IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Not reportable

Case no: M607/2020

In the matter between:

ABRAHAM CHEM BANDA	APPLICANT
And	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Coram: Wessels AJ

Heard: 13 February 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to

SAFLII. The date and time for the handing down of the judgment are deemed to be 15h00 on 24 March 2026.

Summary: Rescission of default forfeiture order – Prevention of Organised Crime Act 121 of 1998, s 53(3) and (4) – Good cause – Applicant served with preservation order on 2 March 2021 – Applicant filed defective notice of intention to oppose not accompanied by affidavit as required by s 39(5) – Respondent's attorneys gave applicant opportunity to cure defect – Applicant failed to do so – Applicant thereafter terminated mandate of his attorneys and instructed new attorneys – Applicant's new attorney involved in motor vehicle accident – Applicant claimed he only discovered forfeiture order on 3 February 2022 – Held that applicant's default was wilful – Applicant failed to provide reasonably satisfactory explanation for failure to comply with s 39(5) – Applicant also failed to demonstrate bona fide defence to forfeiture application – Respondent's founding affidavit set out extensive evidence linking property to illegal gold dealing – Applicant's response consisted of general denials without substantiating evidence – Application dismissed with costs.

JUDGMENT

Wessels AJ

Introduction

[1] This is an application for the rescission of a forfeiture order granted by this Court on 30 September 2021 under case number M607/2020. The applicant seeks the return of cash in the sum of R90,434.00 and three motor vehicles,

namely an Isuzu KB LDV (registration F[...]), a Mercedes-Benz (registration B[...]), and a Toyota Hilux (registration H[...]).

[2] The application is brought under Rule 42(1)(a) of the Uniform Rules of Court, read with s 53(3) of the Prevention of Organised Crime Act[1] ('POCA').

Background

[3] On 17 August 2020, members of the South African Police Service conducted a search and seizure operation at the applicant's residence in Khuma, Stilfontein, pursuant to search warrants issued by the Stilfontein Magistrate's Court on 13 August 2020.

[4] During this operation, the police seized cash totalling R90,434.00 and three motor vehicles. The applicant was arrested on the same day but was released on bail on 21 August 2020.

[5] The applicant subsequently brought an urgent spoliation application under case number UM174/2020, then represented by Kobus Burger Attorneys, in this Court against the Minister of Police for the return of the seized vehicles. Lephadi AJ dismissed that application on 17 September 2020.

[6] On 12 November 2020, the respondent obtained a preservation order against the applicant under the present case number. This order was served on the applicant on 2 March 2021. On 30 September 2021, the respondent obtained a final forfeiture order against the applicant. The applicant launched this rescission application on 28 February 2022.

[1] Prevention of Organised Crime Act 121 of 1998.

Basis of the application

[7] The applicant seeks rescission on the grounds that his default in opposing the forfeiture application was not wilful. He explains that after his spoliation application was dismissed, he terminated the mandate of Kobus Burger Attorneys and instructed Makgetha & Molemane Inc.

[8] On 12 November 2020, the respondent obtained a preservation order against the applicant. This order was served on the applicant's wife at his residence on 2 March 2021.

[9] On 17 March 2021, Makgetha & Molemane Inc. filed a notice of intention to oppose. The applicant states that he was advised by Mr Kenneth Makgetha ('Mr Makgetha') that what the respondent had obtained against him was an interim order to preserve his properties, and that the respondent would have to comply with certain conditions, after which a return date to hear the granting of a final order would be set. According to the applicant, he understood that he would have an opportunity to oppose the final order at that stage.

[10] On or about the end of March 2021, the applicant states that he and Mr Makgetha travelled to Sandton, Johannesburg, for a consultation with counsel. He was advised that an affidavit would be settled and that he would be called in to sign and commission it. He was not given any time frames, and so he waited.

[11] On 14 May 2021, the State Attorney wrote to Mr Makgetha, advising that the notice of intention to oppose was defective because it was not

accompanied by the affidavit required by s 39(5) of POCA. The letter afforded the applicant until 28 May 2021 to rectify the defect.

[12] On or about 20 May 2021, the applicant received a telephone call from Mr Makgetha. According to the applicant, Mr Makgetha advised him to abandon his opposition to the granting of the final preservation order and to wait for the respondent to bring a forfeiture order, after which he should oppose it. The applicant states that he was taken aback by this advice, as there had been no mention of any affidavit being settled, and he was given no reason for the change in strategy.

[13] The applicant was evidently dissatisfied with this advice and decided to seek other attorneys. On 28 May 2021, he appointed Moroenyane M Attorneys to attend to his matter.

[14] The applicant instructed Mr Tumelo Motjope of Moroenyane M Attorneys to oppose the preservation order. He states that despite numerous attempts to obtain the file from Makgetha & Molemane Inc, the file was only made available on or about 2 July 2021.

[15] On 14 July 2021, having obtained the file, Mr Motjope addressed a letter to the State Attorney, advising that Moroenyane M Attorneys would be coming on record and requesting that the respondent advise on the status of the matter. The applicant states that the respondent did not respond to this letter.

[16] On 17 July 2021, Mr Motjope was involved in a serious motor vehicle accident, which resulted in the fatality of a passenger in his vehicle. Mr Motjope himself was seriously injured and was admitted to hospital with multiple fractures. He was hospitalised for about three weeks and was wheelchair-bound

for approximately two months thereafter. The applicant states that Mr Motjope wished not to attach medical records unless the respondent raised the matter.

[17] As a result of Mr Motjope's accident, the applicant decided to take no further action against the final preservation order and resolved to wait for the respondent to bring a forfeiture application, which he would then oppose. The applicant states that his understanding at all material times was that the application he was litigating with the respondent related to the final granting of a preservation order. This understanding, he says, was based on the legal advice he had received from Mr Makgetha, and he continued with this understanding when he instructed Moroenyane M Attorneys.

[18] On 30 September 2021, the respondent obtained a final forfeiture order against the applicant.

[19] On or about 20 December 2021, the applicant, together with Mr Motjope and another person, visited the Director of Public Prosecutions in Mahikeng to learn the status of the matter. They met with an advocate named Manyako, who informed them that he was unaware of the status and that they should write him a letter, which he would forward to another advocate directly involved in the matter.

[20] On or about 24 January 2022, the applicant instructed his correspondent attorneys to uplift the court file and make copies. It was only on 3 February 2022, upon receiving the copies, that the applicant learned that a forfeiture order had been granted against him on 30 September 2021. He states that this was the first time he learned of the forfeiture order and that the application being litigated since early 2021 was a forfeiture application, not a final preservation order. He states categorically that had he been aware that the application against

him was a forfeiture application and, more importantly, when it was set down, he would have done everything in his power to oppose it.

[21] The applicant contends that the respondent's conduct in litigation added to the confusion. He points to the existence of two separate preservation applications: one under case number UM185/2020 against a co-accused, Fati Mbambo and one under the present case number against him. He notes that a preservation order was granted under UM185/2020 on 16 September 2020, but the respondent again approached the court and obtained another preservation order under M607/2020 on 12 November 2020. He states that this situation with parallel applications confused him and his legal representatives.

[22] The applicant further notes that on 22 September 2021, the respondent filed a practice note under the present case number in preparation for the hearing of the forfeiture order. He points to practice notes filed by the respondent on 21 April 2021 and 1 June 2021 under case number UM185/2020, which he says referred to a 'preservation application' as late as June 2021, reinforcing his mistaken belief that the proceedings were still at the preservation stage.

[23] The applicant submits that he has a bona fide defence to the forfeiture application. He claims that the vehicles were purchased with legitimate funds derived from his nightclub and promotions business, and that his tavern generated the cash seized. He contends that the allegations against him in the respondent's founding papers are unsubstantiated.

Respondent's case

[24] The respondent opposes the rescission application. The respondent initially raised a point in limine regarding the applicant's filing under the incorrect case number, but the applicant subsequently filed a corrected application under the present case number, which is now before this Court.

[25] On the merits, the respondent argues that the applicant's failure to oppose the forfeiture application was wilful. The applicant was properly served with the preservation order on 2 March 2021. The order contained clear instructions regarding the steps required to oppose a forfeiture order.

[26] The respondent further notes that on 14 May 2021, its attorneys wrote to Makgetha & Molemane Inc, advising that the notice of intention to oppose was defective because it was not accompanied by the affidavit required by s 39(5) of POCA. The applicant was given until 28 May 2021 to rectify the defect. He failed to do so.

[27] The respondent submits that the applicant's explanation regarding the alleged confusion between case numbers is unpersuasive. The preservation order was served under the case number of the present application (M607/2020), and the applicant's own notice of intention to oppose was filed under that case number. The applicant had a clear obligation to respond to the pending forfeiture application.

[28] The respondent further submits that the applicant has not demonstrated a bona fide defence, pointing to extensive evidence of his involvement in illegal gold dealing and money laundering.

Issues for Determination

[29] The following issues fall for determination: whether the applicant has established that his default was not wilful; whether the applicant has demonstrated a bona fide defence; whether the application was brought within a reasonable time.

Legal principles

[30] The forfeiture order against the applicant was granted by default under s 53 of POCA. Section 53(1) provides that where the National Director of Public Prosecutions applies for a forfeiture order by default and the court is satisfied that no person has appeared on the date of the hearing and that all persons who entered appearances have knowledge of the notices given, the court may make an order by default which it could have made under ss 50(1) and (2).

[31] Section 53(3) of POCA provides the mechanism for rescission of such a default order:

> 'Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1) may, within 20 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court.'

[32] Section 53(4) 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.

[33] The concept of 'good cause' in s 53(4) of POCA must be interpreted in light of the common law principles applicable to rescission applications. In *De*

Wet and Others v Western Bank Ltd[2] the Supreme Court of Appeal undertook a comprehensive review of the common law powers of a court to rescind default judgments. It established the principles that govern the exercise of this discretion.

[34] The Court then set out the requirements that an applicant for rescission must satisfy[3]:

‘The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default.’

[35] The court further emphasised[4] that applicants who are ‘the authors of their own problems’ will not be granted relief. The court endorsed the finding that ‘it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct.’

[36] Applying the principles enunciated in *De Wet* to the present case, the applicant bears the onus of showing a reasonably satisfactory explanation for his default. He must satisfy the Court that his default was not wilful and that there are considerations of justice and fairness that warrant the rescission of the forfeiture order. The Court must also have regard to the prejudice that the respondent would suffer if the order were to be set aside, and to the principle that finality in litigation is an important consideration.

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[2] De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A).
[3] *Ibid* 1042 H.
[4] *Ibid* 1044 D.

[37] In interpreting the provisions of Chapter 6 of POCA, the Constitutional Court in *National Director of Public Prosecutions v Mohamed NO and Others*[5] provided crucial guidance. The court described the purpose of Chapter 6 at paragraph 15 as follows:

'Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.'

[38] In *Mohamed*[6] the court explained the distinction between Chapter 5 and Chapter 6 as follows:

'Chapter 5 (comprising sections 21 to 36) provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the 'defendant' is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.'

[39] In *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd*[7] the Supreme Court of Appeal provided further guidance in stating the following[8]:

'It follows that we endorse broadly the conclusion in those cases, following the first-instance decision in NDPP v Carolus and others, where a narrow rather than a wide interpretation of the definition of 'instrumentality' was held appropriate. Here, despite its different (and pre-constitutional) context, we find practical assistance in S v Bissessue, where a magistrate

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[5] National Director of Public Prosecutions v Mohamed NO and Others (CCT44/02) [2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) (3 April 2003) para 15.
[6] Para 16.
[7] National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd (260/03) [2004] ZASCA 36 (13 May 2004).
[8] Para 32.

declared forfeit a motor vehicle and fishing rods used in fishing without a licence under an ordinance that, in addition to a criminal penalty, required the court to declare any article used 'in, for the purpose of, or in connection with the commission of the offence' forfeit. On appeal the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The Court held that 'to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the offence in question'. **The same in our view applies to 'instrumentality of an offence'. As suggested in NDPP v Prophet, the determining question is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality. Every case will of course have to be decided on its own facts.'** (footnotes omitted and own emphasis applied)

[40] Furthermore, in *Cook Properties*[9], the Court emphasised:

'Mohamed (1) pointed out that chapter 6's primary focus is not on wrongdoers, 'but on property that has been used to commit an offence' or which constitutes the proceeds of crime. A criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even where no charge is pending.'

[41] These authorities establish two principles fundamental to the present application: First, that the forfeiture under Chapter 6 is independent of criminal proceedings, and that the withdrawal of criminal charges against the applicant in September 2021 did not automatically entitle him to the rescission of the forfeiture order. Second, the focus of Chapter 6 is on the property itself, not on the owner's culpability.

Wilful default

[9] Para 20.

[42] The applicant bears the onus of providing a reasonable and credible explanation for his failure to oppose the forfeiture application.

[43] The preservation stage and the forfeiture stage are not independent proceedings. They are part of a single, integrated scheme. A party that fails to participate properly at the preservation stage, by not entering a valid appearance in terms of s 39(5), cannot later claim that the forfeiture stage caught them by surprise.

[44] The preservation order served on the applicant on 2 March 2021 was not a mere preliminary step. Section 39 of POCA required any person with an interest in the property to enter an appearance within 14 days of service, accompanied by an affidavit setting out the basis of their defence. This was the applicant's statutory opportunity to place his case before the court.

[45] The applicant filed a notice of intention to oppose on 17 March 2021, under the correct case number. This demonstrates that he was aware of the proceedings and understood his obligation to respond. However, his notice was defective because it was not accompanied by the affidavit required by s 39(5).

[46] On 14 May 2021, the respondent's attorneys wrote to Makgetha & Molemane Inc, advising that the notice was defective and giving the applicant until 28 May 2021 to cure it. The applicant did not respond. Instead, he terminated his mandate and instructed new attorneys.

[47] The applicant's explanation that Mr Makgetha advised him to abandon opposition and wait for a forfeiture application is difficult to reconcile with the fact that his own notice of intention to oppose had already been filed. Moreover,

the respondent's attorneys' letter put him on notice that his opposition was defective and required attention.

[48] Regarding Mr Motjope's accident in July 2021, the applicant was not personally incapacitated. By that time, the 14-day period for entering an appearance in terms of s 39(4) had long expired. The preservation order had been in force for more than four months. The applicant had already failed to take the necessary steps to place his defence before this Court.

[49] The applicant has provided no medical records or other corroborating evidence regarding Mr Motjope's injuries. The respondent put him to the proof of his allegations, and his failure to provide supporting evidence is a significant omission.

[50] I find that the applicant's default was wilful. His failure to comply with s 39(5) was not due to any confusion or misfortune, but to a deliberate decision to abandon his opposition based on advice that, if given, was plainly inconsistent with the statutory scheme.

Bona fide defence

[51] Even if the applicant had established that his default was not wilful, he must still demonstrate a bona fide defence.

[52] The respondent's founding affidavit in the forfeiture application set out extensive evidence linking the property to illegal gold dealing, including two controlled purchases of state gold by the applicant, the discovery of gold wrappings and refining equipment at his properties, cash payments for vehicles

made from different bank branches, and a bank statement analysis showing that only 10% of his expenditure related to his legitimate business.

[53] The applicant's response in his rescission affidavit is largely a general denial. He does not provide documentary evidence to explain the cash payments for the vehicles, nor does he account for the items found during the search that are associated with gold refining. He has not demonstrated that his income from legitimate sources was sufficient to fund the purchase of the vehicles.

[54] The principles established in *Mohamed*[10] and *Cook Properties*[11] are directly relevant to the facts of the present application. The focus of Chapter 6 is on the property itself, not the owner's culpability. The applicant cannot resist forfeiture merely by asserting his innocence. He must adduce evidence to rebut the respondent's case that the property constitutes the proceeds of unlawful activities or an instrumentality of an offence.

[55] I therefore find that the applicant has failed to demonstrate a bona fide defence.

Whether the application was brought within a reasonable time

[56] The applicant claims he only became aware of the forfeiture order on 3 February 2022, when his attorneys uplifted the court file. His rescission application was filed on 28 February 2022. Section 53(3) requires that an application for rescission be brought within 20 days after the applicant has acquired knowledge of such an order.

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[10] *Ibid* fn5.
[11] *Ibid* fn7.

[57] On the applicant's own version, his rescission application was filed within the 20-day period prescribed by s 53(3). The application was therefore brought within a reasonable time. However, the significance thereof must be assessed in light of the two-stage structure of Chapter 6 and the applicant's prior conduct. The forfeiture order did not emerge in a vacuum. It was the logical conclusion of a process that had been underway for over a year, and in which the applicant had been given clear notice and multiple opportunities to participate.

[58] Affected parties are entitled to a full hearing at the forfeiture stage if they have entered an appearance at the preservation stage. Section 39(3) and (4) of POCA make this explicit. The applicant's failure to comply with s 39(5) meant that he was not entitled to notice of the forfeiture application under s 48(2), and the court was entitled to grant a default forfeiture order under s 53(1).

[59] The 20-day period in s 53(3) is clearly designed to protect persons who, through no fault of their own, did not receive notice of the forfeiture application. It is not intended to allow a person who deliberately failed to participate at the preservation stage to belatedly resurrect opposition after a forfeiture order has been granted.

[60] In this case, even if it is accepted that the applicant had knowledge of the forfeiture order only on 3 February 2022, it does not cure his earlier failure to comply with the statutory requirements at the preservation stage. The forfeiture order was lawfully granted by default because the applicant had not validly entered an appearance in terms of s 39.

[61] While the application was formally brought within the 20-day period, the weight to be attached to this fact is diminished by the applicant's prior conduct.

The applicant cannot ignore the preservation stage, fail to cure a defective notice, and then claim that the forfeiture order came as a surprise. The forfeiture order was the predictable consequence of the applicant's own inaction.

[62] Given my finding that the applicant's default was wilful and that he has failed to demonstrate a bona fide defence, his compliance with the 20-day period does not, on its own, establish good cause for rescission.

Conclusion

[63] The applicant has failed to establish that his default was not wilful and has failed to demonstrate a bona fide defence. There is no good cause shown for the rescission of the forfeiture order.

Order

[64] Accordingly, I make the following order:

1. The application for rescission of the forfeiture order granted under case number M607/2020 on 30 September 2021 is dismissed.

2. The applicant is to pay the costs of this application on the party-and-party Scale B.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For applicant	:Mr T Motjope
Instructed by	:Moroenyane M Attorney
	:Mahikeng
For respondent	:Adv Mr Mahlafore
Instructed by	:State Attorney
	:Mahikeng