

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable Yes/No
Case No: 619/2024

In the matter between:

DAVID SIMBA MAPHOSA

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

First Respondent

**T MALUKA N.O. DEPUTY SHERIFF VEREENIGING
HIGH COURT SHERIFF VEREENIGING**

Second Respondent

CORAM: Hefer AJ

Heard: 28 November 2024

Delivered: 27 February 2025

ORDER

1. The forfeiture order granted on 23 May 2024 is rescinded and set aside.
2. First respondent is to pay the costs of the application on an attorney and client scale C.

JUDGMENT

Hefer AJ

- [1] The applicant approached Court for an order in terms of which 'the final preservation or forfeiture order which was granted against the applicant on 23 May 2024, as a purported unopposed application' be rescinded and set aside.
- [2] It is common cause that a preservation order had been granted on an *ex parte* basis, in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of certain motor vehicles, on 8 February 2024.
- [3] In terms of this order, the applicant (being the first respondent in the present matter), was *inter alia* ordered to cause notice of the order, together with documents supporting the application, to be served personally or in terms of the Uniform Rules of Court by the Sheriff in terms of s 39 of POCA on 'Simba David Maphosa of 1[...] Extension 7B, Orange Farm'.
- [4] In accordance with the provisions of s 39(3) and (4) of POCA, the order further provided for any person having an interest in the property and who intended opposing the application for an order forfeiting the property to the State or applying for an order excluding his or her interest from the forfeiture order in respect of such property, must enter an appearance giving notice of his or her intention:
 - (i) In the case of any person specifically identified for service in terms of this order, within fourteen calendar days of service; and
 - (ii) In the case of any other person, fourteen calendar days after the date when a notice of the order was published in the Government Gazette.
- [5] The applicant, being specifically identified for service in terms of the order, was therefore granted fourteen calendar days to file such notice in terms of s 39(3) read with s 39(5) of POCA.

[6] A return of service which was placed before Court by the applicant, reads *inter alia* as follows:

‘On this 19th day of February 2024 at 12:20 I served the PRESERVATION APPLICATION and COURT ORDER in this matter upon SIMBA DAVID MAPHOSA personally at 1[...] Extension 7B Orange Farm by handing to the abovementioned a copy thereof after explaining the nature and exigency of the said process”

[7] Pursuant to this return of service, the first respondent then approached Court and obtained a forfeiture order in respect of the same motor vehicles by Opperman J on 23 May 2024.

[8] The applicant’s application, which is based on Rule 42 of the Uniform Rules of Court, alternatively on the common law, has a two stage process of consideration. The first being whether the preservation order of February 2024 had been served on the applicant. The second being whether the forfeiture order dated 23 May 2024 had been erroneously granted for purposes of Rule 42 or, then by implication in the alternative, the common law.

Application of Rule 42:

[9] Before dealing with the aspects referred to above and raised by the applicant, it needs to be determined whether the Court can entertain the matter in terms of Rule 42 of the Uniform Rules of Court.

[10] The discretion which is conferred upon a Court in terms of Rule 42 ‘is influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case’.¹

¹ Chetty v Law Society, Transvaal 1983 (1) SA 777 (T) at 761, referred to with approval by the majority of the Constitutional Court in Zuma v Secretary of Judicial Commission of Inquiry Interrogations of State Capture, Corruption and Fraud in the Public Sector including Organs of State 2021 (1) BCLR 1263 (CC) dated 6 June 2023.

- [11] A Court will not exercise its discretion in favour of a rescission application if unfavourable consequences would follow.²
- [12] As far as rescission of judgment on the basis of it being sought or granted erroneously as contemplated in Rule 42(1)(a) of the Uniform Rules of Court, in general terms 'a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.'³
- [13] Judgments had been rescinded under this subrule where the summons had not been served on the respondent⁴, where default judgment was obtained without prior notice to the opposite party after the matter became opposed.
- [14] According to the first respondent, POCA sets out its own criteria for rescission applications. Further, according to first respondent, s 53(3) and (4) of POCA carefully regulate the substantive circumstances in which rescission of the forfeiture order made under POCA may be sought.
- [15] It is further the submission of the first respondent 'that the only resource the applicant had was to invoke s 53(3) and (4) of POCA but the applicant missed that opportunity'.
- [16] I cannot agree with these submissions by the first respondent and counsel appearing on behalf of first respondent. The relevant portions of POCA only deals with the timeframes in which an application for rescission is to be brought by an interested party and the contents of a notice to be given by an interested party if such a party wishes to oppose a preservation order granted. It does not contain any criteria and in particular the criteria as contained in Rule 42. Rule 42 caters *inter alia* in particular for matters where judgments

² Erasmus, Superior Court Practice, Second Edition, Volume 2, p. D1-Rule42-6.

³ Van Loggenberg *supra*, p. D1-Rule42-19;

Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC) at 366E – 367A;

Nyingwa v Moolman NO 1993 (2) SA 508 (TK) at 501D – G.

⁴ Custom Credit Corporation Ltd v Bruwer 1969 (4) SA 564 (D)

had erroneously been granted or sought. The applicant is therefore entitled that the matter be adjudicated upon in terms of Rule 42.

Service of preservation order

[17] According to the applicant, he became aware of the preservation order being granted, only during 'March or early April 2024', through 'a good Samaritan who knew about my criminal case in the Welkom Magistrate Court since he was a public prosecutor'.

[18] Being confronted with the return of service referred to above, the applicant states as follows:

'I will maintain the Sheriff did not serve the preservation order as purported by the return of service by the Sheriff or documented by Mr Maluka, who is the person who drafted the return of service.'

[19] The applicant then alleges that he instructed his attorney Mr Nkuna to seek clarity about the return of service. According to the applicant, Mr Nkuna then decided to approach the Vereeniging Sheriff's office and his investigation elicited the following outcomes or responses:

'It has been conceded that my assertion that I was not served by the Sheriff as initially purported by the return of service is now being confirmed by an affidavit deposed to by the Deputy Sheriff, who is the second respondent.'

[20] The applicant then refers to a what purports to be a sworn affidavit by Mr Tilly Maluka dated 12 July 2024. The contents of this affidavit read as follows:

'I, TILLY MALUKA in my capacity as DEPUTY SHERIFF with Mr MJ Manyandi, Sheriff High Court Vereeniging declare the following under oath: On the 19th February 2024 I went to Orange Farms to serve Court Order to address 1[...] Ext 7A Orange Farms and not to 1[...] Ext 7B Orange Farms.

When I arrived at 1[...] Ext 7A Orange Farms I could not find the respondent Mr Simba David Maphosa at the premises.

I therefore went to the incorrect address from the beginning.

I left the premises and on my way to the vehicle I wrote that the document was served personally.

We apologise for any inconvenience caused in this regard.'

[21] I find this explanation from Mr Maluka to say the least shocking. Not only is it disconcerting in that it appears that through this affidavit an officer of Court is purportedly attempting to come to the rescue of the applicant, but also is blatantly nonsensical. If Mr Maluka did go to the incorrect address, as now stated by him, his version still does not explain why he stated that he effected personal service on the applicant. The purported confusion with the incorrect address does not solve the problem.

[22] I consider this aspect to be so disconcerting, that I intend to bring it to the attention of relevant authorities to be investigated.

[23] The applicant then continues and states as follows:

'It is worth reiterating to mention that when I was arrested, I was arrested at my current residential address which is 5[...] J[...], Naudeville, Welkom. This is the same address on which the motor vehicles were seized from. It is therefore baffling as to why the Sheriff was given the Orange Farm address.

The Orange Farm address is actually an address on which the motor vehicles are registered and is not my current residential address and is occupied by my family members'.

[24] The applicant however loses sight of the fact that the reason why the Sheriff was given the Orange Farm address is because that address is contained in the preservation order of Mhlambi ADJP in respect of notice and service to the applicant.

[25] The final proverbial nail in the applicant's coffin in this regard is that in the applicant's affidavit, which had been filed by the applicant and which will be dealt with as far as the second stage of inquiry is concerned, the applicant himself stated as follows:

'I am a major male and an informal businessman who resides at House No. 1[...] Extension 7B, Orange Farm, Gauteng Province.'

[26] Applicant's reaction to this is as follows:

'In my answering affidavit to oppose the forfeiture order, I used or referred to the Orange Farm address as well solely because it was contained in the preservation order.'

[27] This purported explanation by the applicant can only be regarded as being blatantly untruthful where the applicant himself stated under oath that he resides at the address where service was effected.

[28] Whereas a return of service is *prima facie* proof of the contents thereof, it must therefore be accepted that the application and more in particular, the preservation order had indeed been served on the applicant personally on the 19th of February 2024.

[29] The reason why the applicant seeks to deny personal service of the preservation order is clear. In terms of the preservation order, the applicant was obliged to enter an appearance giving notice of his intention in terms of s 39(3) read with s 39(5) of POCA within fourteen calendar days of service, which was not done. That brings me to the second stage of the inquiry.

Was the forfeiture order erroneously sought?

[30] The applicant alleges that upon receipt of the preservation order, an answering affidavit was prepared and filed at the State Attorney on 29 April 2024.

[31] In this regard, proof of such receipt by the State Attorney in support of the applicant's allegations was placed before me.

[32] In answer to these allegations, the first respondent responded as follows:

'The affidavit filed by the applicant on 29 April 2024 was not received by the NDPP and therefore the NDPP had no insight into it until the applicant on 11 June 2024 made enquiries. It was then that the NDPP made enquiries from the State Attorney and a copy was handed to the paralegal attached to the AFU Bloemfontein Thapelo Hlasane (Hlasane).'

[33] Reference is then made to an affidavit by the said Hlasane who *inter alia* states as follows:

'The matter was dealt with by Ms Sinthia Sibiya who has by then left the Office of the State Attorney and for some unknown reason the relevant affidavit was not handed to me.

After having received communication from Finger Attorneys I enquired at the office of the State Attorney about the affidavit and after some searching the affidavit was found and handed to me.'

[34] That means that for all purposes, an affidavit of the applicant for purposes of s 39 of POCA and as contemplated in the preservation order, was indeed already delivered before the application for the forfeiture order served before Opperman J.

[35] The affidavit by the applicant had indeed been delivered way out of time in respect of the time period as contemplated in POCA as well as the court order, namely fourteen days after service. The applicant has also failed to give proper notice of opposition as envisaged in POCA as well as the

preservation order. The fact remains that when the matter served before Opperman J, the first respondent did not bring the existence of the opposing affidavit by applicant to the attention of Opperman J because first respondent was not familiar with the existence of such an affidavit. The reason why the existence of the opposing affidavit had not been brought to the attention of the Court was due to the failure of the State Attorney, for which the applicant cannot be blamed. This is important, more so where s 39 of POCA expressly provides for a forfeiture order to be granted by default where there is no appearance on behalf of an interested party and therefore by implication no opposition to the application in terms of s 39.

[36] In these circumstances, whereas the Court granting the forfeiture order was not aware of the existence of the opposing affidavit by the applicant and it appears the first respondent itself as well, the forfeiture order was erroneously sought and granted.

[37] The forfeiture order therefore stands to be rescinded. Such rescission will not have unfavourable consequences because the preservation order still stands.

[38] As far as cost is concerned, I am in agreement with Mr *Mkhabela* appearing on behalf of the applicant that a punitive cost order is justifiable in the circumstances. It was through the omissions of the first respondent that caused the forfeiture order to be rescinded and the first respondent should not have persisted in opposing the application.

Order

Therefore, I make the following order:

1. The forfeiture order granted on 23 May 2024 is rescinded and set aside.

2. First respondent is to pay the costs of the application on an attorney and client scale C.

J J F HEFER, AJ

Appearances:

On behalf of applicant:

Instructed by:

Adv RB Mkhabela SC
S Nkuna Attorneys Inc.
Welkom
c/o Blair Attorneys
Bloemfontein

On behalf of first respondent:

Instructed by:

Adv B Somaru
State Attorney
Bloemfontein