



REPORTABLE

CASE NO: SA 62/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between

PROSECUTOR-GENERAL

Appellant

and

MOSES PASANA UANJANDA KAMUNGUMA

First Respondent

MCKUMA AND LENGA TRADING CC

Second Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 29 March 2019

Delivered: 12 June 2019

Summary: The Prosecutor-General has appealed against the decision of the High Court declining to make a forfeiture order in respect of certain assets that the Prosecutor-General (the PG) contends were proceeds of unlawful activities. The PG had earlier successfully applied for a preservation of property order in respect of the property that she sought to be forfeited. In the application for a forfeiture order, the PG did not attach the affidavits filed in support of the preservation application to her forfeiture application affidavit. Instead, she incorporated those affidavits and annexures by reference.

The High Court held that it was not permissible for the PG to rely on affidavits deposed to in the preservation application without annexing those affidavits to her

affidavit in support of the forfeiture application. The court concluded that as the evidence of the PG was based on hearsay, there was no admissible evidence establishing that the preserved assets were proceeds of unlawful activities.

In the Supreme Court, the PG argued that the High Court erred in failing to appreciate that the preservation application and the forfeiture application are two sides of the same coin. As the evidence required in each application is essentially the same, it was not necessary to attach documents filed in respect of the preservation application to the affidavit supporting the forfeiture application.

The Supreme Court held that the important matter to consider is the question whether a person with an interest in the preserved property would suffer prejudice if the documents that were filed in the preservation of property application are not attached to the PG's affidavit in the forfeiture application. The court reasoned that such person is unlikely to suffer prejudice as he or she would have been served with the documents filed at the preservation of property stage. As the evidence in the two phases is essentially the same, it was not necessary to burden the court with repetitive material that may also serve to increase the costs of litigation.

The court held further that the evidence tendered established fraud and money laundering and that the High Court should have ordered the forfeiture of the property on the basis that it represented proceeds of unlawful activities. The Supreme Court accordingly made a forfeiture of property order and also directed the respondents to pay the PG's costs both in the High Court and in the Supreme Court.

APPEAL JUDGMENT

SHIVUTE CJ (HOFF JA and FRANK AJA concurring):

Background

[1] The Prosecutor-General (the PG) successfully applied to the High Court for a preservation of property order under s 51(1) of the Prevention of Organised

Crime Act 29 of 2004 (POCA) in relation to the property described in the application as 'the positive balance in First National Bank investment account number 71253772762 in the name of Moses P U Kamunguma; a Volkswagen Polo Vivo with registration number N58897W, and a Mazda 3.0DIT 4x2SLE with registration number N78991W.'

[2] The essence of the PG's case was that the funds paid into Mr Kamunguma's bank account were proceeds of unlawful activities. The PG further contended that Mr Kamunguma had invested some of the money paid into his bank account and used part of it to purchase the vehicles referred to above.

[3] At the time of the application, Mr Kamunguma, who is the first respondent in this appeal, was employed as the Managing Director of a company. The second respondent is a close corporation registered in Namibia in which Mr Kamunguma holds 50% member's interest while one General Francois Tete Olenga, a national of the Democratic Republic of the Congo, holds the other 50% member's interest in the corporation. In this judgment I will refer to Mr Kamunguma and the close corporation collectively as 'the respondents'.

[4] The PG subsequently brought an application in the High Court for the forfeiture of the preserved property order. The pleadings that were filed in the preservation application and the preservation of property order itself were served on Mr Kamunguma who subsequently filed a notice in terms of s 52(3) of POCA, on his own behalf as well as on behalf of the close corporation, of their intention to

oppose the making of a forfeiture order. Mr Kamunguma also filed an affidavit in terms of s 52(5) of POCA.

[5] In her forfeiture application, the PG did not attach the affidavits and annexures filed in support of the preservation application to her forfeiture application affidavit. Instead, she referred the court to the supporting affidavit deposed to by an official in the Anti-Corruption Commission, Ms Namukwambi-Kanyangela, who initially investigated the matter, 'and [to] the relevant annexures thereto' filed in support of the preservation application as well as to the PG's own founding affidavit in the same application, 'more specifically paragraphs 23 to 61 thereof.' She then incorporated such affidavits and annexures by reference. In doing so, the PG contended that 'as these affidavits are incorporated in the present application, it is not necessary to burden [the court] with a restatement of these facts and submissions'.

Judgment of the High Court

[6] The High Court found that although the application for a preservation of property order and the application for a forfeiture order were intertwined in process and substance, the two were separate applications that must be made in the prescribed manner. Each application must comply with regulation 7 of the Prevention of Organised Crime Regulations and with rule 79(1) and (2) of the Rules of the High Court. The court then held that it was insufficient and impermissible for the PG to rely on affidavits deposed to in the preservation application without annexing those affidavits to her affidavit in support of the forfeiture application and without directing the attention of the other party as well

as that of the court to the relevant portions of documents in those affidavits on which she relied.

[7] The court concluded that as the entire evidence of the PG was based on the information she had obtained from the person whose evidence was not before court, there was no admissible evidence pointing to the preserved assets being proceeds of unlawful activity. The forfeiture application was accordingly dismissed with costs, hence the present appeal.

Arguments of the parties

[8] Ms Boonzaier who argued the appeal on behalf of the PG together with Ms L Angula contended that the High Court erred in finding that the evidence adduced in support of the preservation of property application could not be incorporated in the forfeiture of property application by reference. Ms Boonzaier emphasised the principle that the preservation application and the forfeiture application were intertwined as a matter of procedure and substance. She referred the court to a number of sections in Chapter 6 of POCA that she says establish a close link between the two applications. Counsel argued that the court below should not have therefore disregarded the evidence relied upon by the PG by way of incorporation by reference. She concluded her submissions by contending that as the evidence the PG sought to rely on was properly before court, the High Court should have found that the preserved assets were proceeds of unlawful activities and as such the property should have been forfeited.

[9] On behalf of the respondents, Mr Namandje who argued their case together with Mr N Mhata, supported the findings of the High Court and relied on the provisions of s 59 of POCA, regulation 7 of POCA, and rules 65(1) and 79(1) and (2) of the Rules of the High Court for the proposition that the evidence on which the PG sought to rely in the forfeiture application was not properly before court. Counsel also relied on a number of dicta extracted from well-known decisions of this court and those of courts in South Africa in support of the argument that it was not open to a party to merely annex to its affidavit documentation without identifying the portion on that affidavit on which the party relies, more so to rely on affidavits not 'contemporaneously prepared for the specific and ongoing litigation but for some other purpose'.

[10] On the question of whether a case for a forfeiture order had been made out, counsel for the respondents argued that the PG merely made 'conclusive allegations' that the preserved money and other property were proceeds of unlawful activities without proffering facts on which the conclusions were based. In respect of the alleged unlawful activities, counsel recounted that the PG relied on three predicate offences or unlawful activities, ie. tax evasion, fraud and money laundering offences under ss 4, 5 and 6 of POCA. Counsel contended that the allegations made in relation to tax evasion were denied by General Olenga. In any event, so the argument went, where unlawful activities are alleged to have occurred in a country other than Namibia, the relevant International Convention requires that such unlawful activities be a criminal offence or a contravention of a law in that country and in Namibia. In this respect, counsel relied on Article 6(2)(c)

of the *United Nations Convention against Transnational Organized Crime* and the Protocols thereto to which Namibia is a State Party.

The structure of Chapter 6 of POCA

[11] Counsel for the PG sketched a useful summary of the statutory interface between the preservation application and the forfeiture application. I will borrow from her summary in an attempt to answer the question before us, namely whether it is permissible in law for the PG to incorporate by reference affidavits and other information filed in the application for a preservation order in her affidavit in support of the forfeiture application. Chapter 6 of POCA provides for a two-stage procedure for the forfeiture of proceeds of unlawful activities. The South African Constitutional Court points out in *National Director of Public Prosecutions v Mohamed NO & others* 2002 (4) SA 843 (CC) in relation to Chapter 6 of that country's POCA - whose provisions are identical to those of Chapter 6 of our POCA - that the two stages are complex and tightly intertwined, both as a matter of process and substance.

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

¹ Section 51(2).

² S 52(1)(a) and (b).

[13] Section 52(3) of POCA requires of any person who has an interest in the preserved property to give notice of his or her intention to oppose the making of a forfeiture order.³ This must be done within 21 days after the notice of the preservation order has been given to the person concerned⁴ or 21 days after the notice has been published in the *Government Gazette*⁵.

[14] If the person referred to above has not given a notice in terms of s 52(3), or the notice is not accompanied by an affidavit as required by s 52(5), then such person is not entitled to receive notice of the application for a forfeiture of property order in terms of s 59(2) and is not entitled to participate in the forfeiture proceedings.⁶

[15] It is thus evident that the process leading to a forfeiture order commences at the preservation of property stage, where the application is brought *ex parte*.⁷ After the granting of the preservation of property order, a person who wishes to participate in the proceedings relating to the forfeiture of property application (the second stage) must give his or her notice to do so even before the PG elects to proceed with the second stage.⁸

[16] Section 52(5) requires that the notice in terms of s 52(3) must be

³ S 52(3) also requires the person who wishes to rely on the so-called innocent owner defence to give written notice of his or her intention to apply for an order excluding his or her interest in the property.

⁴ S 52(4)(a).

⁵ S 52(4)(b).

⁶ S 52(6). An exception that permits for an interested party to apply for condonation and leave to participate in the forfeiture proceedings has been made in s 60.

⁷ S 51(2). See also *Prosecutor-General v Taapopi* 2017 (3) NR 627 (SC).

⁸ S 52(3).

accompanied by an affidavit. The requirement of an affidavit with the notice of the intention to oppose appears to be unique to application proceedings. In the affidavit, the person must set out, amongst other things, the nature and extent of his or her interest in the property concerned;⁹ whether he or she admits or denies that the preserved property is an instrumentality or proceeds of unlawful activities;¹⁰ the facts on which he or she intends to rely in opposing the making of a forfeiture order,¹¹ and the basis on which he or she admits or denies that the property is an instrumentality or the proceeds of unlawful activities.¹² There is no forfeiture application before court at this stage, but the notice in terms of s 52(3) and the affidavit in terms of s 52(5) are part of the two stage forfeiture proceedings.

[17] It would appear that a practice has evolved in terms of which the case number allocated to the application for a preservation of property order is also used in the forfeiture order application, which again demonstrates the close relationship between the two proceedings.

[18] The purpose of the s 52(5) affidavit appears, amongst other things, to establish the standing of the person who wishes to participate in the proceedings. This is so, because an interested party is required to set out the nature and extent of his or her interest in the preserved property;¹³ to notify the PG of the relief the interested party intends to seek at the second stage of the proceedings prior to the

⁹ S 52(5)(b).

¹⁰ S 52(5)(d).

¹¹ S 52(5)(e)(i).

¹² S 52(5)(e)(ii).

¹³ Section 52(5)(b).

start of such proceedings,¹⁴ and to define the issues in dispute between the PG and the interested party.¹⁵

[19] A preservation order is only valid for 120 days, unless there is a pending forfeiture of property application. The purpose of the 120 days - period referred to in s 53 would be, amongst other things, to enable the PG to decide whether or not to proceed with the second stage of the proceedings in light of the information disclosed in the s 52(5) affidavit; to afford the PG an opportunity to investigate any allegations made by the person in the s 52(5) affidavit; to afford the PG time to gather more evidence to satisfy the burden of proof, and to give the PG an opportunity to verify the grounds upon which the person intends to rely in the application, in terms of s 63, for the exclusion of the interests in the property subject to the forfeiture order.

[20] Subsections (3) and (5) of s 52, therefore, interlink the preservation of property application with the forfeiture of property application.

[21] Section 59(1) provides:

'If a preservation of property order is in force, the Prosecutor- General 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.'

[22] It follows from the above section that except in an instance of a forfeiture of property order arising from a criminal conviction, there can be no forfeiture

¹⁴ Section 52(5)(c).

¹⁵ Section 52(5)(d) and (e).

application without there being a preservation of property order in place. This again reinforces the intimate connection between the preservation application and the forfeiture of property application.

[23] Section 61(1) of POCA provides that '[t]he High Court must, subject to section 63, make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned - (a) is an instrumentality of an offence referred to in schedule 1; or (b) is the proceeds of unlawful activities.' It can be seen from this provision that the only difference between the two stages is the burden of proof; on a balance of probabilities at the forfeiture stage as opposed to 'on reasonable grounds' at the stage of preservation. Otherwise the evidence required to be led at the preservation stage is essentially the same as that required at the forfeiture stage.

Dicta relied upon by the respondents

[24] As noted earlier, the respondents relied on a number of dicta some of which have been referred to in the judgment of the High Court to support the proposition that it would amount to judgment by ambush for the court to rely on documents annexed to a party's affidavit when conclusions sought to be drawn from those documents had not been canvassed in the affidavit. First, the respondents relied on a passage at para [47] of the judgment of the Supreme Court of Appeal of South Africa in *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) where the court stated inter alia:

[47] The trial judge, again, failed to comply with basic rules of procedure. Judgment by ambush is not permitted. It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. The position is no different from the case where a witness in a trial is not called upon to deal with a fact and the court then draws an adverse conclusion against that witness.'

[25] A careful reading of the judgment in that case shows that the above dicta were made in the context of the judge at first instance having made findings 'that cannot be justified on the record' about an earlier decision to indict the respondent in that case, which decision had been set aside by implication by a different judge. The judge at first instance also relied on a newspaper article that was attached to an affidavit to make a finding - based on speculation by the author of the newspaper article - that the decision to prosecute the respondent had been politically motivated. The appellate court commented adversely on the approach adopted by the court of first instance, remarking that the learned judge in that court 'overstepped the mark' by making findings based on speculation. The context was different and the passage cannot therefore be authority for the argument advanced by the respondents.

[26] Secondly, the respondents relied on a passage in *Swissborough Diamond Mines v Government of RSA & others* 1999 (2) SA 279 (T) at 324F-G where it was stated:

'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.'

[27] The above dictum was made against the background of the plaintiffs in that case having annexed lengthy affidavits to their rule 35 of the South African Uniform Rules of Court. They also endeavoured to incorporate 'several other documents' by annexing them to the affidavits in an attempt to establish a 'conspiracy of silence' or mala fides on the part of the first defendant in that case. The court found that such practice or conduct was to be deprecated. It also underscored the general principles relating to the content of affidavits. Again, the context in which the dictum was made is far removed from the set of facts and circumstances of the appeal before us. It offers no support to the respondents.

[28] The respondents also laid emphasis on the dicta by this court in *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (2) NR 390 (SC) (the *RDP* matter) at para [282] where the court made the following observation:

'[282] Several affidavits relied on by Haufiku in the founding affidavit were deposed before the original founding affidavit of Haufiku which was deposed to on 4 January 2010 and filed on the same date. The affidavits do not even suggest that they are intended to be the basis for any litigation, let alone to support the relief contained in the notice of motion filed of record in the present s 109 application.'

[29] The dictum in para [282] of the *RDP* matter concerns affidavits that were deposed to before the original founding affidavit was made. As the court observed in that paragraph, the affidavits did not suggest that they had been intended to be the basis for any litigation. The dictum is thus not supportive of the respondents' contention that the PG should not have incorporated affidavits deposed to in relation to preservation application, because as found above the preservation application is closely related to the forfeiture application. The respondents also relied on other remarks made in the *RDP* matter at para [285] where the court observed:

[285] There is a sound reason in requiring that in motion proceedings the witness's statement supporting an allegation as to the existence or not of a fact in dispute in the proceeding, must be prepared and deposed to contemporaneously with the affidavits forming the basis for, and in anticipation of, the impending court proceeding. That focuses the witness's mind to the solemnity of the occasion and makes him appreciate that what he deposes to would form the basis for the decision of the court and that because of that, he is under a solemn legal duty to tell the truth. If for some reason that is not possible, it must be clear from the affidavit of a deponent who wishes to rely on a statement of a person made prior to the impending proceeding, that the supporting witness knew about the anticipated proceeding and the duty to be truthful towards the court and that although he was prepared to depose to an affidavit in connection with that proceeding in support of the main deponent's version, they were not able to at the time the papers were drawn — owing to unavailability due to some exigency which must be properly, accurately and fully explained to enable the opponent to assess it and to place, if necessary, facts before court to contradict same or to point to the unreliability of such testimony.'

[30] These observations are again quoted out of context. The background to the remarks is given in para [284] of the judgment wherein the court referred to specific affidavits that were made well before the litigation had commenced. The court observed that those affidavits made no reference to the then pending legal

proceedings. One of the affidavits was not commissioned and the other had no date on it. The court remarked in the last sentence in that paragraph that none of the affidavits purported to be the basis for the allegations made by the deponent to the founding papers. This dictum is again far from supporting the contention under consideration.

[31] The next passages relied on by the respondents were taken from *Nelumbu & others v Hikumwah & others* 2017 (2) NR 433 (SC) at para [42] and [43]. It is not necessary to recite the passages here. On my reading of the *Nelumbu* judgment, the grounds of appeal the court was called upon to decide were that the High Court had misdirected itself by relying on bases or grounds not advanced by the respondents in their founding affidavit and that other findings made by the High Court constituted grounds and complaints the appellants were not called upon to meet and which, if raised, they would have answered. That is not the respondents' case here. The passages thus of no assistance to the respondents.

Analysis

[32] Given the scheme of Chapter 6 of POCA, it is clear that the preservation and forfeiture applications are closely related in process and substance to the extent that in South Africa where the provisions of that country's POCA are similar to those of ours, a rule of practice has evolved in terms of which the founding affidavit to the forfeiture application 'will normally incorporate by reference the founding affidavit to the preservation application.'¹⁶ This is a salutary practice that should be followed in this jurisdiction for the following reasons.

¹⁶ Albert Kruger *Organised Crime and Proceeds of Crime Law in South Africa*, 2 ed p 121, Lexis Nexis.

[33] The overriding consideration in the question under consideration is whether a respondent in an application for a forfeiture order would suffer prejudice if the PG, as applicant, were to be permitted to incorporate by reference the affidavits and other documents filed in an application for a preservation order to her application for a forfeiture order. In my respectful view, there can be no prejudice as the respondent would have been served with the papers that were filed in the preservation of property application. On the facts of this appeal, it is common cause that the respondents had been served with the affidavits and other documents that were considered by the court in the application for a preservation of property order. The respondents knew very well what case they were required to meet. Therefore, there can be no suggestion of trial by ambush.

[34] Counsel for the respondents submitted that there was a real likelihood of prejudice on a respondent who has an interest in the preserved property but who has not been served with the court process giving rise to the preservation of property order. Quite apart from the fact that this was not the respondents' complaint in the High Court or in this court, the answer to the hypothetical situation postulated by counsel is to be found in s 60 of POCA. Subsections (1) and (3) of s 60 provide as follows:

- '(1) Any person who, for any reason, failed to give notice in terms of section 52(3), within the period specified in section 52(4) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.

(2)

(3) The High Court may condone the failure and grant the leave as contemplated in subsection (1), if the court is satisfied on good cause shown that the applicant-

(a) was unaware of the preservation of property order or that it was impossible for him or her to give notice in terms of section 52(3); and

(b) has an interest in the property which is subject to the preservation of property order.'

[35] Such a respondent can always obtain the preservation of property application from the Registrar of the High Court or from the PG to acquaint themselves with the case he or she must meet and to enable compliance with the provisions dealing with the giving of the notice and its content. Moreover, incorporating the affidavit made in support of the preservation application in the forfeiture application serves a practical purpose of avoiding prolixity and overburdening the court with repetitive material, which may also have a bearing on the costs of litigation in this area of the law.

[36] It is of course correct, as counsel for the respondents argued and the court below reasoned, that affidavits by the PG in support of applications under Chapter 6 of POCA must comply with the requirements set out in s 59 of POCA, regulation 7 of the Prevention of Organised Crime Regulations and rules 65(1) and 79(1) as well as rule 79(2) of the Rules of the High Court where no rule has been made under POCA. The passages in judgments relied upon by counsel for the respondents and those referred to in the High Court's judgment are correct on the set of facts of those cases. They are also correct to the extent that they set out

general principles on the content of affidavits and on how information contained in annexures to affidavits may properly be introduced in evidence. However, they do not deal with a different issue of a two-stage process: (a) where the evidence required to establish the facts in the first stage is essentially the same as the evidence required to establish the case in the second phase of the process; (b) most importantly, where such evidence had been served on a respondent in the first stage of the proceedings; and (c) where s 52(5) of POCA requires of a respondent to make an affidavit in which he or she sets out the facts that are admitted and those denied, thus facilitating a further ventilation of the case even before the forfeiture application has been initiated. In those circumstances, it is permissible for the PG to incorporate by reference the affidavits made in the preservation application in the founding affidavit in support of a forfeiture application.

[37] I am persuaded that interpreting the legislation in the manner I have endeavoured to do, does not result in prejudice to a respondent in an application for a forfeiture order as the respondent in question would have been served with the affidavits and other information that had been filed in the application for a preservation of property order. He or she would by then have known what case he or she must meet. In any event, the law makes adequate provision for a respondent who acquires knowledge of the existence of the preservation order from sources other than the service of the order on him or her. Such a respondent is unlikely to suffer prejudice either as s 60 caters for such an eventuality.

[38] For all these reasons, I am persuaded that the court below erred in holding that the preservation application cannot form part of the evidence in support of the forfeiture application by mere incorporation by reference. The court consequently also erred in excluding from consideration the evidence presented by the PG on the basis that such evidence was inadmissible. I turn next to consider and decide whether the PG has established on a balance of probabilities that the preserved goods are proceeds of unlawful activities.

Are preserved good proceeds of unlawful activities?

[39] POCA makes it obligatory to make application for a forfeiture order by way of affidavit. This implies that any factual disputes in such application must be resolved in accordance with the principles applicable to disputes of fact in motion proceedings.¹⁷ The approach in this type of application is therefore that set out in the well-known *Plascon-Evans*¹⁸ case, which is to the effect 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. It is trite that the *Plascon-Evans* rule is subject to exceptions. 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. Also, 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.¹⁹ This is so because 'if by a

¹⁷ *New Africa Dimensions v Prosecutor-General* 2018 (2) NR 340 (SC) at para 16.

¹⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 633 (A).

¹⁹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165.

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.’²⁰ The second exception to the 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 by adopting a ‘robust, common-sense approach’.²¹ The evidence will accordingly be approached in accordance with these legal principles.

[40] As earlier noted, s 61(1) of POCA provides that the 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. ‘Proceeds of unlawful activities’ is defined in s 1 of POCA 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] ‘Unlawful activity’ in turn is defined 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

²⁰ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G.

²¹ *Soffiantini v Mould* read with *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 698I.

that conduct constitutes an offence in Namibia or contravenes any law of Namibia.'

The PG's case and the respondents' answers thereto

[42] The PG's case as distilled from her founding affidavit and the affidavit of Ms Namukwambi-Kanyangela as well as from annexures to the latter's affidavit was that during May 2015 the Anti-Corruption Commission (the ACC) received information of a suspicious transaction made in respect of Mr Kamunguma's bank account held at First National Bank (FNB). The ACC investigated the transaction and found that on 16 June 2014, FNB received instructions to pay on behalf of a Chinese bank an amount of Euro 192 518,60 into Mr Kamunguma's current account. FNB requested Mr Kamunguma to complete a form stating the purpose for receiving foreign currency. Mr Kamunguma declared that the funds were for 'construction' and came from a company known as China North Industries Corporation. On 18 June 2014, FNB cleared the money and the equivalent amount of N\$2 787 504,37 was paid into Mr Kamunguma's current account. The reference for this payment was recorded as 'commission'. Mr Kamunguma says he did not give this reference to the bank and there is no evidence gainsaying his assertion. The fact however remains that the sender of the money categorised it as commission.

[43] On several occasions between 2 July 2014 and March 2015 various amounts of money were moved back and forth between Mr Kamunguma's current account and his investment accounts. This included the transfer of an amount of N\$2 730 000 from his current account to an investment account on 2 July 2014; a

transfer of an amount of N\$55 000 from an investment account to the current account on 14 August 2014; a transfer of N\$250 000 from an investment account to the current account on 28 October 2014; payment of N\$2 048 000 into the current account from an investment account on 21 February 2015; a transfer of N\$2 000 000 to an investment account on 23 February 2015, and a transfer of N\$421 900 to an investment account.

[44] Several large cash withdrawals were also made from the current account. As an example, N\$85 000 cash was withdrawn on 24 November 2014. On the same day, Mr Kamunguma purchased a Polo Vivo motor vehicle, which he paid for in cash. The PG asserted that the amount withdrawn on 24 November 2014 was spent on the purchase of the Polo Vivo motor vehicle, being one of the vehicles sought to be forfeited. This assertion has not been denied by Mr Kamunguma.

[45] An amount of N\$183 880,97 was paid on 16 December 2014 into Mr Kamunguma's account held at another bank. The bank in question confirmed that this amount was paid to settle Mr Kamunguma's motor vehicle finance account in respect of the Mazda, another vehicle in respect of which a forfeiture order had been sought.

[46] When Mr Kamunguma was asked by the ACC to explain the source of funds, he gave the following initial explanation: During 2013 he and his partner, General Olenga, agreed to form a close corporation whose principal business would range from hospitality, construction, mining, investment, fishing,

consultancy, transport and farming. The agreement further entailed that General Olenga would send the funds to Mr Kamunguma for the latter to apply for the registration of a close corporation in which each would have equal member's interest. During June 2014, he received a call from FNB informing him that he had received funds from abroad.

[47] He informed FNB to transfer the funds to his FNB current account. In the meantime, he contacted General Olenga and enquired from him what the purpose of the funds was. General Olenga informed him that the money was meant to be a business start-up capital. During October 2014, he was told that FNB wanted confirmation from the sender that the funds were indeed intended for construction projects as Mr Kamunguma had earlier told the bank. He contacted General Olenga who forwarded to him an email message that Mr Kamunguma sent to FNB. The cryptic email written by a certain Jack and addressed to Mr Kamunguma was couched in the following terms:

'Dear Mr Kamunguma

Thank you for your consulting service with market research, analysis, and other related information for our building construction project. I hope you well received the transfer for your work and service (sic).

Our team is now thoroughly studying all the factors and information of the market in order to make further decision about the next step of the building construction project. And we'll inform you about our decision as soon as possible. Please keep in touch.

Best regards

Jack'

[48] Mr Kamunguma deposed to a second affidavit dated 26 June 2015. In it, he stated that he did not expect any commission as he had had no business dealings with the sender of the money. He further stated that he withdrew N\$780 000 from the funds sent to him from China as a loan from the close corporation to be repaid once the close corporation he and General Olenga had envisaged establishing had been registered. He said N\$2 000 000 of the amount he received had been invested and would be transferred to the close corporation's bank account upon maturity and once an account had been opened. He added that the close corporation had not conducted any business, but that it had applied for land in 2014. The close corporation had no financial statements nor was it registered for VAT or any other tax. Significantly, he also revealed that he had declared the N\$2 788 054 he had received from China on his personal tax return.

[49] On 26 January 2016, Ms Namukwambi-Kanyangela of the ACC received an email message from Mr Kamunguma. Attached to the email was a letter sent to him by General Olenga. The letter stated, amongst other things, that the payment sent to Mr Kamunguma was a refund of the advance paid pursuant to a cancelled agreement to purchase trucks from a China-based entity known as Norinco. On 15 February 2016, Ms Namukwambi-Kanyangela received another email from Mr Kamunguma. Attached to the email was a document purporting to be a 'declaration' made by General Olenga, in which he stated that the money sent to Mr Kamunguma came from a Mr Viong Wei who owed him money. I pause to observe that Mr Wei's first name appears to have been misspelt in General Olenga's 'declaration' as in other documents on record the name is spelt as 'Xiong' Wei, but not much turns on this. General Olenga proceeded to explain in

his declaration that he had instructed that the money be paid into Mr Kamunguma's bank account, because the company he and Mr Kamunguma agreed to register in Namibia did not have a bank account.

[50] It was common cause between the parties that the close corporation, being the second respondent in this appeal, was registered on 12 April 2014. By then Mr Kamunguma had a 100% member's interest in it. On 19 June 2014, the founding statement was amended. In terms of the amendment, Mr Kamunguma and General Olenga held 50% member's interest each.

Section 52(5) notice and opposing affidavits

[51] On 17 March 2016, the respondents filed a s 52(3) notice together with an affidavit. In the affidavit he dealt with his interest pertaining to the money, but said nothing about the vehicles. He stated that the money paid into his account was a loan advanced to the close corporation by General Olenga. He said that out of ignorance, he declared the money in his income statement to the Receiver of Revenue. Mr Kamunguma also deposed to an affidavit in answer to the PG's founding affidavit. In it he for the first time also dealt with the preserved vehicles and denied that the money and the vehicles were proceeds of unlawful activities or instrumentalities of offences. In respect of the money, he repeated the version that the money was owed to General Olenga by a third party in China. General Olenga decided to have it paid to Mr Kamunguma for the latter to keep on behalf of the close corporation. In instances where he had spent some of the money, he did so with the consent of General Olenga and the close corporation. In relation to the preserved cars, Mr Kamunguma asserted that ownership of the vehicles was

consistent with his lifestyle and his income. He therefore denied that the money and the vehicles were proceeds of unlawful activities or instrumentalities of offences.

The analysis of the evidence

[52] The PG contends that the evidence presented supports the commission of fraud, theft, tax evasion and money laundering offences set out in ss 4, 5, and 6 of POCA. The respondents deny that any offence or crime has been committed. It is evident from what has been presented above that the respondents' explanations as to the purpose of the funds vacillated from construction - to the payment for services rendered - to capital start up - to a loan advanced to the close corporation. Mr Kamunguma compounded the first misrepresentation made to FNB about the reason of the payment of the money into his account by giving another falsehood. When asked for confirmation from the sender that the money was indeed for construction, he forwarded an email from 'Jack' that implied that the payment was for services rendered in relation to a building project. He did this despite initially allegedly being told by General Olenga that the money was meant to start a business. According to Mr Kamunguma, the content of Jack's email was false as he had had no contact with the sender of the money. Yet, Mr Kamunguma sent the email to FNB well knowing that he had not rendered any service to Jack and/or the sender of the money. The intention must have clearly been to induce FNB to process the money in its banking system. This on a balance of probabilities amounts to fraud on the bank.

[53] As to the funds being a loan to the close corporation, this explanation is

equally improbable. By the time the money was paid into Mr Kamunguma's account, the close corporation was already in existence, but it had no bank account. No explanation was given why a bank account could not have been opened for the money to be paid into it. No rational explanation was given either as to why money meant for the close corporation was declared to the Receiver of Revenue as personal income. As a Managing Director of a company, Mr Kamunguma ought to have known the difference between company property and property belonging to a director of a company or a member of a close corporation. Coming from a company executive, the explanation that he was naïve to declare the close corporation's alleged money as his own does not sound convincing. It is so untenable and self-serving that we are justified in rejecting it on papers by adopting a robust, common sense approach.

[54] It is evident that a concerted effort was made to give an explanation that would convince the bank to process the money paid into Mr Kamunguma's account through the country's financial system and ultimately to save it from forfeiture. This resulted in rationalisation that polluted the already muddy waters, such as sending a letter dated 25 April 2016 acknowledging receipt of payment of the money already paid into Mr Kamunguma's account on 18 June 2014 in a misguided attempt to establish an alleged debt owed by Norinco to General Olenga.

[55] Although 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,²² it is necessary in this case to deal with the other basis on which the PG contends the preserved property are proceeds of unlawful activities, namely money laundering. On a balance of probabilities, the conduct of Mr Kamunguma and General Olenga also constitutes money laundering in contravention of s 4 of POCA. It is clear that the two entered into an agreement or arrangement or transaction in connection with the money. That agreement or arrangement had or was likely to have had the effect of concealing or disguising the origin or source or ownership of the money, or any interest which anyone may have in it. This was done to facilitate the processing of the money through the Namibian banking system. This was achieved through the making of misrepresentations to FNB and the investigating authorities. The inconsistent explanations as to the source of the money and the way Mr. Kamunguma dealt with the money gave rise to the irresistible inferences that he knew the source was unlawful and that he attempted to disguise this fact.

[56] To recapitulate, the money was explained as funds for construction. When confirmation to that effect was demanded from the sender, the explanation changed from construction to the payment for services rendered by Mr Kamunguma to one Jack. When it was realised that the payment of a commission may land Mr Kamunguma in legal trouble, the story developed into the money being a loan advanced to the close corporation, but even that explanation is problematic. Moreover, despite the money allegedly being advanced to the close corporation, Mr Kamunguma had already moved the money back and forth into

²² *New Africa Dimensions v Prosecutor-General*, cited in footnote 17 above, at para 53.

different accounts and used some of it for personal errands. To cap it all, he declared the funds in his income statement. These are classic patterns of money laundering. To explain away the spending of the money allegedly meant for the close corporation, Mr Kamunguma came up with the story of his having borrowed the money from the close corporation. No resolution or agreement to that effect was produced in evidence. The PG was thus justified in drawing the inference that all these shenanigans were calculated to disguise the origin, source or location of the money.

[57] The submission by counsel for the respondents, based on Article 6(2)(c) of the UN Convention against Transnational Organised Crime, that 'the conduct which is an offence or a contravention of a law in a foreign country must correspondingly be an offence or a contravention of a law in Namibia' is undoubtedly correct. This follows from the definition of 'unlawful activity' reproduced in para [41] above. The unlawful activities in Namibia were fraud on the bank and money laundering.

[58] The crucial question in forfeiture proceedings is whether or not the property concerned is 'the proceeds of unlawful activities', by whosoever committed. It matters not who was responsible for the unlawful activities. 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) 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) of POCA 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.

[59] 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'. Thus, when money paid into Mr Kamunguma's investment account mingled with the other money in that account all the money in the account became the proceeds of unlawful activity. Also, when part of the funds sent from China was used to settle the Mazda account and to purchase the Volkswagen Polo Vivo, the motor vehicles became the proceeds of unlawful activities, because they represent the money received in connection with the unlawful activities. It follows that all the property is liable for forfeiture.

[60] In the final analysis, it has been found that it is permissible in law for the PG to incorporate by reference affidavits and other information produced in an application for a preservation order in her affidavit supporting the application for a forfeiture order. It has also been found that on a balance of probabilities, the conduct of the members of the close corporation towards the money paid into Mr Kamunguma's account amounts to fraud on the bank and to money laundering. The High Court should therefore have found that the preserved money and the vehicles are proceeds of unlawful activities and ordered their forfeiture. The appeal ought therefore to succeed.

Order

[61] The following order is accordingly made:

(a) The appeal succeeds.

(b) The order made by the High Court dismissing the application for a forfeiture order is set aside and the following order is substituted therefor:

- (i) The assets that are presently subject of a preservation of property order granted by the High Court under Case Number POCA 1/2016, on 19 February 2016, in respect of the positive balance in the First National Bank investment account number 7125377262 ('the investment account') held in the name of Moses P U Kamunguma; the Volkswagen Polo Vivo with registration number N58897W, and a Mazda 3.0DIT 4x2SLE with registration number N78991W ('the property') are forfeited to the State in terms of s 61 of the Prevention of Organised Crime Act 29 of 2004 ('POCA').
- (ii) Warrant Officer Emilia Nambadi (W/O Nambadi) of the Commercial Crime: Anti-Money Laundering Sub - Division in Windhoek, who in terms of the preservation of property order has been appointed curator bonis in respect of the property subject to a preservation of property order, or in W/O Nambadi's absence, any other authorised member of the Commercial Crime Investigation Unit: Anti-Money Laundering Sub-Division in Windhoek, is authorised to sell the vehicles and pay the proceeds thereof together with the amount in the investment account into the Asset Recovery Account with the following particulars:

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Standard Bank Account Number 589 245 309

Branch Code 08237200

- (iii) The Registrar of the High Court must publish this order in the *Government Gazette* as soon as practicable after it has been made.
- (iv) Order (b)(i) and (b)(ii) will take effect 30 days after the notice of this order has been published in the *Government Gazette* or after an application, if any, in terms of section 65 of POCA has been disposed of.
- (v) The respondents are ordered to pay the costs of this appeal and the costs of the application for a forfeiture order in the High Court jointly and severally, the one paying the other to be absolved, which costs in each instance shall include the costs of one instructing legal practitioner and one instructed legal practitioner.

SHIVUTE CJ

HOFF JA

FRANK AJA

APPEARANCES

APPELLANT:

M Boonzaier, with her L Angula

Instructed by the Government Attorney

RESPONDENTS:

S Namandje, with him N Mhata

Of Sisa Namadje & Co Inc