

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Knoop NO and Others v National Director of Public Prosecutions (Case nos 657/2022 and 694/2022) [2023] ZASCA 141 (30 October 2023)

Today the Supreme Court of Appeal (SCA) handed down judgment striking, with costs, an appeal against the decision of the Gauteng Division of the High Court, Pretoria.

The facts of this matter were briefly as follows. The NDPP (the respondent in the appeal) instituted an application at the Gauteng Division of the High Court, Pretoria (the high court) for a preservation of property order in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA). The intention of the order being to preserve certain property from being disposed of pending the finalisation of a forfeiture of property order. The property in question consisted of: (a) all shares held in Optimum Coal Mine (Pty) Ltd (OCM); (b) the business of OCM as defined in the business rescue plan adopted by the creditors of OCM in September 2020 including, but not limited to, the assets listed in the business rescue plan; and (c) all shares held in Optimum Coal Terminal (OCT). The shares in question were held by Tegeta Exploration and Resources (Pty) Ltd (Tegeta). OCM, OCT and Tegeta were all under business rescue. The Business Rescue Practitioners appointed for all three companies as well as NUM (who were the representatives of the employees of OCM) were the appellants in this matter. The reason for the NDPP's application for a preservation order was based on the belief that the property in question was acquired with the proceeds of crime and therefore should be forfeited to the State. The high court ruled in favour of the NDPP's application and granted the preservation order.

Aggrieved by the decision of the high court, the Appellants, with leave from the court *a quo*, brought the matter on appeal before this Court.

A preliminary issue for determination before this Court was whether a preservation order granted under Chapter 6 of POCA was appealable. This Court issued a directive requesting the parties to submit written submissions on the question of appealability. In their submissions all the appellants contended that the order was appealable; whereas, the NDPP contended that it was not.

The appellants argued that the previous decisions of this Court in *Phillips v NDPP* (2003 (6) SA 447 (SCA)) (*Phillips*) and *Singh v NDPP* (2007 (2) SACR 326 (SCA)) (*Singh*) were definitive on the issue. In *Phillips*, this Court found that a restraint order granted under Chapter 5 of POCA was appealable. *Singh* involved a preservation order under Chapter 6. This Court commented in its judgment in *Singh* that the NDPP had correctly conceded that the order was appealable, following *Phillips*.

In its judgment today this Court rejected the submission that Phillips and Singh were determinative on the issue of the appealability of a preservation of property order. The Court identified material differences between restraint orders, under Chapter 5, which were considered in *Phillips*, and preservation orders under Chapter 6. The procedure encapsulated in s 38(1) read with s 39 was unique to the asset forfeiture regime under Chapter 6 of POCA. It deliberately positions the right to audi alteram partem within the post-preservation order phase. That the legislative scheme did not envisage, as a general principle, a route to opposition prior to the grant of a preservation order. This, together with other features of Chapter 6 demonstrated the legislative objective of insulating preservation orders from challenge pending the forfeiture process. This was because of the indispensable role that a preservation order played in securing proceeds and instrumentalities of crime. That objective would be compromised if preservation orders were susceptible to appeal. Furthermore, the Court held that a preservation and a forfeiture order shared a distinct symbiotic relationship not shared by restraint and confiscation orders under Chapter 5 of POCA. The Court in Singh had not given consideration to the unique features of the asset forfeiture regime under Chapter 6 of POCA, and was not determinative of the issue either. As such, the SCA found that preservation orders under Chapter 6 were not intended to be appealable.

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