SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 905/2017

In the matter between:

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTION
(EX PARTE APPLICATION) **APPELLANT**

Neutral citation: The National Director of Public Prosecution (Ex Parte Application), (905/2017) [2018] ZASCA (86) (31 May 2018)

Coram: Shongwe ADP, Seriti and Swain JJA and Plasket and D Pillay AJJA

Heard: 23 May 2018

Delivered: 31 May 2018

Summary: Prevention of Organised Crime Act 121 of 1998 (the POCA) - ex parte application in terms of section 38 for a preservation order in respect of a Toyota Prado station wagon motor vehicle - proceedings in respect of chapter 6 of the POCA constitute civil proceedings – section 38 ex parte application to be set down as provided for in Uniform rule 6 (4)(a).

ORDER

On appeal from: Gauteng Division, Pretoria functioning as the Mpumalanga Division, Mbombela (Legodi J sitting as court of first instance);

1 The appeal is allowed.

2 The order of the court a quo is set aside and substituted as follows:

'(a) The appellant may re-enroll with the registrar of the court a quo the application in terms of s 38(1) of the Prevention of Organised Crime Act 121 of 1998 in its original form as an ex parte application.

(b) The application must be set down in accordance with rule 6(4)(*a*) of the Uniform Rules of Court.

(c) A judge of the court a quo as soon as may be reasonably and practically possible after such re-enrolment shall consider and deal with the application as an ex parte application without need for service and decide the application on its merits in accordance with the requirements for the making of the order sought as laid down in s 38(2) of the POCA.'

JUDGMENT

Seriti JA (Shongwe ADP, and Swain JA and Plasket and D Pillay AJJA concurring):

[1] On 14 October 2016, the appellant lodged an ex parte application with the Gauteng Division, Pretoria functioning as the Mpumalanga Division, Mbombela in terms of s 38(1) read with s 74(1) of the Prevention of Organised Crime Act 121 of 1998 (the POCA) for a preservation order in respect of a Toyota Prado station wagon motor vehicle with registration number CV04JK GP. The application was to be heard on 20 October 2016 in chambers, however on that date the matter was stood down to 25 October 2016.

[2] On 25 October 2016 the matter was heard in open court, judgment was reserved and on 10 November 2016 the court (per Legodi J) granted an order which reads as follows: '[t]he application is hereby struck off from the roll and the applicant (NDDP) is directed to serve the application in the event he or she wishes to re-enroll it as a section 38(1) application'.

[3] The appellant aggrieved with this order, applied for leave to appeal which application was dismissed. The appellant with leave of this court appeals against the order of the court a quo. An abbreviated recitation of the factual background relevant to this judgment will follow hereunder.

[4] On 6 March 2016 Sergeant Van der Westhuizen and Sergeant Maluleke, after receipt of certain information, went to Nkomazi toll plaza near Kaapmuiden to intercept a certain 2005 Toyota Land Cruiser Prado station wagon motor vehicle with registration number CV04JK GP

(Prado). At about 10h00, Van der Westhuizen saw the Prado passing through the Nkomazi toll plaza and they stopped the Prado motor vehicle. They searched the motor vehicle and noticed a number of manual modifications to the main rear fuel tank. Van der Westhuizen then loosened ten bolts that were holding the top cover intact, and removed the top cover from the rear fuel tank. Under the cover, they found multiple white plastics bags which contained a certain substance. There were 50 bags in total; and it was later established that these bags contained heroin.

[5] After discovering the heroin in the rear fuel tank, the driver of the Prado, Mr Jeronimo Masoio Mateus Matusse (Matusse) who was alone in the Prado was arrested. The illicit drugs were later sent to the SAPS's Forensic Science Laboratory for analysis and the Forensic Science Laboratory determined that the substance in the 50 bags was diacetyl-morphine (heroin) and that the total mass of the 50 bags of heroin was 50.390 kilograms, which has an approximate street value of R50 million.

[6] The Electronic National Transport Information System indicated that Haji Ramadhani, a Tanzanian national, is the owner and title holder of the Prado motor vehicle since 31 October 2013. It further indicated that the Prado is not subject to a hire-purchase agreement which suggested that Ramadhani bought the Prado cash or had paid it off.

[7] On 7 March 2016 Matusse appeared in the Kaapmuiden district court on charges of possession and dealing in an illicit substance namely diacetylmorphine. He applied for bail which was opposed by the state and dismissed by the court. On 18 May 2016 he appeared in the Barberton Regional Court, where he applied to be released on bail relying on new facts.

[8] During the renewed bail application Matusse testified that he had no knowledge of the illegal substance ie heroin which was found in the fuel tank of the Prado. He further testified that Ramadhani met him at a hotel in Johannesburg and Ramadhani requested him to drive the Prado to Maputo, Mozambique and back to Johannesburg. Ramadhani requested him to deliver the Prado to a person called Sergio who resided in Maputo.

[9] According to his evidence, he acceded to the request of Ramadhani, and drove the Prado to Maputo where he met Sergio and handed the Prado over to him. After a few days Sergio returned the Prado to him and he drove back to Johannesburg in order to return the motor-vehicle to Ramadhani. He was arrested on his way back to Johannesburg and the heroin was found by the police in the fuel tank of the Prado.

[10] Matusse who is a Mozambican national was subsequently released on R5000 bail and his criminal case in the regional court, Barberton was postponed to 4 October 2016.

[11] After the arrest of Matusse, the police attempted to trace Ramadhani. The police went to the address appearing on the Electronic National Transport Information System and to the address appearing on the affidavit allegedly signed by Ramadhani, however he could not be traced as the addresses were incorrect. The police attempted to contact Ramadhani on his alleged cellular phone number but this cellular telephone number turned out to be inactive. Ramadhani did not contact the police in order to request the return of the Prado.

[12] In the supporting affidavit, Constable Thela, stationed at the Nelspruit Organised Crime Unit in the Asset Forfeiture Section, stated that the Prado was modified and adapted in order to covertly transport 50 kilograms of heroin from Mozambique into South Africa. In other words the Prado was used as an instrument to smuggle the heroin through the Mozambique and South Africa border posts. The Prado was further used to transport Matusse, the illicit drug courier, from Gauteng, South Africa to Maputo, Mozambique and back. He requested further that the honourable court preserve the Prado pending the outcome of a forfeiture application.

[13] In his heads of argument, counsel for the appellant urged this court to deal with the various reasons advanced by the court a quo for its decision or judgment. It is trite that an appeal lies against the substantive order made by the court and not the reasons for the judgment – see *ABSA Bank Ltd v Van Rensburg & another* [2014] ZASCA 34; 2014 (4) SA 626 (SCA) at 632F–G and *ABSA Bank Ltd v Mkhize and Two Similar Cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) at 37. In this event, I shall concentrate on the substantive order of the court a quo and deal cursorily with some of the reasons of the court quo which in my view are relevant to the conclusion that I have arrived at hereunder.

[14] Section 38 of the POCA reads as follows:

‘(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

(*a*) is an instrumentality of an offence referred to in Schedule 1;

(*b*) is the proceeds of unlawful activities; or

(*c*) is property associated with terrorist and related activities.'

[15] The fundamental principle in the interpretation of statutes is that words must be given their ordinary meaning, unless that construction would lead to an absurdity. In the event of an ambiguity the court can examine the apparent purpose of the provision and the context in which it appears. In *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at 28, the court said '[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (*a*) that statutory provisions should always be interpreted purposively; (*b*) the relevant statutory provision must be properly contextualised; and (*c*) all statutes must be construed consistently with the Constitution. . .'. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. In an attempt to interpret the provisions of section 38, the fundamental principles of interpretation mentioned above will be invoked.

[16] Section 38, contained in Chapter 6 of the POCA, deals with the civil recovery of property and the relevant sections thereof are ss 37 to 62. Section 37 deals with the nature of the proceedings and ss 38 to 47 deal with the preservation of property and related issues.

[17] When dealing with the scheme of chapter 6, this court in *National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 (SCA) para 3 said, '[I]t authorises the NDPP to apply to a High Court, without notice, for an order that has the effect of temporarily depriving a person of property, so as to preserve the property in anticipation of an order being

sought for its forfeiture. A court is required to make such an order "if there are reasonable grounds to believe that the property concerned . . . is an instrumentality of an offence referred to in Schedule 1" of the Act'.

[18] Schedule 1 of the POCA amongst others refers to 'any offence referred to in s 13 of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992)'. Section 13 of the Drug Trafficking Act read in conjunction with Part 111 thereof classifies heroin (diacetylmorphine) as an undesirable dependence producing substance and dealing in such substance as an offence.

[19] In *National Director of Public Prosecutions v Mohamed NO & other*s 2003 (4) SA 1 (CC), the court was dealing with a declaration of constitutional invalidity made by the Johannesburg High Court in respect of s 38 of the POCA. At para 27 the court said '[f]or purposes of this case "an ex parte application" in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence'. In para 33 the court stated further that '[t]he phrase in s 38 "[t]he National Director may by way of an ex parte application apply" means no more than that, if the National Director is desirous of obtaining an order under s 38, she or he may use an ex parte application above. . .'. The normal meaning of s 38 is that the DPP may, if she or he so decides, approach the high court by way of an ex parte application. The provisions of s 38 are unequivocal and attaching ordinary meaning to the words used in section 38 does not lead to any absurdity.

[20] In various paragraphs of its judgment, the court a quo indicated that the NDPP, in order to proceed with an ex parte application in terms of s 38 is supposed to show a real possibility that the Prado will be lost to them if

the driver or owner thereof comes to know about the application for a preservation order. The court a quo when dealing with s 38(1) said '[i]t is a discretionary power which is conferred on the NDPP to approach the court ex parte in terms of section 38(1) and when that discretionary power is exercised, NDPP is required to show prima facie … that by approaching the court by way of notice of motion, the Prado will be dissipated or destroyed'. I do not agree with the views of the court a quo. In order to obtain a preservation order in terms of s 38, the NDPP must comply with the requirements of s 38. The section does not require the NDPP to show a real possibility that the property in question will be lost if the owner thereof comes to know about the application for a preservation order.

[21] The NDPP is entitled, if he or she so wishes to launch an application in terms of s 38 by way of an ex parte application. Chapter 6 deals, inter alia, with preservation of property orders, forfeiture of property etc and may be invoked prior to, or in the absence of a conviction. The provisions of chapter 6 are not conviction based. They are civil remedies which the NDPP may invoke even if a conviction is lacking.

[22] The court a quo said further, '[s]ection 38(1) gives the NDPP discretionary power to approach the court on ex parte and in camera for preservation of property order. Such discretionary power must be exercised properly based on the facts of each case. Abuse of the section ought to be discouraged. In others words, utilization of an ex parte application as a matter of must and right may not get the pleasure of the court unless there are facts justifying the bringing of any application on ex parte and or in camera'. Furthermore, the court a quo went on to say '[a]s I said, bringing the present application in terms of s 38 for possible forfeiture under s 48 read with section 50 of the POCA without giving

notice, amounts to an abuse'. I do not agree with the views of the court a quo mentioned in this paragraph. This is so because s 38 allows the National Director of Public Prosecutions if he or she so wishes to launch an ex parte application.

[23] In *National Director of Public Prosecutions v Alexander & others* 2001 (2) SACR 1 (T), the applicant brought an application to court in terms of s 26(1) of the POCA. Section 26 deals with restraint orders and subsection 1 thereof reads partly as follows: '[t]he National Director may by way of an ex parte application apply to a competent high court. . .'. The court in *Alexander* stated that, in addition, '[t]he Act clearly and expressly allows an applicant to apply ex parte . . . [b]ut to require an applicant to convince a court of some special circumstances to justify an ex parte application, would be to ignore the wording of s 26(1), or to render it meaningless . . . [b]ut the clear intention of the Legislature that applications of this kind may be brought ex parte is unavoidable. Presumably the Legislature regarded these proceedings as inherently sufficiently urgent'. I am in full agreement with the views of the court expressed herein.

[24] It is not an abuse of s 38 if the National Director of Public Prosecutions decides to approach the court, in terms of this section by way of an ex parte application. Section 39 makes provision for giving notice of the preservation order to affected persons. In terms of s 47, the high court which made a preservation of property order may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned. The preservation orders precede the granting of a forfeiture order in term of s 48. Prior to the application for a forfeiture order in terms of s 48, the

National Director would have given notice of the preservation of property order to all persons known to the National Director that have an interest in property which is the subject of the order. Prior to the granting of a forfeiture order, people with an interest in the relevant property would have been given sufficient opportunity to do what they deem necessary in order to protect their interest if they so wish.

[25] As stated in the previous paragraph, s 39 makes provision for the giving of notice of the preservation of property order so that those with an interest in the said property can do what they deem necessary to protect their interest. Furthermore, the high court can, after hearing a preservation application ex parte and in camera, grant a rule nisi together with an interim preservation order pending the return day of the rule. See *NDPP v Mohamed* above paras 32 and 51.

[26] The audi alteram partem rule is not excluded. Parties who have an interest in the affected property have ample opportunity to do what is necessary to protect their interest prior to the granting of an order forfeiting to the State the property that is the subject of a preservation of property order or if a rule nisi is granted, on the return date or they can anticipate the return date.

[27] 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 . . . legislations 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 the POCA, the legislature enacted, inter alia chapter 6. As stated earlier, it is

not conviction based.

[28] There are other provisions in the Criminal Procedure Act 51 of 1977 which deal with the forfeiture of property. The court a quo in this respect stated that '[t]he NDPP can resort to section 35 of the Criminal Procedure Act by instructing the prosecutor in criminal proceedings to invoke the provisions either of subsection (1) or subsection 2'. The legislature when it passed the POCA was aware of the provisions of s 35 of the Criminal Procedure Act and in its wisdom in order to achieve the objects of the POCA, enacted chapter 6 of the POCA. The National Director of Public Prosecutions is entitled to utilize the provisions of chapter 6 of the POCA despite the fact that the Criminal Procedure Act makes provision for forfeiture proceedings. The State's counsel, in his heads of argument, correctly so in my view, submitted that where more than one potential forfeiture process exists in a given instance it must be left up to the relevant State entities to determine which process would be the most appropriate to adopt in the particular circumstances. It is not competent for the court to interfere with the decision of the State to follow a particular forfeiture process. The NDPP legitimately chose to proceed in terms of Chapter 6 of the POCA, and such a decision must be respected by the court.

[29] The court a quo dealt with some of the provisions of the Practice Directives of the Mpumalanga Division of the High Court 1 of 2016 and said: '[p]aragraph 2.5.5.2 of Mpumalanga Division of the High Court provides that; "ex parte applications, that is applications enrolled without notice being given to the affected party or parties; will not be enrolled and heard; except where such notice is not required by and will not adversely affect any person". In addition paragraph 2.5.5.3 provides that "any ex

parte application will only be enrolled and heard in exceptional circumstances, which must clearly and concisely be set out in the founding affidavit"'. The court a quo was of the view that the s 38 application must comply with the provisions of the Mpumalanga Division of the High Court practice directives.

[30] Rule 6(4)(*a*) of the Uniform Rules of Court reads as follows; '[e]very application brought ex parte shall be filed with the registrar and set down before noon on the court day but one preceding the day upon which it is to be heard'. It is clear that paragraph 2.5.5.2 is inconsistent with Uniform rule (6)(4)(*a*). Furthermore, the provisions of paragraphs 2.5.5.2 and 2.5.5.3 are inconsistent with the provisions of s 38 in so far as they suggest that an ex parte application will not be heard except where notice of the application is not required by and will not adversely affect any person and that any other ex parte application will only be enrolled and heard in exceptional circumstances. Paragraph 8.1 of the Practice Manual of the KwaZulu-Natal Provincial Division correctly states that ex parte applications are catered for in rule 6(4)(*a*) read with Form 2 of the First Schedule. Section 38 stipulates the requirements that must be complied with before the high court can grant a preservation of property order. The section makes no mention of exceptional circumstances.

[31] The practice directive is subordinate to any relevant statute, the common law and the Uniform rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and, their purpose is to supplement the rules of court. In this case, the court a quo afforded the practice directive statutory force overriding both s 38 of the POCA and rule 6(4)(*a*) of the Uniform

rules which is impermissible. The practice directive should not negate the provisions of s 38 and rule 6(4)(*a*) of the Uniform rules. In my view the portion of the practice directive dealing with ex parte applications is not applicable to ex parte applications brought in terms of s 38.

[32] Ex parte applications in terms of s 38 are by their nature urgent. The purpose of the preservation order is to protect the property from being disposed of or removed or dissipated. Proceedings in terms of chapter 6 of the POCA constitute civil proceedings aimed at ensuring, amongst others that property used to commit an offence mentioned in Schedule 1 is preserved and in appropriate cases, ultimately forfeited to the State. The purpose of chapter 6 is to combat crime and for that reason the proceedings for obtaining a preservation order are urgent.

[33] The appellant's counsel submitted that the approach to an ex parte application brought in terms of s 38(1) should be that as soon as is reasonably and practically possible after such an application has been filed with the registrar, a judge in chambers ought to consider the application and make the appropriate order. I agree with this submission.

[34] In the result, I make the following order:

1 The appeal is allowed.

2 The order of the court a quo is set aside and substituted as follows:

'(a) The appellant may re-enroll with the registrar of the court a quo the application in terms of s 38(1) of the Prevention of Organised Crime Act 121 of 1998 in its original form as an ex parte application.

(b) The application must be set down in accordance with rule 6(4)(*a*) of the Uniform Rules of Court.

(c) A judge of the court a quo as soon as may be reasonably and

practically possible after such re-enrolment shall consider and deal with the application as an ex parte application without need for service and decide the application on its merits in accordance with the requirements for the making of the order sought as laid down in s 38(2) of the POCA.'

_____

WL SERITI

JUDGE OF APPEAL

APPEARANCES:

For Appellant: W A Coetzer and S J van der Walt

Instructed by: The State Attorney, Pretoria

The State Attorney, Bloemfontein