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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NO:187529-2026

- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

DATE 7 September 2026

SIGNATURE

In the *ex parte* application:

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

APPLICANT

Delivered: *(This judgment is handed down electronically by uploading to the electronic file of this matter on CaseLines and by email to the Parties/their legal representatives by email. The date of this Order is deemed to be 07 September 2026)*

JUDGMENT

LESO AJ

Introduction

[1] The Applicant is the National Director of Public Prosecutions (NDPP), which filed an *ex parte* application seeking an interim preservation order of a vehicle described as a White Ford Ranger Sedan with Registration number C[...].

[2] The order aims to preserve a white Ford Ranger sedan vehicle alleged to be an instrumentality in the trafficking of narcotics, and in the present matter, the prohibited substance is marijuana/ cannabis (dagga) in terms of section 13 of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Trafficking Act).

Factual Background

[3] The South African Police Service (SAPS) seized the vehicle on the day of the arrest of the accused persons. It is recorded in annexure "SAP13" as:

3.1 Model: White Club Cabb Ford Ranger,

3.2 Registration No: C[...],

3.3 VIN: A[...], with

3.4 Engen No: 1[...] 3[...].

[4] The statement of Sergeant France Mathabela (Mathabela), a member of the South African Police Service (SAPS), stationed at Kaapmuiden Police Station, confirms that the vehicle was used to transport dagga. Mathabela's statement and the supporting affidavit of Tivanani Christian Shivambu (Shivambu) may be summarised as follows

4.1 The Case Docket Kaapmuiden Cas 01/03/2026 reflects that 56 rolls of dagga were recovered from inside the vehicle;

4.2 The dagga was found to weigh 111.68kg with an estimated street value of R330, 000.00;

4.3 The dagga was booked at the Kaapmuiden Police Station (the Station's) SAP13 register under entry number SAP13/24/2026; and

4.4 The vehicle was booked in the Station's SAP13 register under entry number SAP13/25/2026.

[5] It is further recorded in “J15” that the accused persons in this matter appeared on 3 March 2026, and the state refused their release on warning. The case was postponed to 19 March 2026.

[6] On 4 March 2026, Auto Mduduzi Nkosi (the accused), through his attorney, brought an application for the release of the motor vehicle. The magistrate recorded as follows: *“The prosecutors do not oppose the release of the motor vehicle in terms of section 3(1) of the CPA as the state does not intend to use the vehicle as evidence.”*

[7] On 11 March 2026, the magistrate issued a subpoena for W/O Yende and Ms Mafunyeka to explain why they refused to release the vehicle and thereafter matter was postponed to 19 August 2026.

[8] On 10 August 2026, the court received an application for preservation of the motor vehicle described as a ‘White Ford Ranger Sedan with Registration number C[...]’. The affidavits of Thanduxo Bongani Jakavula and Tivanani Christian Shivambu were filed in support of the application.

[9] On 13 August 2026, the NDPP was directed to provide further information after the court noted that the motor vehicle subject to the application is different from the vehicle under the SAPS’ custody so that the application can be properly determined as follows.

Why the vehicle sought to be preserved constitutes an ‘instrumentality of an offence’, rather than merely being property owned or possessed by a suspect.

10] The applicant submitted before this Court that the criminal court’s order related has no bearing on these proceedings. The vehicle was not merely owned or possessed by the suspect, and moreover, the vehicle was found transporting 56 rolls of dagga with a street value of R330,000.00 in contravention of the Drug Trafficking Act and the offence mentioned in item 22 of POCA. According to the NDPP, the facts show a direct nexus: the vehicle was used at the time of the offence to transport the dagga. That direct link makes it an instrument, not merely property owned or possessed.

11] In summation, the NDPP submitted that the vehicle is not merely property owned or possessed by a suspect. It is property that was actively used in the commission of a Schedule 1 offence and is therefore liable for preservation in terms of section 38 of POCA.

The necessity of the preservation order arose after the court on 4 March 2026 ordered the release of the motor vehicle sought to be preserved.

[12] The applicant submitted that, the order of 4 March 2026 is *ultra vires* and *invalid ab initio*. The Magistrates' Court that issued that order for release lacked jurisdiction to do so. Matters relating to the preservation and forfeiture of property that constitute 'an instrument' of a Schedule 1 offence fall exclusively within the jurisdiction of the High Court in terms of Chapter 6 POCA. A criminal court acting in terms of the Criminal Procedure Act 51 of 1977 (the CPA) has no power to make orders concerning preservation under POCA. Therefore, it is argued that the order is *ultra vires*, a nullity, and does not have to be complied with in terms of section 38(1) of POCA. Ultimately, the order of 4 March 2026 was made by a criminal court without jurisdiction over POCA matters and is invalid *ab initio* insofar as it purports to release property liable to preservation and forfeiture. The NDPP, so the argument goes, is therefore entitled to proceed with preservation despite that order.

[13] The applicant further submitted that POCA creates a separate and independent jurisdiction, and the seizure of a vehicle by SAPS in terms of section 20 of the CPA and the institution of preservation proceedings in terms of section 38 of POCA operate in separate spheres. The fact that a criminal court purported to order release does not extinguish the NDPP's statutory duty to institute preservation proceedings where there are reasonable grounds to believe the property is an instrument.

[14] According to the applicant, the criminal court that granted the order for the return of the vehicle did so *ultra vires*. The applicant stated that, In terms of Chapter 6 of POCA, jurisdiction to determine whether property constitutes an instrument, and is liable to preservation and forfeiture vests exclusively in the High Court and that the

NDPP, through the Asset Forfeiture Unit, is empowered in terms of section 38(1) of POCA to institute preservation proceedings irrespective of the fact that the vehicle was initially seized by the SAPS in terms of section 20 of the CPA.

Whether or not the order to release the motor vehicle was suspended, rescinded, varied, or set aside.

[15] The order dated 4 March 2026 has not been suspended, rescinded, varied or set aside by way of a formal court application. The NDPP submitted that, an order made *ultra vires* is a nullity from the beginning, it has no legal force and effect and that it need not be set aside and, therefore, it can be ignored.

[16] The theory of the applicant's case is that, because the release order was made in terms of the CPA, whereas the preservation application is brought in terms of POCA, the two operate independently.

[16] In the logic of the NDPP, the invalid release order does not oust the jurisdiction of the High Court to grant a preservation order and therefore, whilst that order has not been formally set aside, an application for preservation remains 'necessary', and this Court is competent to have heard such a matter and make such an order. Furthermore, the NDPP contends, that it had a statutory duty, upon forming a reasonable belief that the property is an instrument of a Schedule 1 offence, to institute preservation proceedings in terms of section 38 of POCA.

[17] I shall deal with the issue of legality and the finality of orders later in this judgment.

[18] According to the NDPP, releasing the vehicle would have frustrated that statutory duty and prejudiced the State's right to apply for forfeiture in terms of section 50 of POCA. Had the vehicle been released, there was a real risk that it would be sold, transferred, or damaged, thereby defeating the purpose of preservation and/or forfeiture.

[19] In the founding papers, the description of the motor vehicle at issue is as a Ford Ranger Sedan, which is said to have been made in error. The correct description of the motor vehicle is that of a white Ford Ranger 4.0 V6 XLT 4x4. It was the contention of the NDPP that the erroneous description of the motor vehicle does not affect the identity of the vehicle that sought to be preserved. I shall deal with this issue below.

Analysis and Evaluation of The Evidence

[20] The starting point in determining this application is the nature and threshold of the relief sought. The application is brought in terms of section 38 of the POCA read together with section 13 of the Drugs Trafficking Act. In terms of section 38(2), the court is required to grant a preservation order where there are reasonable grounds to believe that the property concerned is, *inter alia*, an instrumentality of an offence referred to in Schedule 1. The enquiry at this stage is therefore not whether the State has established the commission of the offence on a balance of probabilities, but whether the evidence establishes reasonable grounds for the requisite belief.

[21] In terms of section 38(2)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA), instrumentality means property that was used as an “instrumentality of an offence” (instrumentality) referred to in Schedule 1 of POCA, not just property that belongs to the accused. The preservation application is brought in terms of Chapter 6 of POCA, which provides for proceedings in the ‘civil recovery of property.’ The subject of these proceedings is the vehicle itself, not the person who may be suspected in the commission of those offences mentioned in Schedule 1.

[22] If this evidence relayed earlier in this judgment as to the nature, content, weight and monetary (street) value of the narcotics seized is accepted, it establishes a direct factual nexus between the motor vehicle and the alleged offence. The vehicle was not merely alleged to belong to or to have been in the possession of an accused person; the applicant's case is that the vehicle was used to transport the dagga. That distinction is material because, at the preservation stage, the property must be shown to have the requisite connection with the commission of the

Schedule 1 offence. The Supreme Court of Appeal (the SCA) has held that an instrument must play a real or substantial role in the commission of the offence.¹

[23] The preamble of the POCA reads partly as follows: ‘no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence... legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property... concerned in the commission or suspected commission of an offence’. In order to achieve the objectives of POCA, the legislature enacted, *inter alia*, Chapter 6. As stated earlier, it is not conviction-based.²

[24] The court in *National Director of Public Prosecutions v Van der Merwe and Another*,³ in approval of *National Director of Public Prosecutions v RP Cook Properties (Cook Properties)*⁴ the court, articulating the nuances entailed in POCA forfeiture matters, stated that:

“The purpose of Chapter 6’s forfeiture provisions is signalled in the part of the Act’s Preamble that states that ‘no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence. In the NDPP’s argument, releasing the vehicle would have rendered any subsequent forfeiture order nugatory.

[25] The applicant distinguished the nature of this property/ the vehicle in that the vehicle was not simply parked at the suspect’s house and unrelated to the crime; it would be mere property. On the evidence presently before the court, there are therefore reasonable grounds for believing that the vehicle was used in the alleged

1 See *Singh v National Director of Public Prosecutions* [2007] ZASCA 82 at para 11, which relied on *Cook Properties* for authority that:

“(a) there must be a reasonably direct link between the property and its criminal use and
(b) the use of the property must be functional to the commission of the crime and that the property must substantially facilitate,
make possible or be instrumental in, and not incidental to, the commission of the offence”.

2 *National Director of Public Prosecution (Ex parte Application)* [2018] ZASCA 86 at para 27.

3 *National Director of Public Prosecutions v Van der Merwe and Another* (A338/2010) [2011] ZAWCHC 8; 2011 (2) SACR 188 (WCC); [2011] 3 All SA 635 (WCC) (24 February 2011) at para 6.

4 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA) (*Cook Properties*) at para 14.

transportation of the dagga. The applicant accordingly establishes, at least in relation to the statutory threshold contemplated in section 38(2), a basis upon which a preservation order could ordinarily be considered.

[26] That, however, does not dispose of the application. A material and anterior issue arises from the order granted by the Magistrates' Court on 4 March 2026. It is common cause from the applicant's own subsequent response that an application for the release of the vehicle had been brought in the criminal proceedings and that the magistrate ordered its release. The applicant further concedes that the order has not been suspended, rescinded, varied or set aside.

[27] The applicant nevertheless contends that the order was made without jurisdiction and was therefore invalid *ab initio*. It follows from the applicant's argument that it considered itself entitled to disregard the order and to approach this Court for preservation of the same property without first obtaining an order from a competent court setting aside, suspending or otherwise rendering ineffective the magistrate's order.

[28] In my view, that approach cannot be accepted without qualification. The principle that a court order must be obeyed unless and until it is set aside by a competent court is fundamental to the rule of law and the administration of justice.⁵

[27] A party cannot ordinarily assume the power to determine for itself that an order of another court is a nullity and, on that basis, simply disregard it.

[28] After all, the NDPP ought to know the position articulated in the seminal judgment, *Department of Transport and Others v Tasima (Tasima)*, which already affirmed that, irrespective of their flaws, under section 165(5) of the Constitution, court orders are binding until set aside.⁶ Whether the Magistrates' Court ultimately had jurisdiction to make the release order, and whether that order was legally competent, are questions which cannot simply be determined by the applicant and treated as having no legal consequence. If the NDPP considered the order to be

5 MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd [2014] ZACC 6

6 *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39 paras 179 – 182.

invalid, the appropriate course was to place that issue before a competent court and seek appropriate relief.

[29] In *S v Vorster en 'n Ander*,⁷ the court held that “in an application sought for an order for the return of a motor vehicle seized in terms of section 20 of the CPA, the court determined that dealing with property during trial would necessitate some or other kind of finding as to the merits and, further, the decisive reason for the court’s refusal of that application was, namely that section 35 of the CPA provided that the State could apply at the end of a trial for an article used in connection with the commission of an offence to be declared forfeit to the State. Any order for the return of the vehicle would deprive the State of the right to bring such an application.

[30] This conclusion does not amount to a finding that the magistrate’s order was legally correct. It means only that the NDPP was not entitled, on the basis of its own characterisation of the order, to treat it as non-existent. This distinction is important, categorical, if not dispositive.

[31] The issue before this Court is whether the applicant has established a proper basis for the relief sought notwithstanding the existence of an extant court order directing the release of the very property which it now seeks to preserve.

[32] A further difficulty arises from the NDPP’s failure to disclose the release order in the application. The NDPP, too, ought to know that it was required to place before this Court all material facts in the utmost good faith or *uberrima fides*, including those facts which might operate against the relief sought.⁸

[33] In *Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa*,⁹ the authors discuss the *locus classicus*, *Schlesinger v Schlesinger*,

⁷ *S v Vorster en 'n Ander* 2006 (1) SACR 611 (T) at para 617C-F. See also *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA).

⁸ See *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E - 349B; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) per Ngcobo J at para [296].

⁹ *Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa* RS 4, 2026 p13-31.

where the following principles applicable to the *uberrima fides* rule were extracted from the relevant authorities:¹⁰

- “(1) in *ex parte* applications all material facts must be disclosed which might influence a court in coming to a decision;
- (2) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission [of the order obtained *ex parte*; and
- (3) the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.”¹¹

[34] The existence of the release order was plainly material. It concerned the very vehicle which is the subject of the preservation application and directly affected the circumstances in which this Court was being asked to grant relief.

[35] The subsequent disclosure of the order does not render the omission immaterial. In an *ex parte* application the duty of disclosure is exacting because the affected party is absent and the court is dependent upon the applicant for a balanced presentation of the material facts. The question is therefore not merely whether the applicant eventually disclosed the order, but whether the Court, when first approached, was placed in possession of all facts material to the exercise of its discretion.

[36] I am accordingly unable to accept the proposition that the existence of the release order could properly be treated as irrelevant to the present proceedings. The applicant’s own subsequent explanation demonstrates its significance: the preservation application is advanced, in part, on the basis that releasing the vehicle would prejudice the State’s ability to pursue forfeiture proceedings.

¹⁰ Op. cit., fn 17.

¹¹ Ibid. The text makes the following notation: “the non-disclosure does not have to be wilful or mala fide: *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA), [2019] 2 All SA 1 para 45 at 267C-D (SA), 15c-d (All SA) (per Cachalia JA), with reference to *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A-B.”

[37] The explanation advanced by the NDPP for not complying with the release order is also material. The NDPP contends, as stated earlier, that the investigating authority was obliged to maintain the status *quo* because the matter had already been referred to the Asset Forfeiture Unit and because preservation proceedings were contemplated. That contention, however, does not itself provide a legal basis upon which a State organ may disregard an existing court order. The fact that preservation proceedings were contemplated could have justified an application for appropriate interim relief; it did not, without more, extinguish or suspend the existing order.

[38] I turn finally to the discrepancy in the description of the motor vehicle. The vehicle is described in the application as a “White Ford Ranger Sedan”, whereas the NDPP subsequently sought to correct the description to a “White Ford Ranger 4.0 V6 XLT 4x4.” The NDPP contends that this was an error which did not affect the identity of the vehicle.

[39] The court accepts that the applicant made a mistake in the description of the motor vehicle but that does not assist the NDPP because the description is still incorrect and no substantive amendment has been sought before this Court.

[40] In the circumstances, the difficulty with the application is not that the evidence is incapable of establishing the requisite nexus between the vehicle and the alleged offence. Rather, it is that the applicant approached the Court for *ex parte* relief without making full disclosure of a material existing court order and, thereafter, sought to justify non-compliance with that order by unilaterally narratively characterising it as invalid.

[41] In an *ex parte* application for preservation of property, the court must be satisfied not only that the statutory threshold in section 38 has been met, but also that the applicant has approached the court with the requisite candour and has placed all material facts before it. Where a material existing court order affecting the very property in dispute is not disclosed, and where the applicant seeks relief which has the practical effect of undermining that order, the court is entitled to regard the omission as material to the exercise of its discretion.

Conclusion

[42] For these reasons, although the evidence establishes a sufficient factual basis for the alleged 'instrumentality' of the vehicle, I am not persuaded that the applicant has established a proper basis upon which this Court should grant the preservation order in the circumstances in which the application was brought. The application must accordingly fail.

The Order

[43] Wherefore, the following order is made:

1. Application is dismissed.
2. No order as to costs.

J T LESO

**ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA**

Appearances

For the Applicant:

National Director of Public Prosecutions

Counsel:

Adv N. Pisane

103 101 3722

NPisane@npa.gov.za

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