

SOUTH AFRICA / JUDGMENT

National Director of Public
Prosecutions v Pule (M321/2023) [2024]
ZANWHC 234 (16 September 2024)
[2024] ZANWHC 234

COURT
North West High Court, Mafikeng

BEFORE
MZ Makoti

CASE / FILE NUMBER
M321/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE NO: M321/2023
Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO
Circulate to Regional
Magistrates: YES/NO

In the matter between: NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
Applicant
And
ISAAC
PULE
Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 16 September 2024.

JUDGMENT

Makoti AJ

Introduction

- [1] This application was brought by the Applicant for reconsideration and/or rescission of the preservation order that was granted on 15 June 2023 by Reddy AJ, as he was at the time. The notice of motion also contains prayer for condonation of the late filing of the reconsideration or rescission application. The preservation order was granted in terms of the provisions of section 38(1) of the Prevention of Organised Crimes Act[1] (POCA).
- [2] The applicant, MR ISAAC PULE (Mr Pule), had his property, a White Toyota Hilux 2.7 4X2 Double Cab Bakkie with registration numbers F[...], chassis numbers A[...], and engine numbers 2[...] (the motor vehicle), preserved on account of the impugned order.
- [3] The motor vehicle was seized by members of the South African Police Service (SAPS), Mahikeng, under case number CAS144/10/2022. As a result of the preservation order the motor vehicle was to remain in the custody of the Mahikeng SAPS until such time as a forfeiture application that was still to be instituted was finally determined. The motor vehicle would also stay in SAPS' custody unless the order is successfully challenged in an application of this nature or, where applicable, in proceedings for anticipation of a rule nisi.
- [4] Mr Pule wants to retake possession of the motor vehicle, hence his current application. The application is opposed by the National Director of Public Prosecution (NDPP).

Important chronology

- [5] I considered it apt to track the chronology of the events that occurred in this matter. They are the following:
 - [5.1] The motor vehicle was seized by members of the SAPS on 11 October 2022, ostensibly as an instrumentality used in the commission of crime.
 - [5.2] As indicated above, the preservation order was granted in favour of the NDPP on 15 June 2023. The order was served on the respondent by the sheriff on 14 August 2023.
 - [5.3] On behalf of Mr Pule a notice to oppose the preservation was served on 28 August 2023. The notice was served on the 14th day of the day after service of the order; days being calculated on ordinary calendar days.

[5.4] The current application was issued on 02 October 2023.

[5.5] A notice of the preservation order was published in the Government Gazette on 20 October 2023 bearing numbers 49515.

[5.6] On 18 January 2024 the NDPP instituted an application in terms of section 48 of POCA for forfeiture of the motor vehicle.

[5.7] A notice to oppose this application was delivered on 08 May 2024, later followed by the filing of an answering affidavit on 10 May 2024.

[6] What the applicant wants is that the court should order the return of the motor vehicle, and that the NDPP should be ordered to take such reasonable steps as may be necessary to return the motor vehicle to him. He has put 78 hours as the time frame within which the NDPP should return the motor vehicle to him.

Summary of facts

[7] The applicant alleges in his papers that he is the lawful owner of the motor vehicle. He indicated that he bought the motor vehicle on 28 June 2018 using the profits derived from operating a tuck shop at the village of Majemantsho at or near Mafikeng, North West Province. He also stated in his affidavit that he uses the motor vehicle for personal transport and for the operations of the tuck shop. These allegations were not placed in dispute by the NDPP.

[8] Concerning the events that led to the seizure of the motor vehicle, the applicant stated that he was approached by a man called Bheki Mazibuko (Mazibuko) on 09 October 2022 to assist him with transport. He indicated that the said Mazibuko asked for his assistance to transport building materials from town. The two agreed to meet and to drive to the place where the materials were to be collected later that day in the evening.

[9] On that day Mazibuko did not turn up in the evening as they had agreed. Instead, the applicant alleged, Mazibuko went back to him the following day still asking for the same assistance. They then agreed again that they will go to the place where building materials were to be loaded at around 18h00. Indeed, on that day, 10 October 2022,

the two drove together to a hardware store in town where Mazibuko was to be assisted with the transport the building materials.

[10] He said that on their arrival at a hardware store in town, they greeted security officers that they found at the premises. Mazibuko then took keys out of his pockets and opened the shop, and they began to load building materials onto the bakkie. While they managed to load the building materials onto the bakkie, they did not manage to drive away with it as a different security officer - to the one that they found and greeted on their arrival that evening- approached them to enquire as to who had authorised them to load the material.

- [11] The security guard called the owner of the hardware store. Upon arrival at the business premises the owner confirmed that he was unaware of building material that was to be taken away from the hardware store. The applicant was then arrested and taken to Mahikeng Police Station.
- [12] As indicated, the motor vehicle was the seized by the police. Mazibuko, according to Mr Pule, vanished when the security guard approached to confront them about the loading of the building material, which occurrence the applicant says took him by surprise.
- [13] The NDPP instituted the application for preservation, and subsequently the forfeiture application, on the basis of the applicant's arrest and because the motor vehicle was used as an instrumentality of crime.
- [14] The nub of the applicant's defense is that he too was a victim of a crime that was orchestrated by the said Mazibuko. He was not aware that Mazibuko was using him to transport stolen building material from the hardware store. In other words, he lacked the necessary *dolus* to commit a crime.

Statutory framework

- [15] This reconsideration / rescission application is predicated upon the provisions of section 47 of the POCA, which state that a person who has been affected by a preservation order may bring an application to vary or rescind the order. The provision states that such application may be instituted at any time.
- [16] POCA empowers the court which granted such order to, at any time, vary or rescind the preservation of property order if it deems it necessary to do so in the interest justice.[2]
- [17] For context, I refer to the provisions of section 39(3) of POCA, which read as follows:
- "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/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."*
- [18] The NDPP contends that the applicant duly filed its notice to oppose the preservation order but failed to simultaneously file the affidavit espoused in section 39(5) of POCA. The subsection requires that the notice contemplated in subsection 3 be accompanied by an affidavit which states:
- [a] the full particulars and identity of the person entering appearance;
- [b] the nature and extent of his or her interest in the property concerned; and
- [c] lastly, the basis of the party's defense for opposing the forfeiture order or for asking that his or her interest in the property be excluded from the operation of the forfeiture order if it is granted.

[19] The NDPP raised a point in limine that the notice of intention to oppose was not compliant with the provisions of POCA in that, though filed on 28 August 2023, it was not accompanied by an affidavit giving the details as required. I will revert to deal with this point later in this judgment.

[20] Section 40 of POCA is also important for the determination of the issues that arise in this case. On behalf of Mr Pule it was argued that in any case the preservation order has since lapsed as the NDPP failed to apply for a forfeiture order within a period of 90 days from the date of publication of the order. The provision reads as follows:

“A preservation of property shall expire 90 days after the date on which notice of the making of the order is published in the gazette unless –

- (a) there is an application for forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order;
- (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or
- (c) the order is rescinded before the expiry of that period.”

[21] The timetable above will be useful in determining this issue, if the facts take us there. The starting point will be the condonation application because, logically, if that fails there would be no point to deal with the remainder of the case.

Preliminary issues

Condonation for the late filing of the application

[22] What a party seeking condonation must place before court has become settled. The applicant applies for condonation for the late filing of this application as it did not comply with the provisions of paragraph 7 of the impugned order. The stanza reads:

“Any person who is affected by the order may on good cause shown, apply for reconsideration thereof. Such application shall be made upon 72 hours notice (...) to the Applicant and all other persons identified in this order as being persons who may have an interest in the property, and must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the Court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.”

[23] The application for condonation is tersely worded and leaves much to be desired. Recently in *Mdepha v S*[3] Petersen J in this Division applied the principles for condonation from *Grootboom v National Prosecuting Authority*[4] where it was held that:

“It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.” (Emphasis added)

[24] Apart from the fact that the applicant is a layman, and that he consulted his lawyers on 23 and 28 August 2023, there is complete silence on what transpired after the latter date until 02 October 2023 when the application was instituted. The period that passed and which has not been explained is more than a month.

[25] That said, one is not to lose sight of the fact that where deprivation of property is at play, the provisions of section 25 of the Constitution are implicated. In the words of the Constitutional Court in *Mkontwana*,^[5] the court must approach a case of such a nature in a manner as to:

“... establish a balance between the need to protect private property, on the one hand, and to ensure that property serves the public interests, on the other.

...[and]

[i]n approaching the property clause we must therefore recognise the constitutional value of property, and the importance of protecting

it, while recognizing that it is not absolute.”

[26] Taking that into account, and the fact that the delay in instituting the application is just over one month, which was not excessive, I am of the view that condonation for the delay to file the application should be granted. The interests of justice necessitate that I grant Mr Pule an opportunity to defend his possession over the property.

Non-compliance with section 39(5) of POCA

[27] As argued by the NDPP, the applicant’s papers were defective as he failed to file his notice of intention to oppose the application together with an affidavit setting out that factors enlisted in section 39(5) of POCA. The argument goes further to suggest that its application should be treated as unopposed due to the applicant’s failure to comply with the provisions of POCA.

[28] No case was advanced on behalf of Mr Pule on this issue.

[29] Section 39(5) contemplates the filing of two things. The first is the notice which should disclose the full particulars of the address at which further documents must be delivered. The second is an affidavit which must contain the full particulars and identity of the party filing the notice,^[6] the extent of the party’s interest in the property concerned,^[7] and the nature of the defense that the party intends to raise against the forfeiture application.^[8]

[30] The substance of the affidavit contemplated in this provision seems to me similar to what a conventional answering affidavit would contain. The only difference is that the wording of the provision is such that it requires that the affidavit accompanies the notice of intention to oppose the forfeiture. And, in doing so, it employs the peremptory word ‘must’.

[31] This is what the court said about the use of the word in *Minister of Environmental Affairs and Tourism and Others*^[9]:

“... The general principle is, of course, that language of a predominantly imperative nature such as ‘must’ is to be construed as peremptory rather than directory unless there are other circumstances which negates this construction.”

[32] Plasket J held in *Intertrade*[10] that the word is not always going to be construed as peremptory. There are instances where the word would have to carry a different meaning. He held inter alia as follows:

“Whether reg 11(1) postulates a ‘mandatory and material procedure or condition ... the non-compliance with which is fatal of the validity of the administrative action concerned is a matter of statutory interpretation. In part, at least, it involves and enquiry into whether the use of the word ‘must’ was intended to place a mandatory duty on organs of State to comply with the regulation - on pain of their further step being invalid - or whether compliance is merely directory.”

[33] I perceive that the procedure in section 39(5) of POCA was aimed at ensuring that information concerning the ground of defense which a party filing a notice of opposition wishes to raise is brought to the attention of the applicant as speedily as it may be practicable.

[34] I do not think that the provision was intended to slam the door in the face of a party that has failed to file an affidavit simultaneously with the notice of opposition but who, nonetheless seeks to participate further in the litigation. It is my conclusion, therefore, that section 39(5) of POCA falls under the category of directory legislative provisions.

[35] In *Standard Bank of SA Limited v Fobb and Another*[11] the court held as follows concerning a legislative provision which set timeframe for compliance:

“The time limits in this context are a guideline and not peremptory. I say so, first, because a peremptory treatment can lead to an absurdity. Secondly, it is not in the interest of litigants, the public and the national interest to rehear arbitrations for no reason but the fact that the award is issued outside of the time limit. Thirdly, it would conflict with the object of the LRA to resolve labour disputes effectively. In the nature of arbitrations, awards are issued late. If they are a nullity and no effect can be given to them, then the referral for fresh arbitration would not be an effective, expeditious solution.”

[36] To hold the provisions as peremptory, in this case, would be to deny a person like Mr Pule an opportunity to protect his property which would be forfeited. I find it to be in the interests of justice that, despite the non-compliance, Mr Pule be afforded a chance to provide the court with reasons why a forfeiture should not be granted. Such an opportunity ought not to be denied easily. Section 25 of the Constitution demands it. and.

[37] It was noted in *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae)*[12] that POCA could have far reaching and abusive effects if not interpreted with due regard to the rights and the values enshrined in the Constitution.

- [38] The NDPP was not without recourse when the notice of opposition was filed without an affidavit from Mr Pule. Mr. Pule's was an irregular step and the NDPP could have filed a notice calling on him to remedy the cause of complaint. In the premises, I allow the affidavit of Mr Pule the contents of which will be considered in the determination of this matter.
- [39] Of course, I understand that the point of non-compliance with section 39(5) of POCA was also raised for a different reason- to suggest that it was not necessary for the NDPP to serve further documents on Mr Pule as his notice of opposition was entirely non pro scripto as it was not accompanied by affidavit. I am not persuaded. The provision requires that any person who has served a notice must be served with further processes, in particular the application for forfeiture. Notifying a person of a case against him or her is sacrosanct in my view. It would allow the person to exercise a choice on how to deal with the case.

The merits

- [40] What remains to be considered is whether the impugned order ought to be reconsidered. At the hearing of this matter, the Applicant's counsel argued that reconsideration should be granted because the preservation order has in any event lapsed by effluxion of time. He indicated that once a preservation order is granted a party in whose favour the order was granted must publish it in the gazette and apply for forfeiture within a period of ninety (90) days of the date of publication. Where a party fails to do so the forfeiture order lapses and can no longer be pursued.
- [41] I provided a timetable earlier in this judgment. The application for forfeiture was issued on 18 January 2024, a date that preceded the lapse of the 90-day period. That to me is the date on which the wheels of justice in the forfeiture application began rolling. Service of the application took place at a later stage, beyond the lapse of the period of 90 days. The POCA stipulation is that a preservation order lapses if, inter alia, there is no pending application for forfeiture.
- [42] The argument that the preservation order has become lapsed is not persuasive. I have no doubt that the issuing of the application satisfied the provisions of section 40 of POCA in that, by the date on which the preservation order would have lapsed, there was already a pending application for forfeiture.
- [43] I am fortified in this regard by the judgment penned by Djaje J in Bacela[13] where the learned Judge quoted the dictum from *National Director of Public Prosecutions v Hilda van der Burg and Another*[14] in which it was held that:

"In as much as section 39(5) specifically envisages the appointment of a service address for the delivery of documents concerning further proceedings under "this chapter" (that is, Chapter 6 of POCA, which also contains the provisions governing applications for a forfeiture order), there seems to be no merit in the respondents' in limine point that service of the forfeiture application at the service address appointed by them in their section 39(3) notice was insufficient. It is common cause that the forfeiture application was served at the appointed service address within the ninety-day period specified in section 40 of POCA. Furthermore, section 40 of POCA merely requires that an application for a forfeiture order

must be “pending within ninety days after the date on which notice of a preservation order is published in the Government Gazette. That does not presuppose the service of the application but merely the issuing thereof. I accordingly find that there has been proper compliance with the provisions of section 48(1), as read with section 40 of POCA.” (Emphasis added)

[44] This case is not different. For the mere fact that the application was issued before the expiry of 90 days, the contention raised by the applicant cannot be upheld. In *National Director of Public Prosecutions v Braun*[15] the court held that it was not automatic that an order was to be set aside merely because it was granted *ex parte* and that the other party has to be given an opportunity to participate in the proceedings. The court retains wide discretion to

decide whether such order is to be set aside.[16]

[45] It has been established that the motor vehicle concerned was used as an instrumentality of crime. This is common cause as Mr Pule himself accepts it. Mr Pule sought to explain how the motor vehicle came to be involved in the attempted theft of building materials which were being loaded onto his bakkie. *Mohunram*,[17] dealing with immovable property, requires that a close connection between the property in question and the crime should be established.

[46] Having regard to the facts in this case and the principle that there should be a close connection between property and crime, there can be no controversy as to the fact that Mr Pule’s vehicle was used as an instrumentality of crime.

[47] This was explained in *National Director of Public Prosecutions v (1) R O Cook Properties (Pty) Ltd*;

(2) *Gillespie Street Durban (Pty) Ltd and Another*; (3) *Seevnarayan*,[18] where the SCA held that there must be a reasonably direct functional relationship between the property and the crime:

“... the words ‘concerned in the commission of an offence’ must ... be interpreted so that the link between the crime committed and the property is reasonably direct and the employment of the property must be functional to the commission of the offence ... [T]he property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence.” (my emphasis)

[47] I repeat that the connection between the property and the crime is palpable. I am mindful, also, that the impugned order sought to be reconsidered or rescinded is one that has up to this stage preserved the property against dissipation or encumbrance pending a forfeiture application. It has been in police custody since the evening of the arrest.

- [48] I also repeat that a forfeiture application is pending - and I am not called to deal with it at this juncture. The parties will have an opportunity to ventilate the merits of the forfeiture application in due course. With the benefit of full arguments from the parties' respective points of view, the court hearing the forfeiture application will be in a better position to make an informed and conclusive finding.
- [49] That the preservation application was brought ex parte is a direct result of POCA, which permits such cases to be ex parte and in camera. I am satisfied that the NDPP was and still is entitled to the preservation order.
- [50] Taking all these factors into consideration, I am satisfied that the NDPP has satisfied the test in POCA for the preservation of property that was used as an instrumentality of crime.[19]
- [51] In the premises, the application for reconsideration or rescission of the order by Reddy AJ must fail. There are no reasons why costs should not follow the result.

Order

[52] I make the following order:

[a] The application to reconsider and/or rescind the preservation order is dismissed with costs on party and party scale (a).

M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

APPEARANCES DATE OF HEARING : 07 June 2024 DATE OF JUDGMENT : 16 September 2024

COUNSEL FOR APPLICANT : ADV HC DU PLESSIS LABUSCHAGNE ATTORNEYS MAHIKENG

COUNSEL FOR NDPP : MS M MAHLAFORE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
MAHIKENG

[1] Act No. 121 of 1998.

[2] Section 47(1)(a) and (b) of POCA.

[3] Mdepha v S (CA 65/2022) [2023] ZANWHC 45 (8 May 2023).

[4] [2013] ZACC 37; 2014

(2) SA 68 (CC) at paragraph 23.

[5] Mkontwana v Nelson Mandela Bay Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others;

Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng Others (KwaZulu-Natal Law Society and Msunduzi Local Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at paras 81 – 82.

- [6] Paragraph (a).
- [7] Paragraph (b).
- [8] Paragraph (c).
- [9] Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd 2004 (1) SA 308 (SCA) at para 32.
- [10] Intertrade Two (Pty) Ltd v MEC for Public Works and Roads, Eastern Cape and Another 2007 (6) SA 442 (C) at paras 29 – 33.
- [11]
- [2002] ZALC 43; 2003 (2) SA 692 (LC) at paras 6 – 8.
- [12]
- [2006] ZACC 24; 2007
- (3) SA 484 (CC) at para 46.
- [13] National Director of Public Prosecutions v Bacela and Another (M280/2017; FB 09/2020) [2022] ZANWHC 47 (30 September 2022).
- [14] (Unreported) (5597/06) CPD (22 December 2008) at para 26.
- [15] 2007
- (4) SA 72 (C).
- [16] ISDN Solutions (Pty) Ltd and CSDN Solutions CC and Others 1996 (4) SA 484 (W) at 484 H-I.
- [17] Mohunram & Another v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae) [2006] ZASCA 12; 2007
- (4) SA 222 (CC) at para 45.
- [18] 2004
- (8) BCLR 844 (SCA) at para 31.
- [19] Simon Prophet v National Director of Public Prosecutions 2006(1) SA 38 (SCA) as well as National Director of Public Prosecutions v RO Cook Property (Pty) Ltd and others 2004
- (2) SACR 208.

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