



CASE NO.:POCA 11/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the *EX PARTE* application of:

THE PROSECUTOR-GENERAL

APPLICANT

RE:

**IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF SECTION 51
OF THE PREVENTION OF ORGANISED CRIME ACT 29 OF 2004.**

CORAM: MILLER, AJ

Heard on: 17 November 2011, 23 November 2011, 28 November 2011

Delivered on: 02 December 2011

JUDGMENT

MILLER, AJ: [1] This matter comes before me as an application for a preservation order in terms of Section 51 of the Prevention of Organised Crime Act, Act 29 of 2004. I shall henceforth refer to this Act as POCA.

[2] When the matter was called, Ms. Boonzaier appeared to move the application.

[3] Ms. Boonzaier is not an admitted legal practitioner in Namibia, although she is apparently attached to the staff of the Prosecutor-General.

[4] I *mero motu* raised with Ms. Boonzaier the issue whether or not she is entitled to appear and to move the application, if she is not admitted to practice as a legal practitioner in Namibia.

[5] I thereupon postponed the matter to 23 November 2011 in order for the Prosecutor-General to address me on the issue.

[6] Mr. Small, a Deputy Prosecutor-General, and an admitted legal practitioner appeared on 23 November 2011, not to move the application, but instead to advance argument on the issue I had raised.

[7] I was subsequently provided with written heads of argument. I am grateful to Mr. Small for the industry he has shown.

[8] The reason for my concern stems from the fact that applications in terms of Section 51 of POCA are civil proceedings and not criminal proceedings.

[9] Section 50 (1) and 50 (2) of POCA makes that abundantly clear. They read as follows:

“50 (1) for the purposes of this Chapter, all proceedings under this Chapter are civil proceedings and not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter, but any evidence admissible in criminal proceedings, is admissible in proceedings under this Chapter.”

[10] Section 52 (2) of POCA takes the matter further inasmuch as it provides that notice of a preservation order must be served in the manner in which a summons commencing civil proceedings in the High Court is served.

[11] Applications for preservation orders in terms of Section 51 of POCA are analogous to an application for an interim interdict and attachment *pendente lite*. (***National Director of Public Prosecution v Phillips and Others 2002 (4) SA 60 (W)***).

[12] As was pointed out in respect of similar provisions in South Africa applications of this nature are not conviction based and may be invoked even when there is no prosecution. (***National Director of Public Prosecution v Mohamed 2002 (4) SA 893 CC at 851***).

[13] The fact that the application was a civil proceeding was correctly in my view not contested by Mr. Small.

[14] It was also accepted again correctly on my opinion, that a litigant in civil proceedings in the High Court who is represented, must be represented by a legal practitioner admitted to practice in the High Court.

[15] It follows that this must apply when the Prosecutor-General is represented in Section 51 applications under POCA, unless, there are other statutory provisions to the contrary.

[16] A convenient starting point is Article 88 (2) of the Constitution, which sets out the powers and functions of the Prosecutor-General. It reads as follows:

“(2) The powers and functions of the Prosecutor-General shall be:

- (a) To prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
- (b) To prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;
- (c) To perform all functions relating to the exercise of such powers;
- (d) To delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;
- (e) To perform all such other functions as may be assigned to him or her in terms of any other law.”

[17] It is apparent that subsections (a) to (d) all relate to the powers of the Prosecutor-General to institute and prosecute in criminal proceedings. In particular sub-section (d) empowers the Prosecutor-General to delegate her

authority to other officials, but that power is confined to criminal proceedings only.

[18] Sub-section (e) provides that the legislature may by way of statutory enactment assign further functions to the Prosecutor-General distinct from his/her prosecutorial functions. POCA is a good example of that. It empowers the Prosecutor-General to institute civil proceedings to claim the orders provided for in POCA.

[19] POCA itself is silent on the issue of representation at least as far as Section 51 applications are concerned. It contains no provision, at least as far as Section 51 applications are concerned, that the Prosecutor-General may be represented by a person who is not an admitted legal practitioner.

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

[21] Mr. Small did not refer me to any other statutory authority to support his submissions and I was not able to find any.

[22] In the absence of any express provision authorizing persons other than admitted legal practitioners, to appear in applications of this nature I have given consideration to whether it is not an implied provision as POCA.

[23] Regard must be had to the fact that Ms. Boonzaier, is a staff member in the Prosecutor-General's office. She probably has legal qualifications and judging by the written Heads of Argument she prepared prior to moving the application, she is at least as far as POCA is concerned an able and competent lawyer. Not to allow her to appear and move the application may seem to some absurd, even utterly absurd.

[24] Two fundamental considerations point the other way, however.

[25] Firstly I should be slow to read into the legislative provisions that which is not there and to that extent amend or supplement the legislation. I am entitled to do so only in rare and exceptional cases. ***R v Venter 1907 TS 910.***

[26] In ***S v Negongo 1992 NA 352 Hannah J*** summarised the applicable principles as follows on p 3 & 6.

“The following rules are principles, which appear in the forgoing passage seem to me to be worthy of special emphasis.

- (1) The cases in which the Court may depart from the clear meaning of a statute form a rare and exceptional class.
- (2) To justify a departure from or amendment of, the language of a statute when absurdity is relied upon, the absurdity must be utterly glaring.
- (3) It is not enough to come to the conclusion that the amendment “probably” expresses the intention of the legislature. The Court must be certain that it does.
- (4) It is dangerous to speculate as to the intention of the legislature.
- (5) Generally speaking, the language of a statute should not be extended beyond its natural sense and proper limits in order to supply omissions or to remedy defects.”

[27] Bearing in mind these principles, I can only speculate why the legislature when it enacted POCA did not make provision that persons or the staff compliment of the Prosecutor-General and who are not admitted legal practitioners may nonetheless appear. If for instance it was an oversight, it is best left for the legislature to re-consider the position.

[28] Secondly, as I have indicated Section 32 and 33 of POCA contain express provisions enabling public prosecutors, who need not necessarily be admitted legal practitioners to appear.

[29] The absence of similar provisions in relation to Section 51 applications, is arguably an indication that the legislature did not want the provisions of Section

32 and 33 to apply to Section 51 applications. It remains in the end a matter on which I can only speculate.

[30] In the result I conclude that Ms. Boonzaier has no *locus standi* to move the application.

MILLER, AJ

ON BEHALF OF THE APPLICANT:
Instructed by:

Mr. Small
Office of the Prosecutor-General