



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG**

CASE NO: M440/2023

Not reportable

In the matter between:

BRINK CONSTRUCTION (PTY) LTD

FIRST APPLICANT

TLHABEGO DISTRIBUTORS (PTY) LTD

SECOND APPLICANT

and

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

FIRST RESPONDENT

**THE SOUTH AFRICAN REVENUE
SERVICE CUSTOMS,
RAMATLHABAMA BORDER POST**

SECOND RESPONDENT

IN RE:

**IN THE EX PARTE APPLICATION OF:
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
APPLICANT**

Coram: Reddy J

Heard: 12 September 2025

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down of the judgment are deemed to be 09h00 on 16 January 2026.

Summary: The application of section 53(1) of Prevention of Organised Crime Act 121 of 1998. Condonation principles restated. The three set rule in respect of affidavits and the sequence thereof in motion proceedings. The impact and importance of confirmatory affidavits. The application of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and its accompanying regulations.

ORDER

1. The application for the rescission of the forfeiture order of 16 November 2023 is dismissed.
2. The applicants shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

JUDGMENT

Reddy J

Introduction

- [1] On 16 November 2023, this Court in terms of the provisions of s 53 of the Prevention of Organised Crime Act¹ (POCA) declared forfeited to the State, (i) a silver Volvo Horse FH460 with registration number B[...], (ii) a white Tanker Trailer with registration number B[...] and (iii) a white Tanker Trailer with registration number B[...]. The applicants now seek that this order be rescinded within the subset of s 5 of POCA, which the first respondent opposes.

The parties

- [2] The first and second applicants Brink Construction (Pty) Ltd and Tlhabego Distributors (Pty) Ltd are companies duly registered in terms of the laws of Botswana and trade within the Transport and Logistic Industry, primarily transporting fuel within Botswana. For purposes of brevity and ease of reading, these companies will be referred to as the applicants.
- [3] The first respondent is the National Director of Public Prosecutions (NDPP), cited in her capacity as the designated official relevant to the provisions of POCA. The second respondent is the Commissioner of the South African Revenue Services, responsible for oversight of the relevant provisions of the Customs and Excise Act (the CAEA).²

Background

¹ 121 of 1998.

² 91 of 1964.

- [4] It is common cause that diesel was transported into the Republic of South Africa from Botswana. The applicants claim that this occurred erroneously as the driver of a Volvo Hino, Mr Pirukai (Pirukai), had attached full tankers to the Volvo Hino rather than empty tankers, which were destined for calibration in Pretoria since the fuel readers were presenting inaccurate readings.
- [5] The applicants posit that the NDPP had not exercised utmost good faith through non-disclosure of material facts when the relief was sought on an ex parte basis on 16 November 2023, in respect of the preservation and forfeiture orders. The applicants opine that the forfeiture order stands to be set aside on this ground alone. More pertinently, the applicants claim that the NDPP had implicit knowledge that the applicants, duly represented, were engaged in relevant communication most of which occurred amid the forfeiture application. Notwithstanding this live communication the applicants maintain that the NDPP proceeded on an ex parte basis to secure the preservation order, and ultimately a forfeiture order.
- [6] The applicants claim that a day after instructing their attorney of record, Mr Mokale (Mokale), he brokered communication with the second respondent. This culminated in a physical meeting at the offices of the South African Revenue Service (SARS) on 18 October 2023. The representative of SARS, the applicants contend stated that preceding the goods being released an application in terms of the provisions of s 91 read with s 83 of the CAEA had to be launched. The applicants were informed that the Commissioner of SARS would in terms of these provisions determine the monetary penalty that would be payable on the diesel prior to the release of the applicants' goods. The applicants state that on their understanding, a three-prong process was envisaged. First, there would be

the determination of the penalty; second, the penalty would be paid; and third, the goods would be released circumventing any party enduring prejudice.

[7] On 25 October 2023, the applicants in acquiescing in the proposition of SARS submitted an application as evinced in s 91 and 83 of the CAEA for the determination of a penalty by the Commissioner of SARS. The applicants assert that this application is still pending.

[8] Notwithstanding the Commissioner of SARS acknowledging receipt of application as aforesaid, the applicants claim that the Commissioner of SARS despatched a communiqué to the second applicant, stating that on prima facie consideration of the matter, the goods should be liable for forfeiture. Despite, this contention, the applicants avow that the body of this communiqué unmistakably acknowledges the existence of the application in terms of s 93 of the CAEA.

[9] On 30 November 2023, Captain Bantseke, the investigating officer in the parallel criminal investigation informed Mokale that the forfeiture order had been granted. The applicants state that the existence of this forfeiture order was astounding given that the applicants were awaiting the outcome of the pending application. The applicants asseverate that after much effort; the forfeiture order was emailed to Mokale on 12 April 2024. This then, the applicants profess is the decisive date that the forfeiture order came to the knowledge of the applicants.

[10] The applicants claim that SARS on 16 April 2024, issued letters that the tankers were seized in terms of s88 (1)(c) of the CAEA. The applicants

assert that the timeline of the various legal processes lead to the ineluctable conclusion that the first and second respondents secured the perseveration orders disingenuously. The applicants claim that it was untenable for the NDPP to have obtained the order on two scores. First, it was the domain of SARS to consider if such an order was legally permissible, and second, the application in terms of s 93 of the CAEA was still very much alive.

[11] Moreover, the applicants maintain that the warrantless search and seizure of the diesel was unlawful. This the applicants propose is underscored by the fact that, first, the respondents did not consider Pirukai's explanation; second, no inventory of the diesel so seized had been provided to Pirukai, the applicants or Mokale; third, no search and seizure warrant had been obtained; and fourth, Pirukai had not consented to the search.

[12] Resulting from these several alleged irregularities the applicants conclude that the entire process should be set aside.

Overview

[13] In *Hoffman v NDPP*³ the following guidelines were advocated regarding the application of s 53 (3) of POCA:

“[7] This application is obviously brought in terms of Section 53(3) of the Act which provides for the rescission or variation of forfeiture orders granted by default. Section 53(4) of the Act provides that the Court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate.

[8] Section 53 falls within Chapter 6 of the Act. Section 37(1) of the Act provides that all proceedings under Chapter 6 of the Act are civil proceedings. Section 62 of the Act makes the provision of the Uniform Rules of Court insofar as they are not inconsistent with the provisions of the Act applicable to proceedings under Chapter 6 of the Act. I

³ [2010] JOL 25001 (Tk) at paragraphs [7] to [9].

can think of no good reason why the phrase ‘upon good cause shown’ as used in Section 53(4) of the Act should be interpreted any differently from the way such phrase has been interpreted in relation to the rescission of default judgments in terms of rule 31(2)(b) of the Uniform Rules of Court.

[9] In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-7 it was held that the applicant in an application for rescission must:

(a) give a reasonable explanation of his/her default and that if it is shown that his/her negligence was wilful or due to gross negligence the Court should not come to his assistance;

(b) the applicant must be bona fide and not merely intending to delay; and

(c) must show that he/she has a bona fide defence.”

Point in limine

[14] The NDPP raised a point in limine, that the applicants were furnished with the forfeiture order on 5 December 2023, this then is the date upon which the applicants through Mokale acquired knowledge of the forfeiture order. To this end, the NDPP submits that the applicants failed to comply with the provisions of s 53(3) of POCA by setting the matter down for rescission, variation or to file an application for such rescission or reconsideration within 20 (twenty) days as is peremptory. Therefore, the NDPP opines that the failure of the applicants to apply for condonation is fatal to this application.

[15] Additionally, on the assessment of the papers by the Court, there appears to be a fatal irregularity relating to the sequence of affidavits filed of record; and the commissioning thereof by the applicants. Conjointly, this may be dispositive of the application.

The failure to apply for condonation

[16] The forfeiture order was granted on 16 November 2023. The applicants were furnished with the forfeiture order on 5 December 2023. This then is the date upon which the applicants through Mokale acquired knowledge of the forfeiture order. To this end, the NDPP submits that the applicants failed to comply with the provisions of s 53(3) of POCA by setting the matter down for rescission, variation or to file an application for such rescission or reconsideration within 20 (twenty) days, as is peremptory. Therefore, the NDPP opines that the failure of the applicants to apply for condonation is fatal to this application.

[17] Extrapolating from this order, any person whose interest in the property concerned is affected by this order may within twenty (20) days after acquiring knowledge of the order set the matter down for variation or rescission by the court. On 30 November 2023, the applicants on their own version became aware that a forfeiture order had been granted. Notwithstanding the peremptory time frame set out in the forfeiture order which mirrors the provisions of s53 (3) of POCA, the applicants served this application on 8 May 2024. Given these timelines it is incontestable that this application is out of time as prescribed by s 53 (3) of POCA. To this end, it is obligatory for the applicants to make out a substantive application for condonation. It would be opportune to make a sweeping synopsis of our law on condonation.

[18] In *Melane v Santam Insurance Co Ltd*⁴ the principles that underscore condonation were adumbrated as follows:

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.’

[19] In *United Plant Hire (Pty) Ltd v Hills*⁵, the law on condonation was expressed as follows:

‘It is well settled that, in considering applications for condonation, the Court has a discretion to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the relevant Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.’

⁴ 1962(4) SA 531 (A).

⁵ 1990 (1) SA 717 (A) at 720 E-G.

[20] The *Melane* factors must be considered within the prism of the interests of justice. In *City of Ekurhuleni Metropolitan Municipality In re: Unlawful Occupiers 1 Argyl Street and Others v Rohlandt Holdings CC and Others*⁶ the Constitutional Court, postulated factors that a court will consider in deciding whether the grant of condonation is in the interests of justice include:

“...the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.” (Footnotes omitted)

[21] Need I daresay that it is trite that a party seeking condonation must make out a proper case for the court’s indulgence with reference to these jurisdictional factors. The explanation for the delay must be full and “reasonable enough to excuse the default.”⁷

[22] In this instance, and on the application of the deep-rooted condonation principles, the applicants have failed to provide a substantive application for condonation, notwithstanding missing the peremptory twenty (20) day window period by several months. It is relevant to point out that the delay is substantial. The applicants claim that the court order was only received via email in April 2024. This does not negate the irrefutable fact that they had actual knowledge of the existence of the court order on 30 November

⁶ [2024] ZACC 10.

⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 82.

2023. This then, to my mind is the decisive date and from whence the applicants were required to give a full and frank explanation for the inordinate delay.

The sequence of affidavits

[23] Beyond the issue of the delay, the application suffers from a fatal procedural irregularity regarding the sequence of the filing of affidavits and the commissioning of same. Indispensable to the accentuation of this procedural irregularity is the timeline of the applicants' affidavits.

[24] To appreciate the import and sequence of affidavits in motion proceedings a few observations are necessary. Affidavits in motion proceedings serve as a primary medium for the placing of evidence before a court. Logically the affidavits follow a sequence. Settled in our motion culture is the three set rule pertinent to affidavits. Sequentially, no further affidavits may be filed without the leave of the court.

[25] In *Hano Trading Hano Trading v J R 209 Investments (Pty) Ltd*⁸, the court stated that rule 6 of the Uniform Rules of Court:

“...sets out the sequence and timing for the filing of the affidavits by the respective parties” and that “[u]nlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets”.’

[26] The gateway of the motion procedure is the founding affidavit. The reasoning that underscores the need for confirmatory affidavits to follow a founding affidavit is sound. To properly understand the import of a

⁸ 2013 (1) SA 161 (SCA) para 10. *Zarug v Parvathie N.O.* 1962 (3) SA 872 (D) at page 873.

founding affidavit when juxtaposed with confirmatory affidavits the following is relevant. In motion proceedings, the founding affidavit is primary evidence. Confirmatory affidavits follow a founding affidavit as same are intended to confirm the accuracy of facts deposed to in the founding affidavit and to avoid hearsay. It axiomatically follows that a confirmatory affidavit must follow or be contemporaneous with a founding affidavit.

[27] Applying these salutary principles to the present application, the following evinces. The founding affidavit, by the sole director of the first applicant was deposed to and commissioned on 30 April 2024. The director of the second applicant's confirmatory affidavit was signed on 25 April 2024 and commissioned on 30 April 2024. Mokale's confirmatory affidavit was signed on 24 April 2024 and commissioned on 30 April 2024. No plausible explanation is provided for these dates not coinciding. Our law is replete with precedent which underscores the importance of litigants exercising due care in the preparation and presentation of affidavits in motion proceedings.

[28] Ex facie the papers there appears to be a glaring irregularity as regards the commissioning of the affidavits which effects its cogency and impacts the sequence of the filing of same. In our law it is impermissible for an affidavit to be signed on one day and commissioned on another. The signing and commissioning must occur as a single continuous event, which amongst others requires that the deponent must sign the declaration in the physical presence of the commissioner of oaths. These conflicting timelines unexplained leads to the ineluctable conclusion that the confirmatory affidavits were signed by the deponents and then

commissioned in their absence. Self-contained, the dates on which the confirmatory affidavits were signed precede that of the founding affidavit.

[29] To put it simply, at the time the confirmatory affidavits were signed the founding affidavit did not exist. Moreover, the regulatory procedure for the commissioning of affidavits was not followed, which makes it questionable whether the confirmatory affidavits can be regarded as evidence. Regulation 4(1) of the Regulations Governing the Administration of an Oath or Affirmation makes it obligatory for the commissioner to certify the document “below the deponent’s signature” confirming the manner, place and date of declaration was taken. This date must coincide with the date the deponent signed. In this instance this has not occurred. Crucially, there is no affidavit of Pirukai who is best placed to provide factual affidavit evidence relevant to the purported unlawfulness of the search and seizure.

[30] In the present instance, the sequence of affidavits was inverted which is borne out by the dates. It is legally unsound for a deponent to confirm the facts in the body of a founding affidavit that did not exist when the confirmatory affidavit was so deposited. The inverted sequence of the affidavits offends the three-set rule. Besides, the confirmatory affidavits are meaningless legally as it leaves the core averments of the founding affidavit as inadmissible hearsay. In the alternative the affidavits can simply be disregarded as being non-compliant with Regulations Governing the Administration of Oath or Affirmation. On both scores these confirmatory affidavits have no evidential weight.

[31] Resulting from the applicant’s failure to seek formal condonation for a significant delay and the fatal procedural irregularities in the affidavits, the application must fail.

Costs

[32] Whilst costs are at the discretion of the court, the general principle is that costs follow the result. I am unpersuaded that there exists any basis to deviate from this principle.

Order

[33] Accordingly, I make the following order:

1. The application for the rescission of the forfeiture order of 16 November 2023 is dismissed.
2. The applicants shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the applicants: Advocate H J Scholtz

Instructed by: Moshidi Inc.
Mahikeng

For first respondent: Advocate M R Mahlafore

Instructed by: The State Attorney,
Mahikeng