



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The National Director of Public Prosecutions v Gcaba (488/2024) [2026] ZASCA 04 (14 January 2026)

Today, the Supreme Court of Appeal (SCA) upheld the appeal by National Director of Public Prosecutions (the NDPP) against an order of the KwaZulu-Natal Division of the High Court, Durban (high court). That court had dismissed the NDPP's application in terms of s 48 of the Prevention of Organised Crime Act, 121 of 1998 (POCA), for the forfeiture of property which was subject of a preservation order. The application, as well as the appeal before the SCA were not opposed by the respondent, Mr Sithembiso Adolphus Gcaba (Mr Gcaba).

Mr Gcaba was arrested for allegedly being in unlawful possession of R46 120 (the property), which the State alleged, was the proceed of a crime. This amount was held by the State under a preservation order obtained by the NDPP and granted *ex parte* by the high court in terms of s 38 of POCA on 28 September 2022. In terms of s 40(a) of POCA: a preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Government Gazette (the *Gazette*) unless an application for a forfeiture order is pending before the High Court in respect of the property. By the time the 90 days expired in this matter the application was only issued but had not been served.

The issue before the SCA was whether the application was 'pending' before the high court as contemplated in terms of s 40(a) before expiry of the 90 days and ultimately the meaning of the word 'pending'.

The majority judgment, written by Henney AJA, held that dealing with the interpretation of these provisions, and especially with the term 'pending', courts have stressed that the term 'pending' is dependent on the context in which it is used. The SCA held further that in order for a forfeiture application to be regarded as 'pending' for the purposes of s 40(a), it is not a requirement that there should be service of that application within the period of 90 days. There are principally four reasons that compellingly show that the word pending" in s 40(a) means 'issue' and not 'issue and serve'.

The majority reasoned that mere issue and not service of the application within the 90 days would not unduly infringe upon an individual's rights. The person's property rights, if any, are

at best only limited, for the period of the duration of the preservation order, after judicial sanction, at the time when the preservation order was granted. The majority held that at the time of the hearing of the application, despite the expiration of the 90 day period on 27 October 2023, the preservation order was still in force, because the forfeiture application was 'pending' in terms of s 40(a) of POCA, ie even though service of that application only took place on 17 August 2023. The NDPP complied with the provisions of s 48(2) by serving the application on Mr Gcaba more than 14 days before the application was heard.

Writing for the minority, Makgoka JA, disagreed with the first judgment's interpretation of s 40(a) and its conclusion to uphold the appeal. The minority held that a proper interpretation of that provision means that the NDPP is required to issue and serve the forfeiture application within 90 days; failing to do so, the preservation order lapses. The contextual setting of s 40(a) is that it is part of interrelated provisions of POCA, together with ss 38, 39, 40, 48 and 50. Thus, s 40(a) cannot be interpreted in isolation from these provisions. The second is the notification of the existence of a preservation order.

The minority held that s 40(a) must be interpreted in a unitary exercise, simultaneously considering the text, purpose and context of POCA. In addition, the provision must be considered through the prism of s 39(2) of the Constitution, which enjoins courts to construe legislation in accordance with the spirit, purport and objects of the Bill of Rights. The inevitable starting point is the language of the provision. It seeks to limit the duration of a preservation order. It will lapse within 90 days, unless within that period, an application for forfeiture is 'pending.'. As to its purpose, s 40(a) is meant to ensure that the preservation order is either confirmed by a forfeiture order or is discharged without undue delay.

The core disagreement of the minority with the majority is the uncertainty created in the proceedings under Chapter 6 of POCA. The minority pointed out that despite holding that the NDPP is not required to serve the forfeiture application within 90 days, it does not provide any guidance as to when the application should be served. This left the decision solely in the discretion of the NDPP.

The question that remains unanswered by the NDPP is what would necessitate a need to issue a forfeiture application but delay serving it for more than three months. In the present case, it served the forfeiture application after 11 months of issuing it. The NDPP did not furnish an adequate explanation for this inordinate delay, except to say that the failure was due to 'lack of coordination between it and the State Attorney.'. This was not the only tardiness on the part of the NDPP. It also failed to comply with s 39(1)(a), which requires it to serve the preservation order as soon as practicable after obtaining it. This too, it served it after 11 months. In the absence of a proper explanation for these procedural lapses, the minority attributed them to sheer ineptitude. Accordingly, the minority found that in all the circumstances, the appeal should be dismissed.

The majority concluded that the NDPP has made out a case for the forfeiture of the property in terms of s 50(1)(b) of POCA and the high court ought to have concluded accordingly. As a result, the SCA upheld the appeal and further set aside and replaced the order of the high court.

ENDS