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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 6227/2020

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 15 September 2025

SIGNATURE:

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

-and-

KGANTSHI DAVID MALEPA

1ST RESPONDENT

PAULINA MMAPULE MALEPA

2ND RESPONDENT

Delivered : 15 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **15 September 2025 at 10:00 am.**

Date heard : 5 June 2025

Coram : Bresler AJ

JUDGMENT

BRESLER AJ:

Introduction:

[1] The applicant applies for the forfeiture of a red Mercedes Benz GLE 350d Coupe motor vehicle (the 'Vehicle') in terms of Section 48, read with Section 50 of the **Prevention of Organised Crime Act**, Act 121 of 1998 (hereinafter 'POCA').

[2] On the 30th of September 2020, the Applicant obtained a Preservation Order in terms of Section 38 of POCA in respect of the Vehicle on an *ex parte* basis. On the same day a Notice in terms of Section 39(1)(b) of POCA was also issued.

[3] The Preservation Application and Order, as well as the Notice in terms of Section 39(1)(b) was served on the First Respondent on 6 October 2020. The Forfeiture Application was due within 90 (ninety) days from date of publication in the Government Gazette being 16 October 2020. The Forfeiture Application was only served on the 18th of February 2021 and after the lapse of the Preservation order, resulting in the Forfeiture Application being moot. The applications were nonetheless opposed by the Respondents and detailed opposing affidavits were delivered.

[4] On the 6th of July 2021, a Second Preservation order was granted. The Second Order and Application was served on the First and Second Respondent on the 21st of July 2021. The Second Order was published in the Government Gazette

on the 20th of August 2021. A second Forfeiture Application was consequently issued, relying on the Second Preservation Order. The Second Forfeiture Application is likewise opposed by the Respondents.

[5] On the 24th of February 2022, a Forfeiture Order was granted by default against the Respondents purportedly in reliance to the First Forfeiture Application. This order was rescinded on the 12th of January 2023.

[6] On the 17th of January 2023, the Applicant delivered a Replying affidavit to the Second Forfeiture Application.

[7] It is evident that this matter has quite a procedural background. In this Court's view, the Second Forfeiture Application stands to be determined as the First Forfeiture Application was rendered moot by being delivered outside of the 90 (ninety) day period stipulated herein before. The Applicant was aware of the full extent of the Respondents' opposition at the time when the Second Preservation order was obtained and the Second Forfeiture Application was launched.

[8] In justification of the relief prayed for by the Applicant, the following is stated:

8.1 The Vehicle is the proceeds of unlawful activities namely corruption and extortion. It is common cause that the vehicle is registered in the name of the Second Respondent.

8.2 The vehicle was purchased from Mercurius Motors with funds obtained from Lesiba Mokhonoana of Lesibasiba Projects and Elvis Mohuba of Tomele Business Enterprise.

8.3 Both Lesibasiba Projects and Tomele Business Enterprise were service providers at Mokgalakwena Municipality during the period 2016 – 2017. During the same period the First Respondent was employed at Mokgalakwena Municipality as Deputy Manager, Technical Services.

8.4 The Respondents claim that the said amounts were due and payable to Katlego Internet Convenient Stores (Pty) Ltd and Unlimited Liquor Restaurant of whom the Second Respondent is the lawful owner.

8.5 Upon investigation of these allegations, the Applicant ascertained from the employees of Lesibasiba Projects that no training was conducted involving the Respondents or their related entities. The Applicant furthermore ascertained from Mr Elvis Mohuba, the owner of Tomele Business Enterprise that likewise, no agreement was concluded between Tomele Business Enterprise and the First and / or Second Respondent and / or their related entities. Neither Lesibasiba Projects nor Tomele Business Enterprise were in possession of any invoices rendered for these alleged goods and / or services.

8.5 The Respondents have since been charged with the offences they are alleged to be involved in.

[9] In opposition to the proceedings, the Respondents submitted the following:

9.1 The Vehicle is not an instrumentality of an offence referred to in Schedule 1 of the POCA, nor is the Vehicle the proceeds of unlawful activities.

9.2 The Vehicle was obtained through a *bona fide* and lawful purchase and sale transaction between the Second Respondent and Mercurius Motors on or about the 28th of July 2017.

9.3 The withdrawal of the proceedings under case number: 6227/2020 brings the litigation under the said case number to an end. There is not remaining *lis* between the parties. As this application was withdrawn, no reliance can be placed on any evidence led in those proceedings.

9.4 The Vehicle was paid with monies due, owing and payable to the First and / or Second Respondent as a result of loan accounts held in Katlego Internet Convenient Stores (Pty) Ltd and / or Unlimited Liquor Restaurant,

alternative monies accruing to them from Lesibasiba Projects and Tomele Business Enterprise.

9.5 The Vehicle was not obtained as a gratuitous benefit or as proceeds of crime, nor was the Vehicle utilised in the commission of a crime.

9.6 Floyd Nakeng at all material times represented to the First Respondent that he is a representative of Tomele Business Enterprise and he signed a Memorandum of Agreement on behalf of Tomele Business Enterprise in terms whereof Unlimited Liquor Restaurant was to provide conference services to the sum of R801,000.00.

9.7 Lesiba Mokhonwana signed a Memorandum of Agreement on behalf of Lesibasiba Projects in respect of the provision of specialised building and construction material including training of workers and personnel with Katlego Internet Convenient Stores (Pty) Ltd to the value of R1,200,000.00.

Issues that require determination:

[10] This Court is only called upon to determine if the Vehicle should be forfeited in accordance with POCA.

The Applicable Legal Principles:

Was the Applicant prohibited from issuing a second Preservation application and subsequent Forfeiture Application?

[11] Before dealing with the merits of the matter, this Court finds it apposite to determine if the Applicant was, procedurally, entitled to proceed with the Second Preservation and Forfeiture Application.

[12] S 40 of POCA provides:

'Duration of preservation of property orders

A preservation of property order 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 a 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.”

[13] The first order was published in the Government Gazette on 26 July 2013. None of the exceptions contained in s 40 (a), (b) or (c) applied and the order therefore expired on 24 October 2013.

[14] The following was stated in ***National Director of Public Prosecutions v Camel Rock Social Housing Institution and Others***:¹

[10] There is no express provision in POCA which prevents the granting of further preservation orders where an earlier one has expired. Mr. Cole submitted that s 40 of POCA was enacted to protect respondents in preservation applications, and that the word “expire” should be interpreted leniently, in other words once the order expires, no further order can be granted.

[11] I do not agree. Such an interpretation would negate the important social purpose of POCA and in theory render those entrusted with its implementation powerless to prevent, for example, the dissipation of proceeds of unlawful activities. The present case concerns vast public funds provided for the benefit of low and middle income groups. The applicant has made out

¹ 2015 (1) SACR 546 (ECG)

a case for the present order and the reason for the expiry of the first order was fully and satisfactorily explained.'

[15] And further:

'[13] It follows that I am of the view that s 40 of POCA does not prohibit a further application for a preservation order where a previous order in respect of the same property has expired.'

[16] This Court agrees with the submissions made in the aforesaid case. If the purpose of POCA can be defied simply because of an administrative oversight, it would lead to catastrophic results. The opposition of the Respondents on this basis should therefore fail.

[17] I am further fortified in my view insofar as Section 58 of POCA states the following:

'The fact that a preservation of property order or a forfeiture order has been made on the basis of an offence referred in Schedule 1 in which a specific person has been involved does not prevent the making of another or other preservation of property orders or forfeiture orders on the basis of the same offence.'

[18] If further orders can be made on the same offence, I see no reason why a further preservation order cannot be made if a previous order has expired. It follows that a further forfeiture application on the same facts and against the same property on the same offence, in the event of the first application being dismissed on the merits, will however in all probability be subject to *res iudicata*. This is however not the current issue before court and therefore need not be determined.

[19] The Respondents' objection along these lines must therefore fail.

Notice of Withdrawal:

[20] In this Court's view, to determine the procedural consequences of the Notice of Withdrawal, one must take a holistic view of the exchange of pleadings and documents to date. The Notice of Withdrawal was delivered simultaneously with the current Forfeiture Application. By no stretch of imagination could it mean that the Application is simultaneously issued and withdrawn.

[21] The Court is therefore in agreement with the Applicants that, at the time of the Notice of Withdrawal, the First Preservation Order, which was the precursor of the First Forfeiture Application, had lapsed. The order having lapsed, there could be no Forfeiture Application.

[22] The objection against the continuance of the matter on the premise that same was finally withdrawn, can thus not succeed.

Preservation and Forfeiture Applications in general:

[23] What remains to be determined is if the Applicant has shown, on a balance of probabilities, that the Vehicle is the proceeds of unlawful activities. Section 38 of POCA provides that the High Court shall make an order

'if there are reasonable grounds to believe that the property concerned –

(a) Is an instrumentality of an offence referred to in Schedule 1; or

(b) Is the proceeds of unlawful activities.'

[24] As pointed out by the Constitutional Court in ***National Director of Public Prosecutions v Mohamed N O and Others***² :

'Section 38 forms part of a complex, two stage procedure, whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited". In contrast to chapter 5 of the Act, which deals with

² 2002 (4) SA 843 (CC) at 85 par [17]

confiscation of property following upon a conviction, "the guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings".'

[25] Both parties were *ad idem* that in procedures of this nature, the established rules of resolving factual disputes in motion proceedings will apply. This Court is therefore obliged to apply the well-known *Plascon-Evans* rule.

[26] Counsel for the Applicant correctly stated in his Heads of Argument that the effect of the *Plascon-Evans* rule is that the Court must determine if a case has been made out on a balance of probabilities having regard to the facts as stated in the Applicant's affidavits which was admitted by the Respondents, together with the facts alleged by the Respondents. Regard must also be had to allegations that cannot reasonably be disputed.

[27] Having regard to the evidence led by both parties, this Court is in the dark as to the exact nature and extent of the services allegedly provided to the juristic entities in which the Respondents purportedly holds an interest. This Court is also not privy to the full extent of the relationship between the Respondents and the related entities. This is information that should be wholly within the knowledge of the Respondents and should have been fully disclosed to the Court.

[28] One would assume that, in an application of this nature, at the very least a full disclosure would have been made as to entitlement to appropriate business funds (if the Respondents' version is to be accepted) to the acquisition of property in their personal capacities although the alleged agreements were concluded in the related entities.

[29] The evident lack of knowledge of the respective service providers pertaining to these alleged arrangements, also casts serious doubt on the Respondents' version.

[30] Having a holistic view of the evidence presented by the respective parties, this court is satisfied that the Applicants were able to show, on a balance of probabilities, that they are entitled to the relief prayed for.

Costs:

[31] The Applicant has issued a previous preservation application as well as a previous Forfeiture Application. Due to an administrative oversight, they could not continue with these proceedings, rendering the said proceedings moot.

[32] In this Court's view, had those proceedings continued, the Applicant would, in any event, be successful on the merits thereof. It is trite law that once proceedings are rendered moot by subsequent circumstances, the Court must still determine if those proceedings would have been successful to determine the appropriate cost order. It cannot be ignored however that the duplication of the proceedings was brought about because of the first preservation order lapsing prior to the issuing of the first forfeiture application. This oversight must be laid at the door of the Applicant. On this basis then, the Applicant should be deprived of the costs of the first preservation application and the first forfeiture order. A more just and reasonable order would be that each party is to pay its own costs pertaining to the previous proceedings.

Order:

[33] In the result the following order is made:

33.1 An order is granted in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998 (the POCA) declaring forfeit to the state a Hyacinth red Mercedes Benz GLE 350d Coupe motor vehicle with registration number DTG473L, chassis number W[...] and engine number 6[...] (described as a white Mercedes Benz GLE 350d Coupe on Enatis) (the property), which property is presently subject to the preservation of the property order granted by the Honourable Court under the same case number on 6 July 2021.

33.2 In terms of Section 56(2) of POCA, the property shall vest in the state upon granting of this order.

33.3 Subject to paragraph 33.4 below, the property shall remain in South Africa Police Services at Seshego SAP13 Pound.

33.4 Upon expiration of a 45-day period after notice of this order is published in the Government Gazette, Hlamarisa Simon Rikhotso, a Financial Investigator in the employ of the Applicant is authorised to:

33.4.1 assume control of the property on behalf of the Applicant, which property must, subject to paragraph 33.4.2 below, remain in the South African Police Services at Seshego SAP13 Pound;

33.4.2 sell the motor vehicle at best, either by public auction or private treaty;

33.4.3 sign all documentation necessary to affect the sale, transfer and registration of the motor vehicle; and

33.4.4 deposit the proceeds of the sale into the Criminal Asset Recovery Account established under section 63 of POCA, Account number 8[...] held at the South African Reserve Bank, Vermeulen Street, Pretoria (CARA).

33.5 Hlamarisa Simon Rikhotso shall as soon as possible, but not later than within a period of 90 (ninety) days of this order coming into effect, file a report with the Applicant indicating the matter in which she complied with the terms of this order.

33.6 Any person whose interest in the property concerned in affected by the forfeiture order, may within 20 (twenty) days after he or she has

acquired knowledge of such order, set the matter down for variation or rescission by the Court.

33.7 The First and Second Respondent, jointly and severally, the one paying the other to be absolved is ordered to pay the costs of the Applicant on party and party scale, inclusive of the costs to counsel on Scale A.

33.8 The aforesaid costs shall exclude the costs pertaining to the First Preservation application (dated 30 September 2020) and the First Forfeiture Application (dated 14 January 2021).

**M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

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