REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2021/14331

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

20/8/2022 .....
DATE

.....
MOKOSE SNI

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Applicant

and

TARIOMIX (PTY) LIMITED — 1st Respondent

LOUIS PETRUS LIEBENBERG — 2nd Respondent

MAGDALENA PETRONELLA KLEYNHANS — 3rd Respondent

JUDGMENT

MOKOSE J

Introduction

[1] Before me is a reconsideration application by the respondents against the granting of a preservation order granted by this Court in terms of Section 38 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The applicant opposes the relief sought.

[2] Counsel for the respondents indicated to the court that there are several issues which are not in dispute. The right, in terms of Section 38 of POCA, to approach a matter *ex parte* and in camera are not in dispute. However, counsel indicated that the dispute concerns whether the applicant should have approached the court and if so, how it should have conducted itself before and after obtaining the order.

[3] Secondly, the respondents do not challenge the applicant's identification of the asset forfeiture scheme, the meaning of instrumentality of an offence or the meaning of proceeds of unlawful activities. The dispute is whether, on the facts of the case, these features have been established.

[4] Thirdly, the respondents do not challenge the applicant's remarks about the Banks Act 94 of 1990, the Consumer Protection Act 68 of 2008, the Diamonds Act 56 of 1986 and the definitions of fraud and money-laundering. The dispute is whether, on the facts of this matter, these Acts and offences have been committed.

Background

[5] On 18 March 2021 the applicant obtained a preservation order, granted *ex parte,* on an urgent basis and in chambers against the property of the respondents in terms of Section 38 of POCA. The effect of this order is that all funds held in the respondents' bank accounts were frozen. The papers and the order were subsequently served on the respondents on 24 March 2021.

[6] The respondents are the aggrieved parties who apply for the reconsideration of the application. I will refer to the NDPP as the applicant has been referred to in the application for the preservation order. I also note that at the time of the granting of the order, the funds had been frozen on the accounts in question at the instance of the Finance Intelligence Centre ("the FIC").

[7] The applicant contended in the application, that the preservation order was necessitated by the following facts:

(i) on 5 March 2021 the FIC issued intervention notices in terms of Section 34 of the Financial Intelligence Centre Act 38 of 2001 ("FICA"), directing ABSA Bank and Nedbank to place holds on the respondents' accounts;

(ii) the applicant investigated the available facts and interviews given by the first respondent and proceeded with a preservation application;

(iii) the basis for the granting of the order which was granted on 18 March 2021 was that the second respondent, through the use of social media was inviting investors to invest in diamonds for unrealistic profits. Furthermore, the second respondent granted an interview to Carte Blanche where he stated that 'his dealings were illegal but that he made them legal'. He confirmed further that he did not possess a licence to deal in diamonds. He furthermore posted pictures of diamonds and in particular, unpolished diamonds.

[8] The applicant contended further that there was a contravention of several laws including unlawful activities being conducted by the respondents in terms of POCA. It was also noted by the applicant that the bank accounts which had been opened by the respondents to run the business were being run as personal accounts. No normal business-related expenses and transactions were observed nor were payments to SARS observed in respect of VAT. It was also noted by the applicant

that the respondents had been involved in other civil matters, one of which was with Capitec Bank where the respondents' bank accounts had been frozen on allegations of being involved in a multiplication scheme.

[9] It is alleged by the respondents that in making its case, the applicant failed to display *uberrimae fidei* in that it approached the court in a specific and calculated manner which tended to exclude the ability to hear the respondents' version and arguments against the application from the Court's purview. As a result, the respondents aver that the court was not apprised of the inadmissibility of some of the evidence on which the applicant relied. The respondents also allege that the applicant relied upon interviews and television shows in which the respondents had been involved and relied on, *inter alia,* a series of packets of diamonds to show that the funds in the bank were indeed the proceeds as described in Section 38(2) of POCA.

The law in respect of applications in terms of Rule 6(12)(c)

[10] Rule 6(12)(c) of the Uniform rules of Court provide for the remedy of reconsideration to a person against whom an order has been granted in his absence in an urgent application. It is intended that the rule is to afford an aggrieved person a mechanism designed to redress imbalances in and injustices flowing from a court order granted on an urgent basis and in his absence.

[11] In terms of Rule 6(12)(c) the court has a wide discretion to reconsider an order obtained *ex parte.* It also has a discretion to take other factors into account including whether an imbalance, oppression or injustice has resulted. If such an imbalance, oppression or injustice has resulted, the nature and extent thereof and whether there are alternative remedies can be taken into account. The dominant reason for this subrule is to afford the aggrieved party a mechanism designed to

redress such imbalances, oppression or injustices flowing from an order granted as a matter of urgency in his absence.

[12] Although this application is a reconsideration in terms of Rule 6(12)(c) and is so termed, it is not an application by the respondents. It is a reconsideration, in light of the respondents' version, of whether the applicant was entitled to the *ex parte* order granted by the court.

[13] Counsel for the respondents argued that an issue pertaining to the onus of proof needs to be determined by this court. The respondents contend that the hearing is a reconsideration of the applicant's application by a Judge who now has the case of both sides before her. As such, the applicant bears the onus of proving that it is entitled to the order originally sought. The applicant, on the other hand, contends that because the respondents are applying for reconsideration of the order that it had obtained *ex parte,* the respondents bear the onus.

[14] A court which reconsiders an order in terms of Rule 6(12)(c) does so with the benefit not only of the facts contained in the original application but also on the basis of a set of different circumstances presented in affidavits filed by all interested parties. The consequence of this is twofold in that the issues are to be considered in light of the fact that both sides of the story are before the court and that the execution of the original order may have had the effect that those issues are not exactly the same as those which were before the court when granting the original order and are then dealt with accordingly.

[15] I agree with the view of Mr Suttner, counsel for the respondents. The matter is to be considered by this court afresh with both sides of the story before this court. The respondents file

their answering affidavit and the applicant then has an opportunity to reply thereto. Accordingly, the applicant bears the onus of proving that it is entitled to the order which had originally been sought and was subsequently granted.

Issue

[16] The issue in this matter is whether there are reasonable grounds to believe that the property concerned, being funds in the frozen bank accounts, is:

"(i) an instrumentality of an offence referred to in Schedule 1; or

(ii) the proceeds of unlawful activities."

[17] The respondents submit that the applicant has failed to meet the evidentiary requirements for the relief which it seeks against them and that upon a proper consideration of the allegations presented by the applicant, the relief sought is unsustainable and not justified.

Purpose and nature of Preservation Orders

[18] POCA creates two distinct mechanisms in respect of asset forfeiture procedure. Chapter 5 provides for the forfeiture of the benefits derived from crime and Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime but is not conviction based. Accordingly, it may be invoked even where there is no criminal prosecution.

[19] Section 38 of POCA provides that a court shall make a preservation order if there are reasonable grounds to believe that the party is either an instrumentality of an offence or the

proceeds of unlawful activity or property associated with terrorism. The application is directed against the property that had been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners of the goods is therefore not primarily relevant to the proceedings.[1]

[20] The notice which is subsequently given after the granting of the order is to interested parties. It is intended to give those interested parties an opportunity to come forward and either dispute that the property is the proceeds of criminal activity or an instrumentality of an offence. Any interested party may also raise an innocent owner's defence.

[21] Section 38(2) provides that a preservation order of property must be made if there are reasonable grounds to believe exist that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.

Evaluation of Evidence

[22] it is important to deal with certain aspects of POCA before I evaluate the evidence. The legislature intended to introduce strict measures to combat organised crime, money laundering and criminal gang activities and in the process to *inter alia*, provide for the recovery of the proceeds of unlawful activity.

[23] "Proceeds of unlawful activities" is described in Section 1 of POCA and means "any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained,

[1] NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan [2004] 2 All SA 491 (SCA) at para 10

directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere....."

[24] An applicant in a matter such as the matter is *casu* is obliged to set out the facts upon which it relies for an order in terms of Section 38 of POCA to be granted. It must set out the facts upon which it relies to base a belief that is reasonable and that which would cause a reasonable person to hold the belief in question. The issue is whether the applicant has set out such facts as would cause a reasonable person to hold the belief in question. In the case of *Minister of Law and Order & Others v Hurley & Another*[2] the court held that the belief must be based on reasonable grounds and that the information in question must be such as would lead a reasonable man to believe what is required. A belief based on hearsay evidence does not suffice. The test must be an objective one that looks at whether there were reasonable grounds for the belief.

[25] The parties in the matter *in casu* do not differ starkly in respect of the requirements as set out above. The respondents are however of the view that the applicant has fallen short of the onus placed upon it to prove a basis for the preservation order by setting out the facts upon which it relied upon to come to a belief based upon reasonable grounds, that the funds in the frozen bank account are proceeds of unlawful activities. The respondents furthermore refute that the applicant's case has been made out in the founding affidavit and further contend that the applicant has sought to introduce new evidence in reply.

[2] 1986 (3) SA 569 (A)

[26] As a general rule, an applicant must make out its case in the founding affidavit.[3] Introducing evidence in reply is impermissible. In the *locus classicus* case of *Titty's Bar and Bottle Store (Pty) Limited v ABC Garage (Pty) Limited and Others*[4]it was accepted by the court that an applicant will not be permitted to introduce new matters in reply except within a very narrow ambit. The Court may ignore or strike out matter in a replying affidavit that should have been contained in the founding affidavit. The court must therefore consider whether the facts only in the founding affidavit are sufficient to warrant a finding in favour of the applicant.

[27] In ascertaining whether the case made out by the applicant in its founding affidavit contained facts upon which the court may find in its favour, I will consider the following allegations of the applicant concerning the property of the respondents which include bank accounts with Absa Bank held in the names of the respondents. The applicant refers the court to documents and affidavits used in support of the application, which affidavits include one by Ms Brown and Mr Smit, both senior special investigators employed by the Asset Forfeiture Unit. The deponent of the affidavit founding this application refers to the allegations contained in the affidavits of unlawful activities to which the respondents are linked. They include, *inter alia,* the following:

(i) that the second respondent through the use of social media invited investors to invest in diamonds for unrealistic profits;

(ii) that the second respondent gave an interview on Carte Blanche in which he stated that his dealings were illegal but that he made them legal and that he did not possess a licence to deal in diamonds;

(iii) upon scrutinising of the third respondent's bank account it was evident that it was being used to run a business although it was a personal account;

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[3] Eagles Landing Body Corporate v Molewa 2003 (1) SA 412 (T)
[4] 1974 (4) SA 362 (T)

(iv) the respondents were involved in civil litigation including a matter wherein Capitec Bank froze the respondents' account due to a suspicion that the respondents were involved in a multiplication scheme. Capitec Bank was however ordered to release the hold on the accounts;

(v) the applicant, in support of his application, obtained affidavits from the south African diamond and Precious Metal Regulator and the FSB confirming that the respondents did not have a licence to deal in unpolished diamonds and also that they did not have the necessary authority to take deposits.

[28] The applicant avers that the abovementioned activities fall within the realms of POCA and that the proceeds in the bank accounts are accordingly proceeds of unlawful activities.

[29] The applicant introduces the affidavits of Mr Bruwer and Mr Neethling both of whom make some of the allegations as stated above in his affidavit in reply. Furthermore, there is no explanation nor justification for this evidence to be accepted by this court in reply. Accordingly, I come to the view that this evidence should be struck out for the reason that it was not contained in the founding affidavit as it should have been.

[30] I now consider whether the allegations as set out by the applicant in his founding affidavit would cause a reasonable person to hold the belief that reasonable grounds to believe exist that the property concerned is an instrumentality of an offence referred to in Schedule 1 of POCA or is the proceeds of unlawful activities. The applicant alleges and relies upon a Carte Blanche interview as proof of unlawful activities. The court was not given an edited version of the television report or a transcript of same. A mere allegation has been made by the applicant and no evidence of such an

interview is before the court. We are informed by the respondents that this interview dates back to more than a year ago.

[31] I am of the view that this evidence is inadmissible evidence and as such would not suffice for a reasonable person to come to a reasonable belief that the proceeds in the respective bank accounts are proceeds of unlawful activities or are an instrumentality of an offence as referred to in Section 1 of POCA.

[32] The applicant further attaches voluminous documents for the Court to consider in making the *ex parte* application without express reference to the relevant portions. It is important to bear in mind the principles set out in the matter of *Swissborough Diamond Mines (Pty) Limited and Others v Government of the Republic of South Africa and Others*[5] where it was held as follows:

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

[33] In view of the principles set out as stated above, I am of the view that the applicant's approach to placing documentation before the Court without referring to them in the founding affidavit renders the applicant's case having *"not been fully canvassed in the application. No regard can be had to them in determining the application."*[6]

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[5] 1999 (2) SA 279 (T) at 324 F - G

[6] Swissborough case supra at 327A – B/C

[34] Another issue which is noted in the founding affidavit is the applicant's presentation of its case and in particular, the applicant's reliance on similar fact evidence. Similar fact evidence is conditionally admissible in civil proceedings – the condition being that the probative value of the evidence is *"strong enough to warrant its reception in the interests of justice and its admission will not operate unfairly against the other party or parties".*[7]

[35] The respondents contend that the applicant adduces similar fact evidence to further the conclusion that the respondents are guilty and therefore more likely to have committed the offences which it seeks to prove against them. The respondents further contend that this evidence should be excluded. No underlying facts have been submitted to court to enable it consider the reception of similar fact evidence to determine that it is relevant and it has probative value. I agree with Counsel for the respondents and am of the view that such evidence is inadmissible and is accordingly excluded.

[36] The respondents further contend that the applicant is not certain what case it wishes to present to this Court and expects the respondents to meet. On the one hand the applicant avers that the respondents' business does not trade in actual, physical diamonds and on the other hand, relies on an allegation that the respondents' business trades illegally in uncut diamonds. These are two mutually destructive and contradictory allegations by the applicant which cannot be relied upon to obtain the order sought.

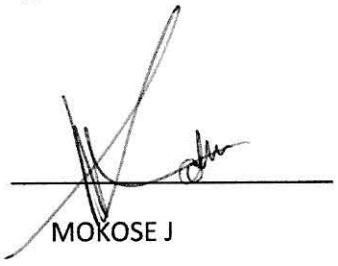
[7] Mood Music Publishing Co Limited v De Wolfe Limited 1976 1 All ER 763 (CA) at 766

[37] For the reasons set out above, I accordingly come to the view that the applicant has failed to prove that the evidence it relied upon for the purpose of obtaining the order does not fall within the purview of the Act and accordingly, the following order is granted:

(i) the application is dismissed;

(ii) the preservation order is overturned; and

(iii) the applicant is ordered to pay the respondents' costs including the cost of two counsel.



MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

Adv J Wilson

On instructions of

Office of the State Attorney

For the First, Second and Third Respondents:

Adv J Suttner and

Adv A Jansen van Vuuren

On instructions of

W N Attorneys Inc

Date of Judgement: 22 August 2022