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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA GAUTENG
LOCAL DIVISION, JOHANNESBURG**

Case Number: 2021/45702

1. REPORTABLE: YES
 2. OF INTEREST TO OTHER JUDGES: YES
 3. REVISED: YES
- Date 01/9/2025**

In the matter between:

THE GOVERNMENT OF MADAGASCAR

Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION

First respondent

PARPIA GOLD & JEWELLS TRADING LLC

Second Respondent

XXX MAHAMODO

Third Respondent

FRANCES DELIOT REGASY

Fourth Respondent

ZAVA HERIMANANA ANJARANANTENAINA

Fifth Respondent

In re

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

THE GOVERNMENT OF MADAGASCAR	First Respondent
PARPIA GOLD & JEWELLS TRADING LLC	Second Respondent
XXX MAHAMODO	Third Respondent
FRANCES DELIOT REGASY	Fourth Respondent
ZAVA HERIMANANA ANJARANANTENAINA	Fifth Respondent

JUDGMENT

Summary: Interpretation of chapter 6 of Prevention of Organised Crime Act 121 of 1998 and, specifically, sections 39 and 40 thereof – determination of procedural nature of application for civil forfeiture of property – such an application is inherently ex parte ; use of rule 30 for setting aside of forfeiture application as an irregular proceeding not competent in that the applicant for relief not a party thereto due to the ex parte nature of the application

FISHER J

[1] This application by the Government of Madagascar (GoM) purports to be an interlocutory application brought under rule 30 of the uniform rules in this, an application for civil forfeiture brought by the National Director of Public Prosecutions (NDPP) under chapter 6 of the Prevention of Organised Crime Act.¹ (the Act).

[2] The causes of complaint raised under rule 30 are that that the forfeiture

¹ Act 121 of 1998.

application is based on a preservation order which must be held to have expired - which expiry precludes the bringing of the application - and that rule 6 of the uniform rules of the High Court has not been complied with in relation to the opposed form of the notice of motion that the forfeiture application should take.

[3] The GoM also sought to bring an application to strike out matter from the heads of argument and the contents of a letter. This latter application is manifestly defective and was, wisely, not pressed by counsel for the GoM.

[4] The forfeiture application is brought by the NDPP in respect of gold bars and cash that were seized at O. R. Tambo International Airport (ORTIA) and preserved for being the proceeds of crime under the Act in terms of the *ex parte* order of Victor J dated 30 September 2021 (the preservation order)

The competing arguments

[5] The GoM argues that the NDPP has failed to comply with the uniform rules of court, which it alleges apply to the forfeiture application by virtue of section 62 of the Act.

[6] The NDPP takes the point that the GoM is not a party to the forfeiture application in that the statutorily mandated form of such an application is *ex parte* and thus that the GoM lacks standing in the forfeiture application.

[7] The NDPP disputes the alleged irregularity of the application but files a conditional application for amendment in the event of the complaint as to form being upheld.

[8] The locus standi point is dispositive of the GoM's rule 30 application.

[9] The *ex parte* nature of the application emerges from an analysis of the legislative scheme that provides for the procedure to be followed by the NDPP in relation to civil forfeiture of property to the State.

[10] Before examining the legislative scheme in which the forfeiture application

operates, I briefly set out the relevant facts which led to the NDPP implementing the forfeiture procedure.

Background facts

[11] The third, fourth and fifth respondents were arrested on the 31 December 2020 upon landing at ORTIA in a private jet flown from Madagascar.

[12] On attempting to clear customs these respondents were found to be in possession of the gold bars and cash that forms the subject of the forfeiture application.

[13] They were arrested for unlawfully and intentionally failing to declare the gold and cash in their possession as per the laws relating to the export of such items into South Africa. Upon their arrest the gold and cash were confiscated by the authorities.

[14] On 30 September 2021 the NDPP applied for and was granted an order, on an ex parte basis, in terms of section 38 of the Act in respect of the gold and cash. The order authorised the preservation of the gold bars and cash pending the finalisation of forfeiture proceedings to be instituted, the court being satisfied of reasonable grounds for the belief that the property constituted the proceeds of unlawful activities or was an instrumentality thereof.

The legislative scheme

[15] The two civil forfeiture schemes in the Act contain their own discrete legislatively determined procedural and substantive rules which are designed to fit the purpose for which they are to be applied under the Act.

[16] The first is chapter 5 (comprising sections 12 to 36) which provides for the restraining of specific persons from dealing with property which forms a benefit derived from an offence and for its seizure and ultimate confiscation on conviction.

[17] The second is chapter 6 (comprising sections 37 to 62) which provides for the

preservation, seizure and forfeiture of property that is derived from unlawful activities or is implicated in the commission or suspected commission of an offence.

[18] The procedure in chapter 5 provides for the bringing of the application against a particular “defendant.”² This defendant is usually the criminal himself or a party to whom he has transferred the property in issue to conceal his involvement therewith.

[19] Chapter 5 applications are dependent on criminal proceedings relating to the property in issue being underway or at least imminent and the confiscation of the property is generally dependant on a conviction of an offence by the accused person who is the defendant in the proceedings.

[20] Chapter 6, on the other hand, is wider. It provides, generally, for the preservation and ultimate forfeiture of the proceeds of and instrumentalities used in crime. Section 6 is not aimed at a particular defendant and its application is not dependent on criminal prosecution.

[21] We are dealing, in this application, with a forfeiture application brought under Chapter 6. The chapter 5 proceedings are not directly relevant to this judgment and only chapter 6 is examined at any length.

[22] The chapter 6 procedure commences with the NDDP launching an ex parte application for a preservation of property order under section 38.

[23] A court must grant the preservation 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. It has no discretion once this belief is established.

[24] Once the preservation order is obtained, the NDPP must, in terms of section 39(1), give special notice of the order to those known to have an interest in property

² defendant' is defined in section 12 of Chapter 5 to be 'a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 25 (1) (b) [a person to be charged under circumstances where a confiscation order may be made against the person]'

which is the subject of the preservation order and publish a general notification of the order in the Government Gazette.

[25] In this case, special notice was given to the GoM on the basis of it having raised an interest therein. It seems that the contention relating to interest is based on the fact of the illegal removal of the gold from Madagascar which is alleged to be subject to lawful process under Malagasy law.

[26] In this rule 30 application the GoM argues that the forfeiture application is based on what must be determined by the court to be a lapsed preservation order. The argument goes that the NDPP delayed unduly in giving notice in the Gazette of the preservation order under circumstances where it is enjoined, under section 39(1), to attend to its obligation to give such notice in the Gazette “as soon as practicable” after the order it is acquired.

[27] The GoM argues that the preservation order must be held to have lapsed as a result of the unexplained delay thus rendering the forfeiture application an irregular step in that a preservation order has to be in effect for a forfeiture application to be brought.

[28] Because I have dealt with the matter at the level of process as opposed to merits it has not been necessary to consider this argument. It suffices to state that all indications are that the point raised is substantive rather than procedural and, thus, not appropriately dealt with under rule 30 in any event.

[29] The most striking feature of the chapter 6 procedure, argues the NDPP, is that it is in rem – i.e. the order sought is, by its nature, not brought against a defendant or respondent.

[30] This in rem feature comes to us from forfeiture legislation in the United States which has been relied on by the Legislature in fashioning the civil forfeiture procedure under the Act.³ It entails a legal fiction which makes the property itself the

³ See for e.g. the Racketeer Influenced and Corrupt Organizations (RICO) Act enacted under the Organized Crime Act of 1970

subject of the process as opposed to the rights of persons to the property.

[31] Under strict application of this in rem fiction, property may notionally be forfeited without necessarily showing any culpability on the part of the owner.

[32] That such a fiction sits uncomfortably with the Constitution hardly need be said. The in rem fiction gives rise to complicated constitutional concerns relating inter alia to rights to property and dignity.

[33] A discussion of this aspect is beyond the scope of this judgment. The nature of the relief is argued by its adherents as being warranted in light of its main purpose which is to create a disincentive to crime - the rational being that crime should not pay. Its critics point to its draconian nature and inherent unconstitutionality.

[34] Whilst the in rem fiction should not be overemphasised from a doctrinal perspective, its nature as property-centred as opposed to rights-centred has, to my mind, dictated the procedural structure imposed by the Legislature. It is for this reason that it has relevance to the construction of the legislative scheme in issue.

[35] The GoM apparently contends that it has become a party to the application by the operation of section 39. Because section 39 is central to the scheme it is worth quoting it in full.

“Section 39 Notice of preservation of property orders

(1) If a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order- [the basis for the GoM's case for irregularity under rule 30]

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

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

(2) A notice under subsection (1) (a) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(3) Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(4) An appearance under subsection (3) shall be delivered to the National Director within, in the case of-

- (a) a person upon whom a notice has been served under subsection (1) (a), 14 days after such service; or
- (b) any other person, 14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette.

(5) An appearance under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and shall be accompanied by an affidavit stating-

- (a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his or her interest in the property concerned; and
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.” (Emphasis added.)

[36] Understanding the nature and effect of the “appearance” provided for in section 39(3) is important in relation to the procedural and substantive rights which section 39(3) affords interested parties.

[37] The central question is this: what is the effect of the service on the NDPP of a notice under section 39(3) and, more specifically, does it lend to the person delivering it locus standi to oppose a forfeiture order on its terms qua party thereto?

[38] Section 40 dictates the procedure to be undertaken by the NDPP in launching the application. It too is worth quoting in full.

“Application for forfeiture order

40(1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

(2) The National Director shall give 14 days' notice of an application under subsection

(1) to every person who entered an appearance in terms of section 39 (3).

(3) A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(4) Any person who entered an appearance in terms of section 39 (3) may appear at the application under subsection (1)-

(a) to oppose the making of the order; or (b) to 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,
and may adduce evidence at the hearing of the application.” (Emphasis added).

[39] The usual triad of text, context and purpose⁴ must be must be employed in construing the procedural operation of sections 39(3) and 40.

[40] The most compelling reason to assume that the Legislature intended that an application for forfeiture be brought ex parte is that the procedure calls for interested parties to make “appearance” in relation to what is, as yet, an unissued application for forfeiture.

[41] Rule 40(2) the provides only that “notice” be given to persons who have entered appearance under section 39(3). In juxtaposition to the procedure in chapter 5 the person who has entered appearance is not given the status of a defendant or

⁴ See :Natal Joint Municipal Pension Fund v Endumeni Municipality; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA)

respondent.

[42] To the extent that the Legislature had intended under chapter 6 to create a process which was centred on individual rights it would have done so by creating a “defendant” as is done in the chapter 5 process.

[43] The NDPP must give only 14 days’ notice of the application. There is no basis on which the procedure allows for participation at the level of the exchange of papers within the procedure.

[44] Thus, the complaint of the GoM in the rule 30 application that the NDPP has not complied with the opposed procedure in rule 6 is misplaced. Such procedure is simply not applicable.

[45] Section 40(4) gives a person who has entered appearance no more than the right to appear at the hearing of the forfeiture application for the purposes of opposing the making of the forfeiture order or bringing a separate application for an order excluding his or her interest in the property or varying the operation of the preservation order. The right to adduce evidence at the hearing of the application is also afforded to such persons.

[46] When comparing these procedural rights under section 40 to those afforded a person receiving notice of an ordinary *ex parte* application one sees that, under rule 6(4)(b), any person having an interest which may be affected by a decision on an application being brought *ex parte*, “may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which such person desires to be heard”. The registrar shall set application for leave to oppose down for hearing at the same time as the *ex parte* application.

[47] The ordinary *ex parte* process thus contemplates two separate applications being heard together : the *ex parte* application and the application for leave to oppose.

[48] Under rule 6(4) the court hearing the matter may grant or dismiss either or both such applications or adjourn the case upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.

[49] Chapter 6 employs a similar procedural structure to that applicable to ordinary ex parte applications. The only difference is that, in an ordinary ex parte application, the interested person must bring an application to be afforded a hearing in opposition to the relief sought in the ex parte application whereas, in terms of section 40(4), the right to oppose the forfeiture is statutory and is derived from the entering of the section 39(3) appearance.

[50] This statutory right to receive notice and be heard in the contemplated ex parte application under chapter 6 does not change the nature of the proceedings. It is not rendered an opposed application by virtue of these features.

[51] The GoM alleges that the rules of court in relation to opposed applications apply to the forfeiture application.

[52] In this, it seeks to rely on section 62 which contemplates the making of rules that are to apply to chapters 5 and 6 of the Act and provides that, in the absence of such rules having been made, the High Court rules “shall, with the necessary changes, apply in relation to proceedings in terms of such hearings except in so far as those rules are inconsistent with procedures prescribed in [chapter 6]”.(Emphasis added)

[53] No such rules have yet been made under section 62(1).

[54] The NDPP makes the point that the chapter 6 procedure is inherent to the ex parte nature of the forfeiture application and argues that the rules pertaining to opposed motions are manifestly inconsistent with such procedure. I agree.

[55] The right to be heard afforded under section 40(4) is by means of separate oppositional applications.

[56] These applications, in turn, have their own unique substantive and procedural provisions which are set out at length in section 52 which deals with applications for the exclusion of property interests from forfeiture under circumstances of innocence of the applicant.

[57] It was argued on behalf of the NDPP in relation to locus standi that the section 39(3) notice delivered by the GoM was non-compliant. This argument takes the matter no further. To the extent that non-compliance with section 39(3) is relevant, this can be raised in opposition to any application brought by the GoM at the hearing or in resistance to the right of opposition under the statute. It is not, to my mind, relevant to the issue of locus standi at this stage.

[58] The forfeiture application makes it clear that it is “in re: All unwrought gold bars and cash seized at OR Tambo International Airport on 31 December 2020 and held in safe custody by the South African Police Service under SAPS criminal case docket reference number: O[...] C[...] 1[...] and S[...] reference number: SAP13A/843/2020” i.e. the property seized and preserved under the preservation order.

[59] Whilst the GoM and the other “respondents” have been cited in the forfeiture application; this is clearly for notice purposes only. The application is not brought against them in the opposed sense. It cannot be otherwise in light of the carefully structured procedure.

[60] It seems to me, that on a purposive construction, the proceedings seek to avoid precisely the taking of the type of points purportedly taken against the forfeiture application in this case and to allow for substantive engagement with the rights of persons claiming an interest.

Conclusion

[61] The GoM has misconstrued its position in the proceedings. Its notice in terms of rule 30 is irregular. It is not a party to the forfeiture application and thus cannot rely

on rule 30 which requires that it be a party.⁵

[62] The attempt to import the rules for opposed motions into a process which does not accommodate such rules and is manifestly at odds therewith is misguided.

Costs

[63] I find no reason why the costs should not follow the result. An appropriate scale, given the nature and complexity of the matter, is C. The GoM employed the services of two counsel in the case.

Order

[64] I make the following order:

1. The application is irregular and is dismissed.
2. The Government of Madagascar is to pay the costs of the application on scale C.

D. FISHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the Applicant: Adv William King SC with Adv. B Prinsloo

Instructed by: Erleigh & associates Inc.

For the First Respondent: Adv P Louw

⁵ Rule 30(1) reads: "A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside."

Instructed by: State Attorney

For the second-Fifth respondent (on watching brief and making no contribution to the proceedings:

Adv J Fourie

Instructed by: Chris Wentzel Attorneys