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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-104694

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE 09 JUNE 2025

SIGNATURE

In the reconsideration application of:

KELEBOGILE PRECIOUS PHUMO

First Applicant

WOMEN AGAINST POVERTY AND HUNGER (PTY)(Ltd)

Second Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

In re the preservation order of:

1. An amount of R1 273 049.40 and accrued interest held at First National Bank (FNB), account number 6[...] in the name of Women Against Poverty and Hunger (Pty) Ltd with registration number 2022/79340107.
2. The amount of R244 039.69 and accrued interest held at Capitec, account number 1052213979 in the name of Women Against Poverty and Hunger.
3. An amount of R4 228.50 and accrued interest held at Capitec, account number 4[...] in the name of Women Against Poverty and Hunger.

4. An amount of R13 722.85 and accrued interest held at Capitec, account number 1[...] in the name of Kelebogile Precious Phumo, ID Number: 8[...] 8

JUDGMENT IN THE RECONSIDERATION APPLICATION

LABUSCHAGNE J

ORDER:

- [1] The *ex parte* preservation order granted on 18 September 2024 is discharged.
- [2] The NDPP is directed to pay the costs of the application and reconsideration application on an attorney and client scale, Scale A.

JUDGMENT

- [3] This is an application for reconsideration, on an urgent basis, on a preservation of property order granted in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) against positive bank balances in various bank accounts which are set out supra in the headpiece.
- [4] The NDPP contends that the bank accounts' credit balances are as a result of a multiplication scheme operated by the first applicant and her company, the second applicant.
- [5] The NDPP contends that there is no urgency of the matter as, during May 2025, the applicants requested the NDPP to hold over the exchange of pleadings pending discussions. The NDPP agreed to this and was then, out of the blue, met with an urgent application for reconsideration.
- [6] The applicants in turn contend that the preservation of property order has expired and/or lapsed on three grounds:

- 6.1 The applicants contend that the ex parte order was never properly served on the applicants in terms of section 39(1)(a) of POCA, as the address upon which such notice was served is not the registered address of the second applicant and no service was effected upon the first applicant.
- 6.2 The applicants further contend that the notice of the order contained in the Government Gazette pertains to an order dated 18 September 2023. The notice as published in the Government Gazette is therefore invalid and was not published in terms of section 39(1)(b) of POCA.
- 6.3 The applicants thirdly contend that, even if both subsections (a) and (b) of section 39 of POCA have been met, the respondent has not given the notices “as soon as practicable” as required by the Act but instead waited until January 2025 to give notice (which notices are faulty).

[7] The upshot of the applicant’s approach is that the preservation order has lapsed in terms of section 40 of POCA.

[8] In answer to the NDPP’s challenge to the urgency of the application, the applicants contend that they cannot trade as a result of the expired preservation order. The urgency is then self-evident.

THE EX PARTE ORDER

[9] On 18 September 2024 Ledwaba DJP granted an ex parte court order in Chambers, preserving the property identified in the headpiece above and prohibiting any dealing with the property (paragraph 2 of the preservation order).

[10] The order provided that the NDPP must, in terms of section 39 of POCA:

“5.1 Cause notice of this order in the form set out in annexure “A”, together with documents supporting the application, to be served by the sheriff on Women Against Poverty and Hunger (Pty) Ltd and Kelebogile Precious Phumo, being the director of Women Against

Poverty and Hunger (Pty) Ltd, at No. 5[...] N[...] R[...] Road, Kempton Park, Johannesburg, Gauteng Province.

- 5.2 *Cause notice of this order, and the forms set out in annexure “A”, to be published in the Government Gazette as soon as practicable after the order was granted.*
6. *In the event the sheriff has not been able to serve on Women Against Poverty and Hunger (Pty) Ltd, publication in the Government Gazette will be regarded as sufficient service.”*

[11] The facts of this matter establish that the aforesaid address set out in the *ex parte* court order is not the address of the applicants. Further, service by means of publication in the Government Gazette is marred by the fact that the wrong year (2023) was used with reference to the date of the court order published in the Government Gazette.

[12] Despite the order being granted on 18 September 2024, the applicants only became aware of it through service that was effected at a different address on 10 January 2025. This occurred when service took place at the business address of the second applicant.

[13] The NDPP clearly did not appreciate that it advanced a wrong factual address as the address for service upon an affected party in preservation proceedings.

[14] The preservation order provides in paragraphs 10 and 11 for reconsideration. The order reads:

“10. Any person who is affected by the order may on good cause shown, apply for reconsideration. Such application shall be made:

10.1 In instances where the person is able to justify the application on grounds of urgency, upon three days’ notice (or such shorter period as the court may determine on good cause shown);

- 10.2 *In other instances, upon at least seven days' notice to the applicant and all other persons identified in this order as being persons who may have an interest in the property.*
11. *Such an application must be made not later than eight 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 in Chapter 6 of POCA."*

URGENCY

The Applicants' request for pleadings to be held in abeyance during May 2025 and the acceptance thereof prima facie removes the urgency of this matter. However, the *ex parte* order has has the continuing effect of preventing the applicants accessing and operating their respective aforesaid accounts. That is where the urgency remains despite the cease fire arrangement. While this is not to be seen as a legitimate means of hoodwinking the NDPP into a false sense of security, ie that urgent proceedings have been staved off, the conduct of the NDPP is not beyond reproach, as will appear below. I am satisfied that urgency remains insofar as the constitutional rights of the applicants' are impacted adversely.

LEGAL PRINCIPLES

- [15] Although section 38 does provide for the NDPP to approach the court on an *ex parte* basis for a preservation order, that does not relieve the NDPP from a normal burden imposed on every applicant who approaches the court for an *ex parte* order. Applying to court for an order *ex parte* should only be invoked when there is some good cause or reason for the procedure, such as genuine urgency, or when the giving of notice would defeat the very object for which the order is sought (see **NDPP v Braun and Another** 2007 (1) SACR 326 (C) at paragraphs [20] and [21]).
- [16] Further, an *ex parte* applicant has a duty of utmost good faith. This requires that material and correct facts be placed before the court. Where facts have

been misstated, even *bona fide*, this does constitute breach of the duty to verify facts before placing them before court for purposes of obtaining an *ex parte* order (see **Schlesinger v Schlesinger** 1979 (4) SA 342 (W)).

[17] The fact that the NDPP obtained an order providing for service on the wrong address is not without consequences. In this instance it has caused a substantial delay in notifying affected parties of the preservation of property order and thereby constitutes a breach of the duty of utmost good faith.

[18] Whilst I appreciate that the mere existence of a mistake made in a *bona fide* manner should be capable of correction, if properly explained, such correction must take place within a time period that reflects an appreciation by the NDPP of the draconian effects of an *ex parte* preservation order on the constitutional rights of the public. In this instance, a delay of some four months ensued, which is not explained by the NDPP. The court has not been apprised as to when it ascertained the correct address for service and why it took so long to obtain it. This raises the spectre of a lack of appreciation by the NDPP of the need to respect constitutional rights with prompt and transparent attempts to correct such error. More troubling, is the spectre of indifference by the NDPP once the *ex parte* order has been granted.

[19] While I make no positive finding in respect of these concerns, the lapsing of time before proper service has taken place underpins the order granted in this matter. In **National Director of Public Prosecutions v Lethopa and Others** (2023/132147) [2025] ZAGPPHC 249 (11 March 2025), Modiba J set aside forfeiture proceedings where the delay in publication of the *ex parte* preservation order was two months.

[20] In the *ex parte* application the NDPP undertook to serve the preservation order as required by section 39. In the **Lethopa matter** Modiba J stated the following in similar circumstances at paragraph [64]:

“[64] *The NDPP failed to fulfil her undertaking to serve the preservation order and application on the respondents. She also did not publish*

the preservation order in the Government Gazette, as required by section 39(3) of POCA as it took more than two months to do so. As a result of these failures, the rights of respondents and those of other persons affected by the preservation order were infringed in a manner not contemplated by the POCA. These undertakings were incorporated in the preservation order and were thus binding on the NDPP. By failing to fulfil them, she breached the preservation order and acted unconstitutionally.”

- [21] The NDPP contends that the applicants were running a multiplication scheme in breach of the FAIS Act, the Banks Act and FICA. As the order that I grant in this matter does not deprive the NDPP of the right to again pursue its remedies as set out in Chapter 6 of POCA, I do not intend going into the detail of the facts of this matter, save to comment that the NDPP did not provide the supporting source documents necessary to establish its factual averments. The report by the Financial Sector Conduct Authority (FSCA) inspector is not annexed. The absence of confirmatory affidavits on factual issues means the application for preservation and forfeiture falls short of establishing the facts necessary for Chapter 6 relief.
- [22] Nevertheless, the basis of the order that I have granted is to be found in the procedural failures by the NDPP and their impact on the constitutional rights of the applicants.
- [23] It suffices to state that the *ex parte* preservation order cannot stand in the face of a four month delay in notifying the applicants of a court order and publishing it (even defectively) in the Government Gazette.
- [24] The applicants have argued for a punitive cost order against the NDPP due to the egregious nature of the violation of constitutional rights and the duties of the NDPP to the court in the *ex parte* proceedings. I agree. Such considerations also informed the decision of the court in the aforesaid matter in **Lethopa**.

- [25] A breach of constitutional rights is inherently urgent. Although the *ex parte* court order would stand until set aside, it is apparent on the facts that it was at risk of being set aside after passing of even a two month period from granting of the court order without proper publication and service. In light thereof I do not intend holding the applicant to the time periods imposed by sec 39 of POCA or the periods set out in the *ex parte* court order for reconsideration. While the applicant purported to exercise their powers to seek a reconsideration in terms of rule 6(12)(c). The legality of the continued existence of the *ex parte* court order is a matter for the High Court to determine and, on the facts of this matter, it does so on the basis of urgency.
- [26] In the premises I grant the order set out supra, including a punitive cost order against the NDPP.

LABUSCHAGNE J
JUDGE OF THE HIGH COURT

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