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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2024-015452**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

In the matter between:

PRIDE MUSA KUPHE

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

PARK VILLAGE AUCTIONS (PTY) LTD

Second Respondent

In Re: *Ex parte application by The National Director of Public Prosecutions*

JUDGMENT

MATTHYS, AJ

Introduction

[1] The applicant, Ms. Kuphe, approached the court in terms of Rule 6 (8) of the Uniform rules of court, for the reconsideration and discharge of a preservation of property order (preservation order). The order, granted ex parte on 22 February 2024, by Malindi J in favour of the first respondent, the National Director of Public Prosecutions (NDPP), preserves her silver Toyota Fortuner

(reg. no. B[...]).¹ The vehicle is preserved under section 38(2) of the Prevention of Organised Crimes Act (POCA)² and is being held for safekeeping by the second respondent, Park Village Properties (PTY) LTD.

[2] The following issues are required to be determined:

- a. Whether it was appropriate for the NDPP to bring an ex parte application for the preservation of property order granted on 22 February 2024;
- b. Whether the applicant's reconsideration application, brought after a forfeiture application has been issued and given her failure to properly oppose the pending forfeiture application in terms of section 39 of the POCA is still an available remedy to the applicant.
- c. Condonation for the late filing of the reconsideration application.³

Background

[3] A brief reference to the salient background facts needs to be made to provide context. It is undisputed that the applicant's vehicle is one of two vehicles preserved under the order. Both vehicles were seized by the South African Police, under case docket Sandringham CAS 208/10/20234⁴, which relates to crimes of kidnapping and robbery committed on 23 October 2023.

[4] The preservation order was granted based on affidavits submitted by the NDPP, including those from Deputy Director of Public Prosecutions S'Khumbuzo Maphumulo; SAPS members (Sergeants Ndlovu, Masemene, and Constable Henderson); a member of the public (Mr. Dube); a Community Active Protection (CAP) employee (Mare Saul Shapiro); and the victim (Mr. De Freitas). In the current application, the NDPP supplemented this evidence with an affidavit by Carel Dreyer Rothman, an expert fleet administrator at Car Track Pty Ltd.

¹ Fully described as registration number B[...], VIN A[...]; engine number 1[...].

² Act No. 121 of 1998.

³ The question of whether the evidence establishes reasonable grounds to believe the property is an instrumentality of the offences will be discussed in the context of condonation- prospects of success.

⁴ SAP13 reference numbers: 13/4980/2023 and 13/4981/2023.

- [5] The NDPP's evidence details that on the evening of 23 October 2023, around 19:08 in Lyndhurst, Mr. De Freitas was kidnapped and robbed at gunpoint by suspects using a Toyota Fortuner and an accompanying red VW Polo. The suspects kidnapped Mr. De Freitas in the Toyota Fortuner to 4[...] B[...] Street, N[...] P[...], where they held him captive. His affidavit states that he was told he would only be freed if his family paid a R10 million ransom.
- [6] It is not disputed that police investigations on 24 October 2023, confirmed the kidnapping of Mr. De Freitas which was captured on VUMACAM cameras, mounted in Lyndhurst. Mare Saul Shapiro of CAP analysed this footage, along with camera footage from cameras mounted in public areas between L[...] and B[...] Street, N[...] P[...]. Shapiro's analysis of the camera footage confirmed, the suspects used a Toyota Fortuner and a VW Polo. Both vehicles were tracked to 4[...] B[...] Street, N[...] P[...]. At this address, the police rescued Mr. De Freitas, arrested four males, and seized the red VW Polo.
- [7] Also, on 24 October 2023, the police learned that the Toyota Fortuner used in the kidnapping bore the false plate K[...], but that its true registration was B[...]. This intelligence led the police to the vehicle in Hillbrow. The applicant and a Mr. Mota were found seated in the Fortuner (reg. no. B[...]), they were arrested, and the vehicle was seized.
- [8] The fact that the applicant's seized Toyota Fortuner has a car tracker is not in dispute. To address this, the NDPP submitted the affidavit of Carel Dreyer Rothman, an expert fleet administrator at Car Track Pty Ltd. Mr. Rothman's affidavit includes a detailed trip report for the applicant's Toyota Fortuner (reg. no. B[...]) from the 1st to the 24th of October 2023. This report shows that on the evening of 23 October 2023, the vehicle's tracker placed it in the Lyndhurst area and later at Bafadi Street, Norkem Park, where Mr. De Freitas was held and rescued.
- [9] The applicant's case rests solely on her own affidavits. She claims she used her Toyota Fortuner, to generate income by hiring it out and transporting goods for a kitchen she rents in Hillbrow. She also transported her minor daughter to

school. She asserts that the income generated supported herself, her daughter, and three other family members.

- [10] Since being deprived of the vehicle, she has experienced financial difficulty, she has struggled to pay her daughter's school fees, their monthly rent, and other daily necessities for her dependents.
- [11] The applicant avers that the NDPP failed to establish a case for the preservation order granted, because there is no nexus between the crimes committed and her vehicle or herself. In this context, she challenges the colour description of the vehicle, noting that her vehicle is silver and bronze, not "only bronze or champagne" as described by the NDPP's witnesses, Mr. De Freitas (the victim) and Shapiro (the footage analyst).
- [12] The applicant denies that her Toyota Fortuner was that used in the commission of the crime. Yet, in her replying affidavit, she states that on 23 October 2023, she lent the vehicle to her boyfriend around 18:30 in Berea, Johannesburg. He claimed he needed it for a client in Yeoville to pull a trailer. He returned the vehicle to her Westdene residence at approximately 22:00 that night. It is her evidence that she was not involved in the crimes and that she possesses video footage to prove she was at home at the time.
- [13] Crucially, she avers that on 12 February 2024, the investigating officer in the criminal case, testified that a police vehicle, not a Toyota Fortuner, pulled over the victim's car, and that his investigation concluded that she was not a participant in the crimes.
- [14] She submits that the NDPP failed to disclose during its ex parte preservation application, the investigating officer's testimony, which was averse to the NDPP's case. Further, that this failure constitutes a breach of the mandatory duty of an ex parte litigant to disclose all known facts, violating the principle of uberrima fides. The applicant further challenges the preservation order, arguing that the NDPP's ex parte application procedure, violated her fundamental right to be heard (*audi alteram partem*).

- [15] Following the granting of the preservation order on 22 February 2024, the order and the ex parte application were served on the applicant on 17 May 2024. According to the evidence, the applicant received and perused the order but did not fully understand its contents. She then met with the investigating officer, Sergeant Ndlovu, during the week of 20 May 2024. She gave him the served documents, expecting him to revert to her regarding its contents. When the investigating officer failed to revert by 3 June 2024, she instructed her attorneys.
- [16] Her attorney obtained the papers from the investigating officer on 6 June 2024 and that same day filed a notice to oppose. However, the notice was defective because it lacked the required affidavit under section 39(5) of the POCA . The applicant states that her attorney was only able to consult with her on 11 June 2024, when she informed him of the investigating officer's testimony presented in the criminal court, on 12 February 2024.
- [17] The attorney then sought a transcript of the criminal court proceedings, for the current application. It transpired that due to the applicant's failure to file her mandatory section 39(5) affidavit (opposing a forfeiture application) the NDPP issued an unopposed forfeiture application on 4 July 2024.
- [18] Notwithstanding, the applicant then delivered this reconsideration application on 11 July 2024. On 16 July 2024, the State Attorney wrote to the applicant's attorney, stating her notice to oppose was defective for failing to comply with section 39(3), (4), and (5) of the POCA. The State Attorney further wrote that, due to the applicant's defective notice to oppose, the NDPP was not obliged to serve the forfeiture application on her, citing section 48(4) of the POCA.
- [19] The State Attorney contended that the applicant lacked the necessary locus standi to oppose the forfeiture. Additionally, they reasoned, that the applicant's reconsideration application filed on 11 July 2024 (after the forfeiture application), was irregular. The State Attorney suggested the applicant withdraw her reconsideration application and comply with the legislative prescripts, if she elected to oppose the forfeiture application.

[20] The applicant's attorney replied on 23 July 2024, by proposing a compromise, that the reconsideration application's founding affidavit serve as the opposing affidavit for the forfeiture application and that the forfeiture application be set down on the opposed motion roll.

[21] In response, the State Attorney sought an undertaking from the applicant's attorney, that the reconsideration application would be withdrawn. This undertaking was not provided by the applicant's attorney, as the State Attorney's letter was interpreted as a rejection of the applicant's proposal made on 23 July 2024.

Discussion

[22] This matter must be approached within the following legal context. In *National Director of Public Prosecutions and Another v Mohamed NO and Others*⁵, the Constitutional Court clarified the distinction between the two forfeiture regimes in the POCA- that Chapter 5 (sections 12–36) concerns the forfeiture of crime benefits and is conviction-based, while Chapter 6 (sections 37–62) concerns the forfeiture of crime proceeds and instrumentalities and is not conviction-based, allowing invocation even without a prosecution.

[23] This application resorts within the purview of Chapter 6. Therefore, the proceedings are in rem aimed at the property itself and not the guilt of its owner or possessor. Thus, Chapter 6 establishes the legal fiction that the property is condemned in rem, treating the inanimate asset as though it were a conscious offender.⁶

[24] It is further important to keep in mind, that the civil forfeiture procedure under Chapter 6 of the POCA, comprises of two distinct, yet interrelated, stages. The first stage is the preservation stage and the second stage the forfeiture stage.⁷ The standard of proof is a key difference between the preservation and forfeiture stages. A preservation order, under Section 38(2) of the POCA, only

⁵ *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC) para 16.

⁶ *Mohunram and Another v National Director of Public Prosecutions and Another* [2007] ZACC 4; 2007 (4) SA 222 (CC) para 118.

⁷ The forfeiture stage is triggered when a preservation order is in force, and when the NDPP must apply for a forfeiture order under section 48 of the POCA.

requires the Court to be satisfied that there are reasonable grounds to believe (Prima Facie) that the property is an instrumentality of a Schedule 1 offence or the proceeds of unlawful activities.⁸ However, the standard escalates for a forfeiture order which is granted only if the Court finds, on a balance of probabilities, that the property is tainted.⁹ Furthermore, the forfeiture stage allows interested parties to oppose the application via the "innocent owner" defence and requires the Court to consider proportionality.¹⁰

[25] Accordingly, as this matter concerns the reconsideration of a preservation order, the applicable dictates are those pertaining to the preservation stage. Against the stated legal framework, I now revert to the issues raised by the parties.

Whether it was appropriate for the NDPP to bring an ex parte application for the preservation of property order granted on 22 February 2024

[26] The applicant contends that the NDPP acted improperly by launching the preservation of property application ex parte, thereby depriving her of her right to be heard. The decision in *Mohamed* is critical to resolve this issue, as the case specifically addressed a constitutional challenge to section 38 of the POCA, which permits the NDPP to obtain a preservation order by way of an ex parte application.

[27] It was held in *Mohamed*, that ex parte applications for a preservation order are permissible.¹¹ Crucially, it was found that the audi alteram partem principle is not denied but merely deferred until after the preservation order is granted. Consequently, a High Court granting an ex parte preservation order, must issue a provisional order in the form of a rule nisi, calling upon interested parties to show cause, why the order should not be made final. So doing the court held,

⁸ *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189 as qualified in *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688 C-E.

⁹ See section 50 of POCA.

¹⁰ In *Mohamed* footnote 5 above at paragraph 19, the following observation is made:- "At the forfeiture stage of the proceedings an owner can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ("the innocent owner" defence). Also see National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC) at para 18

¹¹ Because of the risk of asset dissipation, the purpose of the preservation order to secure the assets would be defeated, if the affected party received prior notice.

that the affected parties' rights to challenge the order, before the forfeiture application is determined, is secured through both Uniform Rule 6(8)¹² and an application to vary or rescind the order under section 47 of the POCA.

[28] At paragraph 33 in *Mohamed*, the court made the following striking statement: -

"It sanctions a particular initiating procedure to be employed when relief of a particular nature is being sought. An important consequence of this is that an application by the National Director under section 38 can never be dismissed solely on the ground that it has been brought ex parte".

[29] Guided by the authority referred to, the contention by the applicant in this regard, cannot be upheld.

Whether a reconsideration application, is still an available remedy to the applicant

[30] The NDDP argued, that a reconsideration application is unavailable to the applicant, due to her failure to properly oppose the pending forfeiture application in terms of section 39(5) of the POCA. This contention is equally unfounded, as the decision in *Mahomed*, is clear that there is no bar from bringing a reconsideration application, albeit that the notice to oppose a pending forfeiture application is defective.¹³ The applicant retains the right to challenge the preservation order, any time prior to the determination of the forfeiture application.¹⁴ The applicant is however obliged to obtain the required condonation for the late filing of her reconsideration application.

Condonation

¹² Which allows for the anticipation of the return day of the rule nisi.

¹³ ***Mahomed*** at paragraph 20 "Chapter 6 also provides other opportunities to affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a person who is affected by a preservation order made in respect of immovable property may apply for the order to be rescinded and the High Court shall rescind the order "if it deems it necessary in the interests of justice" to do so. Section 47(1) provides, in respect of movable property, that a High Court may, on the application of an affected party, vary or rescind the preservation order "if it is satisfied" that the order will "deprive the applicant of . . . reasonable living expenses and cause undue hardship for the applicant; and . . . the hardship . . . outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred".

¹⁴ Consider that section 49 of POCA go as far as to allows affected parties to apply to the court for leave to enter late appearance in respect of a pending forfeiture application. Section 49 (1) and (2) provides- (1) Any person who, for any reason, did not enter an appearance in terms of section 39(3) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for leave to enter such an appearance. (2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 48(1), but shall be made before judgment is given in respect of such an application for a forfeiture order.

[31] The applicant requests condonation for the late filing of the reconsideration application. She failed to within 14 days of the service of the preservation order, anticipate a hearing as allowed by Rule 6(8). Consequently, the application, due on 6 June 2024 was filed late on 11 July 2024, resulting in a delay of one month and five days.

[32] Generally, condonation will be granted only if it serves the interests of justice. To make this determination a court must weigh all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the applicant's explanation, the prospects of success, the potential prejudice to the other party and the effect on the administration of justice.¹⁵ The applicant's prospects of success are but only one of the factors relevant to the exercise of the court's discretion. The cumulative effect of the relevant factors in the case should be decisive and where it is found on the non-observance of the court rules has been gross, condonation shall not be granted, whatever the prospects of success might be.¹⁶

[33] I considered that the applicant failed to submit a substantive application for condonation as envisaged by Rule 27(1) which provides:-

- a. In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

[34] Instead, the applicant's reasons for condonation are scantily embedded in her founding affidavit (for reconsideration of the preservation order) giving the appearance of an afterthought. On this basis the application for condonation in itself is in violation of the rules of court.

[35] It is a trite principle that an applicant for condonation must furnish a full, detailed, and reasonable explanation that covers the entire period of the

¹⁵ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC).

¹⁶ *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281 J- 282 A.

delay.¹⁷ In my considered view the applicant's explanation fails to meet these essential requirements.

[36] The applicant's initial choice to approach the investigating officer for guidance, rather than a legal practitioner (as she was advised by the order served) was objectively unreasonable. Further, her account is vague as to the specific date she delivered the documents to the investigating officer during the week of 20 May 2024. She fails entirely to account for her inaction or any steps taken during the intervening period until 3 June 2024, when she eventually instructed her attorney.

[37] Furthermore, no explanation is advanced for the lack of full compliance with the requirements of section 39 of the POCA, which were explicitly set out in the order. This is important regard being had to the nature of the litigation. In *Knoop NO and Others v National Director of Public Prosecutions*¹⁸ at paragraph 42 the Supreme Court of Appeal reiterated the import of time bars in litigation of this nature and made the following observation:-

“ Inherent in Chapter 6 of POCA is the recognition that forfeiture should proceed without undue delay. This explains the fourteen-day limit for a person to enter an appearance after receipt of notice of the preservation order, as well as the cut-off of ninety days for the institution of a forfeiture application. The aim is to progress towards the forfeiture stage as soon as possible. In this, the scheme is pragmatic and serves the interests of justice. It is at the forfeiture stage that a person with an interest in the property has the opportunity to participate in the proceedings to defend their interests. Thus, it is to their benefit that this opportunity should not be delayed”.

[38] Beyond the foregoing, the applicant's mere assertion that her attorney could only consult with her on 11 June 2024, is insufficient as no explanation for that impediment has been tendered to the Court. The inherent deficiency of the condonation application is exacerbated by the delay incurred in obtaining the criminal court transcript. The investigating officer's conclusion, that the applicant did not participate in the crimes is immaterial. Such evidence, fails to

¹⁷ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC).

¹⁸ *Knoop* (657/2022; 694/2022) [2023] ZASCA 141; [2024] 1 All SA 50 (SCA).

address the distinct evidential standard required for a preservation application. The applicant's attorney should have avoided further delay in bringing the reconsideration application, by not requesting transcription of this irrelevant evidence.

[39] While knowing that the applicant is a lay person who relied on legal assistance, it is established in our jurisprudence that there is a limit to the indulgence afforded, where a party's non-compliance with the rules is attributable to a legal practitioner's failings. Condonation, in such circumstances, is not a foregone conclusion.¹⁹

[40] While the applicant's prospects of success are but one factor in determining whether to grant condonation, her evidence on this point is also deficient. For a reconsideration application, the court is required to adjudicate the matter upon the evidence presented as if it were a clean slate. Consequently, all available evidence must be considered to determine if the NDPP's evidence establishes a prima facie reasonable belief that the vehicle is an instrumentality of the offences in question. Considered the available unchallenged evidence, in particular the video footage and car tracker report, the applicant has negligible prospects of success on reconsideration.

[41] The reasons advanced for the delay are inadequate and cannot be accepted as good cause for condonation to be granted. The request for condonation fails. The following order is issued.

Order

[1] The applicant's condonation application for the late filing of her reconsideration application is dismissed with costs;

[2] The preservation of property order granted 22 February 2024 remains in force, pending the forfeiture application.

MATTHYS R

¹⁹ *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) 135 (A.D.).

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant:

**Mr AZ Seckel instructed by Smit Sew
Attorneys**

For the Respondent:

Adv N Mlomo (State Advocate)

Date of hearing:

26 August 2025

Date of judgment:

20 October 2025

