

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON RULE 61 APPLICATION

CASE NO: HC-MD-CIV-MOT-POCA-2018/00140

In the matter between:

MARTIN NANDE SHILENGUDWA

FIRST APPLICANT

HILMA DALONDOKA SHILENGUDWA

SECOND APPLICANT

and

THE PROSECUTOR – GENERAL
BUSINESS AND INTELLECTUAL PROPERTY

FIRST RESPONDENT

AUTHORITY

SECOND RESPONDENT

Neutral citation: *Shilengudwa v The Prosecutor - General* (HC-MD-CIV-MOT-POCA-2018/00140) [2019] NAHCMD 256 (24 July 2019)

Coram: MASUKU J

Heard: 24 June 2019

Delivered: 24 July 2019

Flynote: Civil procedure – Rules of court – Rule 61 – irregular step or proceeding. POCA – s 59(1) – regulation 7 – forfeiture application – rule 79(2) – contents of application – rule 65(1) – requirements in respect of applications – whether s 59(1) application brought on notice of motion, supported by a fresh

founding affidavit and confirmatory affidavits thereto, calling upon applicants to indicate their intent to oppose and file answering papers within a specified time constitute an irregular step or proceedings within the meaning of rule 61.

Civil procedure – Condonation – POCA – s 60(1) – application to court – requirements in respect of time period – powers of court when determining condonation under POCA – s 60(3) – requirements to be satisfied – whether court may, notwithstanding the express and unambiguous provisions of s 60(1), consider and decide an application for condonation outside the prescriptive time period.

Summary: The Prosecutor – General (PG) obtained a preservation order under the Prevention of Organised Crime Act (POCA) in respect of certain properties of the applicants. The properties relate to an impugned property transaction wherein the second respondent (BIPA) seeks to obtain certain relief. The PG proceeded in terms of s 59(1) of POCA to apply for a forfeiture order and, by way of notice of motion supported by founding and confirmatory affidavits, called upon the applicants to indicate their intention to oppose and to then file answering papers in accordance with the rules of this court. The applicants declined the invitation and filed a rule 61 application, contending that the aforesaid steps taken by the PG are irregular and stand to be set aside. BIPA, in filing its s 52(5) POCA affidavit out of time, sought condonation for leave to file its s 52(3) notice. BIPA contends that such application was filed and incorporated on 12 June 2018 in its s 52(5) affidavit and as such it substantially complied with s 60(1). It further filed a notice of motion on 3 October 2018, seeking to incorporate certain paragraphs of its s 52(5) affidavit, wherein it sought leave to file the statutory notice.

Held: what rule 61 contemplates is a step or proceeding not authorized in terms of the rules of court.

Held that: rule 65(1) is applicable to proceedings instituted under POCA.

Held further that: an application for forfeiture is an application in terms of section 59(1) of POCA which must comply with regulation 7, read with rule 65(1) of the rules of this court.

Held that: a section 52 POCA notice does not serve to oppose a forfeiture application which, at that stage, has not even been issued.

Held further that: a section 52 POCA notice serves, amongst others, to permit a respondent to receive notice of a subsequent forfeiture application in terms of 59(2) POCA.

Held that: it is only a person who served a section 52 notice who may oppose a section 59(1) application in the manner provided for in section 59(4). and then may elect to oppose such application in terms of section 59(4) POCA.

Held further that: a section 59(1) POCA application must comply with regulation 7 and rule 65(1) of the rules of this court. In these circumstances it can hardly be contended that the applicant's application is one which is irregular within the meaning of rule 61.

Court accordingly dismissing the rule 61 and condonation application with costs.

ORDER

- (a) The Applicants' Rule 61 application is refused.
- (b) The Applicants are ordered to pay the first respondent's costs, not limited by rule 32(11), jointly and severally, the one paying the other to be absolved, including the costs of one instructing and one instructed counsel.
- (c) The Second Respondent's application for condonation is refused.
- (d) The Second Respondent is ordered to pay the first respondent's costs, limited by Rule 32(11).
- (e) The matter is postponed to 15 August 2019 at 08:30 for a status hearing to regulate the further conduct of the matter.

RULING

MASUKU J:

Introduction

[1] This matter comes before court as an interlocutory application wherein the applicants seek to set aside as irregular the first respondent's notice of application for forfeiture and supporting founding affidavit. At the same time, the court is confronted by an opposed condonation application, instituted by the second respondent wherein it seeks leave to file its statutory notice in terms of the Prevention of Organised Crime Act¹.

[2] The nature of these applications necessitates a reflection of the context within which the issues giving rise to the applications in question arose. I turn to a cursory overview of the salient aspects of this matter presently.

Context of the application

[3] By way of an urgent *ex parte* application launched on 02 May 2018 by first respondent (hereinafter referred to as the PG), in terms of s 51(1) of the Prevention of Organized Crime Act (Act 29 of 2004, hereinafter referred to as POCA), a s 51(2) preservation order was granted by this court. The said order was in respect of the positive balance in Capricorn Asset Management Investment Entity number 13849639, and the positive balance in the Bank Windhoek account number NDP-1014291703 held in the name of first applicant.

[4] The PG sought the preservation of property order on the premise that there are reasonable grounds to believe that the properties sought to be preserved are the proceeds of unlawful activities, namely – fraud; contravention of the provisions of the Public Procurement Act 15 of 2015; offences in terms of the Public Procurement Act 15 of 2015; and a contravention of the provisions of the Business and Intellectual Property Authority Act 8 of 2016.; contravention of the provisions of the State Finance Act 31 of 1991; offences in terms of the Anti – Corruption Act 8 of 2003; and money laundering offences in contravention of s 6 of POCA.

¹ Act No. 29 of 2004.

[5] On 08 May 2018, the applicants were served with the preservation of property order, which became opposed on 29 May 2018. On 29 May 2018 the applicants indicated their intention to oppose the making of a forfeiture order, and further indicated their intention to apply for the exclusion of their interest in the property subject to preservation. Thereafter, on 12 September 2018, the PG filed an application in terms of s 59(1) of POCA, seeking a forfeiture order against the preserved property. The 12 September 2018 notice of application, was supported by a founding affidavit by the PG, some confirmatory affidavits, and incorporated by reference, the papers initially filed in support of the preservation application.

[6] The 12 September 2018 application by the PG called upon the applicants (as respondents therein), to indicate their intention to oppose the forfeiture application within 14 days from date of service of the application, and to serve and file affidavits in opposition within the time periods allowed by the rules of this court. It further indicated that in the absence of a notice of intention to oppose, the application would be heard on 03 October 2018.

[7] The set-down date was subsequently vacated in consequence of a so-called one-sided status report filed by the PG wherein, amongst others, proposals regulating the filing of further papers were made. The applicants' absence in partaking in these proposals regulating the further conduct of the matter metamorphosed into a rule 32(10) report, setting the stage for the present interlocutory application.

[8] Following compliance with rule 32(9) and (10) procedures, including subsequent directions issued to the parties, the applicants on 19 October 2018 filed their rule 61 notice wherein they sought to have the PG's notice of application and founding affidavit set aside as an irregular step. It is within this context that the parties are presently before court.

Issues for determination

[9] The following issues fall for determination:

- (a) Whether the PG's notice of motion calling upon the applicants to indicate their intention to oppose the forfeiture application constitute an irregular step within the meaning of rule 61, and
- (b) Whether the PG could permissibly rely on a (new) founding affidavit, together with confirmatory affidavits, in the forfeiture application.

Basis of the rule 61 application

[10] The applicants' rule 61 application sets out the particulars of the claimed irregularity (verbatim), as follows:

"1. The (regular) procedure is as follows:

- 1.1 In terms of section 51(1) the PG "may apply to the High Court for a preservation of property order", which the PG did on 3 May 2018. In terms of section 52(1) and (2), the PG must serve the preservation order on all interested parties and publish it in the Government Gazette. The preservation order was served on 8 May 2018, after which it was published in the Government Gazette on 18 May 2018.
- 1.2 In terms of section 52(3) and (4) any interested person may, within 21 days, "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".
- 1.3 In terms of section 52(5)(e)(i) such a notice, "must be accompanied by an affidavit stating" the "facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order "excluding his or her interest in the property preserved. The 1st and 2nd respondents' affidavit as envisaged in terms of section 52(5)(e)(i), was delivered on 23 May 2018.
- 1.4 In terms of section 90, the "Judge – President must make rules for the High Court regulating the proceedings contemplated in Chapters 5 and 6". In terms of Rule 79(1) the "rule applies to applications brought in terms of sections 25, 43, 51, 59 and 64 of the POCA", and, in terms of Rule 79(2) "must comply with rule 65(1) and (3) as well as the provisions that apply to specific applications referred to in the relevant sections of the POCA".

1.5 In terms of Rule 66(2) the applicant “may, within 14 days of the service on ... her of the (opposing) affidavit ... deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits”. The applicant’s 14 days to deliver a replying affidavit expired 14 days after 23 May 2018, i.e. on 13 June 2018.

1.6 In terms of section 59(1), and while a preservation order is in force, the applicant “may apply to the High Court for an order forfeiting to the State all or any of the property that I subject to a preservation of property order”. In terms of section 59(2) the applicant “must, in the prescribed manner, give 14 days’ notice of an application under subsection (1) to every person who gave notice in terms of section 52(3)”.

2. On 12 September 2018, the 1st and 2nd respondents received a notice of application for a forfeiture order.

2.1 Therein, they are instructed to give notice of their intention to oppose the making of a forfeiture order or to apply for an order excluding their interest in the property, within 14 days, failing which the forfeiture application will proceed on 4 October 2018. They are also instructed to file their answering affidavit 14 days thereafter.

2.2 The 1st and 2nd respondents have already done so in the manner prescribed by section 52(3), (4) and (5) of the POCA and cannot be called upon to do so again by the applicant.

2.3 The notice of application further sets the matter down on 4 October 2018.

2.4 The notice of application is accompanied by a (new) founding and supporting affidavits, which are also used to answer to the 1st and 2nd respondents opposing affidavit, in the same manner as a replying affidavit would. Such a replying affidavit was due on 13 June 2018 already, some 3 months before.

3. The POCA Act and the High Court Rules do not allow for the irregular notice of application, late replying affidavits or a further founding affidavit. These are all irregular and the 1st and 2nd respondents are prejudiced thereby.

3.1 They have incurred substantial costs to prepare the notice to oppose and opposing affidavit prescribed by the POCA Act.

3.2 The 1st and 2nd respondents’ funds are preserved and they simply cannot afford to and will not answer to the late replying affidavit or to the new and irregular founding affidavit.

4. In the result, this application must succeed with costs.”

Submissions by the parties

[11] Mr. Heathcote, for the applicants contended in his written heads of argument, and further, in oral argument, that the applicants did what they were called upon to do in response to the statutory notice contemplated in s 52(1) of POCA. They filed their s 52(3) POCA notice to oppose, together with their s 52(5)(e)(i) affidavits on 23 May 2018.

[12] It was further argued on behalf of the applicants, with reference to s 90 of POCA that, in terms of rule 66 of the rules of this court, the PG could only have filed a replying affidavit within 14 days of receipt of the applicants' answering affidavit. Thus, it was so contended, the PG's right to file a replying affidavit, expired on 13 June 2018. It is on this basis that the applicants contend that the affidavits filed by the PG in support of the forfeiture application are neither sanctioned by the rules of court nor any provision of POCA and are as such, irregular within the meaning of rule 61.

[13] Mr. Boonzaaier for the respondents surveyed the background to the matter and, with reference to the statutory architecture and a recent judgment of the Supreme Court in the matter of *Prosecutor – General v Kamunguma*,² contended that the PG was not only entitled but obligated to proceed with the forfeiture application in the manner she did. He further submitted that the applicants could not have suffered prejudice as a result of the impugned application as it is a statutory requirement, if a party is so advised, to indicate its opposition to a forfeiture application.

Rule 61 of the High Court

² (SA 62/2017) [2019] NASC [12 June 2019].

[14] The relevant parts of the rule provide:

(1) A party to a cause or matter in which an irregular step or proceeding has been taken by any other party may, within 10 days after becoming aware of the irregularity, apply to the managing judge to set aside the step or proceeding, but a party that has taken any further step in the cause or matter with knowledge of the irregularity is not entitled to make such application.

(2) An application under subrule (1) is an interlocutory application and must be on notice to all parties and must specify in the notice the particulars of the irregularity alleged as well as the prejudiced claim to be suffered as a result of the irregular step.

[15] The question to determine in the circumstances is this: Is it irregular for the PG to call upon the applicants to indicate their intention to oppose the forfeiture application?

[16] It is a constitutional imperative and fundamental principle of natural justice that parties have the right to be heard before an adverse order is made against them. Such right finds expression, in POCA matters, albeit in slightly varied form, in the provisional nature of preservation orders granted *ex parte* which are, however, subject to being set aside on application by affected parties in appropriate cases. S 58 of POCA expressly provides for such procedure.

[17] The applicants, invoking their procedural rights, filed their s 52(3) opposition, seeking to both oppose the forfeiture application and further applied for an order excluding their interest in the property made subject to the preservation order.

[18] Part 3 of POCA provides the legislative scheme relevant to applications for forfeiture orders. S 59(1), provides that the PG may apply for a forfeiture order if a preservation order is in force. It requires at s 59(2) of the PG to give notice of such forfeiture application to every person who gave notice in terms of section 52(3). It follows that a person, such as the applicants, who gave a s 52(3) notice, is entitled

as of right, to receive notice of a forfeiture application under s 59(2). Such notice is not without consequence as the recipient may, as provided for in s 59(4), either oppose the forfeiture application or apply for exclusion of his or her interest or variation of the order in relation to the property.

[19] Section 59(4) provides: *Any person who gave notice in terms of section 52(3) may –*

(a) oppose the making of the order, or

(b) apply for an order –

(i) excluding his or her interest in that property from the operation of the order; or

(ii) varying the operation of the order in respect of that property.

[20] Acceptance of an argument that a s 52(3) notice of opposition is sufficient for the purposes of a s 59(1) application not only renders nugatory the s 52(6) limitation and the s 59(2) notice requirement, but stands in stark contrast to the essential rights afforded to a respondent in terms of s 59(4). The applicants, having filed their s 52(3) opposition, became entitled under s 59(4) to elect one of the optional remedies. I may add that a failure to file a s 52(3) notice has a crippling effect on a respondent in that it not only disentitles him or her to receive notice of a s 59(1) application, but also effectively deprives such person, subject to s 60, from participating in the forfeiture proceedings.

[21] It irrefragably follows that a respondent, who fails to elect either of the s 59(4) optional remedies may yield an unopposed s 59(1) application for forfeiture. Section 59(4) does not state when the election must be exercised. Both counsel, correctly in my view, accepted that rule 65(1) of the rules of this court apply where an application in terms of s 59 POCA is launched.

[22] In a recent judgment the Supreme Court, in the matter of *Prosecutor – General v Kamunguma*³, held that:

[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.

[23] Regulation 7 of the POCA Regulations provides as follows:

'7. Subject to section 91(2), (3) or (4) of the Act, every application made pursuant to section 25, 43, 51, 59 or 64 of the Act, is made as follows -

- (a) it must be in writing;
- (b) a notice of application of at least 7 days must be given to the respondents to an application and to any other person upon whom an application is required to be served unless leave to serve short notice is given by the High Court; and
- (c) it must be supported by affidavit evidence, unless otherwise stated in the Act or by an order of the High Court.

[24] The PG's s 59(1) application was filed in compliance with Regulation 7, read with rule 65(1) of the rules of this court. Furthermore, it correctly, in terms of rule 65(4), called upon the applicants to file their notice of intention to oppose, if so advised. I accordingly accept as correct the submission by Mr. Boonzaaier that the PG's notice calling upon the applicants to indicate their intention to oppose the application was not irregular but is in fact sanctioned by POCA and the relevant rules of this court. It follows that the first question is answered in the negative.

Does the PG's founding affidavit and further confirmatory affidavits filed in support of the section 59(1) application constitute an irregular step?

³ SA 62/2017 (delivered 12 June 2019).

[25] Mr. Boonzaaier, argued with reference to the *Kamunguma* matter that the PG was entitled to file further affidavits in support of the forfeiture application. The applicants moved to reject such contention, arguing that *Kamunguma* is no authority for the proposition that the PG can require a party to duplicate the notice to oppose and opposing affidavits to set up a valid defence. Mr. Heathcote, submitted in his written heads of argument that ‘the ratio decidendi of *Kamunguma* is simply to avoid prolixity in the papers at the forfeiture stage and accordingly the Supreme Court found that the PG can by reference in her founding affidavit in the forfeiture application incorporate her founding affidavit in the preservation proceedings without annexing it as it is already before Court’.

[26] The issue under consideration may conveniently be determined with reference, if not to rule 65(1) of the rules of this court, to the *Kamunguma* matter where the Supreme Court was confronted with the question whether it was permissible in law for the PG to incorporate by reference affidavits and other information filed in an application for a preservation order in her affidavit in support of a forfeiture application. Such question was, after a thorough survey of the relevant sections of the POCA, its regulations, and the rules of this court, answered in favour of the PG.

[27] It was, in my considered view, not only permissible but incumbent on the PG to proceed with the s 59(1) application in the manner provided for in Regulation 7, read with s 65(1) of the rules of this court. In the matter of *Kamunguma* the Supreme Court reasoned as follows:

“[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. (Emphasis added).

[28] I thus accept Mr. Boonzaaier's submissions that the PG's founding affidavit and confirmatory affidavits filed in support of the forfeiture application do not constitute an irregular step within the meaning of rule 61 as correct. It is clear that this is sanctioned by Regulation 7, and is required by rule 65(1). The second question is thus also answered in the negative.

[29] The resultant effect of these findings disposes of the applicants' application to have the PG's notice of motion and founding affidavit set aside as an irregular step. The application must accordingly fail, and so it does.

[30] I need to make the following additional observations. First, it is beneficial to a person in the shoes of the applicants to state, in terms of s 52(5)(e)(i), the facts upon which he or she intends to rely in opposing the forfeiture application. I say so for the reason that in appropriate cases, the facts so provided may persuade the PG not to proceed to the step of applying for forfeiture. The information provided at this stage is therefore not merely inconsequential.

[31] Second, it appears to me that the need to file further reasons in support of the opposition to the forfeiture application is also not superfluous. This is stated in recognition of the fact that the standards of proof required at the preservation stage is a tad lower than it is at forfeiture. It may appear to be a work of supererogation for a respondent to seem to repeat the same allegations in opposition to a forfeiture application but is not as the standard required at the latter stage is higher, and which, in a sense, may work in the respondent's favour, an advantage he or she may not enjoy if he or she contents him or herself with the information provided in relation to the previous stage of preservation.

The second respondent's condonation application

[32] It is common cause that the 04 May 2018, a preservation order was served on the second respondent (hereinafter referred to as BIPA) on 08 May 2018. On 12 June 2018, BIPA filed its statutory notice and accompanying affidavit. In such

affidavit BIPA indicated its intention to seek condonation for the late filing of its s 52 POCA notice and affidavit.

[33] On 02 October 2018, the PG filed a status report wherein she indicated that BIPA was non-compliant with the time-periods provided for in s 52 of POCA. BIPA responded with a disjunctive notice of motion, relying on its 12 June 2018 affidavit, wherein it sought condonation for the late filing of its s 52 notice and affidavit. The PG opposes the application for condonation.

[34] It was contended in argument by Mr. Kauta, representing BIPA, that the application of 03 October 2018 was merely filed *ex abundanti cautela* as BIPA had, on 12 June 2018, already substantially indicated its intention to seek condonation. As such, so he contented, BIPA substantially complied with the provisions of s 60(1) of POCA. The thrust of his argument further suggested that the PG elected to acquiesce in BIPA's condonation in June 2018 and that its subsequent opposition impermissibly prevaricates in its conduct of litigation.

[35] Mr. Kauta further submitted in his written heads of argument, and as further amplified in oral argument, that certain jurisdictional facts must be present in order to invoke the provisions of s 60(1) of POCA. These facts, so he submitted, are that (a) a person must have failed to give a notice within the period specified in s 52(4) of the POCA; (b) such section gives 21 days from date of service or publication in the Gazette; (c) the application must be filed within 14 days of becoming aware of the existence of a preservation order; and (d) the application must be for the failure to comply with s 52(4).

[36] It is on the basis of these 'jurisdictional facts' that Mr. Kauta reasoned that on a proper reading of ss 52(4) and 60(1) of POCA, the 14 days within which to apply for condonation begins to run after the lapse of 21 days as set out in s 52(4) for a person who has been served with the preservation order. Accordingly, so the argument developed, the application for condonation was within the permissible period of 14 days. Such reasoning appears to be underscored by his submission that, since the application was served on BIPA on 8 May 2018, the 21 days expired on 29 May 2018, and the 14 days only expired on 12 June 2018, i.e. the date on

which BIPA filed its statutory notice and affidavit (including therein a reference in the paragraphs 7; 7.2; 85 and 86 to condonation for the late filing).

[37] The affidavit of BIPA, deposed to on 11 June 2018, states at paragraph 7 that its purpose is two-fold, i.e. to seek an exclusion of interest, and to seek condonation for the late filing of its affidavit. At paragraph 85 the deponent states that she had to consult certain Ministers, and that such consultation only occurred on 31 May 2018. Thereafter the affidavit had to be prepared and thus it was impossible to give the statutory notice prior to such consultation. At paragraph 86 the deponent sought condonation for the late filing of the affidavit and further sought leave to file a notice in terms of ss 52(3) and (4) of POCA.

[38] The PG, in opposition to the BIPA condonation application, filed a rule 66(1)(c) notice, purporting to raise certain questions of law which she maintains are dispositive of the condonation application. The question sought to be answered was whether BIPA complied with the s 60(1) of the POCA notice period within which to seek condonation.

[39] Ms Kuelder contended with reference to s 60(3) of the POCA that BIPA in any event failed from 12 June – 03 October 2018 to advance any reasonable explanation for its failure to apply for relief. Relying on the matter of *Shalulu v The Prosecutor - General*⁴ Ms Kuelder contended that the question raised by the PG ought to be answered in the negative as the applicant failed to comply strictly with the requirements of s 60(1) of POCA. Mr. Kauta, for his part contended that the *Shaululu* matter is distinguishable on the facts, and is no authority for the proposition that this court may not rely on its inherent power to regulate its own procedure.

Determination

[40] It is common cause that BIPA filed its statutory affidavit on 12 June 2018 wherein it sought both an exclusion of interest in the property subject to preservation and also condonation for its late filing of the affidavit. As such, it therein proceeded to seek leave to file the statutory notice of opposition. It is furthermore not disputed that

⁴ (POCA 2/2013) [2014] NAHCMD 222 (24 July 2014)

on 03 October 2018 BIPA filed a notice of motion seeking leave in terms of s 60(1) of the POCA to file its statutory notice. The issues which confront this court are (a) whether there is an application properly serving for determination in the manner contemplated in s 60(1) of the POCA? If (a) is answered in the affirmative, (b) whether BIPA has satisfied the twin requirements of section 60(3)(a) and (b)?

[41] Section 60 of POCA provides the following:

(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) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 59(1), but must be made before judgment is given in respect of the application for a forfeiture order.

(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.

(4) When the High Court grants an applicant leave to give notice as referred to in subsection (3), the Court -

(a) must make an appropriate order as to costs against the applicant; and

(b) may make an appropriate order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order.

(5) A notice given after leave has been obtained under this section must contain full particulars of the chosen address of the person who gives the notice for the delivery of

documents concerning further proceedings under this Chapter and must be accompanied by the affidavit referred to in section 52(5).

[42] In its notice of motion filed on 3 October 2018 BIPA indicated that it sought leave to give statutory notice and indicated that it relied on paragraphs 58 and 59 of the affidavit filed of record in support of such application for condonation. I reject as unsustainable, with deference, Mr. Kauta's contention that the 12 June 2018 affidavit served the purpose contemplated in s 60(1) as BIPA ought to obtain leave to file such affidavit as clearly contemplated by s 60(1) read with 60(5) of the POCA. S 60(1) contemplates an application to court, not a fleeting reference to condonation in a s 52(4)(a) POCA affidavit.

[43] The parties drew the court's attention to the matter of *Shaululu* and I find, with respect, the reasoning therein both instructive and persuasive. Parker, AJ therein, with reference to s 60(1) of the POCA, held:

'[17] ... But – it must be stressed – the enjoyment of this statutory largesse is subject to a time limit. In terms of s 60(1) the interested person who had failed to give notice in compliance with s 52 must launch his or her application for condonation of that failure and leave to give a notice accompanied by the required information. Having sought and found the intention of the Legislature clearly expressed in the words of the statutory provision and the purpose of POCA, as set out in the long title of POCA, I hold that the provisions on the time limits are peremptory. See *Compania Romana de Pescuit (SA) v Rosteve Fishing* 2002 NR 297 at 301H-I. The court is, therefore, not entitled to disregard or extend those time limits.

[44] I accordingly find that the BIPA condonation application filed on 03 October 2018 was out of time and in contravention of s 60(1), thus not entitling the court to nonetheless rely on its inherent powers to regulate its own procedure and determine the condonation application. It follows that the question raised by the PG must be answered in the negative. In the result, it becomes inappropriate to consider the second issue raised.

[45] In the premises, and on the basis of the foregoing reasoning, I find that the applicant's condonation application falls outside the time period provided for in

s 60(1) of the POCA, and stands to be dismissed for that reason. The court's hands are tied and it may not, in the circumstances, come to BIPA's rescue.

Costs

[46] Both parties sought costs of the application and opposition thereto. The opposition of the PG was limited to a question of law as she was entitled to do in terms of rule 66(1)(c). No reason was advanced as to why costs should not follow the result. In the exercise of my discretion I direct that BIPA shall be liable for the costs of the PG's opposition, limited in the manner contemplated in rule 32(11), the application clearly being interlocutory in nature.

Conclusion


[47] In the circumstances, I have found that the application in terms of rule 61 launched by the applicants should fail. I have equally found that the application for condonation filed by the second respondent BIPA should fail. In the circumstances, it would appear that the PG has been the successful party on both scores.

Order

[48] Having regard to the foregoing, I am of the view that the following order is condign:

- (a) The Applicants' Rule 61 application is refused.
- (b) The Applicants are ordered to pay the first respondent's costs, not limited by rule 32(11), jointly and severally, the one paying the other to be absolved, including the costs of one instructing and one instructed counsel.
- (c) The Second Respondent's application for condonation is refused.
- (d) The Second Respondent is ordered to pay the first respondent's costs, limited by Rule 32(11).

- (e) The matter is postponed to 15 August 2019 at 08:30 for a status hearing to regulate the further conduct of the matter.



T.S Masuku
Judge

APPEARANCES:

APPLICANTS: Mr. Heathcote (With him Mr. Jacobs)

Instructed by: Van der Merwe, Greef, Andima, Windhoek.

1ST RESPONDENT: Mr. Boonzaaier (With him Ms. Van der Byl)

Instructed by: Office of the Government Attorney

2ND RESPONDENT: Mr. Kauta (with him Ms. Kuzeeko)

Of Dr Weder, Kauta & Hoveka, Windhoek.