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NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL 943/2023

In the matter between

**ZAIDAN TRADING (PTY) LTD
MOHAMMED ZAHID KHAN**

First Applicant

Second Applicant

and

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS
HENRY JOHN QUIRK
FIRST NATIONAL BANK**

First Respondent

Second Respondent

Third Respondent

In re :

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

and

HENRY JOHN QUIRK

Interested Party

**In re: R3 000 000, including interest, in First National Bank account number 6[...], which
are the proceeds of unlawful activities.**

**JUDGMENT IN RESPECT OF
APPLICATION FOR RESCISSION (POCA)**

HARTLE J

[1] The first applicant is a company, represented through the directorship of the second applicant, who is authorized to bring the present application on its behalf.

[2] The applicants seek an order rescinding a judgment of this court dated 1 August 2023 pursuant to which this court, seized with the hearing of an application

under the provisions of section 48 of the Prevention of Organised Crime Act, No. 121 of 1998 (“POCA”) for forfeiture of property the subject of a preservation order, instead of authorizing forfeiture, acceded to a request by the first respondent to exclude the second respondent’s interest in the property “*from the operation of any forfeiture order that may be granted against the property*”.

[3] The terms of the order, which I will refer to as “*the exclusion order*”, was made in the absence of the applicants and provides as follows:

- “1. The lawful interest of Henry John Quirk (**The Interested Party**) being R3 000 000, including interest, in First National Bank account number 6[...] (**the property**) thereon, is hereby excluded in terms of section 52 of the Prevention of Organised Crime Act 121 of 1998 (**POCA**) from the operation of any forfeiture order that may be granted against the property.
2. The property is to remain under control of First National Bank, appointed by this court in terms of the preservation order, and which are directed to pay to the Interested Party in fulfilment of the exclusion in paragraph 1.
3. The property is to be deposited into:
BANK : **NEDBANK**
ACCOUNT NUMBER : **1[...]**
ACCOUNT HOLDER : **EAST LONDON BATTERY CENTRE CC**
4. There is no order as to costs.”

[4] Although the order ostensibly deals only with the exclusion and suggests that there is a forfeiture order still in the offing, this is the final order in respect of the forfeiture proceedings. There is no property that ostensibly remains to be declared forfeited.

[5] The First National Bank account referenced in the exclusion order belongs to the first applicant.

[6] The first respondent is by obvious designation the authorized representative of the State tasked with the responsibility of attaining the objects of the POCA in the pursuit of combatting organized crime.

[7] The second respondent is a member of East London Battery Centre CC, a close corporation whose interests in effect were excluded from the operation of any forfeiture order on the basis indicated in the exclusion order and who was recognized in the POCA proceedings under scrutiny as “*the Interested Party*”. He is not the sole member of the close corporation but was commonly regarded as the “owner” of Battery Centre in the raft of the related proceedings under the POCA.¹

[8] The third respondent is First National Bank who was appointed under the preceding preservation order to take control of the property for safekeeping until the conclusion of the forfeiture application that was anticipated in the natural progression of matters under the provisions of POCA, and who in terms of the exclusion order was further directed to pay to the second respondent the value of the property in fulfillment of the exclusion in paragraph 1 of that order.

[9] Without even going further, although the third respondent was cited as a party in the POCA proceedings in its capacity as the recognized curator *bonis*, it has vitally not been served with the present application and would have a

¹ According to an official certificate of the CIPC, the second respondent holds a 60% interest in the close corporation. As will become clear in narrating the facts of this unfortunate saga, it was the close corporation that was defrauded of the property or from which the monies were stolen. In identifying the interested party in the POCA proceedings, the second respondent should have been cited as the representative of the close corporation, but nothing really turns on this.

significant interest in the order which the applicants seek in the notice of motion,² more especially since the first respondent contends that it already carried out the fulfilment of the exclusion order on 10 August 2023.³

[10] The property that is the subject matter of the present application is a sum of 3 million rand, plus interest, that was paid into the first applicant's banking account (then marked as "*the targeted account*") on 10 May 2023 at the end of what the first respondent contended in the forfeiture application was the progression of an unlawful money flow. This deposit was instantly flagged by the Financial Intelligence Centre ("*FIC*") as the likely proceeds of crime, placed on a temporary hold in the first applicant's banking account, and thereupon seized in terms of a preservation order issued by this court on 23 May 2023.

[11] It is the applicants' submission, latterly expressed, that these proceeds (whatever illegal trajectory may have preceded their transfer into the first

² The applicants seek an ancillary order (assuming the grant of the rescission order as prayed) that the previously ordered curator *bonis*, that is First National Bank, is again appointed to take control of the property with the second respondent cooperating by yielding control back to the curator. From the context of the applicants' founding papers this control would be exercised pending the determination afresh of the first respondent's application for forfeiture and the (then) competing claims for exclusion once the exclusion order is set aside and assuming the applicants are permitted to participate in what their counsel referred to as the "*principal case*".

³ The first respondent states that the second respondent as the owner of the property was reimbursed on this date, which was days after the exclusion order was made. This is the reason advanced by her why the second respondent does not oppose the present application. Given the provisions of sections 50 (6) and 56 (2) and (3) of the POCA, the payment appears to have been made prematurely. Usually forfeiture orders state that their terms are subject to the provisions of section 50 (6), and by incorporation, section 55 (dealing with appeals) and, more significantly, section 54, which holds out for the interests of persons affected by such an order and who were entitled to receive notice of the application, but did not, within 45 days after publication of the notice of the forfeiture order in the *Gazette*, to apply for an order under the section's provisions to exclude their interest in the property, or varying the operation of the order in respect of the property. It is not clear whether the Registrar of this court published a notice of the exclusion order, as provided for in terms of section 50 (5) of the POCA, which would vitally determine the outer limit of the effective date of the order even if it only frames the exclusion of the second respondent's interest in its terms. The curator takes possession of the property upon the forfeiture order "*taking effect*". Not only is the curator accountable to the court for the control and care of the property (see sections 42 (1), 56 and 57), but in a scenario where the applicants envisage the property being recovered from the second respondent, it appears that the curator is indispensably an interested party in these proceedings. These points were not taken by either party but are raised here merely for concern.

applicant's First National bank account)⁴ were lawfully paid into the said account as consideration in lieu of a legitimate business transaction and this informs their view that they were, and remain, entitled, albeit late, to seek the exclusion of their interest in the property from the operation of any forfeiture order in respect thereof in competition with the second respondent.

[12] It is really this part of the default order that the applicants take issue with as opposed to the necessary implication that the property was indeed liable to forfeiture given the unlawful activity contended for as contemplated by section 50 (1) (b) of the POCA.⁵

[13] The first respondent, consistently in the progression of the related proceedings under POCA to maintain control of the property, is and has been of the view that the monies which came to be earmarked as "*the property*" in the first applicant's bank account constitute the proceeds of unlawful activities within the meaning contended for in the POCA, which was the premise in the first place for the preservation order and the concomitant exclusion order in favour of the second respondent at the hearing of the forfeiture application, ostensibly on a "*restorative justice*" basis.

⁴ The applicants disavow any complicity with the underlying offence(s), claiming to be innocent bystanders and nescient of any reasonable grounds to have suspected that the property in which they claim to have an interest is the proceeds of unlawful activities within the meaning of the POCA. However they do not seriously challenge the first respondent's categorisation of the property as the proceeds of unlawful activities or that the property was liable for forfeiture in the first instance.

⁵ Whilst the applicants confusingly suggest in places that the property ought not to have been declared the proceeds of crime, the essence distilled from the present application is that they acquired a lawful right to the monies as consideration for a legitimate business transaction in circumstances where they had no reason to suspect that the property was criminally tainted. The ostensible motivation for the application, although obfuscated by rhetoric here and there, is that they were hard done by but not having participated in the proceedings when they ought to have presented their case, and that the remedy that they would have sought had they so participated in the proceedings, would have been for the first applicant's professed interest in the property to be excluded from the operation of the forfeiture order.

[14] The premise for the court's finding in the preservation application that there were reasonable grounds to believe (on the basis envisaged by section 38 (2) (b) of POCA) that the property concerned constituted the proceeds of unlawful activities arose on the back of the following facts.

[15] On 27 March 2023 the close corporation represented by the second respondent in dealing with its franchisor of 40 years, First National Battery, received an email purportedly from the latter advising that their banking details had changed. The supposed new account details were communicated in the same email. Due to this misrepresentation, the second respondent on 26 April 2023 paid a sum of R3 823 069.58 in lieu of their April stock due to the franchisor into the supposed new account number 6[...]2held with First National Bank. On 11 May 2023 the second respondent received a statement from First National Battery indicating that the April payment was still outstanding. He immediately opened a criminal case of fraud when he realized that he had been duped into paying the April payment into the supposed new bank account. First National Battery indeed disavowed that they had sent the email advising of the changed banking particulars.

[16] An investigation by the FIC revealed that the supposed new account belonged to one Eliza Ncamane and that the close corporation's payment was made into this account on 26 April 2023.

[17] Thereafter, on 10 May 2023, an amount of R3.7 million was paid from that account to a second account held with First National Bank in the name of Maharimani Loan Centre, after which the bank account of Ms. Ncamane was promptly closed.

[18] Later, on the same day, an amount of R3 000 000.00 was paid from the second account to the account held by the first applicant with First National Bank.

[19] Due to the perceived illegal flow of the monies into the first applicant's account, a temporary hold was placed on the property from 15 – 26 May 2023. This was followed through with an *ex parte* preservation order which had as its aim to prevent the first applicant from being able to transact with the property and - as was the obvious mischief the first respondent sought to interdict, dissipate it further. The preservation order was also intended to provide the necessary premise to later seek an order of forfeiture of the property and thereafter, according to the supporting affidavit of the first respondent's Senior Special Financial Investigator, to reimburse the second respondent who was alleged to be the victim of the fraud and theft or cybercrime.

[20] The application that culminated in the order which the first applicant seeks to have rescinded was brought by the first respondent citing the third respondent as the "*Interested Party*" who also filed an affidavit in support of the relief sought therein. The first respondent's express intention was to obtain an order declaring the property forfeit to the State on the premise that the property was "*the proceeds of unlawful activity, to wit, fraud and theft or cybercrime*".⁶ However, the first respondent asserted its view, in the forfeiture application, that the property lawfully "*belonged*" to the second respondent and that the latter was the victim of the underlying offences and thus asked the court for the relief outlined in the exclusion order on the basis provided for in section 52 of the POCA.

⁶ There was also a suggestion that an offence of money laundering had been committed, but the first respondent did not seek to make this the primary premise of her case. The offence of money laundering is defined in Chapter 3 of the POCA.

[21] The basis for this approach, of advocating for the victim so to speak, was brought under the scope by this Division in *The National Director of Public Prosecutions v Marius Van Zyl* (“*Van Zyl*”)⁷ in which the court specifically dealt with the question whether it had the authority to grant similar relief directing that an identified owner of property that had been seized as proceeds of illegal activity under a preservation order could be transferred back to the owner to preclude it from being forfeited to the State where it was clear that he had been the victim of a fraud perpetrated against him, this despite the latter not having sought to participate formally in the proceedings by filing the necessary notice of his intention to apply for his interest to be excluded.

[22] In that matter the owner had not noted the customary appearance to oppose the forfeiture order nor had he indicated that he was intent on applying to have his interest in the property excluded when the NDPP applied for forfeiture of the property. This is because he had been given assurances by the NDPP that the money that belonged to him as the victim of the fraud would be repaid to him pursuant to the institution’s past practice of vindicating such persons. Whilst the court permitted him, despite not having followed the formal processes to participate at the hearing to justify the exclusion of his interest in his own right and using the machinery of the POCA at his disposal to do so, the court was indeed critical of the fact that the NDPP had purported by their expedient and victim-friendly informal approach of accommodating such an interested party, to circumvent the procedure with its many checks and balances overseen by the court which POCA prescribes for civil forfeiture. Indeed, the court issued a stern injunction that such an informal arrangement that purports to bypass the prescribed

⁷ Port Elizabeth High Court, Case No. 950/2021, delivered on 3 December 2021.

application for the exclusion of a victim's interest in the property from the operation of a forfeiture order “*cannot be sanctioned*”.⁸

[23] No doubt heeding the court's intimation of what it is proper to do while still supporting the victim whose interests are clearly at risk of being forfeited to the State - upon which event the property will instead accrue to the Criminal Assets Recovery Fund (“CARA”) unless at the time of seeking forfeiture of the property such an anticipated eventuality is varied to allow for exclusion, the affidavit made by the second respondent in the forfeiture application under scrutiny was presented under cover of a document styled: “*ENTRY OF APPEARANCE IN TERMS OF SECTION 39 (3) OF THE PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998 (POCA) AND APPLICATION IN TERMS OF SECTION 52 (1) OF POCA.*” The second respondent contended in the affidavit that he was supported by the first respondent who had no objection to his interest being excluded from the operation of a forfeiture order that may be granted by virtue of his being the victim of crime in the matter and that he wanted to preclude the inevitability that the preserved funds would, if his interest was not excluded at the time, be paid to the CARA, which funds are allocated for specific purposes adverse to his own.⁹

[24] Such an order that recognizes the interests of innocent third parties who have become the victims of fraudulent activity as a basis for exclusion from the operation of a forfeiture order under the mantle of section 52 (1) of the POCA has been commonly pursued in our courts. Indeed the Constitutional Court in *Minister of Rural Development and Land Reform v Land and Agricultural Development Bank of South Africa*¹⁰ recently endorsed as justified the expansive approach relied

⁸ At [46].

⁹ See sections 57, 63, 64 (a) and 69A of the POCA. See also *Van Zyl, supra* at paras [25] – [26] and [47].

¹⁰ (CCT 311/22) [2024] ZACC 14; 2024 (10) BCLR 1239 (CC); 2025 (2) SACR 1 (CC) (12 July 2024)

on by the High Court and the Full court, whose judgments were under scrutiny in the appeal to it against a judgment of the Supreme Court of Appeal, of the interpretation of the expression in section 52 (1) of “*interest in property*” as adopted by the court in *National Director of Public Prosecutions v Levy and others* (“*Levy*”)¹¹.

[25] In *Levy* the court found that:

“Section 52 of the Act permits a person with an ‘interest in the property’ to intervene in the forfeiture proceedings and the Court may then ‘exclude certain interests in property which is the subject of the order from the operation thereof’. *It was clearly the intention of the Legislature to protect the interests of innocent third parties who have become the victims of a fraudulent activity...*”.¹²

[26] The Constitutional Court held that this wide view of the concept of interests in property to include that of a victim of crime “*does not conflict with the overarching purpose of the POCA.*”

[27] I have especially related this view taken by our courts of the interests of innocent victims of crime to allay the applicants’ suggestion that the first respondent acted as a debt collection agent and unfairly promoted the second respondent’s cause by reimbursing the property to him, supposedly at its expense. I find nothing untoward by this approach and nothing patently objectionable was held up to me in argument. Indeed Mr. Razak who appeared for the applicants attenuated their concern by confirming that he was in no way indicating that the second respondent was not entitled to benefit “*fortuitously*” from the provisions of the POCA.

¹¹ [2004] 4 All SA 103 (W)

¹² *Levy supra* at [21].

[28] Concerning the applicants' absence from the proceedings which culminated in the granting of the exclusion order, the first respondent contended in the forfeiture application that it had been entitled to approach the court on a default basis, well at least in respect of the second applicant. The second respondent was indeed joined in the forfeiture proceedings as indicated above as an interested party. The second applicant's interest was also noted in the preceding preservation application, evidently because the "*targeted account*" belonged to the first applicant whose interests he was ostensibly representing and the "*clearly fraudulent manner*" in which the property came to be received in its bank account.

[29] This bias that the latter was complicit in the crime of fraud notwithstanding, but ostensibly to refute any suggestion that the applicants were not afforded procedurally regular judicial process, the first respondent alleges in the present application that the second applicant was properly served with the application papers, preservation order and notice of intention to make the forfeiture order thereanent and about this there is indeed no dispute.¹³

[30] However, despite the fact that the State Attorney representing the first respondent had received email correspondence from the second applicant's attorneys advising of the applicants' intention to oppose the forfeiture application¹⁴
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¹³ The first respondent says that the sheriff served the preservation order on the second applicant on 29 June 2023. The second applicant's attorney's intimation is that he received the papers and preservation order only on 6 July 2023. There is no official return of service. Notice of the preservation order was also published in the Gazette on 9 June 2023.

¹⁴ The first email was dated 13 July 2023. The first respondent merely stated the fact of receipt of such a letter in the forfeiture application but did not disclose its contents. The applicants attached it in the present application. In it the applicants' attorneys state that their client is the lawful recipient of the property in the targeted account and that they are not a party to the fraud but that the funds were received on account of goods sold and delivered.

under cover of the email also provided a notice of intention to oppose,¹⁵ the notice was in its view late and served irregularly,¹⁶ and the appearance deficient of the required affidavit in terms of section 39 (5) of the POCA, rendering the purported opposition “*fatally defective*”.¹⁷

[31] It was on this basis that the first respondent contended that the court hearing the forfeiture application was empowered to determine the matter, certainly *vis-à-vis* the second applicant, on a default basis as provided for in section 53 (1) of the POCA.¹⁸

[32] The latter section provides as follows:

“53(1) If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 48 (1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who entered appearances in terms of section 39 (3) have knowledge of notices given under section 48 (2), the Court may-

¹⁵ The Notice identifies the applicants as the first and second interested parties who wish to oppose the application for an order forfeiting the property to the State, claims that the first applicant is the owner of the account held with FNB (the targeted account), heralds that the interested parties will prepare an affidavit in response to the allegations in the *ex parte* application, to be filed “*in due course*”, and indicates who its attorneys are and what their contact details are.

¹⁶ Section 39 (4) of the POCA requires the appearance to be delivered to the NDPP within 14 days of service, or publication in the Gazette, as the case may be, of the preservation order. The notice was alleged to have simply been sent under cover of correspondence exchanged with the State Attorney on 17 and 24 July 2023 respectively, albeit it is dated 14 July 2023. Section 39 (4) requires delivery to the National Director who was represented in the POCA proceedings by the State Attorney. Notably it also does not “*contain full particulars for the delivery of documents concerning further proceedings under this Chapter*” as contemplated in section 39 (5) and read with the Uniform Rules of Court.

¹⁷ What was missing was the requisite affidavit (see section 39 (5)) that would speak to the nature and extent of the affiant’s interest in the property concerned and the basis of the defence upon which he intended to rely in opposing the forfeiture order or applying for the exclusion of his (or the first applicant’s) interests from the operation thereof.

¹⁸ The first respondent states that the applicants were indeed informed of the set down of the application. They were significantly however not served with the application.

- (a) make any order by default which the Court could have made under sections 50 (1) and (2);¹⁹
- (b) make such order as the Court may consider appropriate in the circumstances; or
- (c) make no order.”

[33] As for the factual basis on which the first respondent relied for the relief sought in the forfeiture application, it was again contended that the property that was subject to the preservation order made pursuant to the provisions of section 38 (1) of the POCA, were “*the proceeds of unlawful activities*” on the basis that had already been fully outlined in the preservation application and hence entitled the High Court to proceed on the basis provided for in section 50 (1) (b) of the POCA.

[34] I should add that the first respondent filed supplementary affidavits (in the forfeiture application) in which certain significant developments after the granting of the preservation order were also documented. These include the fact that the second applicant attempted to bribe the NDPP’s financial investigator to release the property under judicial restraint extra-curially. Interventions were also sought to be made by other persons who called the investigator to facilitate the release of the R3 000 000, including one Mr. Mathebula (“*Martin*”) associated with the Maharimani Loan Centre that received the payment of R3 700 000 in the second FNB account from Ms. Ncamane. These critical allegations were co-incidentally not engaged with by the applicants in the present application at all and stand unchallenged in effect.²⁰

¹⁹ The order contemplated under section 50 (1) is that the property is in the first place liable for forfeiture on one of the three recognized bases in this provision on the civil standard of proof. Subsection (2) makes provision for orders that are ancillary to the making of the primary forfeiture order.

²⁰ Since the applicants were not served with the application, I suspect that this is the reason the allegations did not come to their attention. Mr. Razak, on being apprised of the critical averments ostensibly for the first time during argument, imagined that his clients would have the opportunity to respond to them in “*the main application*”, assuming the rescission order was granted. This is however a misconception of what the provisions of section 53 (3) and (4) require, or provide.

[35] Whilst section 50 (1) (b) of the POCA permits the grant of a forfeiture order where a preservation order is in force in circumstances where the court finds on a balance of probabilities that the property concerned resorts in such a category of criminal property, this eventuality is however especially made subject to the provisions of section 52 of the POCA which allow for an application to be made to the High Court *when it makes a forfeiture order* to make an order excluding certain interests in property which is subject to the order, from the operation thereof.²¹

[36] The provisions of section 54 are also available to a qualifying party to apply after the grant of a final order for an order that his interest in the property concerned be excluded from the operation of the order, or varying the operation of the order in respect of such property, but these provisions are not relied upon by the applicants in the present application.²²

[37] Notwithstanding the distinction between the two kinds of applications, the jurisdictional requirements for each are identical in relation to property the subject of a forfeiture application that has come onto the radar as it were under the compass of POCA as “*the proceeds of unlawful activities*”.

[38] Interests that may be excluded are those that an interested party establishes on a balance of probabilities were legally obtained for consideration in circumstances where, at the time of the acquisition of such interests, the party

²¹ The ineluctable fate of such property otherwise is that it should be declared forfeit to the State on the accepted premise that no person should benefit from the proceeds of crime.

²² The applicants do not put themselves in such a category of persons, namely persons who are affected by a forfeiture order and who were entitled to receive notice of the application for the order under section 48 (2) but did not receive such notice. The first respondent suggested that the option was open to the applicants to rely on this provision, but that contradicts its premise that there was no entitlement on the applicants’ part to receive notice and enter the proceedings after filing a deficient notice in terms of section 39 (3).

neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities. In other words, the interest must have been acquired innocently, legally, and for consideration.²³

[39] The provisions of section 52, which the applicants contend are of application for present purposes, apply to two types of persons identified in sub-section (1) who may bring such an application. The first is a person who has given notice on the basis envisaged by section 39 (3) of his or her intention to oppose the application or to apply for an exclusion order. That person would have done so within the requisite period after having been served with the preservation order (on the basis of him or her being known to the NDPP as a person having an interest in the property which is subject to the order),²⁴ or after publication of the order in the *Gazette*.²⁵ The other kind of person is one who has qualified for a late entry of appearance under the provisions of section 49 (1).

[40] A party who invokes the machinery provided for under section 39 (3) of the POCA is expected to be served with a copy of the forfeiture application on 14 days' notice.²⁶ One who has been condoned under section 49 (4) would be entitled to participate on the basis of the court's order regulating such participation.²⁷ Both such persons would strictly have been expected to outline the basis for their participation in the forfeiture proceedings in the peremptory affidavit provided for in section 39 (5), the latter subsection providing as follows:

²³ Section 50 (1) (b) of the POCA.

²⁴ See section 39 (1) which requires that the National Director gives notice, as soon as practicable after the making of a preservation order to "*all persons known to the National Director to have an interest in property which is subject to the (preservation) order*". The second applicant was identified by the first respondent as such a person in the preservation proceedings.

²⁵ Section 39 (1) (b) of the POCA.

²⁶ Section 48 (2) and (3) of the POCA.

²⁷ Section 49 (4) (b) of the POCA.

“(5) An appearance under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and shall be accompanied by an affidavit stating—

- (a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his or her interest in the property concerned; and
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.”

[41] The timing and manner of giving notice is significant for POCA’s purposes. The court in *Van Zyl*²⁸ explains the purpose, and helpfully sets out the legislative scheme in this regard as follows:

“[12] POCA sets out notice and service requirements after a preservation order has been obtained. Section 39(1)(a) read with section 39(2) obliges the NDPP to cause a copy of the preservation order to be served on all persons known to have an interest in the property subject to the preservation order. The NDPP must also publish a copy of the order in the Government Gazette.²⁹ Both the service and publication must be done ‘as soon as practicable’.

[13] The purpose of dissemination of the preservation order is to enable any person who has an interest in the property ‘to enter an appearance giving notice of his or 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.’³⁰ Section 39(4) and (5) set out the details which must be provided by an interested party.

[14] Section 48(1) empowers the NDPP to apply for a forfeiture order in respect of the property subject to the preservation order. This must be done within 90 days of the date of the preservation order, failing which the preservation order lapses.³¹ Notice of the forfeiture application must be served on any interested party who entered an appearance in terms of s 39(3) giving 14 days’ notice of the forfeiture application.³² The notice requirement provides an opportunity to an interested party to oppose the application, to apply for exclusion an interest or to apply for the variation of the order.³³

²⁸ I have, for convenience, included the footnotes exactly as they appear in the excerpt.

²⁹ Section 39(1)(b).

³⁰ Section 39(3).

³¹ Section 40.

³² Section 48(2) and (3).

³³ Section 48(4).

[16] Section 49 permits (the) late entry of appearance by an interested party. An interested party who failed to enter an appearance in terms of section 39(3) may apply to court for leave to enter appearance late and must do so within 14 days of becoming aware of the existence of the preservation order. This application to enter late appearance must be done before or after the date on which the forfeiture application is made, but before the judgment is handed down. The court may allow a party to enter appearance outside time, provided that the interested party gave a sufficient reason for failing to enter appearance within the prescribed time frame and has an interest in the property under preservation order.³⁴

[42] In *National Director of Public Prosecutions v Botha N.O. and Another (“Botha”)*³⁵ the court emphasizes that the elaborate procedure that POCA prescribes which must be followed before an order of forfeiture is made is in particular “*in order to safeguard the rights in the property concerned*”. Hence section 48 obliges the NDPP to give notice of the application for forfeiture to every person who has recorded in terms of section 39 that they have an interest in the property in question. The benefit to such a person recognized for his/her/its interest is that once served with the papers, such person may appear at the hearing of the application and oppose the order of forfeiture or request that the operation of the order should exclude their interest in the property. Vitaly that person is entitled to adduce evidence at the hearing of the application.

[43] Although sensitive to the rights of parties with an interest in property that is the subject of a preservation order, the manner in which such a party engages with a forfeiture application is indeed also significant from the perspective of the NDPP. The details that are to be provided in the requisite notice in terms of section 39 (3) read with subsection (5) are indeed necessary to enable the NDPP to know on what

³⁴ Section 49(3).

³⁵ [2020] ZACC 6; 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) (26 March 2020) at [107].

grounds a forfeiture order will be opposed or on what grounds an application will be made for the exclusion of an interest in the property concerned.

[44] These provisions (and the late entry provisions outlined in section 49 of the POCA) evidently concern the position before judgment is given in respect of such an application for a forfeiture order and will have the desired result that such a person will be qualified to appear at the hearing of the application and adduce evidence concerning the explicit issues that have been framed so to speak in the mandatory affidavit required.

[45] An affidavit is also required to accompany an application contemplated by the provisions of section 54 of the POCA that follows the granting of a forfeiture order by a party seeking after the fact to exclude his or her interest in the property concerned from the operation of the order or varying the operation of the order in respect of such property. The need for such an affidavit is also expressed in mandatory terms and is required to set forth the nature and extent of the applicant's right, title or interest in the property concerned; the time and circumstances of the applicant's acquisition of the right, title or interest in the property; any additional facts supporting the application; and the relief sought.³⁶

[46] In *Karas Auto Spares v The National Director of Public Prosecutions* ("*Karas Auto Spares*")³⁷ the court expounded upon the purpose of section 39 (5) in the context of a party's failure to have strictly complied with its provisions, as follows:

³⁶ Section 54 (2) of the POCA.

³⁷ (618/2016) [2017] ZAECPEHC 11 (2 February 2017).

“[18] It seems to me that the purpose of s 39 (5) of POCA is to enable the respondent to know as soon as possible on what grounds a forfeiture order will be opposed or on what grounds an application will be made for the exclusion of an interest in the property concerned. These grounds, especially in the latter case, will often be within the exclusive knowledge of the party opposing the forfeiture order or applying for the exclusion of an interest in the property and the purpose of the civil forfeiture may be thwarted if the respondent has insufficient time to prepare to meet the opposition or the application. This purpose would be negated if the absence of the s 39 (5) affidavit did not render the s 39 (3) notice a nullity, and would render s 39 (5) meaningless and superfluous. Moreover there is no remedy available to the respondent if s 39 (5) is breached. The fact that affidavits would be filed in opposition to forfeiture or in support of an application to exclude an interest, is not a remedy in the sense alluded to in *Steenkamp (supra)*. If non-compliance with s 39 (5) did not render the s 39 (3) notice a nullity, it would mean that s 39 (5) “may be breached with impunity.”

[19] It follows that I am of the view that the applicant is not a person who entered an appearance in terms of s 39 (3) of POCA and service on it was not required in terms of s 48 (2).”

[47] Mr. Myburgh, who appeared for the first respondent, was also concerned to bring to this court’s attention the stance adopted by the North Gauteng High Court in *NDPP v Jabbar and Another*³⁸ in which it was held that section 39 (5) of the POCA requires strict compliance and a parties’ non-compliance therewith is “*fatally destructive to its case*”. It was on this point alone he mused that both the rescission and exclusion applications ought to be dismissed.

[48] Since the applicants did not properly qualify themselves, so it was contended, they had no *locus standi* to bring the present application. Such an argument however misses the claw back for exactly such a party to either apply for rescission under section 53 (3) of the POCA, or to apply for the exclusion under the mantle of section 54 open to qualifying parties, no doubt in recognition of the purpose of the elaborate procedure outlined in section 48, as referenced in *Botha* above.

³⁸ Unreported judgment of the Gauteng Local Division, Pretoria, Case No. 25640/2004, per Makhafola AJ, dated 18 October 2025.

[49] In this instance the preservation order and notice were indeed served on the second applicant and both respectively appear to conform in all respects with what the provisions of POCA require. The preservation order also invited the first applicant, evidently as an additional precaution, to apply for reconsideration of the *ex parte* order as is provided for in terms of Uniform Rule 6 (12)(c).

[50] None of this really matters, say the applicants, because they could not afford legal representation at the time, more especially since the monies, which they say they were lawfully entitled to in their bank account, were prohibited from use by the preservation order. They also bemoaned the fact that they were hard pressed for time once the preservation order was served on the second applicant in relation to the date of the hearing of the forfeiture application and appear to assert, quite bizarrely, that it was necessary to first confer with the Mr. Mathebula (Martin) of the Loan Centre before them in the trajectory of the money flow to request an explanation from him of the transactional history preceding the deposit of the property into the first applicant's bank account, this supposedly with a view to confirming that the second applicant was at arm's length from Mr. Mathebula and not acting in concert. The latter confirmation only came to them in the form of a letter received from the latter's attorneys early September 2023.

[51] The notice accompanying the preservation order that was served to the applicants indicated, as it must, that the appearance had to comply with the provisions of section 39 (3), (4) and (5) of the POCA; drew attention to the time limits; and invited the applicants to properly enter an appearance if they wished to be afforded the benefit of being given 14 days' notice of the application by the first respondent for a forfeiture order in respect of the property and to be entitled to

appear at the hearing thereof, failing which it was made plain that neither benefit would pertain and that the court would be entitled to grant a default order forfeiting the property to the State under the provisions of section 53 of the POCA.

[52] The applicants do not complain in this instance that they were entitled to be served with the forfeiture application, neither do they really argue against the first respondent's stance that they in effect waived their right to be recognized as parties properly qualified to oppose the forfeiture proceedings.³⁹ What they simply say again is that they did not have the means at their disposal at the time to engage with legal counsel and formally present their case, and that time was significantly against them.⁴⁰

[53] Whilst the courts took a hard line in *Karas Auto Spares* and *Jabbar* that the provisions of section 39 (5) of the POCA are peremptory and non-compliance with its provisions fatal, interested parties who have sought to be recognized in POCA proceedings after the fact have not consistently been denied an audience or a late opportunity to seek an exclusion of their interests in property concerned. Even in *Karas Auto Spares* the court attenuated the adverse effect of its finding that the applicant in that matter was "*not a person who entered an appearance in terms of section 39 (3) of POCA and (that) service on it was not required in terms of section 48 (2)*" by allowing for the possibility that it might be wrong in this conclusion, and in effect going on to deal with the merits of its claim that its interest in a motor vehicle be excluded from the operation of a forfeiture order or that its terms be varied.

³⁹ It would be remiss of this court not to point out that section 48 (2) of the POCA requires the National Director to give 14 days' notice of a forfeiture application "*to every person who entered an appearance in terms of section 39 (3)*". No mention is made of subsection (5). In this instance however the first respondent also complains that the notice of appearance was not even filed at court.

⁴⁰ They had certainly attempted informally to make their case in email correspondence addressed to the State Attorney, although in the tersest of terms.

[54] *Van Zyl* of this Division provides another example of this court's deference shown to an interested party by choosing substance over form and not non-suiting him in circumstances where the procedure adopted by him in advancing his interest in the property concerned had been found to be irregular by the absence of a formal appearance in terms of section 39 (3) or a proper and timeous application by him in terms of section 52 (1) of the POCA. It appears that the NDPP had instead supported the exclusion of his interest in the property to be forfeited and relied on an affidavit deposed to by him in this respect but without him having sought the leave of the court to note an appearance out of time before filing his affidavit. The irregularity noted in that matter was as a result of the assurances given to that applicant that the NDPP would endorse the exclusion of his interest in the property concerned but was also due to the NDPP's failure to have fulfilled their service obligation in respect of the applicant (in terms of section 39 (1) and (2)), despite him having been a person known by the NDPP to have an interest in the property. The court noted that, whilst not in the form of an application to court to note a late appearance, the applicant's affidavit, which had outlined his position as the victim of the crime and given a context to his interest in the property, met the requirements of section 49 (3) of the POCA in substance. It noted further that the NDPP had suffered no prejudice because of the absence of a formal application given the fact that it supported the exclusion of the applicant's interest in the property.

[55] By parity of reasoning, such deference ought to be shown to any person belatedly seeking to vindicate an interest in the property concerned who properly motivates such a request, not just an "*owner*".

[56] In *Prinsloo N.O and Others v NDPP*,⁴¹ the court noted that the requirement that a potential litigant should file a formal appearance was not “*sacrosanct*”, and that the purpose of section 39 is “*not to bar the door to people who have a bona fide interest in the property, and who may wish to oppose its forfeiture to the State.*” In that matter the court refused to non-suit the parties *qua* liquidators who applied for leave to intervene in the forfeiture proceedings rather than following the procedure for seeking late appearance as provided for in section 49, accepting their approach as being “*in substance*” on a par with an application under its provisions. The court also noted the absence of any real evidence of prejudice to the NDPP by the failure on the part of the liquidators to have followed the strict letter of the procedure provided for in sections 39 (3) or 49 of the POCA.

[57] I do not intend to make any determination on the issue of whether the applicants ought in fact to have been served with the forfeiture application, given their acceptance that they are tardy in coming to the party after the fact for their own reasons, but I merely raise the concern that despite knowing and recognizing the applicants’ potential interest in the property and the fact that they purported to indicate their desire to enter an appearance, the first respondent consciously chose not to give them notice of the application, adjudging for herself that the applicants’ appearance was deficient in the several respects relied upon. I also point out the anomaly in this matter that the first respondent’s bias in favour of the second respondent was sealed⁴² by the amplified information in the forfeiture papers that

⁴¹ Unreported judgment of the Gauteng Local Division, Johannesburg, Case no 7907/20, per Keightley J, dated 10 December 2020, at [95].

⁴² It was inevitable that the court hearing the forfeiture application would on the basis of the supplementary affidavits have been more inclined to accept that the first respondent had shown that the property was probably the clear proceeds of crime (first stage of the enquiry) and that the applicants were probably not innocent in the whole scheme of things (second stage of the enquiry).

pointed away from the applicants being “*innocent owners*” in the money flow.⁴³ The applicants were quite evidently not informed of these allegations which would have pushed the court to determine that only the second respondent’s claim to the property mattered.

[58] It occurs to me to be inimical to the purpose of the elaborate forfeiture process indicated by section 48, exactly to safeguard the rights of parties to an interest in the property concerned, to impose the construct, as it were, that the applicants should not be regarded for purposes of section 48 (2) of the POCA as persons who had in fact entered an appearance in terms of section 39 (3) for want (in the first respondent’s own estimation) of their failure to have complied with the provisions of section 39 (5) of the POCA when the first respondent had herself identified the second respondent as a person with a qualifying interest even if she was convinced that it was axiomatic to the State’s case that such an interest could be a legitimate one. Such a fiction not only damns a party wishing to oppose the proceedings or seek an exclusion of their interest in the property concerned from being unable to participate in a full hearing as envisaged in section 48 (4) of the POCA, but also puts the applicants outside of qualifying under section 54 to apply after the conclusion of the forfeiture proceeds to vindicate their position under these provisions, because they will be unable to assert (on the basis of the fiction)

⁴³ It is logical that the applicants would have been unaware of these crucial allegations because the papers since the papers were not served on them. The court hearing the forfeiture application would probably have accepted that they had nothing to offer by way of opposition to either premise that the NDPP had established on a balance of probabilities that the property was the proceeds of unlawful activities, or that the second respondent had established that he was entitled to have his interest in the property excluded from the operation of a forfeiture order because he was the “*owner*” of the property, and the victim of the underlying crime. The preservation papers, if these were even served on the applicants, would incidentally have forewarned only in the briefest of terms that the first respondent intended to assist the second respondent by way of a restorative justice endeavour to reimburse the property to him as the victim of the crime in competition with the first applicant or any other party’s potential claim for an exclusion of interests that might come. That having been said, the adverse allegations, now known, can hardly be wished away.

that they ought to have been served with notice of the application, but did not receive notice.

[59] The further thought occurs to this court that consciously not serving *known* parties with an interest, who have in substance purported to explain what that interest entails, may brook interference on the basis provided by rule 42 (1) (a) of the Uniform Rules of the High Court on the basis that the order was “*erroneously sought or erroneously granted in the absence of any party affected thereby*” which would not require good cause to be established for such a rescission or variation.⁴⁴ Whilst being mindful of the caveat expressed in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*⁴⁵ that a court should be wary of litigants artfully pleading and staging the “*absent victim*” in situations where the judicial process in all other respects has been carried out with “*the utmost degree of regularity*”,⁴⁶ it is of concern that the applicants seem to fall somewhere between the dividing line of sections 53 (3) and 54 (1) remedy wise.

[60] Perhaps the answer lies in exactly where the applicants themselves say they see their remedy, and why they locate themselves there.

[61] In this instance, the applicants take it on the chin that they did not follow the requirements of the POCA in qualifying themselves as persons entitled to appear at the hearing of the forfeiture proceedings and that they must vindicate their position

⁴⁴ This is in effect the purport of section 54 of the POCA because such persons affected by a forfeiture order would have been entitled, legally and procedurally, to have received notice of the application, but did not. Quite evidently the late opportunity afforded to a qualifying person under this section does not require him or her to show good cause. See further the commentary of *Erasmus: Superior Court Practice* regarding the provisions of Rule 42 (1) (a) and the cases cited there at RS 26, 2025, D1 Rule 42.

⁴⁵ 2021 (11) BCLR 1263 (CC).

⁴⁶ At [60]. In order to avoid disputes in procedural issues such as these, perhaps the best course of action open to the first respondent is to simply serve the forfeiture application on the “*wrongdoer*” as well.

after the fact by seeking a rescission under the provisions of the POCA. What they do not do, however, is name or claim their shortcomings by not having followed the laid out procedure or ask for condonation in any respect at all. This makes it very difficult for this court to come to their assistance even if it is sympathetic to the fact that they are at a disadvantage by having missed an opportunity to participate in the hearing (and missed being copied in on the supplementary papers), because they were not given notice of the application.

[62] On the subject of condonation, the first respondent raised an *in limine* objection that the applicants have not prayed for condonation, but the focus of her complaint is limited to the supposed fact that the present application ought to have been brought within 20 days of *the date of the granting of the exclusion order*, which she assumes equates to the date upon which the applicants acquired knowledge of the order.⁴⁷ This assumption is ironically based on the first respondent's claim to have given the applicant's notice of the set down, although not having served them as an interested party with the application itself.⁴⁸

[63] If I may dispose of the first respondent's narrow, and only objection on the subject immediately, the applicants contend contrariwise that they did not receive a copy of the exclusion order until their attorney sought a copy thereof from the State Attorney under cover of a letter dated 8 September 2023. They bemoan the fact that, although they were cited as an interested party in the preservation application, they were not automatically copied in on the order. The preservation and forfeiture order were evidently emailed to their attorney on 11 September 2023. (The applicants say the 13th). The founding papers and Notice of Motion are

⁴⁷ The first respondent merely alleges that the applicants became aware of the order since its granting on 1 August 2023 without suggesting how, except that elsewhere she asserts that the NDPP “*set the matter down for hearing and informed the Applicants of the Court date*”.

⁴⁸ Merely serving a notice of set down without the founding papers was seemingly pointless.

dated 26 September 2023, but there is no indication that the application was “*issued*” by the Registrar on this date and the applicants do not state pertinently when the present application was launched in order to have met the 20 day requirement set forth in section 53 (3) of the POCA.⁴⁹ The sheriff served the application on the first and second respondents on 10 and 6 October 2023 respectively. Even on the applicants’ version that the knowledge implicated by section 53 (3) arose on the 13th, the application was served on the first and second respondents (and not even on the third) more than 20 calendar days later, with no excuse offered let alone a formal request for condonation.

[64] Again, although this court has guarded sympathy for the applicants’ exclusion from participation in the proceedings, I think it is a fair submission by the first respondent that, absent a proper application for condonation, their application should fail.

[65] Although the mechanism for the late entry of an appearance under section 49 concerns an application that is required to be made before judgment is given in respect of an application for a forfeiture order, the jurisdictional requirements for the successful granting of leave in such a case, helpfully speaks to the kind of good cause that such a party is required to show to be allowed as a basic minimum to participate in the hearing of a forfeiture application where such an opportunity has been missed. The first requirement is to demonstrate that such applicant has “*for sufficient reason*” failed to enter an appearance in terms of section 39 (3), and the second is that such person has an interest in the property which is (at that stage)

⁴⁹ The parties have used the same case number utilised in the POCA proceedings which probably explains why the process was not issued before it went to the sheriff for service. The registrar’s stamp on the face of the Notice of Motion says “2024-08-02”. The first respondent stated in her answering affidavit that the Notice was “*filed*” on 27 September 2023, but this is not indicated in the court file.

subject to the preservation order. The import of a court granting leave to an applicant under these provisions would be in the nature of granting condonation, which the applicants do not ask for in the present application, let alone expound upon in the context of a request to be condoned.

[66] If I may be so bold as to state, the applicants do not appear to know exactly why they are in the predicament that they are in, neither do they appreciate what hurdles need to be overcome to put them in a position where the court may come to their assistance in belatedly vindicating their claimed right or competing interest in the property. This court must, however, steel itself against making a case for the applicants which they appear less concerned to do for themselves.

[67] The applicants accepted that in order to persuade this court that they have a *bona fide* defence and prospects of success in this matter, they would also have to “*speak to the remedy found in terms of section 52 of POCA.*” In this respect they would have had to convince this court that they have an interest in the property, which is of the kind, in relation to the forfeiture of the proceeds of unlawful activities, that a court is likely to find ultimately on a civil standard it acquired innocently, legally and for consideration.⁵⁰

[68] Given the unchallenged evidence put forward by the first respondent, I am inclined of the view held by her that a court in an enquiry to assess if the applicants’ professed interest in the property is legitimate would hardly be able to find in their favour in this respect. The forensic flow of the money indicates to the contrary that the monies were not legally acquired as contended for by them. The evidence that the applicants purport to put forward with a view to establishing

⁵⁰ Section 52(2) of the POCA.

likely success in the requisite enquiry does not say what the second respondent imagines it says.

[69] The first respondent is indeed astute to question the supposed documentation provided on the basis that dates and figures are not aligned, are misleading, and or are inconsistent with the so called patterns, or facts, sought to be established thereby.

[70] The applicants are required to show cause now and to raise a plausible response to the adverse allegations against them in the preservation and forfeiture applications. They appear to labour under a misapprehension that whatever they cannot say now will miraculously present itself in a full hearing if they are belatedly allowed to participate in an enquiry down the line. The fate of the outcome of that enquiry is, however, already quite apparent.

[71] Before concluding, the first respondent raised as further point *in limine* the applicants' failure to have interdicted the second respondent and "*impossibility*" since the applicants also prayed for an ancillary order in the present application that the monies reimbursed to the second respondent be recovered from First National Bank, the appointed curator *bonis*, pending the exclusion enquiry they imagined they would be able to participate in if successful in being granted the primary relief sought by them rescinding the default order. Firstly, it is hardly appropriate to hold up impossibility as a reason why in a deserving case where an exclusion order needs to be revisited this should not happen because the POCA in fact makes provision for the variation of such orders so as to make allowance, obviously after the fact, for orders excluding a party's interest in property concerned from the operation of a forfeiture order, where the property's destiny

otherwise would be that it is declared forfeited to the State.⁵¹ The fact that money as opposed to tangible property is concerned is neither here nor there. Further the fact that one party's interests have been excluded, but not the party who applies for exclusion after the fact, is also irrelevant. In practice courts are often called upon to decide competing interests after granting forfeiture applications, which requests the POCA envisages be determined both expeditiously and in a consolidated hearing.⁵² Secondly it is not the interdicting of the reimbursed victim that is necessary, but the vital joinder of the curator *bonis* who is under obligation under POCA's provisions to give effect to the court's variation orders wherever these may arise.⁵³

[72] Despite not upholding the latter objection, the first respondent has been substantially successful in opposing the application and is entitled to her costs.

[73] I issue the following order:

1. The application for rescission is dismissed.
2. The first applicant is liable for the costs of the failed application.

B HARTLE

⁵¹ Sections 52 and 54 of the POCA.

⁵² Section 54 (3) and (4) of the POCA.

⁵³ See footnotes 2 and 3 above. See also section 54 (6) and (7) that point to the role that the curator plays in applications for the exclusion of interests, after the granting of a forfeiture order.

JUDGE OF THE HIGH COURT

DATE OF HEARING : 30 January 2025

DATE OF JUDGMENT : 14 August 2025

Appearances:

For the applicants: Mr. M Y Razak instructed by Yousha Tayob Attorneys, Johannesburg c/o Malusi & Co. Attorneys, East London (ref. Yousha/3795/TY).

For the first respondent: Mr. W Myburgh instructed by the State Attorney, East London (ref. Ms. AS Sakasa 57/2023).

For the second respondent : Nil.

For the third respondent : Nil.