



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO:** 2024-110053

**DATE:** 21 APRIL 2026

**DELETE WHICHEVER IS NOT APPLICABLE**

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

Date: **21 April 2026**

Signature: \_\_\_\_\_

In the matter between:

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Applicant

and

**NOMSA WELHERMINA MBALATI**

First Respondent

**WOMEN AGAINST POVERTY AND HUNGER (PTY) LTD**

Second Respondent

**KELEBOGILE PRECIOUS PHUMO**

Third Respondent

**ITUMELENG THAI**

Fourth Respondent

**THULISILE MILDREND MBAMBO**

Fifth Respondent

**BUSISIWE PRIMROSE HORACIO**

Sixth Respondent

**NOMAKHOSI ZWANE**

Seventh Respondent

**GUGU PRINCESS CELE**

Eighth Respondent

**MPHO HAZEL PATSA MOKOENA**

Ninth Respondent

**AGNES MOFOKENG**

Tenth Respondent

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## **JUDGMENT**

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**NYATHI, J:**

### **Introduction**

[1] This is an opposed application for leave to appeal against the whole of the judgment and order handed down by this Court on 26 November 2025. In that judgment, a preservation of property order granted *ex parte* on 30 September 2024 in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998 (“POCA”) was reconsidered and set aside; the preservation of the Respondents’ bank accounts was lifted; and the Applicant was ordered to pay costs on an attorney and client scale.

[2] The Applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court. The Respondents oppose the application and contend that the Applicant has failed to satisfy the elevated threshold prescribed by section 17(1) of the Superior Courts Act 10 of 2013.

## **The statutory test**

[3] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be granted where the court is of the opinion that—

- (a) the appeal **would** have reasonable prospects of success; or
- (b) there is some other compelling reason why the appeal should be heard.

[4] It is now settled that this test is more stringent than the pre-existing standard. An applicant must demonstrate a sound, rational basis for concluding that another court **will**, not merely might, come to a different conclusion. A mere disagreement with the reasoning or outcome does not suffice. In *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176; 2017 (5) SA 44 (SCA) The SCA authoritatively stated:

“An applicant for leave to appeal must convince the court on proper grounds that there is a *reasonable prospect or realistic chance of success on appeal*. A mere possibility of success, or an arguable case, is not enough.”

## **Background (briefly)**

[5] The preservation order of 30 September 2024 was obtained *ex parte*. It was published in the Government Gazette only on 1 November 2024. Service on the Respondents was effected months later, in piecemeal fashion, and in several instances not at all.

[6] A reconsideration application brought by the Second and Third Respondents was previously heard by Bam J, who issued procedural directives but did not finally determine the status of the preservation order *vis-à-vis* all affected parties.

[7] A further reconsideration application was thereafter brought by respondents who had not been properly served and who had not been heard at all. That application served before this Court and culminated in the judgment now sought to be appealed.

### **The grounds of appeal**

[8] The Applicant advances, in essence, the following grounds:

- that this Court applied an incorrect test under Rule 6(12)(c);
- that it impermissibly entertained a second reconsideration application;
- that it misapplied sections 39 and 40 of POCA;
- that it incorrectly found that no forfeiture application was pending;
- that it violated the principle of *res judicata*; and
- that it wrongly granted a punitive costs order.

I deal with these contentions collectively in determining whether the statutory threshold has been met.

## **Rule 6(12)(c) and the reconsideration jurisdiction**

[9] Rule 6(12)(c) exists to protect persons against whom orders are granted in their absence. It permits such parties to approach the court urgently for reconsideration. The underlying pivot of the rule is the absence of the affected party when the order was granted. (See *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486I–487A; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraph [13].)

[10] In the present matter, several of the Respondents were neither served with the preservation order nor afforded an opportunity to be heard prior to the intervention sought from this Court. The contention that they were bound by proceedings to which they were not party is unsustainable.

[11] The Applicant's submission that reconsideration was confined strictly to the four corners of the papers before Motha J is incorrect. The authorities make it plain that a court hearing a reconsideration may consider whether the order can lawfully stand in light of all relevant facts placed before it, including whether statutory safeguards were complied with and whether constitutional prejudice persists. (See *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkiers A/S (In Liquidation)* 2024 (1) SA 373 (SCA))

[12] The complaint is, in truth, directed not at the test applied, but at the outcome reached. That does not constitute a misdirection.

### **Alleged second reconsideration and *res judicata***

[13] The argument that this Court impermissibly entertained a second reconsideration is misconceived. The earlier proceedings did not involve all the Respondents now before court, nor did they result in a final determination of their rights.

[14] The requirements for *res judicata* — same parties, same cause of action, and a final judgment — were not met. In any event, the doctrine cannot be invoked to shield procedural irregularity or unconstitutional conduct, particularly where affected parties were denied a hearing through defective service.

### **Sections 39 and 40 of POCA**

[15] Section 39 of POCA obliges the NDPP to give notice of a preservation order “as soon as practicable”. This requirement is not ornamental. It is a critical statutory safeguard designed to limit the intrusive effect of an *ex parte* order and to enable affected persons to exercise their rights.

[16] In this matter, publication of the order occurred more than a month after it was granted. Service occurred several months later, sporadically, and, for some Respondents, not at all. No satisfactory explanation was provided for these delays.

[17] Section 40 provides that a preservation order expires 90 days after publication unless there is a forfeiture application pending before court. Proper institution of forfeiture proceedings necessarily entails both filing and service.

[18] This Court found, on the facts, that no forfeiture application had been properly instituted within the statutory period. That conclusion was grounded in the record and in the Applicant's own concessions regarding service.

[19] The expiry of a preservation order in terms of section 40 is an objective statutory consequence. Once the order had lapsed, it could not be resuscitated by belated procedural steps.

### **Prospects of success and compelling reasons**

[20] The issues raised by the Applicant are predominantly factual and discretionary. Appellate courts are slow to interfere with findings of fact or the exercise of a discretion unless a material misdirection is shown.

[21] No such misdirection has been demonstrated. On the contrary, the judgment accords with other decisions of this Division, on materially similar facts, in which delays in service and publication were held to render preservation orders unsustainable and constitutionally infirm.

[22] The Applicant has also failed to identify any novel legal issue, conflicting authority, or broader public interest consideration that would constitute a compelling reason for the appeal to be heard.

## Costs

[23] The award of costs on an attorney and client scale was an exercise of a true discretion. It was informed by the Applicant's persistent non-compliance with statutory duties, its failure to provide frank explanations in an *ex parte* setting, and the resultant infringement of the Respondents' constitutional rights.

[24] No basis has been shown for appellate interference with that discretion. (*Public Protector v South African Reserve Bank* 2019 (6) SA 253 (SCA).)

## Conclusion

[25] The Applicant has failed to demonstrate that the appeal would have reasonable prospects of success or that there exists any compelling reason for leave to be granted, as contemplated in section 17(1) of the Superior Courts Act.

## Order

The following order is made:

1. The application for leave to appeal is **dismissed**.
2. The Applicant is ordered to pay the costs of the application for leave to appeal on a party and party **scale B**, including the costs of counsel.





**JS NYATHI**

Judge of the High Court  
Gauteng Division, Pretoria

HEARD ON: 10 April 2026

JUDGMENT DATE: 21 April 2026

FOR THE APPLICANT: Adv. S.  
Chikuni; with Adv M. Mawelela

INSTRUCTED BY: **State Attorney, Pretoria**

FOR THE RESPONDENTS: Adv A. Kotze

INSTRUCTED BY: **Maseya Attorneys,  
Pretoria**

**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 21 April 2026.