REPORTABLE

CASE NO: SA 20/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL **Appellant**

and

GERSON UUYUNI **Respondent**

Coram: MAINGA JA, CHOMBA AJA and HOFF AJA
Heard: **21 October 2014**
Delivered: **02 July 2015**

APPEAL JUDGMENT

MAINGA JA (CHOMBA AJA and HOFF AJA concurring):

Introduction

[1] The appeal before us is against the whole judgment and order of the High Court (Geier J) in terms of which that court discharged with costs a provisional preservation order made by Ueitele AJ (as he then was) on 11 April 2012. The

provisional order had been granted in favour of the appellant (Prosecutor-General) under Case No POCA 4/2012 in terms of s 51(2) of the Prevention of Organised Crime Act 29 of 2004 (POCA).

Background

[2] On 5 August 2011 the High Court granted a preservation order under Case No POCA 7/2011 in respect of the following property of the respondent (Mr Uuyuni):

2.1 The positive balance Sanlam Namibia Unit Trust Windhoek account number 6…….~~2035560342~~ with investment number 6…….~~5265442~~;

2.2 The positive balance in FNB Oranjemund account number 6…….~~2048276746~~ held in the name of Gerson Uuyuni;

2.3 The positive balance in FNB Oranjemund account number 7…….~~4242731111~~ held in the name of Gerson Uuyuni;

2.4 Toyota Hilux Bakkie with registration number N…….~~2PAONA~~;

2.5 A BMW with registration number N1…….~~903W~~.

[3] After the order was granted, the appellant applied for variation of the order, to correct the incorrect registration number of one of the vehicles referred to in the order. The respondent opposed that application and also counter-applied for an order declaring that the preservation order was a nullity, on the ground that the appellant had been represented by one Ms Boonzaier, who was not an admitted legal practitioner of the High Court of Namibia. The variation and the counter applications were placed on the roll for a status hearing on 12 April 2012, in order to establish the way forward and, if necessary, set them down for hearing.

[4] At the time, there was a judgment of the High Court, Case No POCA 11/2011 delivered on 2 December 2011 holding that Ms Boonzaier who was not an admitted legal practitioner in Namibia did not have *locus standi* to move an application under POCA for a preservation order.

[5] As a result of the fact that Ms Boonzaier who appeared on behalf of the Prosecutor-General in the application for preservation of property on 5 August 2011 was not an admitted legal practitioner in Namibia and that the order might have been obtained in error, in order to avoid further delay on 10 April 2012 by notice served on the respondent and filed with the Registrar, the Prosecutor-General withdrew the application in Case No 7/2011 for a forfeiture order. A day before that withdrawal, on 11 April 2012, the appellant applied for a fresh order for the provisional preservation order as in para [2] above in terms of s 51 of POCA. She disclosed the facts surrounding the previous application. The application was brought on an *ex parte* basis, was heard *in camera* and granted. On the same day the respondent's legal representatives were notified of that fact.

[6] The order issued by Ueitele AJ on 11 April 2012 in its entirety reads as follows:

> 'In the *ex parte* matter of:
>
> **THE PROSECUTOR-GENERAL** **APPLICANT**
>
> **IN RE:** The positive balance in Sanlam Namibia Unit Trust Windhoek account number 6……..~~2035560342~~ with investment number 6……~~5265442~~; the positive balance in FNB Oranjemund account number 6……..~~2048276746~~ held in the name of Gerson Uuyuni; the positive balance in FNB Oranjemund account number 7……~~4242731111~~ held in the name of Gerson Uuyuni; Toyota Hilux Bakkie with registration number N……..~~2PAONA~~; a BMW with registration number N 1903 W;
>
> **IN THE APPLICATION FOR A PRESERVATION OF PROPERTY ORDER IN TERMS OF SECTION 51 OF THE PREVENTION OF ORGANISED CRIME ACT, NO 29 OF 2004**
>
> ---
>
> Having heard ***MS S E ISAACS,*** Counsel for the Applicant and having read the Notice of Motion and other documents filed of record:
>
> **IT IS ORDERED**
>
> 1. That the draft order annexed hereto as annexure X is hereby made a provisional order of Court.
>
> 2. That the provisional order made in prayer 1 above is returnable on **Friday,** the **18th** of **May 2012** at **10h00,** and a *rule nisi* is hereby issued calling upon the respondent to show cause, if any, on the return day why:

2.1 the provisional order in prayer 1 should not be confirmed pending any proceedings for a forfeiture order that may follow:

2.2 the respondent or any other person who wishes to oppose the making of confirmation of the order in prayer 1 should not be ordered to pay the costs of this application.'

[7] The draft order which was annexed as annexure X in prayer 1 above which was made a provisional order of court is lengthy. It is sufficient to say that the order put under restraint the properties in para [2] above, authorised any member of the Namibian Police to seize the said properties and to place them under the supervision of Inspector Rector Sandema or any other member of the Namibian Police, to exercise control over the properties for the purpose of the order and to safeguard them. It afforded a reasonable opportunity to the person from whom the properties were to be seized, to summon a legal representative to be present during the seizure, it obliged the Prosecutor-General to comply with the provisions of s 52(1)(a) and (b), it invited persons with interests in the properties with intention to oppose the application for an order forfeiting the property to the State or applying for an order excluding their interests from a forfeiture order in respect of the properties, to enter an appearance giving notice of their intentions in terms of s 52(3) of the Act, it specifies to whom the notice should be delivered, the period within which it should be delivered and what contents should be contained therein.

High Court Litigation

[8] Subsequently, the appellant applied to the High Court before Geier J for a final preservation order. The respondent opposed the application on the merits

and raised a number of objections *in limine*. On the interpretation of s 98 of POCA, the High Court held that the appellant had not met the threshold of s 98(2)(*a*) of POCA when the provisional preservation order was granted without having given notice to the respondent and that on the facts of the case, the application should not have been heard *in camera*, therefore Article 12(1)(*a*) was violated, the *rule nisi* was granted in violation of the fundamental requirements espoused by Art 12 and accordingly the High Court upheld an objection *in limine* that the application for an interim preservation order had been heard *in camera* but rejected an objection *in limine* that the application for an interim preservation order had been made *ex parte*. The court discharged the *rule nisi* and dismissed the application for a final preservation order.

[9] This appeal is against the decision dismissing the application for a final preservation order.

Appellant's submissions

[10] The appellant contends that there are reasonable grounds for the belief that the property as in para [2] above constitutes the proceeds of the unlawful activities on the part of the respondent, namely, the contravention of the Income Tax Act 24 of 1981 (as amended) and/or the Prevention of Organised Crime Act 29 of 2004 and/or s 344(e) of the Financial Intelligence Act 3 of 2007 and/or theft. The appellant further contends that once the requirements of s 51(2) of POCA are met, the court has no discretion but 'must' make a preservation order, and that the section authorises the making of the application on an *ex parte* basis.

[11] Appellant contends that Geier J was not required to decide whether Ueitele AJ should have made a provisional order on 11 April 2012 or to decide the correctness of the procedure he followed, that the provisional order before Geier J was not an appeal against or an application for rescission of that order, that the question before Geier J was whether on the papers as they then stood, a preservation order should be made. In other words, Geier J should have considered the matter afresh, on its merits, in the light of all the information which was then before court, as if the order was first being applied for.

[12] The appellant contends that the holding of Geier J that in *ex parte* applications the court has a discretion whether to hear the matter *in camera* and that that holding is governed by s 98(2) which is applicable to all proceedings, including *ex parte* applications, ignores the distinction which s 98(1) expressly draws between *ex parte* applications and other proceedings, contends that the court *a quo* ignored the words ‘except for *ex parte* hearings’, and read s 98(1) as if it does not contain those words. The appellant contends that that approach by Geier J conflicts with the fundamental principle of interpretation, namely, that statutes do not contain purposeless provisions, that is, ‘a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant’ per Cockburn CJ in *The Queen v Bishop of Oxford* [1879] 4 QB 245 at 261; *Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC) at 373A-374J; *S v Weinberg* 1979 (3) SA 89 (A) at 98E–F. Appellant contends that the legislature determined in s 98(1) of POCA, that *ex parte*

proceedings under the Act are one of the circumstances in which a deviation from the open justice principle is justified. That this avoids creating the opportunity for assets to be spirited away, concealed and dissipated before they are secured.

[13] Appellant submits that on the facts, a proper case was made out for hearing the *ex parte* application *in camera* and prays that the appeal succeeds with costs and the order by Geier J be set aside and replaced with an order confirming the *rule nisi* issued by Ueitele AJ.

Respondent's submissions

[14] The respondent contends that the appellant's purported appeal should be struck from the court's roll, alternatively be dismissed with costs for the reasons that:

(a) the order that discharged the *rule nisi* is not appealable as its effect is neither final nor substantially dispositive of issues in the application; that the issues between the parties did not become *res judicata*, the appellant could start afresh reapplying for a provisional preservation order in accordance with the law.

(b) the appellant failed to serve both the application and the provisional order as ordered by Ueitele AJ and as promised by the appellant to Mr Konis Uuyuni.

(c) the appellant on the facts of this case, particularly its history and background prior to 11 April 2012, could not have had the matter heard without notice to the respondent and without complying with the peremptory provisions of Rule 6(4)(*a*) of the old Rules of the High Court relating to the setting down of *ex parte* applications.

(d) the order of 11 April 2012 was a nullity for having been obtained *in camera* without any basis for such a hearing as required by Art 12(1)(*a*) of the Namibian Constitution and s 13 of the High Court Act 16 of 1990.

(e) non-disclosure of material information.

(f) the appellant did not make a case on the merits, for the confirmation of the provisional order.

Issue to be decided

[15] Given the historic background of this case, where *inter alia*, the appellant had abandoned the initial provisional property order in Case No POCA 7/2011, could Ueitele AJ have granted a fresh provisional property order *ex parte* and *in camera*, in respect of the same property of the respondent as in para [2] above.

Relevant legal provisions

[16] For ease of reference the relevant POCA legal provisions, Art 12(1)(*a*) of the Constitution and s13 of the High Court Act No 16 of 1990 are set out hereunder.

[17] Section 51 of POCA provides:

> 'Preservation of property orders
>
> (1) The Prosecutor-General may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> (2) The High Court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is-
>
> (a) an instrumentality of an offence referred to in Schedule 1; or
>
> (b) the proceeds of unlawful activities,
>
> and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.
>
> (3) When the High Court makes a preservation of property order it must at the same time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.'

[18] Section 52 provides:

'Notice of preservation of property order

(1) If the High Court makes a preservation of property order, the Prosecutor-General must, as soon as practicable after the making of the order-

(a) give notice of the order to all persons known to the Prosecutor-General to have an interest in the property which is subject to the order; and

(b) publish a notice of the order in the *Gazette*.

(2) A notice under subsec (1)(a) must be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served or in any manner prescribed by the Minister.

(3) 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.

(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 subsec (1)(a), 21 days after the service; or

(b) Any other person, 21 days after the date on which a notice under subsec (1)(b) was published in the *Gazette*.

(5) A conviction and sentence under subsection (4) for a failure to comply with a confiscation order or a forfeiture order does not discharge the order in respect of which a court had convicted or sentenced an offender.'

[19] Section 90 provides:

‘Rules of court

(1) The Judge-President must make rules for the High Court regulating the proceedings contemplated in Chapters 5 and 6 and the Rules Board established by section 25 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) must make rules for the magistrate’s court regulating the proceedings or matters referred to in sections 32, 33, 62, 84, 85 and 87 of this Act.’

[20] Section 91 provides:

‘Procedure for certain applications

(1) Every application under sections 25, 43, 51, 59 and 64 must be made in the prescribed manner.

(2) The Prosecutor-General may, in cases of urgency, apply to the High Court to dispense with any requirements prescribed for an application made under s 25 or 51.

(3) In an application in terms of subsec (2) the court may have regard to oral evidence and evidence with regard to hearsay provided that that evidence would not render the proceedings unfair.

(4) In an application in terms of subsec (2) the court may-

(a) direct the applicant to file complete papers or to adduce further evidence at a date and time specified by the court before deciding whether or not to make an order, including an order referred to in para (b);

(b) make a provisional order having immediate effect and may simultaneously grant a rule *nisi* calling on the person against whom the order is made to appear on a day mentioned in the rule and to show cause why the order should not be made final.’

[21] Section 98 provides:

> ‘Hearings of court to be open to public
>
> (1) Subject to this section, the hearings of the court contemplated in this Act, except for *ex parte* applications, must be open to the public.
>
> (2) If the court, in any proceedings before it, is satisfied that-
>
> (a) it would be in the interest of justice; or
>
> (b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,
>
> it may direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them.
>
> (3) An application for proceedings to be held behind closed doors may be brought by the Prosecutor-General, the *curator bonis* referred to in s 29 or 55 and any other person referred to in subsec (2)(*b*), and that application must be heard behind closed doors.
>
> (4) The court may at any time review its decision with regard to the question whether or not the proceedings must be held behind closed doors.
>
> (5) Where the court under subsec (2) on any grounds referred to in that subsec directs that the public must not be present at any proceedings or part of them, the court may-
>
> (a) direct that information relating to the proceedings, or any part of them, held behind closed doors, must not be made public in any manner;

(b) direct that a person must not, in any manner, make public any information which may reveal the identity of any witness in the proceedings;

(c) give any directions in respect of the record of proceedings which may be necessary to protect the identity of any witness,

but the court may authorise the publication of so much information as it considers would be just and equitable.'

[22] Article 12 (1) (*a*) of the Constitution provides:

'Article 12 Fair Trial

1(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[23] Section 13 of the High Court Act No 16 of 1990

Proceedings to be carried on in open court

'Save as is otherwise provided in Art 12 (1)(a) and (b) of the Namibian Constitution, all proceedings in the High Court shall be carried out in open court'.

[24] Undoubtedly Ueitele AJ had granted a *rule nisi* in the form of an interim order which afforded the respondent an opportunity to be heard as to whether the provisional preservation property order should be confirmed on the return date.

[25] The court *a quo* approached the matter on the interpretation it accorded to s 98 above. In that regard the court had this to say:

> '[45] Should one therefore come to the conclusion that just because the legislature has seemingly created an exception to this fundamental requirement in sub-section 98(1) that the section was actually intended to create an absolute entitlement for the applicant to always approach the court *in camera*, regardless of the circumstances and without motivation?
>
> [46] In my view such interpretation would be absurd and would lead to an obvious conflict not only with the provisions of section 13 of the High Court Act, but more importantly also with the prevailing requirements set by the "supreme law" in Article 21(1)(*a*). Such interpretation would also be in conflict with the remainder of section 98 of POCA which give the court, in "any" proceedings before it, the discretion, on the additional grounds, as listed in sub-section 2(a) and (b), to direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them, and to review such decision at any time in terms of sub-section (3).
>
> [47] In addition it is clear that the section also, as a whole, does not only have to be read in context but also in conformity with the common law and the Constitution.
>
> . . .
>
> [57] In addition it will by now have been noted that the "open-court" principle – "fundamental to all democratic societies", as also rooted in

Namibia's common law and in the said statutory enactments and its Constitution - has always catered for exceptions.

[58] At the same time it will have become clear that "closed-door" proceedings are always the exception rather than the norm.

THE IMPACT OF THE COMMON LAW- STATUTORY LAW- AND CONSTITUTIONAL LAW PROVISIONS ON THE INTERPRETATION OF SECTION 98

[59] In such circumstances the question arises why would the legislature then have intended a departure from the entrenched norm in sub-section 98(1), recognising it at the same time in sub-sections 98(2) to (5)? It should also be asked why would parliament have wanted to violate the important fundamental rule applied in all democratic societies by creating an automatic exception thereto? It can immediately be stated that it is highly unlikely that Parliament would have intended such a departure from such a deep-rooted fundamental principle given also that Namibia is a constitutional democracy.

[60] Also the unqualified use by the legislature of the phrase ". . . in any proceedings before it . . ." in subsec 98(2) – which phrase is wide enough to encapsulate *ex parte* proceedings - suggests that subsec (2) was intended to govern the decision whether or not "any proceedings" – inclusive of *ex parte* proceedings under POCA - should be conducted *in camera* or not. Such a conclusion would not only be in line with the context of the section but would also accord with the said general common law and statutory principles.

[61] A further important indicator – if not the most conclusive one - supporting an interpretation along these lines - is found in the legislature's choice of the introductory words to subsec (1) ". . . Subject to this section . . ." obviously meaning ". . . subordinate to what is contained in the remainder of section 98 . . ." intimating that section 98(1) must be read, subject, to the remainder of the section.

[62] It surely would have been an easy matter for Parliament to have decreed - in clear and unambiguous language - for instance – if that is what was really intended – that all proceedings, instituted in terms of POCA, if brought on an *ex parte* basis, must be heard *in camera*. This intention was however not unambiguously expressed.

[63] All these indices then drive me to the conclusion that the section then permissively and only in directory terms was intended to mean that ". . . all *ex parte* hearings, contemplated in POCA, "may" be held behind closed doors – if the requirements for the exclusion of the public – set by subsec (2) (and by the Constitution) have been met, . . ." whereas all other proceedings, contemplated in POCA, ". . . 'must' be held open to the public . . . ." This is decreed in peremptory terms.

[64] Ultimately such interpretation would, in my view, not only give recognition to the common law, but would also be one in conformity with the High Court Act, and more importantly, would also accord with the letter and spirit of the relevant provisions of the Namibian Constitution and the "fundamental principle" accepted in democratic societies.

[65] This finding then means that Mr Budlender's first argument - that the applicant was simply, because of the fact that the court was approached on an *ex parte* basis, also entitled, *per se*, to an *in camera* hearing - cannot be upheld. This finding would also mean that Mr Budlender's second argument to the effect that it was the National Assembly that had determined in Section 98(1) of POCA that *ex parte* proceedings under the Act automatically constitute one of the constitutionally permissible circumstances to conduct a hearing or trial behind closed doors also cannot be held.

. . .

[67] This leads to the final question which has to be determined namely, whether or not the applicant had thus, on the facts, ultimately, acted within the parameters provided for by Section 98 of POCA and the Constitution and whether the court, which granted the *rule nisi*, in this instance,

therefore correctly allowed the hearing before it to take place behind closed doors.

[68] This question must also be answered with reference to the applicable approach the court is to take when faced with the question of whether or not to confirm a *rule nisi*.

THE APPROACH ADOPTED ON THE RETURN DATE

[69] The approach that the court is to take on the return date has recently again been set out by the court in the case of *Prosecutor General v Kanime* in which the court applied the test formulated in the South African judgment of *Gomeshi-Bozorg v Yousefi*, adopted by this court in *Prosecutor- General v Lamech and Others*.

[70] It appears from these authorities that the court is essentially tasked to consider the matter "afresh" on the return date - that is on the merits - in the light of all the information which has by then been placed before the court - "as if the order was first being applied for".

. . .

[82] This then leads to the consideration the central question whether or not the applicant has met the requirements set by section 98 (2) of POCA and the Constitution?

[83] In this regard it is firstly of relevance that it is without question that section 98(2)(b) is not of application.

[84] Secondly I consider that the requirements set by section 98(2)(a) were also not met as the bringing of this application, without notice to the respondent, already satisfied the interests of justice, which, in this instance, did not also require the exclusion of the public on the facts of this case.

[85] In this regard it must also be kept in mind that the respondent was forewarned during the proceedings before the lower court on 28 July 2011

that an application for the preservation of his assets would be brought or at least was contemplated and that if he had wanted to dissipate his assets he could have done so by the time that the first preservation order was applied for on 5 August 2011.

[86] As also nothing was shown on the papers which warranted the extra-ordinary departure from the general rule as to the exclusion of the public for reasons also of morals, the public order or national security as is necessary in a democratic society it must be concluded further that also the requirements of Article 12(1)(a) of the constitution were not met.

[87] In such circumstances I therefore ultimately also find on the facts of this case that the *in camera* hearing in this matter was never warranted and should never have occurred.

. . .

[90] Amongst the factors which a court surely will be entitled to take into account in the exercise of its discretion will be the extent to which a fundamental rule and basic requirement of our system of justice has been breached. I have already found that not only had no case been made out for the departure from the overall requirements set by section 98 - (that in general all hearings in terms of POCA have to be open to the public) but that, *in casu*, also the particular requirements set by section 98(2) had not been met. Ultimately - and what should even weigh even more heavily - is that also the fundamental requirement - to hold trials in public - as decreed by the Supreme law - was violated in this case.

[91] I have no doubt that if the court, which granted the *rule nisi* in this instance, would have had the benefit of argument on this fundamental issue, it would have been influenced in its willingness to have accommodated the hearing of this matter behind closed doors.

[92] In similar vein therefore I do not consider myself bound by the *rule nisi* granted herein in violation of one of the most fundamental requirements, deeply embedded in our law, that justice must be seen to be done.

> [93] Therefore, and on an afresh consideration of this matter, on all the material before the court, as if the order was first being applied for, I find that the exclusion of the public, at the initial hearing of this matter, inclines me to refuse to exercise my discretion in favour of confirming the interim order granted in this instance'.

[26] In my view the approach by the court *a quo* is not correct, so is the interpretation it accorded to s 98. Section 98 is seated in Chapter 9 of the Act headed 'General Provisions'. Subsection (1) provides unambiguously that 'the hearings of the court contemplated in this Act, except for *ex parte* applications, must be open to the public'. Subsection 2 further provides that 'if the court, in any proceedings before it is satisfied that (a) it would be in the interest of justice; or (b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open, it may direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them'. The court *a quo* interprets the words "in any proceedings" to include *ex parte* applications as well. I disagree. Both subsections are clear and unambiguous and should be given their literal meaning. Such an interpretation as the court *a quo* held would be in conflict with s 51 which do not require that notice of the application be given to any other person. "In any proceedings" in subsec 2 refers to any proceedings contemplated in the Act other than *ex parte* applications. Even in those applications on application the proceedings may be held behind closed doors if it is in the interest of justice or the likelihood that harm may ensue to any person as a result of the proceedings being open but the court may review its decision whether or not the proceedings must be held behind closed doors. Sections 51 and 98 focus on purposes at variance. Section 51 has the purpose of

preserving property which is used to commit crime or proceeds of unlawful activities from being dissipated while s 98 focuses on hearings other than *ex parte*, to be open to public unless in the interest of justice or the likelihood that harm may ensue to any person as a result of the proceedings being open, the court may direct that those proceedings be held behind closed doors. With all due respect to the court *a quo*, in terms of s 98(2) the applicant has no obligations to meet any requirements as stated by the court *a quo* in para 82 of its judgment.

[27] The Legislature passed the POCA well aware of Art 12(1)(a). The High Court in *Shalli v Attorney General* 2013(3) NR 613 (HC) para 8 at 617 and *Lameck and Another v President of the Republic of Namibia and Others* 2012(1) NR 255 (HC) para 58 at 271 are on point when they held that the restrictions and prohibitions, I may add, and the out of the ordinary contained in POCA, are in the public interest and serve a legitimate object, taking into account the Act's overall purpose.

[28] In *National Director of Public Prosecutions v Mohamed NO and Others* 2002(4) SA 843 (CC) the Constitutional Court of South Africa after stating the purpose of POCA in paras 16 to 19 and 22 it went on to say:

> '[16] The present Act (and particularly chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes.
>
> The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the State. These

mechanisms are set forth in chap 5 (comprising ss 12 to 36) and chap 6 (comprising ss 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.

[17] Section 38 forms part of a complex, two-stage procedure whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited. That procedure is set out in great detail in ss 37 to 62 of the Act, which form chap 6 of the Act. Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chap 6 needs to be understood in contradistinction to chap 5 of the Act. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.

[18] There is, however, a defence at the second stage of the proceedings when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ("the innocent owner" defence). My underlining.

[19] The forfeiture process provided for in chap 6 of the Act commences when the National Director applies *ex parte* in terms of s 38 of the Act to a High Court for a preservation order. Section 38(2) of the Act provides that the High Court shall make such an order:

"if there are reasonable grounds to believe that the property concerned–

> (a) is an instrumentality of an offence referred to in Schedule 1; or
> (b) is the proceeds of unlawful activities".
>
> Once the preservation order is granted, notice must be given to "all persons known to the National Director to have an interest in the property"; and a notice of the preservation order must be published in the *Gazette* in terms of s 39(1). Thereafter, within 14 days of notice of the order, an affected party who wishes to oppose the grant of a final forfeiture order must enter an appearance of his or her intention to oppose that order. The National Director must then within 90 days of the grant of the preservation order apply for the forfeiture of the property. <u>At that stage, affected parties are entitled to a full hearing to determine whether the property should be forfeited or not.</u>
>
> . . .
> [22] The provisions of chap 6 are therefore complex and tightly intertwined, both as a matter of process and substance. At the initial stage of the proceedings, when the National Director launches an *ex parte* application for a preservation of property order, a Court must grant the order if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities or the instrumentality in a crime. Thereafter, the preservation order may be varied or rescinded in terms of ss 44 and 47. If the preservation of property order remains in force, then–within 90 days–the National Director must apply for an order of forfeiture. In the absence of such application the preservation of property order will lapse'.

[29] The Namibian POCA is a replica of the South African Act. Chapters 5 and 6 above, are incidentally also Chapters 5 and 6 of the Namibian POCA. Section 38 is the Namibia's s 51 and s 38(2) is s 51(2), and s 39(1) is the Namibia's POCA s 52(1). In Namibia a person affected by the order who wishes to oppose the grant of the final order must deliver the notice of his intention within 21 days after service of the notice on him/her. Any other person 21 days after the notice of the

order is gazetted. The preservation of property order generally expires 120 days after the date on which notice of the making of the order is published in the Gazette. Section 57(1) makes provision for living expenses where necessary and s 58(1) provides for variation or rescission. The Namibian POCA like its South African counterpart also allows for a two stage procedure of proceedings, the *ex parte* stage which in my opinion makes no provision for a *rule nisi* contrary to the practice that has developed in the High Court where applications in terms of s 51 are granted accompanied by a *rule* nisi. The High Court has read in s 51 a *rule nisi* which is not provided for by that section. Section 52(3) makes it very clear that any person who has an interest in the property subjected to the preservation of property order 'may give written notice of his or her intention to oppose the making of a forfeiture order . . . .' That first stage of the proceedings is consistent with the purpose of the Act to preserve the property from being dissipated and allow the interested party to raise a defence at the forfeiture stage. In the first stage of the proceedings the court need only be satisfied that the information contained in the affidavit that the property concerned is an instrumentality of an offence or proceeds of unlawful activities shows on the face of it that there are reasonable grounds for that belief. The balance of probabilities test only arises at the second stage, the application for forfeiture order. See s 61(1). An *ex parte* application is one brought for the benefit of one party to a proceeding in the absence of the other or without the adverse party having had notice of its application. By its nature an *ex parte* application only the one party would be in court and the adverse party is only served with the application and the court order thereafter.

[30] Much of the respondent's case and the submissions on his behalf were devoted to matters that do not bear directly on the case that was advanced by the appellant but was directed rather at supporting a submission that given the historic background of this case the matter could not have been heard or the preservation of property order could not have been granted without having given notice to the respondent and that the order of 11 April 2012 was a nullity for having been obtained *in camera* without any basis for such a hearing as required by Article 12(1)(*a*) of the Namibian Constitution and s 13 of the High Court Act 16 of 1990.

[31] It is plain from the language of the Act that in applications as in the application which forms the subject matter of this appeal they are with no exceptions, brought in terms of s 51 of POCA. Whether the respondent was earlier warned of such an application is irrelevant. Section 51(2) makes it plain that such applications must be granted without notice to any other person or the adduction of any further evidence from any other person. The requirements are that the application should be on affidavit with sufficient information that the property concerned is –

a) an instrumentality of an offence referred to in schedule 1; or
b) the proceeds of unlawful activities; and

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

[32] Once these requirements are met the court must grant the application. In *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) the South African Supreme Court of Appeal at 614 C-F put it thus:

> 'It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (*National Director of Public Prosecutions v Basson* 2002(1) SA 419 (SCA) (2001 (2) SACR 712) in para 19 it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the Court is properly seized of its discretion, it is not open to the Court to then frustrate those criteria when it purports to exercise its discretion'.

See also *National Director of Public Prosecutions v Kyrialou* 2004(1) SA 379 (SCA) paras 9 and 10.

[33] In *Shalli v Attorney-General*, above, a judgment in which Geier J concurred and *Prosecutor-General v Lameck and Others* para [4] also above, the High Court endorsed the approach of South African Courts (*Ghomeshi-Bozorg v*

Yousefi 1998(1) SA 692 (WLD) at 696C-F) that an order granted *ex parte* is by its nature provisional 'irrespective of the form it takes'. In the *Shalli* case, paras 36 and 37 the High Court, amongst other things, held that 'an order granted *ex parte* is in any event provisional and subject to being set aside on application by a party affected by it. It follows that whilst being unfortunately formulated, the provisions of s 51(2) do not . . . violate the right to a fair trial protected by Art 12(1) nor the applicant's right to a fair trial . . . .'

[34] In my view when the court *a quo* held that when the appellant failed to give notice to the respondent in the application of this appeal the requirements of s 98(2) were not met and that the holding of the application *in camera* violated the open court principle contradicts the decision in *Shalli* (paras 36 and 37) in which that court had concurred. The question that should have arisen before the court *a quo* is whether there was sufficient evidence that the properties in para [2] above were instrumentalities of an offence or proceeds of unlawful activities. Had the court below confined the enquiry to this narrow issue, it would have found that the respondent who earned a salary of N$9571 per month, had in less than one year received N$611 819,30 in addition to his salary. On 30 September 2010 respondent opened a unit trust account with Sanlam Namibia, declaring on the registration form that the source of income and of the funds was 'Namdeb bonus and his salary'. In two months he made three deposits in cash in South African Rand totalling to N$240 000 into his unit trust account. The respondent also operated a cheque account with First National Bank (FNB) Namibia in which he received his salary from Namdeb. Between 16 July 2010 and 12 July 2011 deposits over and above his monthly salary payments amounting to N$209 790 in cash were

made into the cheque account. Of this amount respondent deposited N$48 500 himself, the balance was deposited by individuals from Oranjemund, Keetmanshoop and Outapi. Respondent also operated a FNB 32 day account which was opened on 25 November 2010. At 29 April 2011 it had a balance of N$123 202,88. From 25 November 2010 to April 2011 he had deposited the amounts of N$25 000, N$47 000, N$8000, N$21 000 and N$54 000 totalling to N$155 500. All these amounts originated from his FNB cheque account. In April 2011 he transferred N$35 000 from this account to his FNB cheque account. There was also evidence that in November 2010 the respondent bought a Toyota motor vehicle for N$157 029,30 in cash. He also bought a BMW motor vehicle in April 2011 for N$55 000. Of this amount N$20 000 was paid in cash.

[35] The respondent offered the explanation as to the source of income that N$400 000 was an inheritance he received from his late father and N$206 819,30 was money his brother paid into respondent's 32 day investment account for investment. Respondent initially claimed that his father died during 2009, the period allegedly he received the inheritance. His father died in 1999. Respondent later altered that version to say his father died in 1999 but the inheritance was brought to his attention by his brother in 2009. The brother allegedly died two months after respondent received the inheritance. The N$206 819,30, the respondent alleged that his brother derived this money from a bar, gambling machines and a bus transport business.

[36] There was evidence that respondent's father was employed by Namdeb until 1988. He earned a salary of about N$4857 per year or about N$406,25 per month.

[37] The court below concluded, 'therefore, and on an afresh consideration of this matter, on all the material before the court, as if the order was first being applied for, I find that the exclusion of the public, at the initial hearing of this matter, inclines me to refuse to exercise my discretion in favour of confirming the interim order granted in this instance'.

[38] I already found that this approach by the court below was incorrect. Its misunderstanding of that first stage procedure of s 51 and the misinterpretation of s 98 pervaded all its reasoning and was instrumental to the conclusion to which it came and this court will have to approach the matter afresh. At the cost of repetition, that first stage procedure of s 51 is *ex parte* and *in camera*. *National Director of Public Prosecutions v Mohamed NO*, supra, at 575C. The defence of a person who has an interest in the property only arises at the second stage of the proceedings when forfeiture is being sought by the Prosecutor General or the State. That first stage procedure does not violate the interested party's Art 12(1) rights nor is it in conflict with s13 of the High Court Act as the rights of the interested party are not determined, only the property is preserved on the belief that the property is an instrumentality of an offence or unlawful activities. During that first stage the interested party has various other options in terms of the Act. The Prosecutor-General or the interested party may apply for a variation or rescission of the order, or apply for living expenses and legal costs. In this case

where a *rule nisi* was issued, the respondent had his opportunity in court to oppose the confirmation of the rule. The appellant was in no better position than the respondent. The application was considered afresh as if it was brought to court then. As a result the respondent was successful and would still have another defence at the forfeiture stage and thus the submission that the application of 11 April 2012 could not be heard *in camera* and without notification to the respondent is without substance. In *National Director of Public Prosecution v Mohamed NO*, supra, the Constitutional Court of South Africa, amongst other things held that '. . . an application by the National Director under s 38 can never be dismissed solely on the ground that it has been brought *ex* parte'. Sections 51(2) has the focus of preserving property which is the proceeds of unlawful activities or the instrumentality in a crime from dissipation and therefore it is imperative that proceedings at the first stage of the proceedings be held *in camera* to prevent the information and outcome of the application from being transmitted to the adverse party. In the world of technology we live in, it would be to defeat the purpose of s 51(2) to hear an application in terms of that section in an open court. Any person observing the proceedings, who knows the adverse party could easily inform the adverse party who in turn could remove the property provisionally ordered to be preserved.

[39] The case advanced by the appellant on the evidence above was not challenged in any way. The explanation offered by the respondent as to the sources of the huge funds that were deposited in the three accounts he held, given his salary only and bonuses at Namdeb, are improbable and pure fabrication. It is improbable that 10 years after his father's passing on, his brother would still have

kept the money in a suitcase without making it available to him. It is further improbable that more than a year after he had allegedly received the money he continued keeping it in a suitcase before it was invested. It is further not clear when he decided to invest the money and why it was not deposited at once. At the salary of the respondent's late father, it would have taken the late father a life time to invest that kind of money without spending a cent of it. Respondent's brother Konis who allegedly must have transferred N$206 819,30 to the respondent's 32 day account operated his own two accounts and could have opened his own 32 day account and there is no reason why he would have transferred that amount of money to the respondent's account. It is thus improbable that respondent inherited the N$400 000 from his father and improbable that he received N$206 819,30 from his brother Konis for investment. There can be no doubt that the two vehicles were bought from the monies whose legitimate source could not be established. In the absence of rather more convincing explanations for the source of the property, the evidence adduced by the appellant provides reasonable grounds to believe that the properties in para 2 above, are instrumentalities of an offence, or are the proceeds of unlawful activities.

[40] For the conclusion I arrive at I do not find it necessary to strike out from the respondent's answering affidavit the entire paras 9 and 17 and sentences in paras 10 and 21 referred to in para 113 of the appellant's heads of argument. I also do not find it necessary to consider in full the respondent's submissions whether the decision of Geier J is appealable, so is the non-disclosure of the allegedly material information and the failure to serve the application on Konis Uuyuni. They are

without substance. It was argued that the issue between the parties is not *res judicata* as the appellant could still bring a fresh application in accordance with the law. The 'in accordance with the law' is most probably service of the application on the respondent and a hearing of that first stage procedure in an open court. The appellant brought the application in terms of POCA, s 51 in particular. With greatest respect to the court *a quo*, s 51 does not make room for the applicant to prove to the court hearing the application in terms of s 51, that the application should be heard *in camera* or not, so is s 98. Section 98(2) makes it clear that if the court in any proceedings before it is satisfied . . . .' The requirements that should be present to move an application in terms of s 51 are very clear. In actual fact the practice which has developed in the High Court to read into s 51 applications a *rule nisi* has made what might seem unconstitutional which is not, in that initial stage of the proceedings, constitutional bound. The decision of Geier J is appealable. The grant of a preservation order is 'final' in the sense required for appealability see S*ingh v National Director of Public Prosecutions* 2007(2) SACR 326 (SCA) at 331C, Phillips and Others v National Director of Public Prosecutions 2003(6) SA 447 SCA at 453F. On non-disclosure, the appellant, applicant at the time, gave the historic background of the case and it was up to Ueitele AJ to have demanded the previous documents if he found it necessary. In any case the application was *ex parte* in terms of POCA. Ueitele AJ ordered the application to be served on Konis Uuyuni as well, but, as counsel for the appellant correctly observed on what basis does the non-service on Konis have any bearing on whether the provisional order should have been confirmed or discharged. In this case where a *rule nisi* was issued the service of the application and order on the respondent occurred in the ordinary course of any service in civil proceedings

would have been served. The non-service of the order on Konis complained of does not arise at that stage. The service of the order on Konis will only kick in once the provisional property order is confirmed.

[41] For the reasons above in my view the provisional property order should have been confirmed.

[42] The following orders are made

1. The appeal succeeds with costs.

2. The order made by Geier J is set aside, and is substituted therefor an order that:

    a) The *rule nisi* issued by Ueitele AJ is confirmed, and an order is made in terms of the draft attached as Annexure 'X' to the notice of motion.

3. The respondent is ordered to pay the costs of this appeal and the costs of the High Court which costs shall include the costs of one instructing and a senior instructed counsel.

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MAINGA JA

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CHOMBA AJA

_____
HOFF AJA

APPEARANCES

APPELLANT:	G M Budlender SC (with him M Boonzaier) Instructed by the Government Attorney
RESPONDENT:	S Namandje Instructed by Sisa Namandje & Co Inc