising public functions constituted an abuse and warranted censure. The court confirmed the special costs order made by the High Court against the appellants.

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and MOKGORO AJA concurring):

[1] The appellants lodged an appeal against the judgment and order of the High Court granting an application for a forfeiture order brought under s 61 of the Prevention of Organised Crime Act 29 of 2004. The first appellant, New Africa Dimensions CC (NAD), is a close corporation of which the second and third appellants are the only members. When necessary to distinguish them from the first appellant, the second and third appellants will be referred to in this judgment by their surnames, namely Mr Shilongo and Mr Shikage respectively. The respondent is the Prosecutor-General (the PG).

Background

[2] The PG applied to the High Court under s 51(1) of the Prevention of Organised Crime Act (POCA) for a preservation of property order in respect of the following property, which order the High Court granted on 29 June 2012:

- (a) the positive balance in Bank Windhoek account number 8003042804 in the name of NAD, namely N\$1 453 083,73;
- (b) the positive balance in Bank Windhoek account number 8002979907 in the name of Kage Trading Enterprises CC, of which Mr. Shikage is the sole member, namely N\$498 527,86;

- (c) the positive balance in the Bank Windhoek account number 8002359254 in the name of C Three Trading Enterprise CC, of which the sole member is a Mr Eradius Lazarus, namely N\$62 557,14;
- (d) the positive balance in First National Bank account number 62234053560 in the name of Taleni Multi Media Consulting CC, of which Mr Shilongo is the sole member, namely N\$343 265,75; and
- (e) a 2010 Volkswagen Golf GTi motor vehicle with registration number N130698W and engine number CCZ049937.

[3] The thrust of the PG's case was that Mr Shilongo and Mr Shikage corruptly colluded with officials in the Ministry of Agriculture, Water and Forestry (the MAWF) to defraud the MAWF in relation to the procurement of Lister engines and other goods related to water supply. The PG further alleged that on 23 September 2011, the Tender Board awarded a term tender for the supply of Lister engines to the MAWF for the period ending on 30 June 2012. The successful tenderers were Continental Spares CC, Conserve Engineering CC and First Investments CC. The effect of the award was that whenever during that period the MAWF required Lister engines, it had to source them from the successful tenderers. The PG contended that one of the Lister engine types covered by the tender was the Lister series TR1 engine. The tender for the Lister series TR1 engines was awarded to Continental Spares CC. The tender price for a 4.5 kW engine was N\$18 500 including VAT and transport.

[4] It was further the PG's case that despite the existence of the term tender, Mr Benedictus Freyer, the Deputy Director of Regional Support Services in the MAWF, caused notices to be published in the *Government Gazette* and the press calling for quotations for the supply of Lister engines and subsequently authorised the conclusion of an agreement between the MAWF and NAD for the supply of the

engines. Mr Freyer also subsequently approved 11 purchase orders (one purchase order for each of the eleven rural water supply regions in the country) for the purchase of 110 Lister engines from NAD at a cost of N\$26 782,30 per engine, excluding transport. Mr Freyer made a statement under oath, in which he sought to justify the decision to purchase the Lister Engines from NAD. In it he stated, amongst others, that before deciding to authorise the purchase, he consulted a Programme Analyst, Ms Sylvia Hoeses, and one other official in the MAWF about the quality of the Lister engines on the annual tender. After discussion with the two officials, in his own words:

'I concluded, based upon their advice that the Lister engines on the annual tender were not the original TR 1 Lister engines. I then concluded that it will be better to buy engines with better technical specifications. This was done due to the fact that I do not personally have the technical know-how about which engines are so called pirate engines and which are original. It is against that background that the decision was taken collectively (it was not a decision which was taken solely by me) that we buy TR 1 Lister engines. I tasked Ms Hoeses to get quotations for TR Lister engines. She got quotations from Agra, New Africa Dimensions and Continental Spares. New Africa Dimensions quotation was the cheapest amongst the quotations presented to me with the requisition. I signed the requisition because I found it to be in order when presented to me by Ms Hoeses. . . .'

[5] During the period between February 2012 to June 2012 payments amounting to N\$9 834 143,91 were made into NAD's bank account in respect of the Lister engines and other items connected to water supply. What stands out from the evidence is that when the payments were made the goods had not yet been delivered. Yet members of NAD certified that the goods had been delivered and certain officials in the MAWF also certified that the equipment had been received, taken charge of and were performing satisfactorily. Before money

sourced from the MAWF was paid into NAD's bank account, NAD had only N\$300 in the account.

[6] In a number of instances, the money paid into NAD bank account was not used to buy goods procured by MAWF. Instead, it was paid into the bank accounts of entities such as Kage Trading Enterprises CC (Kage Trading), C Three Trading CC (C Three Trading) or Taleni Multi-Media Consulting CC (Talen). This brings me to the interrelationship between these entities, the appellants and the preserved property. Messrs Shilongo and Shikage were employed by the Office of the Prime Minister. Neither of them had been granted permission to perform remunerative work outside of the Public Service. As mentioned above, Mr Shilongo and Mr Shikage were the only members of NAD. Mr Shikage was the sole member of Kage Trading. Mr Shilongo was the sole member of Taleni. When the PG brought the preservation application, she believed that Mr Shilongo was the sole member of C Three Trading. Unbeknown to her, Mr Shilongo had transferred his member's interest in C Three Trading to a certain Mr Eradius Lazarus. The Volkswagen Golf GTi motor vehicle (the Golf) was purchased by NAD for Mr Shilongo in April 2012 for N\$320 000 and was registered in his name.

[7] In terms of the preservation order of the High Court, Mr Karl Patrick Cloete of the Anti-Corruption Commission (the ACC) or any member of the ACC was authorised to assume control of the preserved property and to take the property into his or her custody. In addition, the court directed the PG to serve the order on Mr Shilongo and Mr Shikage and on any person who has had an interest in the property and who intended to oppose the forfeiture application.

[8] The preservation application and preservation order were duly served on the appellants and were also published in the *Government Gazette*. NAD, Mr Shilongo and Mr Shikage gave notice in terms of s 52(3) of POCA of their intention to oppose the application for a forfeiture order and simultaneously filed answering affidavits. In addition to the merits, they raised two preliminary points in relation to the application. Firstly, they contended that the PG's founding papers were irregular. Lastly, they complained about the non-joinder of certain entities that may have had an interest in the preserved property. Kage Trading, C Three Trading and Taleni did not deliver notices of opposition and so they played no part in the proceedings in the High Court or in this court.

[9] On 9 November 2012, ie within the period of 120 days required by s 53(1) of POCA, the PG launched an application for the forfeiture of the preserved property. After hearing argument against and in support of the application, the court granted the application with costs, culminating in the present appeal.

Findings of the High Court

[10] The High Court dismissed the preliminary points directed at the founding and supplementary affidavits in support of the forfeiture application by holding that the PG was granted leave to amplify her founding affidavit. The court concluded that filing a supplementary affidavit was thus not an irregularity. As to the second preliminary point, namely the non-joinder of certain parties the court *a quo* reasoned that the proceedings brought under Chapter 6 of POCA were not directed at the alleged wrong doers but at the property used to commit an offence or which constituted the proceeds of crime. The court held, therefore, that the

participation in the proceedings of every person having potentially committed the unlawful acts justifying the forfeiture of their proceeds was not required.

[11] Having dismissed the preliminary points, the court proceeded to consider the argument on the merits. The court held that the PG had proved on a balance of probabilities that the property was the proceeds of unlawful activities. The court found that the conduct of officials in the MAWF, notably Mr Freyer, Ms Hoeses and Mr Sadiék Meintjies (a Procurement Clerk in the MAWF) not only amounted to fraud but also contravened the now repealed Tender Board of Namibia Act 16 of 1996 (the Tender Board Act)¹. Pertinently, the court found that but for the unlawful activities of the officials in the MAWF the payments would not have been made to NAD.

[12] In making these findings, the court placed particular emphasis on the fact that the appellants' affidavits did not in any proper sense put in issue most of the pertinent allegations made by the PG. In this respect, the court noted that the unsupported allegations of abuse of process and of engaging in vexatious activities directed at the PG in her exercise of public power constituted abuse, warranting censure and discouragement through appropriate cost orders. It therefore ordered the appellants to jointly and severally pay the PG's costs in respect of the preservation and forfeiture applications on a legal practitioner and own client scale.

¹ Repealed and replaced by the Public Procurement Act 15 of 2015.

The Legislative Scheme

[13] It has become evident in recent times that the criminal justice system does not live up to the adage that crime does not pay. Criminals are, for a variety of reasons, able to keep and enjoy the spoils of their loot. This anomaly provided a powerful incentive for crime to thrive. The Namibian Legislature, in line with a similar trend worldwide, has taken steps to address the problem through POCA. The approach adopted in POCA is to hit the criminal where it hurts most; his or her pocket so as to remove the incentive for crime².

[14] POCA provides not only for 'criminal forfeiture' in Chapter 5, but also for 'civil forfeiture' in Chapter 6. The reason for the addition of a regime of civil forfeiture is that criminal forfeiture on its own was perceived to be an inadequate law-enforcement tool. One of the major shortcomings of criminal forfeiture is that it depends on a successful criminal conviction. In contrast, civil forfeiture does not require any prosecution at all. It provides an avenue through which the perpetrators of crime can be prevented from benefiting from crime. Civil forfeiture removes the profit from unlawful activities by targeting specific assets that are derived from or used for unlawful purposes.

The requirements for a forfeiture order

[15] Section 59 of POCA forms part of the civil forfeiture regime in Chapter 6. Section 59(1) provides that, if a preservation of property order is in force, the PG may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to the preservation order. Section 61(1) provides that the

² This much was recently confirmed by this Court in *Prosecutor-General v Onesmus Taapopi* (SA25-2015)[2017] NASC (19 June 2017) para 64.

High Court *must* make a forfeiture order if it finds on a balance of probabilities that the property is an instrumentality of an offence referred to in schedule 1, or is the proceeds of unlawful activities. The court has no discretion if these requirements are met. Section 61(1) is, however, made 'subject to section 63'. Section 63 provides that when the High Court makes a forfeiture order in terms of s 61(1), it may exclude certain interests in the property (generally referred to as the 'innocent owner' defence). In the present appeal, the 'innocent owner' defence has not been established. What remains to be decided therefore is the question of whether or not the High Court was correct in holding that it had been shown on a balance of probabilities that the preserved property is the 'proceeds of unlawful activities'.

Approach to disputed facts

[16] As noted above, the test in s 61 (1) of POCA is that the court must find 'on a balance of probabilities' that the property in question is the proceeds of unlawful activities. Regulation 7 of the Prevention of Organised Crime Regulations provides that any application for a forfeiture order must be made in writing and 'must be supported by affidavit evidence'. As POCA makes it obligatory to apply for forfeiture by way of affidavit, I agree with the submission of counsel for the PG that any factual disputes in such application must be resolved in accordance with the applicable principles to disputes of fact in motion proceedings. The appellants' contention that the court should apply the principles applicable to instances where different versions are given by witnesses in trial proceedings cannot, therefore, be accepted as correct. The approach to evidence in an application for a forfeiture order should be that set out by the South African Appellate Division in the well-

known *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*³ case and as endorsed in numerous judgments of our courts.

[17] The general rule in *Plascon-Evans* is that final relief may be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the granting of such relief. There are, however, two exceptions to this general rule. The first exception is where the denial by a respondent of a fact alleged by the applicant is not such as to raise a real, genuine or bona fide dispute of fact. This exception was formulated by the South African Constitutional Court in *Rail Commuters Action Group v Transnet Limited t/a Metrorail*⁴ as follows:

'Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the court is persuaded of the inherent credibility of the facts asserted by an applicant, the court may adjudicate the matter on the basis of the facts asserted by the applicant.'

[18] It has been stated that 'a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases.⁵ This is so because 'if by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device'⁶

³ 1984 (3) SA 623 (A).

⁴ 2005 (2) SA 359 para 35.

⁵ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 at 1165.

⁶ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G.

[19] The second exception to the *Plascon-Evans* rule is where the allegations or denials of the respondent are so clearly untenable that the court is justified in rejecting them on the papers. If the respondent's version is 'so improbable and unrealistic that it can be considered to be fanciful and untenable',⁷ then it may be rejected on the papers by adopting a 'robust, common-sense approach'.⁸

Were the requirements for a forfeiture order satisfied?

The Lister engines

[20] The appellants contend in the main that there are no grounds for viewing the forfeited property as proceeds of unlawful activities and that the High Court was wrong in holding that the requirements for a forfeiture order had been met. In their main opposing affidavit filed during the preservation stage, the appellants averred that the term tender was limited to Lister series *L* engines and did not include the 4.5 kW Lister series *TR1* engines which NAD contracted with the MAWF to supply during the tender term. However, the appellants' contention has been contradicted by tender documents which indisputably show that the tender awarded to Continental Spares CC included the sale of 4.5 kW Lister series *TR1* engines for N\$18 500 (including VAT and transport).

[21] In their main opposing affidavit filed during the forfeiture stage, the appellants appeared to have abandoned the averment that the tender was limited to Lister series *L* engines as they made no further mention of it. Instead, they contended that the Lister *TR1* series engines that NAD supplied to the MAWF were not covered by the term tender because they operated at 2500 rpm whereas

⁷ *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 699F-G

⁸ *Soffiantini v Mould* read with *Truth Verification Testing Centre* case at 698I

the term tender was for engines operating at between 650 rpm and 1500 rpm. The original contention thus changed to the averment that the MAWF ordered Lister Engines with a KW capacity of 2500 RPM which was not on annual tender. But this new contention appears to have overlooked the description of the engines in the tender document which reads as follows:

'Supply and delivery of stationary air-and water-cooled diesel engines (rated from 2.0 kW up to 17 kW @ 650 to 1500 rpm) for the period 1 July 2011 to 30 June 2012: Ministry of Agriculture, Water and Forestry.'

[22] Furthermore, the schedule of technical information, for each type of engine, specified its rated sea-level power at 1500 rpm and its 'derated' power at approximately 1500 metres above mean sea level at 1500 rpm. The schedule also made provision for the inclusion, by each tenderer, of the engine's permissible working range (which, in the case of the 4.5 kW Lister TR1 engine, was 1500 rpm to 2500 rpm) and, if it had a constant speed governor, the constant speed (which, in the case of the 4.5 kW Lister TR1 engine, was 1500 rpm). Mr Jürgen Henning Mercker of Continental Spares explained this in his affidavit as follows:

'The TR1 engine is designed to operate in a speed range of between 1500 rpm and 2500 rpm, generating power at between 5.5 to 8.6 kW continuous power (depending on speed). For borehole application as used by the Ministry of Agriculture the only configuration offered is the Built 16 series engine. The engines sold to New Africa Dimensions CC are exactly the built 16 series engine . . .'

[23] There is thus no doubt that the Lister series TR1 engines that NAD contracted to supply to the MAWF were exactly the same as the ones covered by the term tender awarded to Continental Spares. Indeed, it is common cause that NAD had sourced the engines it supplied to the MAWF from Continental Spares,

selling each engine to the MAWF for N\$26 782,30 including VAT but *excluding transport* in stark contrast to Continental Spares' price of N\$18 500 *per engine* including both VAT and transport. The purchase by the MAWF from NAD of 110 4.5 kW Lister engines for N\$26 782,30 per engine including VAT and excluding transport, was obviously prejudicial to the Government because, under the term tender, the MAWF could have purchased the same engines from Continental Spares for N\$18 500 per engine inclusive of VAT and transport. The appellants' averment that the Lister series TR1 engines it contracted to supply to the MAWF were not on term tender is not correct. The High Court was thus justified in rejecting it on the papers.

Was there an exemption to the tender for the supply of the engines?

[24] When Mr Freyer approved the orders for the purchasing of the Lister Engines by the MAWF, he purported to act under the authority of tender exemption number E1/18/1-120113.25. In their principal opposing affidavit filed during the forfeiture stage, the appellants also relied heavily on the alleged tender exemption. It was stated in the affidavit, for example, that 'MAWF pursuant to a Tender Board exemption procured goods on a capital budget which is a budget distinct and separate from the regional budgets from where annual tender procurements are procured', and that 'the Tender Board duly granted a tender exemption for procurement of goods that was effected by Mr Freyer, in his capacity as Acting Director of Rural Water Supply'.

[25] An analysis of the tender exemption shows the following prominent features: The exemption bears the heading 'Annual Tender Board Exemption from

Normal Tender Procedures: 2011/2012 Financial Year: Ministry of Agriculture, Water and Forestry'. The purpose of the exemption was stated to have been the granting by the Tender Board to the MAWF of approval for the exemption, in terms of s 17(1)(c) of the Tender Board Act 'from compliance with the required Tender procedures in respect of essential purchases and the supply of services which cannot be procured through the formal tender procedures during the 2011/2012 financial year...'.

The ambit and scope of the exemption are set out in paragraph 3.25 of the document embodying the exemption. The paragraph reads as follows:

'Purchase of emergency spares, satellite images, HF communication equipment and spares (GPS), special items and equipment for water supply, agricultural, and hydrological, firefighting equipment and trailers for transporting of firefighting equipment

It is often necessary to *purchase spares* on an emergency basis *to repair the above-named equipment* under the following circumstance:

- (a) *In cases where annual contracts do not exist;*
- (b) *Where it will be impractical to call for tenders due to the urgency of the repairs to avoid an interruption in service delivery; and*
- (c) *If the agent of the specific equipment is the sole supplier of spares in which case it will serve no purpose to call for tenders.'* (Emphasis supplied).

[26] The appellants' reliance on the tender exemption is untenable and falls to be rejected on the papers for the following reasons: It is abundantly clear from para 3.25 of the exemption that the tender exemption is confined to the purchase

of emergency spares, whereas NAD contracted to supply complete engines. The tender exemption applied only in circumstances where all the three conditions in (a) to (c) had been met. However, none of those conditions was satisfied because: an annual contract (ie the Continental Spares term tender) existed and there is no allegation or evidence of impracticality in the calling for tenders or any urgency in the supply of the engines. On the contrary, several of the regions to whom the engines had been sent did not need the Lister engines supplied by NAD at all or had spare Lister engines in store when the additional Lister engines supplied by NAD were delivered. Lastly, NAD, which had no track record and had to source the engines from Continental Spares for on-selling to the MAWF, was not an existing supplier or a sole supplier. The High Court was thus correct in holding that the tender exemption did not apply.

Was the Tender Board Act contravened?

[27] The PG submitted that the acquisition by the MAWF from NAD of the 110 Lister engines contravened the Tender Board Act. The appellants merely deny that the Tender Board Act had been contravened.

[28] Section 7(1) of the Tender Board Act provided that 'unless otherwise provided in this Act or any other law, the [Tender] Board shall be responsible for the procurement of goods and services for the Government . . . and may for that purpose - (a) on behalf of the Government conclude an agreement with any person within or outside Namibia for the furnishing of goods or services to the Government . . . '.

[29] Section 17(1)(c) of the Tender Board Act authorised the Tender Board to dispense with calling for tenders by publishing notices in the *Government Gazette* and newspapers, in a particular case, if for good cause the Board deems it impractical or inappropriate to invite tenders.

[30] Section 21 of the Tender Board Act provided that the provisions of the Act applied to the procurement of all goods and services for or on behalf of the Government. There can, therefore, be no question of the Lister engines having been excluded from the application of the Act by any provision of the Act itself or any regulation made under it.

[31] What happened in the present matter was that Mr Freyer (not the Tender Board) in cahoots with others and contrary to the provisions of the Tender Board Act dispensed with the calling for tenders by causing notices to be published in the *Government Gazette* and the press. The official unlawfully authorised the conclusion of an agreement with NAD for the supply of the Lister engines to the MAWF. It follows from this finding that the PG's contention to the effect that the powers and functions assigned to the Tender Board by the Act had been usurped by the MAWF officials is borne out by evidence.

[32] The unlawfulness of the actions of the MAWF officials is compounded by the fact that the Tender Board had awarded a term tender to Continental Spares for the supply of the same engines to the MAWF at a cheaper price. The contract with NAD appears to have undermined the contract with Continental Spares and in so doing undermined the regulation by the Tender Board Act of the procurement of

goods for the Government. The contract with NAD resulted in an additional cost to the Government of N\$911 053, excluding the cost of transport for which NAD charged and Continental Spares would not have charged.

Alleged lawfulness of administrative decisions by Mr Freyer

[33] The appellants argued that Mr Freyer's decision that the MAWF should purchase the Lister engines from NAD and the resulting contract between the MAWF and NAD constituted administrative decisions. As these had not been set aside in proceedings for judicial review, so the argument progressed, they must be accepted as lawful. Relying on the dictum in *Rally for Democracy and Progress v Electoral Commission of Namibia*,⁹ the High Court rightly held that the presumption of regularity 'is rebuttable and can be rebutted in any proceedings which are pending before a court and not only by review proceedings'. I also agree with the PG's contention that the cases relied on by the appellants for the proposition contended for by them deal with principles of public law regarding when administrative action would be 'lawful' in the sense of being *intra vires*. The cases relied on have not addressed the different question regarding when conduct would be 'unlawful' in the sense of constituting an offence or contravening a law as the phrase 'unlawful activity' has been defined under POCA. There is thus no merit in the contention based on the presumption of regularity and it too falls to be rejected.

Whether there was evidence of fraud

[34] The ACC investigating officer, Mr Cloete (deposing to an affidavit in support of the PG's application), alleged that the Government was a victim of a co-

⁹ 2010 (2) NR 487 (SC).

ordinated fraud involving Mr Freyer, Ms Hoeses, NAD, Mr Shilongo and Mr Shikage. Mr Cloete averred that these individuals conspired or acted with a common purpose to defraud the MAWF. The appellants' reaction to the portion of Mr Cloete's affidavit where these allegations were made was a blanket denial. The allegations by Mr Cloete were dismissed as 'irrelevant, repetitive, speculative and argumentative matter concerning the conduct of parties extraneous to the [appellants]'.¹⁰

[35] Fraud 'consists in unlawfully making, with the intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.¹⁰

[36] As noted earlier, Mr Freyer sought to explain in his affidavit why he authorised the purchase of the Lister engines from NAD when there was already a term tender in place. Mr Freyer alleged in the first place that the Lister engines on term tender 'were not the original Lister TR1 engines' and so he decided to buy engines with 'better technical specifications' and which were not 'pirate engines'. He proceeded to state that Ms Hoeses obtained quotations for the Lister TR1 engines from Agra, NAD and Continental Spares. He then maintained that NAD's quotation was the cheapest, hence its acceptance by him. All the above assertions by Mr Freyer are untenable and can be safely rejected on the papers.

[37] First, the statement that the type of engines under the term tender were 'pirate engines' cannot be correct. Under the tender, Continental Spares was contractually bound to supply 'Lister-Petter TR1 engines manufactured in the

¹⁰ JRL Milton *South African Criminal Law and Procedure, Vol II*, at 702.

United Kingdom'. The specifications of the engines were set out in Continental Spares' completed tender document. Moreover, the engines which NAD contracted to supply to the MAWF were exactly the same engines that Continental Spares contracted to supply under the term tender. In fact, as previously mentioned, NAD sourced the engines from Continental Spares for onward sale to the MAWF. There can therefore be no question of the engines under the term tender being counterfeit products. Secondly, the assertion that Ms Hoeses obtained quotations for TR1 engines from Agra, NAD and Continental Spares and presented those quotations to Mr Freyer is partially incorrect, because the quotations were in fact obtained from NAD, Express Bearing Centre CC and DFL Trading Enterprises. Lastly, the statement that NAD's quotation was the cheapest is palpably false. In fact, NAD's quotation of N\$27 782,30 including VAT was N\$3 011,80 more expensive than the quotation provided by Express Bearing Centre CC which stood at N\$23 770,50. In the context of the low standard of proof allowed under POCA, it would appear therefore that a co-ordinated fraud perpetrated on the Government is the most natural and plausible inference to be drawn from the facts of this case.

Forfeiture proceedings concerned with the property and not the person

[38] The appellants contend that they have no knowledge of internal processes within the MAWF and that if officials there committed irregularities, this should not be imputed to them. For the purposes of a forfeiture order under s 61 of POCA, it is not necessary for the owner of the property to have been involved in the commission of the offence or the contravention of the law. The crucial question in such an application is whether or not the property concerned is 'the proceeds of

unlawful activities'. It matters not who was responsible for the unlawful activities. This much is apparent from the language of the section. If the owner of the property liable to forfeiture on the ground that it is the proceeds of unlawful activities wishes to avoid the operation of the forfeiture order on the basis that he or she is innocent, s 63(1) of POCA requires that the owner bring an application for an order excluding his or her interest in the property from the operation of the forfeiture order. Section 63(2) provides that in any such application, the 'innocent owner' must prove, on a balance of probabilities, that he or she acquired the interest concerned legally and for a consideration not significantly less valuable than the value of the interest; and further that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held was the proceeds of unlawful activities.

[39] Although Mr Shilongo and Mr Shikage, gave notice in terms of s 52(3) of their intention to 'apply for exclusion of [NAD's] property from the operation of preservation of property order', no such relief was asked for in their answering affidavits. In fact, they did not even attempt to show that the requirements for the innocent owner defence in s 63(2) were satisfied. By neglecting to deal with the evidence relating to the events inside the MAWF or to engage in any detail with the evidence concerning the interactions between Mr Shilongo and Mr Shikage and the MAWF officials implicated in the clearly unlawful activities, the appellants failed to discharge the burden of proof they bear in relation to any such application. For the same reason, the appellants did not make out a case for the forfeiture order to be limited to certain assets as opposed to all forfeited property.

Whether the forfeited property constitutes 'proceeds of criminal activities'

[40] Section 1 of POCA defines 'proceeds of unlawful activities' in very broad terms as meaning:

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

[41] From the above definition, it is clear that the proceeds might involve 'any property or any service, advantage, benefit or reward', including 'any property representing property so derived'; the proceeds might have been retained or received 'directly or indirectly'; the proceeds might have been retained or received 'in connection with or as a result of' any unlawful activity; the unlawful activity might have been carried on 'by any person'; the proceeds might have been retained or received 'in Namibia or elsewhere', and the proceeds might have been retained or received 'at any time before or after the commencement of this Act'.

'Unlawful activity' in turn is defined in POCA as meaning:

'any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.'

[42] The evidence presented by the PG as substantiated by bank statements of the accounts held by NAD, Kage Trading, C Three Trading and Taleni shows that

from 15 December 2011 to 18 June 2012, the MAWF made 15 deposits into NAD's bank account totalling N\$9 279 032,72. Kage Trading received N\$200 000 from NAD on 20 April 2012. C Three Trading received from NAD N\$20 000 on 19 December 2011 and N\$135 000 and N\$100 000 on 18 June 2012. Taleni received from NAD N\$295 000 on 22 May 2012 and N\$400 000 on 7 June 2012.

[43] Neither NAD nor Mr Shilongo nor Mr Shikage declared this income for income tax purposes. As by definition in s 1 of POCA 'proceeds of unlawful activities' includes 'property representing property so derived' and 'property which is mingled with property that is proceeds of unlawful activity'. When the MAWF made payments for the Lister engines into NAD's bank account and the MAWF-derived money mingled with the other money in the account, all the money in the account became the proceeds of the unlawful activity. Likewise when money was transferred from NAD's bank account to the bank accounts of Kage Trading, C Three Trading and Taleni, the MAWF-derived money mingled with the other money in those accounts and consequently all the money in those accounts became the proceeds of unlawful activity. Also, when money in NAD's bank account was used to purchase the Volkswagen Golf GTi, the motor vehicle became the proceeds of unlawful activity because it represents the money received in connection with the unlawful activity. It follows that all the property is liable for forfeiture. The High Court was thus correct in so holding.

Other goods procured from NAD

[44] As earlier noted, in addition to the Lister engines the MAWF also procured other items from NAD such as pipes and fittings, couplings, nuts and bolts, washers, valves, water metres, etc. There was no term tender for the procurement of these items, so the MAWF obtained three quotations.

[45] The cell-phone records of Mr Shilongo indicated that, after the MAWF received two quotations in respect of these items, there would be regular telephone contact between Mr Shilongo and Ms Hoeses. NAD would then submit a quotation that appeared to undercut the two quotations already received by the MAWF. The PG drew the inference that Ms Hoeses provided the information regarding the other quotations to Mr Shilongo in order for NAD to submit the lowest quotation. In response to the inference drawn by the PG, the appellants relied on the statement of Ms Hoeses that she 'was forced to make various phone calls to Mr Shilongo because [she] wanted progress reports on the delivery of the goods ordered'. But this version in my respectful view is so implausible that the High Court was justified in rejecting it on the papers.

[46] The evidence presented in the High Court shows that in total, 54 invoices to the tune of N\$9 834 143,91 were received by the MAWF from NAD between 30 November 2011 and 9 February 2012, for the purchasing of equipment related to water supply. Order numbers were issued in respect of the 54 invoices. All the invoices were paid by the MAWF. Fifty one (51) of the fifty four (54) purchase order forms were signed by Procurement Clerk, Mr Meintjies, who in doing so confirmed that he had received the goods even though in fact the goods had not been delivered on the date certified. A total of 55 purchase order forms were

issued in favour of NAD from the MAWF between 30 November 2011 and February 2012.

[47] In respect of all the transactions between NAD and the MAWF, NAD received payment *before* the goods were delivered and a representative of NAD certified on the purchase orders that the goods were delivered whereas in fact they had not. The misrepresentations caused the MAWF to make payment to NAD when in fact payment was only due to NAD after the delivery of the goods. In some instances, the goods were not delivered at all. Ms Reinhilde Lebereki from Omaheke Regional Stores stated that HDPE pipes to the value of N\$860 137,60 were not delivered in respect of orders where the supplier was NAD. Nor were straight couplings to the value of N\$58 075 delivered either. The official in charge of the store for Oshana and Omusati Regions similarly stated that goods to the value of N\$680 309,68 that were certified by officials in the MAWF head office as having been received from NAD and for which NAD received payment had not in fact been delivered to the regional store. According to Mr Cloete of the ACC, the value of the goods paid for but not delivered by NAD, including goods in a container now in the ACC's possession, totals N\$5 088 940,12.

[48] Mrs Anna Shiweda, the then Deputy Permanent Secretary in the MAWF, made it clear that the State Finance Act prohibited payment for goods before delivery without prior approval by Treasury and that no such approval had ever been obtained in respect of the goods NAD was supposed to supply to the MAWF. The appellants gave an example of payment in advance by the MAWF to Continental Spares on 13 March 2012 for goods delivered on 26 May 2012.

However, in the replying affidavit of the PG these advance payments were explained to say that the MAWF had a special arrangement with Continental Spares on purchase order no 125169 relating to equipment that had to be specially ordered from abroad. In relation to transaction no 123627 for N\$115,000, the invoice was issued on 13 March 2012 but the cheque was kept until delivery was made in May 2012. Contrary to NAD's contention, Ms Albertina Nankela the then Deputy Director of Finance in the MAWF, made it clear that it was not the practice within the MAWF to pay service providers upfront when the financial year drew to a close. Ms Nankela explained that if a supplier was issued with an order to provide goods to the MAWF and, as the end of a financial year approached, the supplier would finish the work in that year or early in the following financial year, then arrangements could be made for cheques to be printed and left with the financial division until the work was completed. Such arrangements are however only made if the goods were not budgeted for in the following financial year. In the case of NAD, no such arrangements were made.

[49] In their answering affidavits, the appellants did not deny that NAD certified the goods as delivered even though they had not been delivered. They did not also dispute that this resulted in NAD receiving payment for goods not delivered. Significantly, Mr Shilongo and Mr Shikage did not explain why they transferred money to other entities owned by them, while goods remained to be purchased for the MAWF.

[50] The misrepresentation that the goods had been delivered was of additional benefit to NAD. By certifying that the goods had been delivered and by processing

the payment at a time when the goods had not in fact been delivered, NAD was placed in a position to purchase the goods in circumstances where it would not otherwise have been able to purchase the goods at all as it had only N\$300 in its bank account.

[51] Moreover, the appellants' contention that the preservation order unfairly interrupted the parties' contractual performance with the freezing of the appellants' bank accounts appears to overlook the fact that the preservation order was only granted on 29 June 2012 well after payments had been effected and not all the goods having been delivered. I, therefore, agree with the submission on behalf of the PG that the procurement of the items other than the Lister engines was also tainted by fraud. As mentioned above, Mr Shilongo, Mr Shikage and/or NAD certified 50 invoices of goods as delivered to the MAWF totalling an amount of N\$9 834 143,91 while the goods had not in fact been delivered on the date certified by NAD. NAD could not have supplied any goods if it had not certified that the goods were delivered as it did not have sufficient funds in its bank account nor did it have an established financial track record.

[52] Mr Freyer and Ms Hoeses in collusion with other unconscionable officials within the MAWF, particularly Mr Meintjies, made the misrepresentations that goods were delivered by NAD to the employees of the MAWF and that they were in a good working order while in fact the goods were not delivered. These misrepresentations caused the MAWF to make undue payment to NAD. In some instances the goods were not delivered at all. It was estimated that goods to the value of N\$5 000 000 was not delivered to the MAWF. The value of the forfeited

property is estimated at N\$2 677 434,48 of which N\$1 224 350,75 was paid to third parties without an explanation tendered for such payments. There was no explanation either how goods to the value of approximately N\$5 000 000 were going to be purchased with the remaining balance of N\$1 453 083,73.

[53] In her application for forfeiture, the PG alleged the commission of three offences, namely fraud, corruption and money laundering. The appellants deny that any offence or crime had been committed. A reading of the definition of 'proceeds of unlawful activities' and of 'unlawful activity' makes it plain that it would be sufficient for the purposes of the appeal for this court to find on a balance of probabilities that any (one) Namibian law was contravened or that the conduct giving rise to the unlawful activity constitutes any (one) offence or crime and that the property subject to forfeiture represents the proceeds of such crime or offence. Therefore, in light of the finding made hereinbefore that the conduct relating to the procurement of the Lister engines and the other items constitutes the crime of fraud, it is not necessary to decide whether the conduct also amounts to other crimes or offences contended for by the PG.

[54] It follows from the findings made so far that the entire funds received by NAD from the MAWF are to be viewed as 'proceeds of unlawful activities' and are thus subject to forfeiture. The entire funds received as payment for the Lister TR1 engines and for the other goods were tainted, on a balance of probabilities, by at the very least fraud.

[55] Contrary to the appellants' contentions, the value of the items received by the MAWF in return for its payments does not play a role for the purposes of the forfeiture order. The forfeiture order is directed at the proceeds of unlawful activities regardless of values or assets given or intended to be given in exchange. What is more, in principle the entire funds with which the sums received from the MAWF mingled when they were transferred to the bank accounts in question must be considered as proceeds of unlawful activities as defined by s 1(1) of POCA.

[56] Finally, the appellants invoke the constitutional principle of proportionality, decrying the 'rigidity' of the High Court's decision, and submitting that the High Court could have ordered forfeiture to a lesser extent than sought by the PG. As noted above, the High Court was bound to order forfeiture under s 61 of POCA once it found the requirements laid out in this provision to have been fulfilled. Section 61(1) of POCA binds the court not only with respect to whether it orders forfeiture, but also with respect to the extent to which it may do so. Elements of proportionality are confined by POCA to narrow possibilities for the court to reduce the scope of the forfeiture order, particularly by granting an exclusion of certain interests under s 63 or 65 of POCA. As already mentioned, such avenues have not been resorted to by the appellants. In the context of the structure of POCA, I find that the High Court could not simply have exercised a general discretion on the basis of the constitutional principle of proportionality with respect to the extent of the forfeiture. On a proper reading of s 61 of POCA, the appellants' contention ought to be rejected.

Costs

[57] In light of the appellants' unsupported allegations of improper conduct on the part of the PG during the court proceedings, the High Court considered that the circumstance deserved a special costs order. I fully agree that the various epithets gratuitously used in the appellants' principal answering affidavit to cast aspersions on the PG and to ridicule her application such as 'malicious prosecution', 'dishonourable conduct', 'conspiracy', 'fraud', 'nonsense' or even 'foolishness', are not supported by any evidence. They appear to have been raised *ad hominem*, so as to discredit the PG or the officials seized with the conduct of the application personally for only exercising their public functions. Conducting the defence of a client in such a highly antagonistic and personal fashion is patently contrary to the high standards of practice to which all counsel must be committed. I therefore endorse the forceful admonition proffered by Smuts J in *Prosecutor-General v Xinping*¹¹ and strongly urge legal practitioners to heed the learned judge's wise counsel. Smuts J cautioned:

' . . . Unsupported allegations of abuse of process and of engaging in vexatious activities directed at a repository of public functions in exercising public powers itself in my view constitute an abuse and warrant censure. They are to be discouraged by appropriate costs orders when this form of abuse occurs. All too often I encounter a resort to unsupported and unwarranted allegations of dishonesty or moral turpitude or abuse by a deponent in affidavits when dealing with the approach taken or allegations made by a public official. These unfounded attacks upon integrity are to be discouraged and in my view warrant a special order as to costs.'

In future if similar conduct persists, it might call for a stern warning that courts will have to consider personal costs orders against legal practitioners. Regular costs orders affect the pocket of clients who should not be held to account for what may

¹¹ Case No. POCA 4/2013 [2013] NAHCMD 300, delivered on 24 October 2013.

amount to unprofessional or dishonourable or unworthy conduct on the part of their legal practitioners.

Conclusion

[58] I am persuaded, on a balance of probabilities, that the property being the positive balance in the bank accounts held by NAD, Kage Trading, C Three Trading and Taleni, as well as the Golf, constitutes the proceeds of unlawful activities. The conduct relating to the procurement of the Lister engines and the other goods being the subject matter of the forfeiture application constitutes the crime of fraud. The property concerned is thus the proceeds of unlawful activities. The High Court's decision to order the forfeiture of the property is correct. Consequently, the appeal against the judgment and order of the High Court must be dismissed. The costs must follow the result and the special costs order made by the High Court should be upheld for the reasons given above.

Order

[59] In the result, the following order is made:

The appeal is dismissed with costs, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners and to be paid on a legal practitioner and own client scale by the appellants jointly and severally the one paying the other to be absolved.

MAINGA JA

MOKGORO AJA

APPEARANCES

APPELLANTS: R Bhana SC (with him TC Phatela, SJ
Scott and L Murorua)
Instructed by Murorua Kurtz Kasper Inc

RESPONDENT: A Cockrell SC (with him M Boonzaier)
Instructed by the Government Attorney