REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

***EX TEMPORE* JUDGMENT**

In the matter between: Case no: POCA 3/2012

THE PROSECUTOR-GENERAL **APPLICANT**

and

NATANGWE KONDJENI KANIME **RESPONDENT**

Neutral citation: *The Prosecutor-General v Kanime* (POCA 3/2012) [2013] NAHCMD 317 (24 September 2013)

Coram: GEIER J

Heard: **24 September 2013**
Delivered: **24 September 2013**

Flynote: Sanctions hearing – failure by respondent to show 'lawful excuse' for the non-compliance with the court's case management order as required by rule 37 (16) – imposition of previous costs orders not showing desired effect – court deeming it fit to impose sanctions in terms of Rule 37(16)(i) and bar respondent to

bring an application in terms of Section 60(1) of POCA in opposition to a forfeiture of property order which had been brought by applicant -

Summary: The facts appear from the judgment.

ORDER

1. The respondent is barred from bringing an application in terms of Section 60 (1) of POCA.

2. The respondent is to bear the costs of the hearings of the 16th and 23rd of July as well as of 24 September 2013.

RULING

GEIER J:

[1] This matter is the sequel to the confirmation of a Provisional Preservation of Property Order which was granted against the respondent on 20 December 2012.

[2] The Prevention of Organised Crime Act No 29 of 2004 (herein after referred to POCA) provides in Section 52 (3) that:

'Any person who has an interest in the property which is subject to the preservation of property order may give written notice of his or her intention to oppose the making of a

forfeiture order or apply, in writing, for an order excluding his or her interest in the property concerned from the operation of the preservation of property order.'

[3] Section 52(5) then prescribes the content and the form of the notice that such an interested person has to give.[1]

[4] It is common cause that the respondent is such a person, with an interest in the property, which was preserved, as a result of the confirmed order of 20 December 2012 and also that he has failed to give the requisite notice in terms of Section 52 (3).

[5] If I understand counsel's argument correctly, a person who has failed to give such a notice within the time specified by Section 52(4)[2], may, in terms of Section 60(1) of POCA[3] apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.

---

[1] (5) A notice under subsection (3) must contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by an affidavit stating-

(a) full particulars of the identity of the person giving notice;
(b) the nature and the extent of his or her interest in the property concerned;
(c) whether he or she intends to-
(i) oppose the making of the order; or
(ii) apply for an order-
(aa) excluding his or her interest in that property from the operation of the order; or
(bb) varying the operation of the order in respect of that property;
(d) whether he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities; and
(e) the-
(i) facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in subparagraph (c)(ii); and
(ii) basis on which he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities.

[2] (4) A notice under subsection (3) must be delivered to the Prosecutor-General within, in the case of-

(a) a person on whom a notice has been served under subsection (1)(a), 21 days after the service; or
(b) any other person, 21 days after the date on which a notice under subsection (1)(b) was published in the Gazette.

[3] 60 Failure to give notice

(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

[6] It is also common cause that the applicant, the Prosecutor General of Namibia in this matter, has indeed brought an application for the forfeiture of the property that was so preserved, and that the respondent has, to date, failed to apply in terms of Section 60(1), for leave to give the required notice accompanied by the required information.

[7] The forfeiture of property application was in this instance served on the correspondent legal practitioners of Inonge Mainga Attorneys, in Windhoek, on the 23rd of May 2013.

[8] The matter was initially set down for hearing on the 25th of June 2013.

[9] At such hearing Mr Boesak, who appeared on behalf of the respondent, applied for a further opportunity to file the requisite application.[4]

[10] In such circumstances the matter was postponed to the 2nd of July 2013 on which occasion Mr Boesak again, on behalf of the respondent, indicated that his client was still of the intention to file the appropriate application.

[11] In such circumstances the matter was again postponed, this time to 16 July 2013, and the respondent was now directed, by case management order, 'to file such papers as he deems fit by that date'.[5]

[4] Meaning an application in terms of Section 60(1) od POCA

[5] The court also ordered the respondent to pay the wasted costs occasioned by the postponement and the respondent was notified in the order that 'any failure to comply with the obligations imposed on the parties by that order will entitle the other to seek sanctions as contemplated in Rule 37(16)(e)(i) – (iv) – and that – 'any failure to comply with any of the above directions will ipso facto make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation thereof not less than 5 court days before the next scheduled hearing, by notice to the opposing party'.

[12] On the 16th of July 2013 it appeared that the respondent had not complied with paragraphs 3 and 5 of the case management order of 2 July 2013 and in such circumstances the court ordered the respondent's legal practitioners to file an affidavit, on or before the close of business of 19 July 2013, explaining the non-compliances with the case management order of 2 July 2013, and to show cause, why any of the sanctions, as contemplated by Rule 37(16)(i)–(iv) should not be applied.

[13] The matter was then postponed to 23 July 2013.

[14] The aforesaid affidavit was not delivered within the time stipulated, in that it was served on the 19th of July, but only filed at court on the 22nd of July 2013.

[15] On the 23 of July 2013, Mr Boonzaaier, on behalf of applicant indicated that his client wished to oppose the respondent's application and file an answering affidavit thereto.

[16] In the circumstances the court put the parties to terms in regard to the further exchange of papers and the matter was postponed to the 24th of September 2013 for the determination of sanctions, if any.

[17] The applicant thereafter filed an answering affidavit to respondent's sanctions affidavit to which the respondent has since replied.

THE EXPLANATION OFFERED

[18] Ms Mainga, the legal practitioner for the respondent, in her explanatory affidavit sketched the background and the circumstances which gave rise to a

situation in which the intended application in terms of Section 60(1) of POCA was not brought timeously, and also not in accordance with the case management order given by this court. She states further that she was not originally involved and thus she did not immediately become aware of the fact that a forfeiture application had been served on her correspondents on the 23rd of May 2013 and that she only became aware thereof, through an email received from Ms Shipopyeni, on 31 May 2013, who would send the papers with a candidate legal practitioner, who returned to her offices on the 3rd of June 2013. Ms Mainga then received the papers in the forfeiture application on that date and immediately perused the application and noted that a Notice in terms of Section 53 (3) had not yet been filed.

[19] She contacted the respondent and requested him to come in for consultations and bring a deposit. The consultation materialised on 11 June 2013 at which she advised the respondent that a Notice of Oppose had not been filed by his previous legal practitioners of record.

[20] An affidavit was sought from Mr Kaumbi, the previous legal practitioner of record, who was not immediately available. Telephonic contact was made with him on the 18th of June 2013 and oral confirmation was given that no such notice had been filed.

[21] On the 18th of June 2013 respondent was advised that the remedy available to him was to bring an application in terms of Section 60 (1) of POCA. Ms Mainga apparently tried to finalise this application, but was unable to do so in time.

[22] She does not say precisely in her affidavit what this is supposed to mean - I presume however that this was intended to be a reference to the 14 day period, which is set, for the bringing of such applications by Section 60 (1).

[23] I pause to point out that also the respondent was thus pertinently made aware of the requirements set by Section 60(1) as far back as the 18th of June 2013.

[24] Ms Mainga then went on to explain that the respondent intended to utilise senior counsel to assist him in the defence of the forfeiture application and that the intention was to obtain the assistance of Advocate Hinda SC, in addition to the instruction of junior counsel. It was in such circumstances that Mr Boesak found himself at the forefront of the respondent's quests to seek extensions for the filing of the intended Rule 60 (1) Application.

[25] Ms Mainga confirmed further that the postponements of the 2nd and the 16th of July were requested and that the reason therefore was to be attributed 'to a confusion in the documents that were forwarded to junior counsel who was unable to finalise a draft dealing particularly with the prospects of success' of the respondent'.

[26] It also emerged that the services of senior counsel, due to the inability to secure the necessary funds, were ultimately not secured.

[27] Ms Mainga's affidavit however fails to explain why the necessary application still had not been brought by the 19th of July, the date on which the respondent's sanctions affidavit was attested to.

[28] I pause to state that even to this day[6] no application in terms of Section 60 (1) has been filed or tendered.

[29] It also appears from Ms Mainga's explanation that no specific detail was provided as to what was really done and when - since the realisation that an

[6] 24th September 2013

application in terms of Rule 60 (1) of POCA was required and to have same finalised.

[30] Mr Boesak, who also appeared on behalf of the respondent, at the sanctions hearing, implored the court to afford the respondent yet a further opportunity. He submitted that the respondent was in essence prevented and thus excused from filing or at least tendering to file the intended Rule 60 (1) application even at this late stage, because of the sanctions hearing, which had intervened in the meantime. Mr Boesak also requested the court to take into account the nature of the application with its far reaching consequences for the respondent.

[31] Ms Boonzaaier, on behalf of the applicant in the main proceedings, submitted that no *good cause* had been shown for the respondent's conduct to be condoned and that the court should thus utilise its powers to prevent the respondent from further opposing the applicant's forfeiture of property application.

[32] It also did not escape her attention that the threatened Rule 60 (1) application had to date not yet been brought and that no real reason or explanation was offered, why that application had not been filed within the initial 44 day period afforded, which had elapsed, nor that there was any explanation why, for some 100 days later, there was still no such application.

[33] She submitted that the applicant was prejudiced by the conduct of the respondent. In this regard she asked the court to take into account that the mechanisms of the notice, as required by Section 52 (3), were there to assist the applicant in deciding whether or not to persist with a forfeiture of property application. As a result - and if I understand Ms Boonzaaier's argument correctly - the respondent's failure to give such notice, as well as the respondent's failure to have launched any application in terms of Section 60 (1) by September 2013, prejudiced the applicant particularly as she was constrained to launch its preservation of property application within the period of 120 days as prescribed by Section 53(1).

[34] She also pointed out that the prescribed 14 days for the bringing of a Rule 60 (1) application had long expired. The said section requires a respondent, who has become aware of the existence of a Preservation of Property Order, to make such application within 14 days and that it was clear from the papers that the respondent has been aware of such an order for a much longer period, as indicated in Ms Mainga's affidavit and - according to which – she also advised the respondent of his rights in this regard.

SANCTIONS

[35] A sanctions hearing such as the present one is governed by the provisions of Rule 37 (16) and the question, in terms of that Rule is, whether the respondent has shown any 'lawful excuse' for not complying with the court's case management order of 2 July 2013.

[36] In that context I suppose it would also be relevant to consider whether good cause for any condonation or extension or excuse for the non-compliance with the court's order and the forms and procedures required in this case by POCA has been shown.

[37] I have already indicated that the respondent's explanation is lacking. What is further of relevance is that no application in terms of Section 60 is at least tendered or is available for scrutiny with reference to which the court would be able to ascertain the veracity of any defence the respondent may wish to raise in the forfeiture application.

[38] It is clear that the merits or demerits of any such a defence would heavily weigh with a court when a court considers whether or not to extend any time periods

or to condone a party's non- compliance with rules or with case management orders. Unfortunately, this important factor is not available for consideration.

[39] Also if one looks at the downside of Mr Boesak's submission that the court should consider the far reaching consequences of the nature of the application - of which the respondent was clearly aware all along - due to the advice received - one would have expected the respondent - particularly as a consequence of such advice - to prosecute his defence with vigour in order to escape from the far- reaching nature and consequences of the relief sought by the applicant.

[40] It appears particularly, if one has regard to these factors and the vague explanations proffered, that the respondent has not given a reasonable explanation for his default and thus has not shown a 'lawful excuse' for the various non – compliances in this case.

[41] The question then arises, what sanctions should be applied or imposed?

[42] It has emerged that the cost orders made on 25 June and 2 July 2013 against respondent have had no impact on the conduct of the respondent.

[43] Nevertheless Mr Boesak has urged the court to impose yet a further cost order on the respondent, and allow him a further opportunity to bring the intended application.

[44] Ultimately - and what inclines me not to accede to that plea and to grant the relief that is sought by the applicant (in the main application) - is the respondent's failure to utilise the ample opportunity he has had to take any steps to meaningfully defend the forfeiture of property order which he is facing. The failure to meaningfully

take any such steps to oppose that threat is indicative of the fact that he is not serious in this regard.

[45] In the result I deem it fit to exercise my powers in terms of the provisions of Rule 35 (16) (i) of the Rules of Court and order that the respondent is barred from bringing an application in terms of Section 60 (1) of POCA.

[46] The respondent is also directed to bear the costs of the hearings of the 16th and 23rd of July as well as of today.

H GEIER

Judge

APPEARANCES

APPLICANT:	M Boonzaier Government Attorney, Windhoek
RESPONDENT:	A W Boesak Instructed by Inonge Mainga Attorneys c/o Shikale & Associates, Windhoek