

SOUTH AFRICA / JUDGMENT

Eastern Cape Transport Tertiary Co-Operative and Others v The National Director of Public Prosecutions and Others (2284/2021) [2022] ZAECMKHC 25 (31 May 2022)

[2022] ZAECMKHC 25

COURT

Eastern Cape High Court, Makhandha

BEFORE

G.H. Bloem

CASE / FILE NUMBER

2284/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO:2284/2021

In

the matter between

EASTERN

CAPE TRANSPORT TERTIARY CO-OPERATIVE

First Applicant

QUSTA

SECONDARY CO-OPERATIVE LIMITED

Second Applicant

UNCEDO

SERVICE TAXI ASSOCIATION MTHATHA PRIMARY

TAXI

CO-OPERATIVE LIMITED

Third Applicant

MELTA

TRANSPORT PRIMARY CO-OPERATIVE LIMITED

Fourth Applicant

IDUTYWA

MULTI-PURPOSE PRIMARY CO-OPERATIVE LTD

Fifth Applicant

DUTYWA

TRANSPORT SERVICES CO-OPERATIVE LTD

Sixth Applicant

DUTYWA

DEVELOPMENT LIMITED

Seventh Applicant

BHISHO

**KING TAXI ASSOCIATION PRIMARY CO-OPERATIVE
LTD**

Eight Applicant

NTLANZA

**TRANSPORT SERVICES AND MULTI-PURPOSE
CO-OPERATIVE
LIMITED**

Ninth Applicant

FABBS

TRANSPORT PRIMARY CO-OPERATIVE

Tenth Applicant

HUTA

TRANSPORT SERVICES

Eleventh Applicant

PORT

ELIZABETH AND DISTRICT TAXI ASSOCIATION

Twelfth Applicant

TSOMO

TAXI ASSOCIATION PRIMARY CO-OPERATIVE

Thirteenth

Applicant

INGQIQO YETHU

TRANSPORT PRIMARY CO-OPERATIVE

Fourteenth Applicant

UBUNYE

NGANDANDLA TRANSPORT SERVICES

Fifteenth Applicant

ECTTC

CO-OP FINANCIAL SERVICES (PTY) LTD

Sixteenth Applicant

SOMILA

CONSULTING AGENCY (PTY) LTD

Seventeenth Applicant

BCM

FET COLLEGE (PTY) LTD

Eighteenth Applicant

BLUE

GROUP SERVICES (PTY) LTD

Nineteenth Applicant

KOUGAKAMMA

CO-OPERATIVE LIMITED

Twentieth Applicant

MATATLELE

**MALUTI BUS PRIMARY CO-OPERATIVE
LIMITED**

Twenty-first Applicant

BUTTERWORTH

MULTI-PURPOSE CO-OPERATIVE

Twenty-second Applicant

MQANDULI

**TRANSPORT SERVICES AND MULITI-PURPOSE
PRIMARY**

CO-OPERATIVE

Twenty-third Applicant

MQANDULI TRANSPORT

**SECONDARY CO-OPERATIVE Twenty-fourth
Applicant**

LELILLITHA TRANSPORT

PRIMARY CO-OPERATIVE LTD

Twenty-fifth Applicant

UNCEDO

**TRANSPORT AND BUSINESS PRIMARY
CO-OPERATIVE**

Twenty-sixth Applicant

MOUNT

**FLETHCER – MACLEAR BUS AND TAXI
CO-OPERATIVE
LIMITED**

Twenty-seventh Applicant

WILLOWVALE

**TRANSPORT AND MULTI-PURPOSE
PRIMARY**

CO-OPERATIVE LIMITED

Twenty-eight Applicant

META

YELANGA TRANSPORT SERVICES

Twenty-ninth Applicant

MINILUX

TRANSPORT SERVICE AND MULTI-PURPOSE

PRIMARY
CO-OPERATIVE
Thirtieth Applicant
PORT
ST. JOHNS TAXI OWNERS ASSOCIATION
PRIMARY
CO-OPERATIVE LIMITED
Thirty-first Applicant
KUYASA
PROGRESSIVE PRIMARY CO-OPERATIVE
LIMITED
Thirty-second Applicant
XESI
DEBE TRANSPORT SERVICES PRIMARY
CO-OPERATIVE
Thirty-third Applicant
KULASANDE
EDIMBAZA LOGISTIC CO-OPERATIVE
Thirty-fourth
Applicant
MACLEAR
TAXI ASSOCIATION PRIMARY CO-OPERATIVE Thirty-fifth Applicant
and
THE
NATIONAL DIRECTOR OF PUBLIC PROSECUTION
First Respondent
ACTING
COMMISSIONER: UNEMPLOYMENT INSURANCE
FUND
Second Respondent
DIRECTOR-GENERAL
EMPLOYMENT AND LABOUR
Third Respondent
MINISTER
OF EMPLOYMENT AND LABOUR
Fourth Respondent
FIRST
NATIONAL BANK
Fifth Respondent
NEDBANK
LIMITED
Sixth Respondent
ABSA
BANK LIMITED

Seventh Respondent

STANDARD

BANK LIMITED

Eight Respondent

FINANCIAL

INTELLIGENCE CENTRE

Ninth Respondent

In

Re: THE
NATIONAL DIRECTOR OF PUBLIC PROSECUTION
Applicant

JUDGMENT

(reconsideration of preservation orders)

BLOEM J:

1. The National Director of Public Prosecutions (the NDPP) sought and was granted an ex parte order on 30 July 2021 (the first preservation order) in terms whereof the credit balance, including interest (the credit balance), in nineteen bank accounts at First National Bank, two at Nedbank and four at Absa were preserved. Another ex parte order was granted in favour of the NDPP on 16 August 2021 (the second preservation order) in terms whereof the credit balance in another banking account at Nedbank and five at Standard Bank were preserved. On 27 August 2021 the Acting Unemployment Insurance Commissioner, the Director-General and the Minister of Employment and Labour (the Commissioner, DG and Minister) delivered a notice wherein they indicated their intention to apply, in terms of section 48(4)(b) (i) of the Prevention of Organised Crime Act[1](POCA), for an order excluding from any impending forfeiture order, the credit balances in the above banking accounts. That notice was accompanied by an affidavit contemplated in section 39(5) of POCA wherein the nature and extent of the interest of the Unemployment Insurance Fund in the preserved property were set out.
2. The NDPP obtained another ex parte order on 15 September 2021 (the third preservation order) in terms whereof the credit balance in one bank account at First National Bank, one at Absa and four at Standard Bank were preserved.
3. On 30 September 2021 twenty-eight applicants launched an application for an order that the first preservation order be reconsidered. The applicants were co-operatives and companies whose credit balances are preserved pursuant to the first preservation order. The NDPP delivered an answering affidavit on 24 November 2021 and heads of argument on 30 November 2021.

4. On 3 December 2021 Beneke AJ dismissed the application for the reconsideration of the first preservation order on the basis that “the UIF very clearly has an interest in the funds attached” and that the failure to join it was fatal. The application for reconsideration was accordingly dismissed with costs.
5. On 13 December 2021 the applicants launched another application for an order that the first, second and third preservation orders be reconsidered. That application was essentially the same as the one that was dismissed by Beneke AJ, save that more applicants, the Commissioner, DG and Minister as well as the banks holding the credit balances and the Financial Intelligence Centre were added in the heading of the application, not the affidavits in support of that application.
6. The NDPP did not deliver a new answering affidavit or heads of argument. At the hearing Mr. Wolmarans, attorney for the NDPP, made submissions based on the answering affidavit and heads of argument which were delivered during November 2021, as the facts upon which the applicants relied for the relief sought in the application that was dismissed are the same in the present application.
7. The applicants rely on two grounds for the reconsideration of the preservation orders. The first is that the deponent of the founding affidavit which culminated in the first preservation order failed to show good faith when he placed incorrect facts before the court. The second ground was the applicants’ reliance on the audit report which was attached to the founding affidavit in the present application. According to Mr. Mashavha, counsel for the applicants, the applicants’ defence was set out in chapter and verse in that report, which defence, it was submitted, shows that the applicants did not commit theft, fraud

or any unlawful activities. To deal with those grounds, one has to have regard to the grounds upon which the NDPP relied to obtain the preservation orders.

8. On 25 March 2020 the Minister issued a directive which provides for a Covid-19 Temporary Employees/Employer Relief Scheme (TERS). The purpose of the directive was inter alia to make provision for the payment of a benefit to employers and employees who make a contribution in terms of the Unemployment Insurance Contributions Act[2] and who have lost income due to the Covid-19 pandemic (the pandemic); minimize economic impact of loss of employment because of the pandemic; and to establish TERS to alleviate the economic impact of the pandemic. The directive sets out the circumstances under which an employee shall qualify for a Covid-19 temporary relief scheme benefits (the benefit or benefits). Such benefits will be paid to cover only the costs of salary for the employees during the temporary closure of business operations. An employee would also qualify for illness benefits if he or she is in quarantine for fourteen days due to the pandemic. Where an employer submits an application for the benefits under TERS, it is required to furnish the Unemployment Insurance Fund with a letter of authority from the company and a signed memorandum of agreement (MOA) from the employer or bargaining council with the Unemployment Insurance Fund.

9. The MOA was signed on 8 April 2020 for and on behalf of the Unemployment Insurance Fund. The purpose of the MOA is to give effect to TERS in order to expedite the payment of benefits to contributors who lost income due to the pandemic, to alleviate the economic impact of the loss of employment and closure of businesses due to the pandemic and to allow for applications for benefits to be made.
10. The NDPP's case is that the benefits paid out to the applicants are the proceeds of unlawful activities because the applications for payment and, after receipt of benefits by the applicants, the payment to the employees of benefits received from the Unemployment Insurance Fund did not comply with the directive and the MOA.
11. One of the requirements in the directive is that an employer, when applying for the benefits, must submit a letter of authority as well as a signed MOA with the Unemployment Insurance Fund. The first applicant, after creating a profile, submitted applications for benefits on behalf of the other applicants, as employers, and was paid in six instalments in one banking account in the total sum of R19 743 977.00. An interim audit was conducted at the instance of the Unemployment Insurance Fund in response to allegations of large-scale looting of the benefits. Irregularities which were uncovered included applications made on behalf of persons employed by the South African Government and that applications were made on behalf of deceased individuals. It was also alleged that an application was made on behalf of a prisoner. The NDPP contended that those applications were

fraudulent because the intended recipients were not eligible for the benefits, that they amounted to unlawful activities, as they

contravened the MOA which provides that an employer would only qualify for the benefit if the temporary closure of its business

operations is a direct result of the pandemic; and they contravened Item 7 of the MOA which provides that the employer undertakes to use the benefits exclusively and solely for the purpose of paying the benefits to its employees.

12. In this case the first applicant, being a co-operative, submitted applications for benefits on behalf of affiliate co-operatives. A search revealed that sixty-six entities submitted applications for benefits using the same contact details and collectively received R220 552 295.88. It furthermore revealed how the applicants received very many millions of rands as benefits. It was against the above background that the NDPP sought and obtained the preservation orders.
13. Regarding the allegation that there was a lack of uberrima fides when the first ex parte application was launched, the applicants pointed out that the NDPP made Smith J, who granted the first preservation order, to believe that a claim was submitted on behalf of an employee who had died and another who was in custody, the contention being that false claims had been submitted in respect of those two employees.

14. On 10 November 2021 the NDPP launched an application for an order that the money preserved in terms of the preservation orders be forfeited to the state. In support of that application, the NDPP relied on an affidavit by Sipho Melani who is employed in the fraud and anti-corruption section of the Department of Employment and Labour. The purpose of that affidavit was to correct and clear up two errors. The first was to acknowledge that the person who was alleged to have died was in fact still alive; and the second was that the person who was alleged to have been in custody, was in fact never in custody. Mr. Melani explained that the mistake regarding the alleged deceased person was made because his identity number was given to the Unemployment Insurance Fund by the first applicant. That information was then passed on to the Auditor-General, who in turn gave the information to the Department of Employment and Labour. Mr. Melani then used that incorrect information in his affidavit which was used in support of the application which culminated in the first preservation order. Mr. Melani furthermore pointed out that the information regarding the incarceration of a person was also obtained from the Auditor-General's report, which turned out to be incorrect. Mr. Melani tendered his apology for the wrong information in respect of those two persons.
15. The main affidavit in support of all three applications for the preservation orders was deposed to by Nkululeko Ndzengu, an attorney and a senior Deputy Director of Public Prosecutions attached to the asset forfeiture unit. One of the affidavits upon which Dr. Ndzengu relied was Mr. Melani's affidavit. Because the above information in Mr. Melani's affidavit was incorrect, it follows that Dr. Ndzengu's affidavit, insofar as it relied on Mr. Melani's affidavit, was also incorrect in that regard. It was in that respect that Mr. Mashavha criticised Dr. Ndzengu because, so he submitted, as an attorney he should have ensured that correct facts were placed before the court. In my view the criticism of Dr. Ndzengu is unwarranted. Mr. Melani gave an explanation as to why incorrect facts were placed before the court. There is no merit in the contention that Dr. Ndzengu displayed an absence of *uberrima fides*. The fact that he placed incorrect facts before the court does not mean that he intentionally misled the court. There is also no merit in the submission that the preservation orders should be set aside because of the alleged absence of good faith on the part of Dr. Ndzengu.
16. I now deal with the applicants' second ground upon which they relied for the relief sought. The applicants' reliance on the audit report is misplaced for two reasons. The first is that in terms of clause 22 of the MOA, it is the Unemployment Insurance Fund which has the power to appoint, at its expense and sole discretion, an auditor or a suitably qualified investigator to audit or investigate suspected breach of the MOA and corruption or fraud related to the implementation of the MOA. Neither the directive nor the MOA gives an employer the power to appoint an auditor to audit or investigate suspected corruption or fraud related to the implementation of the MOA. Secondly, and more importantly, the main deponent to the application, Nokuthula Mbebe, attached a copy of a report by a firm of chartered accountants and auditors dated 20 September 2021 to her affidavit. It is apparent from the covering letter of the report that Dr. Mbebe requested that firm to "perform agreed upon

procedures engagement in relation to UIF TERS application and disbursement of the co-operatives and private companies.” Dr. Mbebe described herself in her affidavit as the applicants’ Chief Executive Officer. The writers of that report have not filed affidavits to confirm the correctness of its contents. A document that is introduced as evidence in court proceedings must be identified by a witness who is either the writer or signatory thereof. The most common way to prove the authenticity of the document in question would be to call the author thereof to identify the document.[3] The contents of that report can accordingly not be used as evidence, with the result that it is inadmissible.

17. Mr. Mashavha also submitted that neither the directive nor the MOA precludes benefits being paid to persons who are employed by the government, be it at local, provincial or national level. It is correct that there is no specific limitation to that effect in either the directive or the MOA. This issue became relevant because very many employees are employed by the government and they claimed to be also employed by the various applicants. Those employees received their full salaries from government since the onset of the pandemic. On the assumption that they were indeed employed by the applicants, they received an additional salary from the applicants. In my view to grant benefits to those employees, albeit that they may have lost a second income due to the pandemic, would be to go against the purpose of the directive, as pointed out above. It is important to note that

the preamble of the directive states that the Minister anticipated that, as a result of the lockdown, companies would “have to shut down and employees laid off temporarily. This means that employees are compelled to take leave, which is not out of choice. We therefore anticipate that employees may lose income”.

18. In my view it is apparent from the directive that the benefits were meant for persons who, because of the pandemic, would not have an income. It was not meant for those who, despite the pandemic, would nevertheless receive a full government salary. To interpret the directive in the way that the applicants have, would, in my view, offend the purpose which the benefits were meant to serve.
19. In all the circumstances, I am satisfied that the applicants have failed to demonstrate the need for this court to interfere with the preservation orders. The application should accordingly be dismissed. There is no reason why the applicants should not pay the costs occasioned by the application.
20. Mr. Wolmarans pointed to the fact that on 27 August 2021 the Commissioner, DG and Minister entered an appearance in terms of section 39(3) of POCA giving notice of their intention to apply for an order excluding the Unemployment Insurance Fund’s interest in the credit balances from the operation of the impending forfeiture order. As stated in paragraph 1 above, that notice was accompanied by an affidavit contemplated in section 39(5) of POCA. Mr. Wolmarans submitted that this application should be dismissed because the applicants have to date not entered an appearance giving notice of their intention to either oppose the making of a forfeiture order or to apply for an order excluding their

interest in the credit balances from the operation thereof, as they were obliged to do in terms of section 39(3).

21. In response to that submission, Mr. Mashavha submitted that the applicants did not enter a notice in terms of section 39(3) because the credit balances should not have been the subject matter of the preservation orders in the first place and that “there is accordingly nothing to exclude”. Counsel furthermore pointed out that the preservation orders had lapsed because the NDPP did not institute arbitration and/or action proceedings against the applicants within thirty days of 20 August 2021, as ordered by this court.
22. This court did not make such an order against the NDPP. On 20 August 2021 this court, at the instance of the Commissioner, the DG and Minister, ordered First National Bank to freeze the bank accounts of the first, second, third, fifth, eighth, tenth to nineteenth and twenty-seventh applicants. The court ordered the Commissioner, DG and Minister “to institute arbitration proceedings and/or action proceedings against the first to fifteenth respondents within thirty (30) days of the date of this order for recovery monies which the applicants allege were unlawfully and/or erroneously paid to or retained by the first to fifteenth respondents.” The court furthermore ordered that that order “shall lapse and be of no force or effect” in the event of the Commissioner, DG and Minister failing to institute the above proceedings within the period stated above.
23. At the commencement of the hearing Mr. Barrow placed on record that he held a watching brief on behalf of the Commissioner, DG and Minister. After Mr. Mashavha had made submissions in reply, Mr. Barrow sought leave to address the Court in what he deemed to have been a factual inaccuracy in Mr. Mashavha’s address relating to the order granted by this court on 20 August
2021. Despite Mr. Mashavha’s objection to Mr. Barrow’s application, I granted him leave to address the court.
24. Mr. Barrow pointed out that, in addition to the above relief that the Commissioner, DG and the Minister, the second, third and fourth respondents herein, obtained on 20 August 2021, they were also ordered to institute arbitrations and/or action proceedings against, not all but only, fifteen applicants referred to in that order and that they had complied with that order. In his response thereto, Mr. Mashavha denied that there has been compliance with that order. In light of what Mr. Barrow had informed

the court, I enquired from counsel whether his submission was that the Commissioner, DG and Minister did not institute those proceedings

or whether he meant that he, as counsel, was unaware of the alleged compliance. Counsel then stated, as a fact, that those

proceedings had not been instituted. I then ordered Mr. Barrow to deliver, before 16h00 on 27 May 2022, proof that there has been compliance and Mr. Mashavha or his instructing attorney to deliver a response thereto before 16h00 on 30 May 2022.

25. On 27 May 2022 Mr. Barrow delivered documents demonstrating that on the last day of the 30 day period, the Commissioner, DG and Minister instituted action proceedings in this court against the first, fifteenth, seventeenth, eighteenth and nineteenth applicants and on that same day the Commissioner instituted arbitration proceedings under the auspices of AFSA against the first, second, third, fifth, eighth, tenth to fourteenth and twenty-seventh applicants. Mr. Barrow furthermore reported, and I have checked with the registrar, that in the action proceedings, the five applicants, represented by Mr. Mashavha's instructing attorney, who is also his instructing attorney in this application, caused a plea to be delivered on 14 December 2021.

26. On 30 May 2022 the applicants responded to the documents delivered on 27 May 2022 by delivering an affidavit deposed to by their instructing attorney and another by Dr. Mbebe. The instructing attorney's affidavit is irrelevant to the order granted on 20 August 2021 or whether or not it had been complied with.

27. In paragraph 6 of her affidavit, Dr. Mbebe stated the following:

"The calculation of the said thirty (30) days resumes from the day the order was granted which is the 20th day of August 2021 and it ends on the 18th day of September 2021 and even if we do not include the weekends and holidays the thirty (30) days lapses on the 1st day of October given the fact that the 24th of September was a holiday."

28. Dr. Mbebe furthermore alleged that by "the time we received the combined summons, the above mentioned order had already lapsed." She also confirmed that the applicants' instructing attorney caused appearance to defend to be served on 4 October 2021. She raised an issue as to the institution of the arbitration proceedings because, what was attached to Mr. Barrow's affidavit, were requests to AFSA for arbitration under its rules. It is in my view unnecessary to decide whether or not those requests can be equated to the institution of arbitration proceedings, because the Commissioner, DG and Minister have instituted action proceedings. They were ordered to institute either action or arbitration proceedings or both action and arbitration proceedings. The institution of one form of those proceedings would constitute compliance with the order granted on 20 August 2021, provided

that such proceedings were instituted within thirty days of 20 August 2021.

29. Only court days are to be included in the computation of time fixed by an order of court.[4] If 20 August 2021, Saturdays and Sundays thereafter and the public holiday on 24 September 2021 are excluded from and the last of the thirtieth day included in the computation of the thirty day period referred to in the order that was granted on 20 August 2021, then the Commissioner, DG and Minister had until midnight of 4 October 2021 to comply with that order.[5] They have accordingly complied with the order.

30. That the Commissioner, DG and Minister complied with the order is, in my view, at present less important than the concerning issue that counsel stated, as a fact, that those proceedings had not been instituted. Dr. Mbebe confirmed in her affidavit that the action proceedings had been served on four of the five applicants on 4 October 2021. The face of the summons indicates that summons was issued against the five applicants whose bank accounts were suspended or frozen pursuant to the order granted on 20 August 2021. The documents delivered on 27 and 30 May 2022 demonstrate that Mr. Mashavha's submission, regarding

the non-compliance with the order of 20 August 2021 was indeed factually incorrect.

31. As a result of that factually incorrect submission, the second, third and fourth respondents incurred costs by compiling the documents delivered on 27 May 2022 and perusing the documents delivered on 30 May 2022. There is no reason why the applicants should not pay those costs.

32. It is pointed out that, while the order granted on 20 August 2021 remains in place, the present application is academic, insofar as it relates to the fifteen applicants affected thereby, because even if the preservation orders are set aside, the order will

still prevent those applicants from having access to the credit balances in the bank accounts concerned.

33. In the result, it is ordered that:

1. The application for the reconsideration of the preservations orders be and is hereby dismissed.
2. The applicants shall pay, jointly and severally the one paying the other to be absolved:

2.1 the fist respondent's costs of the application; and

2.2 the second, third and fourth respondents' costs, such costs to be limited to the compilation of the documents delivered on 27 May 2022 and the applicants' response thereto delivered on 30 May 2022.

G.H. BLOEM

JUDGE OF THE HIGH COURT

For the applicants:

Mr. M.J. Mashavha, instructed by Matiwane Attorneys, East
London and Netteltons Attorneys, Grahamstown.

For the first respondent: Mr. M. Wolmarans of NN Dullabh and Co,
Grahamstown.

For the second, third and fourth respondents:

Mr. G. Barrow of Whitesides Attorneys, Grahamstown.

Date of hearing:

26 May 2022.

Date of delivery of judgment:

31 May 2022.

- [1] Prevention of Organised Crime Act, 1998 (Act 121 of 1998).
 - [2] Unemployment Insurance Contributions Act, 2002 (Act 4 of 2002).
 - [3] Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v de Sousa 1971
 - (3) SA 937 (T) at 940E – H and Maize Board v Hart 2005
 - (5) SA 480 (O) at 484E referred to with approval in the minority judgment in Hal obo MML v MEC for Health, Free State 2022
 - (3) SA 571 (SCA) at par 117.
 - [4] Pierre Cronje (Pty) Ltd v Adonis 2010
 - (4) SA 294 (WCC) at par 14.
 - [5] Section 4 of the Interpretation Act, 1957 (Act 33 of 1957).
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