

SOUTH AFRICA / JUDGMENT

Tamire v National Director of Public Prosecutions (663/2016) [2016] ZAECGHC 144 (6 December 2016)

[2016] ZAECGHC 144

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

663/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 663/2016

In

the matter between:

BEREKA

JEMAL

TAMIRE

Applicant

and

NATIONAL

DIRECTOR OF PUBLIC

PROSECUTIONS

Respondent

JUDGMENT

Bloem J.

- [1] On 23 February 2016 and at the instance of the respondent this court granted a preservation order against the applicant in terms of section 38 (2) of the Prevention of Organised Crime Act (POCA)[1] in respect of R100 000.00 cash and a Hyundai 2.6 deck bakkie (the goods).
- [2] After the preservation order was granted, in terms of section 40 (a) of POCA the respondent should have instituted an application for the forfeiture of the goods within 90 days after the date on which notice of the making of the preservation order was published in the Government Gazette.[2] It is common cause that the respondent failed to institute a forfeiture application.
- [3] On 26 July 2016 the respondent accordingly applied for and was granted another preservation order in respect of the goods.
- [4] On 29 August 2016 the applicant delivered a notice of his intention to oppose the application. It is not clear from that notice whether he gave notice of his intention to oppose the making of a forfeiture order or to apply for an order excluding his interest in the operation of the preservation order, as section 39 (3) required him to do. He simply gave notice of his intention to oppose the application. Under cover of that notice he delivered his answering affidavits.
- [5] Because the respondent failed to publish the required notice in the Government Gazette on 18 November 2016 the applicant instituted what he refers to as a counter-application wherein he sought an order:
- 5.1. that the preservation order that was granted on 26 July 2016 be discharged;
- 5.2. that the respondent release the goods; and
- 5.3. that the respondent pay the costs of the main and counter-applications.
- [6] Coincidentally, on the same day that the applicant launched the counter-application (18 November 2016) a notice of the preservation order was published in the Government Gazette.
- [7] The registrar unfortunately did not place the counter-application on the roll of opposed applications to be heard on 1 December
2016. The parties' attorneys approached me on Tuesday, 29 November 2016 when it was agreed that the matter would be heard on Friday, 2 December 2016. On the following day, 30 November 2016, the respondent instituted an application for an order
- that the goods be forfeited to the State.

[8] Section 39 (1) of POCA reads as follows:

“(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-

- (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.”

[9] The quoted subsection places a duty on the respondent, as soon as practicable after the preservation order was granted, to do two

things. Firstly, he must give notice to all persons known to him to have an interest in the preserved goods that the preservation

order was granted. Secondly, he must publish a notice of the order in the Government Gazette. What the respondent must do in terms of section 39 (1) is obvious. When he must execute those two functions is, with respect, also obvious. He must do so “as soon as practicable after the making of the [preservation] order”. Where something has to be done as soon as practicable after the making of a preservation order, the performance of that duty must take place within a time which is as soon after the preservation order is made as is reasonably practicable in all the circumstances of the particular case[3].

[10] The duties imposed on the respondent by section 39 (1) are not onerous or time consuming. They can reasonably be executed within two, at most three, weeks from the date when the preservation order has been granted. The respondent placed no evidence before the court to explain why he caused the order to be published in the Government Gazette only on 18 November 2016, some 16 weeks (3½ months) after the preservation order was made. In my view the respondent did not publish a notice of the preservation order in the Government Gazette as soon as practicable after it was granted.

[11] During the hearing Mr Mayekiso, counsel for the applicant, informed me that, since the application for a forfeiture order is pending before the court, the applicant did not persist with the relief sought in the counter-application, save for the issue of costs. Mr Wolmarans, attorney for the respondent, submitted that the application should be dismissed with costs alternatively that each party should pay his own costs. He submitted that the applicant should have made an application in terms of section 47 of POCA[4], which provides for the variation and rescission of preservation orders. In this case the applicant did not seek an order for the variation of the preservation order. Although the prayers in the counter-application were inelegantly framed, it was common cause at the hearing that the relief therein should be read to be the rescission of the preservation order.

[12] To have a preservation order which relates to movable property rescinded, a person affected by the preservation order must, in terms of section 47 (1) of POCA:

12.1. make an application to the High Court which made the preservation order; and

12.2. satisfy the Court in that application:

12.2.1. that the operation of the preservation order will deprive him or her of the means to provide for his or her reasonable living expenses and cause him or her undue hardship; and

12.2.2. that the hardship that he or she will suffer as a result of the preservation outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

[13] In his affidavit in support of the counterapplication the applicant did not set out facts to satisfy the jurisdictional requirements of section 47 (1) (a) of POCA. Insofar as the seizure of the goods is concerned, he stated simply that he required the sum of R100 000.00 “in order to continue with my business” and that he has been unable to use his vehicle which is exposed to the elements. He did not deal with whether or not the seizure of the goods deprived him of the means to provide for his reasonable living expenses or that it caused him undue hardship. In the circumstances, the applicant failed to make out a case for the rescission of the preservation order.

[14] The general rule is that costs follow the result. However, there are exceptions to the general rule. The history of this matter shows that after the preservation order was granted, the respondent did not seem to have been in a hurry to institute the application for the forfeiture of the property. It was instituted only 12 days after the applicant had instituted the

counter-application and after the parties had approached me in chambers on 29 November 2016. The respondent would probably

have continued doing nothing to institute the forfeiture application had the applicant not instituted the counter-application. To that extent, even if it was only to get the respondent to do what it was statutorily obliged to do, the applicant was justified to approach the court for relief. He was obviously frustrated by the respondent’s disregard for the applicant’s

proprietary rights in the goods which formed the subject matter of the preservation order. Although the application was misguided, it would, in the circumstances of this case, not be in the interest of justice to make a costs order in favour of the respondent. It would be appropriate for each party to pay his own costs.

[15] In the result, it is ordered that each party pay his own costs of the counter-application.

G H BLOEM

Judge of the High Court

For the applicant:

Adv Mayikiso, instructed by B Nduli & Co, East London and Cloete & Company, Grahamstown

For the respondent:

Mr Wolmarans of Dullabh & Co Attorneys, Grahamstown

Date heard:

2 December 2016

Date of delivery of the judgment: 6 December 2016

[1] Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998).

[2] Compare National Director of Public Prosecutions and another v Mohamed NO and others

[2002] ZACC 9; 2002 (4) SA 843 (CC) wherein Ackermann J stated at 852C that the National Director must “within 90 days of the grant of the preservation order apply for the forfeiture of the property.” In National Director of Public Prosecutions and another v Mohamed NO and others 2003 (4) SA 1 (CC) Ackermann J also stated at 10A that the 90 day period run from the grant of the preservation order.

[3] Union Guarantee & Insurance Co Ltd v Potgieter 1959 (3) SA 881 (E) at 882E.

[4] Section 47 (1) of POCA reads as follows: “(1) A High Court which made a preservation of property order- (a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied- (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and (ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and (b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.”

[4] Section 47 (1) of POCA reads as follows:

“(1) A High Court which made a preservation of property order-

- (a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-
- (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
- (ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- (b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.”

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Prepared on 14 October 2026 · Esheria