THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 488/2024

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

SITHEMBISO ADOLPHUS GCABA **RESPONDENT**

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

Coram: MAKGOKA and COPPIN JJA and DAWOOD, PHATSHOANE and HENNEY AJJA

Heard: 26 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 14 January 2026 at 11h00.

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – application in terms of s 48 for forfeiture of property held under a preservation order obtained under s 38 – whether 'pending' in s 40*(a)* requires that the application for forfeiture of property to be issued and served within 90 days of publication of preservation order.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Kruger J, sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court dated 27 October 2023, dismissing the application for a forfeiture order, is set aside and replaced with the following:

‘1. An order is granted in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring forfeit to the State R46 120 (the property) held under the reference: SAP13/886/2021 via Durban Central CAS 257/03/2021 at the Durban Central Police Station.

2. After the forfeiture order referred to in paragraph 1 takes effect, the Station Commander, Durban Central Police Station, is directed to forthwith deposit the property into the banking account described below:

2.1 Name of Account: Criminal Asset Recovery Account

2.2 Name of Bank: The Reserve Bank of South Africa

2.3 Account number: 80303056

2.4 Deposit reference number: 10/8/3/AFU-KZN/25/2021

3. In terms of s 50(5) of POCA, the State Attorney, Durban is directed to forthwith publish a notice of this Order in the *Government Gazette*.

4. The Applicant is directed to deliver a copy of this order by hand, or through email to:

4.1 The Station Commander, Durban Central Police Station, SAPS

and

4.2 The SAP13 Exhibit Clerk, Durban Central Police Station.

5. The Applicant is directed to forthwith serve a copy of this judgment on the Respondent, Sithembiso Adolphus Gcaba, within 20 days of this order.

6. Any person whose interest in the property concerned is affected by the forfeiture order, may within 20 days after they have acquired knowledge of such order, in terms of the relevant provisions of POCA, apply for the order to be varied or rescinded by the high court.

7. Any person affected by the forfeiture order, who was entitled to receive notice of the forfeiture application under s 48(2) of POCA but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the *Government Gazette*, apply to the high court for an order under s 54 of POCA, to exclude his, her or its interest in the property, or to be part of the operation of the order in respect of the property

8. In terms of s 50(6) of POCA, this forfeiture order shall not take effect before the period allowed for an application under s 54 of POCA, or an appeal under s 55 of POCA has expired, or before such application or appeal is disposed of.'

JUDGMENT

Henney AJA (Coppin JA and Phatshoane AJA concurring):

Introduction

[1] This is an appeal by the National Director of Public Prosecutions (the NDPP) against an order of the KwaZulu-Natal Division of the High Court, Durban (the high court), in which its application in terms of s 48 of the Prevention of Organised Crime Act, 121 of 1998 (POCA), for the forfeiture of property (the application), was dismissed. The application, as well as this appeal were not opposed by the respondent, Mr Sithembiso Adolphus Gcaba (Mr Gcaba). The appeal is with the leave of the high court.

[2] Mr Gcaba was arrested for allegedly being in unlawful possession of R46 120 (the property). 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 *Gazette* unless – (*a*) there is an application for a forfeiture order *pending* before the High Court in respect of the property, subject to the preservation of property order.' (My emphasis). By the time the 90 days expired in this matter the application was only issued but had not been served. The question that arises is whether the application was 'pending' before the high court as contemplated in that section before expiry of the 90 days. At the heart of this case is, therefore, the meaning of the word 'pending' in s 40(*a*) of POCA.

[3] Given the debate and the difference in interpretation of the word 'pending' in this judgment and the second judgment as will become obvious later, the provisions of POCA that deal with the preservation and forfeiture procedures are not models of clarity. This judgment seeks to assign a meaning to the word 'pending' in s 40, it does not seek to resolve anomalies that may arise from that provision.

Factual background

[4] On the evening of 6 March 2021 members of the South African Police Services observed Mr Gcaba engaged in suspicious and unlawful activity at a petrol service station's automatic teller machine (ATM). He had a total number of 69 orange Social Security Agency (SASSA) cards in his possession and carried a black bag, which contained additional SASSA cards and R 7 640 cash.

[5] Mr Gcaba gave an unsatisfactory explanation to the police regarding the cards and money. He was arrested. A further R39 800 was found in his car. The total amount of cash recovered was thus R46 120. It was established that these cards had been dispatched from Bloemfontein to various SASSA offices in KwaZulu-Natal and that an amount of R118 000 was withdrawn from ATMs in the eThekwini region over a five-hour period with 62 of the cards that were found in the possession of Mr Gcaba.

[6] Following the seizure of the property the NDPP applied for a preservation order, which the high court granted on 28 September 2022. The high court in terms of s 39(1) of POCA ordered the NDPP to publish a notice of the preservation order in the *Government Gazette* (the *Gazette*); serve its copy together with the preservation application on Mr Gcaba through the office of the sheriff of the high court; serve a copy

of the order on any other person who becomes known to the NDPP as having an interest in the property; and that any person who has an interest in the property and who intends to oppose the granting of a forfeiture order, must enter an appearance to oppose and give notice of such an intention in terms of s 39(3) of POCA.

[7] The preservation order was published in the *Gazette* on 14 October 2022. On 11 January 2023, while the preservation order was still in force, the NDPP, for the first time, launched the present application for the granting of a forfeiture order in terms of s 48 of POCA which was set down for hearing on 20 April 2023. The application was removed from the roll and reinstated on several occasions between the period of 20 April 2023 and 14 August 2023, by which date the service of the preservation order and the application had not been effected on Mr Gcaba. Only on 17 August 2023 after cooperation between the State Attorney and the investigating officer, the preservation order and the forfeiture application were served on Mr Gcaba personally at the Regional Court for the Regional Division of KwaZulu-Natal, Durban. Mr Gcaba was appearing in the criminal matter related to this application and was also advised about the court date.[1] This was after numerous unsuccessful attempts by the State Attorney to get the sheriff to serve the preservation application order as well as the forfeiture order on Mr Gcaba at his given address.

[8] On 27 October 2023, the application was heard in the high court and dismissed on the basis that, in terms of s 40*(a)* of POCA, the preservation order had expired because '…the application [for a forfeiture order] was served on [Mr Gcaba] way beyond the expiration of the 90-day period. The preservation order had therefore lapsed'. In terms of s 48(1) of POCA the NDPP may only apply for a forfeiture order in respect of property while the preservation order in respect of that property is still in force.

The NDPP's submissions

[9] POCA does not prescribe or stipulate a specific time limit for the service of a preservation order on a respondent. It merely requires, in terms of s 39(1) and (2), service of the preservation order, 'as soon as practicable after the making of the order',

[1] See paragraphs 6-8 of the affidavit of Kenneth Mark Samuel filed in support of the application for condonation.

in the manner in which a summons, whereby civil proceedings in the high court are commenced, is served. Furthermore, POCA does not expressly provide that a preservation order would expire in the event that it is not served within 90 days from the date of the grant thereof. The 90 days commence after the date of the publication of the notice of the making of the preservation order in the *Gazette* (s 40). Section (40)(*a*) provides for the expiration of the preservation order at the end of the 90 days, unless an application for the forfeiture order is pending before a high court by such date.

[10] The obvious purpose of a preservation order is to ensure that the property is preserved until the grant or refusal of a forfeiture order. It is unclear why the failure to serve or a delay in the service of a forfeiture order within the 90day period prescribed by s 40*(a)* of POCA, would impinge on any of Mr Gcaba's rights in an unacceptable manner. This is so because in the absence of service, the preservation order may not be confirmed, and the forfeiture may not be granted. This can only happen when the preservation order and a forfeiture order application are served in the same manner in which a summons in civil proceedings in the high court are commenced.

[11] It is a frequent occurrence in litigation that the service of papers is sometimes delayed. The reasons for the delay in this matter do not appear from the record and there is nothing in the record to indicate that the delay in service was deliberate. In an affidavit filed in support of the condonation application in this Court, Mr Kenneth Mark Samuel, a Deputy Director of Public Prosecutions with personal knowledge of the facts, explains that there were efforts to serve the relevant documents personally at Mr Gcaba's place of residence, but the delays were essentially due to lack of coordination. It is only after the staff of his office, the State Attorney and the investigating officer coordinated their efforts, that the sheriff managed to serve the preservation application, its order and the forfeiture application personally on Mr Gcaba on 17 August 2023. Accordingly, the NDPP submitted, that Mr Gcaba had been served and his entitlement to resist the confirmation of the preservation order and the grant of the forfeiture order remained unaffected. The fact that Mr Gcaba elected not to contest those processes, was entirely his prerogative.

[12] There is no ambiguity in the word 'pending' as contemplated by s 40*(a)* of POCA. Additionally, there is no absurdity which results from interpreting the word 'pending' as meaning that the papers in the forfeiture application have been issued and that the application has accordingly commenced or launched and awaiting a final decision as contemplated in *Malebane v Dykema.*[2]

[13] Chapter 6 proceedings under POCA are proceedings *in rem* because their focus is on property that is used to commit an offence, or which constitutes the proceeds of unlawful activity. In advancing this argument the NDPP rely on *National Director of Public Prosecutions and Another v Mohamed N O and Others*,[3] which held that 'Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence, or which constitutes the proceeds of crime'. The NDPP also relies on *MV Jute Express v Owners of the Cargo Lately Laden on Board the MV Jute Express*[4] where this Court dealt with an action *in rem* and held '…that in the case of an action *in rem* the moment of commencement is deemed to be the *issue* of process and, in case of an action *in personam,* the *service* of process.' (Emphasis added.)

[14] Based on these authorities, Chapter 6 of POCA encapsulates the preservation and forfeiture provisions which are in *rem,* by parity of reasoning, the *issue* and not the *service* of the application is required to avert the expiration of the preservation order. This interpretation does not result in any absurdity. The NDPP submits that it is feasible for an application for a forfeiture order in respect of property co-owned by two or more persons to be considered 'pending' where the papers in the preceding preservation application have been issued and the forfeiture application is served on only one of the co-owners within the 90-day period but not on the others. Such an application would be 'pending' against that co-owner but not on others. And that an interpretation that service is required in such circumstances would result in absurdity.

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[2] *Malebane v Dykema* [2018] ZASCA 174; [2019] 1 All SA 316 (SCA); 2018 JDR 2116 (SCA) paras 14-16.
[3] *National Director of Public Prosecutions and Another v Mohamed N O and Others* 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC); 2002 (2) SACR 196 (CC) para 17.
[4] *MV Jute Express v Owners of the Cargo Lately Laden on Board the MV Jute Express* 1992 (3) SA 9 (A) at 17A-C; [1992] 2 All SA 95 (A).

[15] It is also feasible that a preservation order is not directed at a reasonably identifiable respondent. In such circumstances, it is submitted, it may materialise that upon the grant and publication of a preservation order no person delivers a notice in terms of s 39(3) to oppose the grant thereof, nor an affidavit in terms of s 39(5) setting out the requisite particulars and grounds of opposition. In such an instance they would accordingly not be obliged to deliver a s 48(3) notice to any person. In such circumstances, according to the NDPP, the service requirement would be meaningless and would serve as an impediment to the grant of a forfeiture order.

[16] If due regard is to be had to the text, context and purpose of the word 'pending' in s 40*(a)* of POCA and the ordinary grammatical sense thereof, the requirement of service, ie, to render the forfeiture application 'pending', would clearly result in an absurdity. Lastly, the high courts' decisions, which held that service within 90 days is a necessary requirement in order to preserve the validity of the preservation order, were clearly wrong and ought not to be endorsed by this Court.

Discussion

[17] Our jurisprudence on interpretation emphasises a contextual and purposive approach**.** This Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*) [5] said that interpretation requires a holistic consideration of the text, context and purpose of legislation, with preference given to sensible, and businesslike meanings, over rigid formalism.[6]

[18] The key issue for consideration is whether the high court was correct to conclude, relying on *Levy v National Director of Public Prosecutions* (*Levy*)[7] and in *National Director of Public Prosecutions v Moolla* (*Moolla*),[8] that the matter was not 'pending' because the preservation order had expired due to non-service of the forfeiture application on Mr Gcaba within 90 days of the publication of the preservation order. And whether the interpretation of the term 'pending' by the court in *Levy,* and the other courts that relied on that interpretation, was correct. And, similarly, whether

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).
[6] *Endumeni* para 18.
[7] *Levy v National Director of Public Prosecutions* 2002 (1) SACR 162 (W) para 9.
[8] *National Director of Public Prosecutions v Moolla* [2010] ZAGPJHC 56; 2010 (2) SACR 429 (GSJ) *(Moolla).*

the finding to the contrary in *NDPP v Hilda van der Burg and Another* (*Van der Burg*),[9] was correct.

[19] This Court in *Knoop NO and Others v National Director of Public Prosecutions (Knoop)*,[10] where it dealt with appealability of preservation orders, stated that 'if the NDPP does not institute that application (forfeiture) within a period of 90 days of publication of the notice of the preservation order, the preservation order expires'.[11] This Court also stated that inherent in chapter 6 of POCA is that forfeiture should proceed without delay and it explains the 14-day time limit for a person to enter an appearance after notice of the preservation order, as well as the cutoff of 90 days for the institution of a forfeiture application. It is however not apparent from this judgment what is meant by the word 'institution' of a forfeiture application, could it have meant only the issuance of the application and not service. It bears repeating that on 11 January 2023, while the preservation order was still in force, that is within the prescribed 90 days period, the NDPP launched the forfeiture application. In *Knoop* this Court was not called to specifically deal with the meaning of 'pending' in s 40 as we are enjoined to do.[12]

[20] The court in *Levy* concluded that whilst the interpretation of the word 'pending' is ambiguous, it can either mean that service of an application is required or not required. It concluded that for the proceedings to be 'pending' and for the preservation order not to be considered to have lapsed, not only the issue of the forfeiture application but also service thereof was required within the period of 90 days. It held that it preferred that interpretation, because POCA is impactful on individuals' rights.

[21] The court in *Levy* applied *Mahlangu and Another v Van Eeden and Another* (*Mahlangu*)[13] where Dodson J stated that he was of the view '…that when pending proceedings are referred to at common law, they are proceedings which have commenced by the service and not mere issue of summons'. In *Levy* the court also

[9] *NDPP v Hilda van der Burg and Another* (5576/06) CPD (22 December 2008) *(Van der Burg).*
[10] *Knoop NO and Others v National Director of Public Prosecutions* 2024 (1) SACR 121 (SCA).
[11] Para 40.
[12] Ibid para 42.
[13] *Mahlangu and Another v Van Eeden and Another* (LCC53/99) [2000] ZALCC 17; [2000] 3 All SA 321 (LCC) (2 June 2000) para 27.

took into account a number of decisions[14] dealing with the question when a matter is considered to be 'pending' before a court, including what was said by Eloff J in *Noah v Union National South British Insurance Co Ltd* (*Noah*)[15], namely, that '. . . the word ''pending'' has different meanings in different contexts . . .'.[16]

[22] *Mahlangu* referred to the decision of the Constitutional Court in *S v Mhlungu and Others* (*Mhlungu*)[17] where the Constitutional Court, relying on the decisions of *Noah* and *Arab Monetary Fund v Hashim and Others (Arab Monetary Fund),*[18] stated that '…[t]he term ''pending'' in relation to proceedings may have different connotations according to its context'[19]. The Constitutional Court in *Mhlungu* further stated the following with reference to what was said in *Arab Monetary Fund*:

'As Hoffmann J said in the latter case at 558 (at 649j All ER), in the normal meaning of the term proceedings "are pending if they have begun but not yet finished". It is clear enough that a ''pending'' proceeding is one not yet decided. … What is not so clear is when a legal proceeding may be said to have begun.'[20]

[23] It seems that in several decisions of the different divisions, reliance was placed on *Levy* as to what is considered to be the proper interpretation of the term 'pending'[21]. The Western Cape Division of the High Court, in *Van der Burg*,[22] relied on *Noah* and stated: '…s 40 of POCA merely requires that an application for a forfeiture order must be "*pending"* within ninety days after the date on which notice of a preservation order is published in the *Government Gazette*. That does not presuppose the service of the application, but merely the issuing thereof. I accordingly find that there has been proper compliance with the provisions of s 48(1) as read with s 40 of POCA'. In *National Director of Public Prosecutions v Pule*[23] the high court relied on *Van der Burg* and concluded that where the application for a forfeiture order was issued on a date that 'preceded the lapse of

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[14] *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) (*Noah*); *Bienenstein v Bienenstein* 1965 (4) SA 449 (T).
[15] *Noah* ibid.
[16] *Levy* para 7.
[17] *S v Mhlungu and Others* 1995 (2) SACR 277(CC); 1995 (3) SA 867 (CC); 1995 BCLR 793 (CC)
[18] *Arab Monetary Fund v Hashim and Others* [1992] 1 WLR 553 ([1992] 1 All ER 645 (Ch)).
[19] *Mhlungu* para 51.
[20] *Mhlungu para 51*.
[21] *Moolla*; *NDPP v Jansen van Vuuren* 2010 JDR 1358 (GNP); *NDPP v Landomax (Pty) Ltd and Others* (M194/2015) [2017] ZANWHC (4 May 2017); *National Director of Public Prosecutions v Bacela and Another* (FB 09/2020) [2022] ZANWHC (28 October 2022); *Quantoi v NDPP* & Others ZAECDG (657/2022) 20 August 2024.
[22] *Van der Burg* para 26.
[23] *National Director of Public Prosecutions v Pule* (M321/2023) [2024] ZANWHC 234 (16 September 2024) para 41.

the 90-day period. That to me is the date on which the wheels of justice in the forfeiture application could be said to have begun rolling. Service of the application took place at later stage, beyond the lapse of the period of 90 days'. The court also did not state why it preferred the interpretation followed in *Van der Burg* but simply stated that: '…The argument that the preservation order has become lapsed is not persuasive. I have no doubt that the issuing of the application satisfied the provisions of section 40 of POCA in that, by the date on which the preservation order would have lapsed, there was already a pending application for forfeiture'.[24]

[24] In my view, the interpretation followed by the court in *Levy* to conclude that a forfeiture application is not 'pending', unless service thereof had been effected within 90 days from the date of the publication of a preservation order, did not follow a purposive and contextual approach in the interpretation of the relevant provision of POCA. Such an approach was also not followed in *Van Der Burg*, although the court there came to a different conclusion. In *Van Der Burg* the court simply relied on *Noah* for its conclusion, that on the mere issue of summons a matter becomes 'pending'.

[25] The decisions seem not to have had sufficient regard for the purpose and overall context of POCA, which is to combat organised crime, which includes the recovery of the proceeds of unlawful activity; and the civil forfeiture of criminal property that has been used to commit an offence or of property that constitutes the proceeds of unlawful activity.

[26] In dealing with the interpretation of these provisions, and especially with the term 'pending', the courts have stressed that the term 'pending' is dependent on the context in which it is used. It may have a normal or extended meaning. In *Noah*[25] the court said that 'interpretation of "pending" is therefore conditioned by the context in which it [was] used'. This stance was confirmed by the Constitutional Court in *Mhlungu* where it was stated that the term 'pending' in relation to proceedings may have different connotations according to its context.[26] The Constitutional Court also stated that in the ordinary meaning of this term, the proceedings are 'pending' if they have begun but not yet finished. In *Arab Monetary Fund* the court stated that '…There

[24] Ibid para 42.
[25] *Noah* at 332G.
[26] *Mhlungu* para 51.

seems no doubt that in modern English procedure a personal action is begun when the writ is issued. It follows that as a matter of ordinary language; it must thereafter be pending.'[27]

[27] The interpretation advanced by the NDPP is consistent with the statutory framework and the overall purpose of POCA. It bears repeating that the purpose, as stated by the Constitutional Court in *Mohamed*,[28] is this:

'[14] … The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

[15] It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard, and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature.

[16] The present Act (and particularly Chaps 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes. The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the State. These mechanisms are set forth in Chap 5 (comprising ss 12 to 36) and Chap 6 (comprising ss 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime, but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of, and instrumentalities used in crime but is not conviction-based; it may be invoked even when there is no prosecution.' (Footnotes omitted.)

[28] It is for these reasons that POCA makes use not only of conventional procedures in terms of criminal and procedural law, to curb the scourge of organised

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[27] *Arab Monetary Fund* at 558H.
[28] *National Director of Public Prosecutions and Another v Mohamed N O and Others* 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC) paras 14-16.

crime, but draws on the law in civil proceedings relating to service and the giving of notice to persons in the *Gazette,* which is a rather extraordinary measure of informing persons of what would happen to their property that was either prima facie found to be the proceeds of crime or used in the commission of a criminal offence.

[29] The question whether the preservation order was served in terms of s 39(2) on Mr Gcaba before the expiry of the 90 days, is not central to the inquiry whether the forfeiture application was pending in terms of s 40*(a)* of POCA. The fact that the preservation order was only served after the 90-day period cannot in my view disqualify the NDPP from seeking a forfeiture application, which is the second stage of a two-stage process. The only question which needs to be considered is whether the preservation order was still in force, and the forfeiture application was still 'pending'.

[30] I am of the view 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'. Firstly, service is not a requirement because, as stated in *Mohamed*,[29] the focus of the proceedings is not on the alleged wrongdoers, but on the property that has been used to commit an offence, or which constitutes the proceeds of crime, after it has been shown, during the preservation proceedings, that reasonable grounds exist to come to such a conclusion. It is for this reason also that s 50(3) states that the absence of a person whose interest in the property may be affected by a forfeiture order does not prevent the high court from making the order. The guilt of the owners, possessors or persons that may have an interest in the property is not relevant to the proceedings and it does not affect the validity of the forfeiture proceedings in terms of s 50(4).

[31] In this regard it was stated in *MV Jute Express* that an action *in rem* commence with the issue of summons, unlike an action *in personam* which commence with the service of process.[30] Whilst that case was concerned with an Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA), it is of equal application here where the focus is not on the person, but on the property which the State seeks to declare forfeited. This

[29] *Mohamed* para 17.
[30] *MV Jute Express* at 17A–C.

was confirmed by this Court in *Knoop* with reference to what the Constitutional Court stated in *Mohamed*.[31]

[32] In my view, 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. I therefore disagree with the finding in *Levy* that the term 'pending' should be interpreted to include the *issue* and *service* of a forfeiture application on account that '. . .a statute makes serious inroads on the rights of an individual . . . '.[32] There are sufficient safeguards in POCA[33] to prevent an abuse of process and to protect the rights of affected persons, after the issue of the application, whilst the proceedings are pending and unduly delayed, and the preservation order is still in force.

[33] Secondly, and more significantly, is that if the word 'pending' is assigned the meaning ascribed to it in *Levy* it would imply that every forfeiture application would have to be issued and served, within the 90 days even though there might be no one to serve it upon, thereby undermining the other provisions of POCA. As already discussed, it may occur that no one with an interest in the property is known to the NDPP, or those with an interest in the property have not entered an appearance as required in terms of ss 39(3), (4) and (5) of POCA, or are unwilling to participate in the proceedings or may not wish to be associated with the property that was seized or is under preservation.

[34] Thirdly, s 48(2) allows the NDPP to apply for a forfeiture order in respect of property while a preservation order in respect of that property is in force. On a proper construction of s 40, a preservation order is in force for a period of '90 days after the date on which notice of the making of the [preservation] order is published in the Gazette'. It might happen that while the issue of the forfeiture application in that time is possible, for various reasons, service of that application may not be possible within that period. Such a forfeiture application would be rendered futile if 'pending' means

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[31] Paras 33 and 34.
[32] *Levy* para 9.
[33] See, inter alia, ss 47 and 49 regarding the rights of a person affected by a preservation order. See also *Knoop* para 38.

'issue and serve' because the application would not be 'pending' and thus result in an extension of the duration of the preservation order which is legally impermissible. That is not a sensible outcome.

[35] The absurdity of such an outcome is further illustrated with reference to the following realistic, albeit hypothetical, set of facts. The NDPP has published a preservation order that it obtained in respect of certain property. It only manages, despite reasonable effort to do so, to serve the notice of the preservation order as contemplated in terms of s 39(1) of POCA shortly before the expiry of the 90 days since publication of the preservation order. Because the NDPP wants to bring a forfeiture application in respect of the property, it is forced to issue that application while the preservation order is still in force. Notice of the forfeiture application must be given to everyone who entered an appearance in terms of s 39(3). Persons on whom the preservation notice were served has 14 days to enter an appearance. The 14 days only expire after the expiry of the 90 days. Service of the forfeiture order must only be effected on those who enter such appearance, and it is only possible to know at the end of the 14 days which persons must be served. Technically it means that the forfeiture application cannot be launched because the preservation order ceased to be in force on the 90th day, since it was not 'pending' during that period for lack of service. There are other examples with the resultant anomalies.

[36] Fourthly, in *MV Jute Express* it was said that as matter of settled procedural law, in all matters that:[34] *'this Court had long since held that all actions commence with the issue of summons: Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407(A) at 413D and *Labuschagne v Labuschagne*; *Labuschagne v Minister van Justisie* 1967 (2) SA 575(A) at 584.*There was therefore no need for the lawgiver to say anything in s 3(5) about when action would commence. It was a matter of settled procedural law.'* (Emphasis added.) In *Seaspan Holdco 1 Ltd and Others v MS Mare Tracer Schiffahrts and Another* (*Seaspan*)[35] this Court dealt with the provisions of the Admiralty Jurisdiction Regulation Act 105 of 1983 (ARJA) in a different context and confirmed what was stated in *MV Jute Express* regarding the commencement of an

[34] *MV Jute Express* at 16 H-I.
[35] *The Seaspan Grouse*
Seaspan Holdco 1 Ltd and Others v Ms Mare Tracer Schiffahrts and Another 2019 (4) SA 483 (SCA) para 29.

action in rem. The upshot of what was stated in that case in the context of the ARJA was that, *MV Jute Express* did not decide that an arrest of a vessel actual or deemed was unnecessary in order to institute an *action in rem*.[36] It confirmed what was stated in *MV Jute Express* that actions in general start with the issue of process and not only confined to *actions in rem* in Admiralty matters. It did not change what was said in *MV Jute Express* about the settled procedural law in civil proceedings in South Africa.

[37] On the aforegoing exposition, the established jurisprudence in civil proceedings, which would include application proceedings, is that the proceedings are commenced by the issue of the initiating process, eg. summons. A priori, proceedings which have commenced are certainly 'pending'. Accordingly, properly construed, the word 'pending' can only mean that the forfeiture application has been issued. Service is not required in addition, to render it 'pending'.

[38] The word 'pending' cannot be given two meanings. Stated otherwise, it cannot mean 'issue and service' and 'issue' at the same time. It is one or the other. Unless that is so, the uncertainty that the second judgment purports to avoid will prevail. The second judgment seems to suggest that this judgment has not said when the forfeiture application ought to be served. That is not correct. It is clear that the commencement of the 90 days is not tied to the service referred to in s 39(1)(*a*), but to the publication referred to in s 39(1)(*b*). By so doing, the legislature clearly seems to have accepted that service may not be required or may involve practical difficulties resulting in delay. POCA does not provide that the service of the preservation order or forfeiture application be effected within 90 days. In terms of s 39(1) the preservation order should be served 'as soon as practicable after the making of the order.' In terms of s 48(2) 14 days' notice of the forfeiture application must be given to everyone who entered an appearance in terms of s 39(3). I have alluded to examples where service legitimately might not be possible within the 90 days, and the debilitating consequences that may follow if there is a hard rule that service of the preservation order and of the forfeiture application be made within the 90 days.

[39] In the present matter, 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

[36] Ibid para 30.

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. The high court, therefore, effectively, erred in finding that the application was futile because the 90-day period, from the date of the publication in the *Gazette* the preservation order had lapsed; and the forfeiture application was not 'pending' within that period.

[40] The NDPP submitted that the order of the high court refusing the application of the forfeiture order ought to be set aside on the basis of the undisputed facts and the merits of the case. It urged us to replace the order of the high court with an order granting the forfeiture application.

[41] The evidence establishes on a balance of probabilities that the R46 120 is the proceeds of crime and that Mr Gcaba can hardly make any lawful claim to it. Despite being served with relevant papers, including the preservation order and the forfeiture application, and having had 14 days to respond, Mr Gcaba did not oppose the relief sought. He also took no other steps, including those contemplated in ss 47(1) and (3) of POCA to rescind the preservation order. In any event, as stated before, even if he has an interest in the property, in terms s 50(3) of POCA, his absence could not have prevented the high court or prevent this Court from making the forfeiture order sought. 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. Out of an abundance of caution, in addition to publication of the forfeiture order in the *Gazette,* service of the forfeiture order, made by this Court in substitution of the high court's order, would have to be served on Mr Gcaba.

[42] From the second judgment it appears that there is a concern with the fact that the high court had initially granted an order without reasons. Unfortunately, the NDPP never raised this issue and all the facts in that regard are not before us. In the high court, unopposed motion court matters (which this one was) are usually disposed of without reasons and reasons are requested in which event they must be promptly provided. Due to the paucity of information on the record before us, we cannot find that there has been a departure from the norm that requires censure by this Court.

[43] The following order is made:

1. The appeal is upheld.

2. The order of the high court dated 27 October 2023, dismissing the application for a forfeiture order, is set aside and replaced with the following:

‘1. An order is granted in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring forfeit to the State R46 120 (the property) held under the reference: SAP13/886/2021 via Durban Central CAS 257/03/2021 at the Durban Central Police Station.

2. After the forfeiture order referred to in paragraph 1 takes effect, the Station Commander, Durban Central Police Station, is directed to forthwith deposit the property into the banking account described below:

2.1 Name of Account: Criminal Asset Recovery Account

2.2 Name of Bank: The Reserve Bank of South Africa

2.3 Account number: 80303056

2.4 Deposit reference number: 10/8/3/AFU-KZN/25/2021

3. In terms of s 50(5) of POCA, the State Attorney, Durban is directed to forthwith publish a notice of this Order in the *Government Gazette*.

4. The Applicant is directed to deliver a copy of this order by hand, or through email to:

4.1 The Station Commander, Durban Central Police Station, SAPS and

4.2 The SAP13 Exhibit Clerk, Durban Central Police Station.

5. The Applicant is directed to forthwith serve a copy of this judgment on the Respondent, Sithembiso Adolphus Gcaba, within 20 days of this order.

6. Any person whose interest in the property concerned is affected by the forfeiture order, may within 20 days after they have acquired knowledge

of such order, in terms of the relevant provisions of POCA, apply for the order to be varied or rescinded by the high court.

7. Any person affected by the forfeiture order, who was entitled to receive notice of the forfeiture application under s 48(2) of POCA but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the *Government Gazette*, apply to the high court for an order under s 54 of POCA, to exclude his, her or its interest in the property, or to be part of the operation of the order in respect of the property

8. In terms of s 50(6) of POCA, this forfeiture order shall not take effect before the period allowed for an application under s 54 of POCA, or an appeal under s 55 of POCA has expired, or before such application or appeal is disposed of.'

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R C A HENNEY

ACTING JUDGE OF APPEAL

Makgoka JA (Dawood AJA concurring):

[44] I have read the judgment prepared by my colleague, Henney AJA (the first judgment). I disagree with its interpretation of s 40(*a*) and its conclusion to uphold the appeal. In my view, 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. My core disagreement with the interpretation of the first judgment is the uncertainty it will create in the proceedings under Chapter 6 of POCA.

Facts

[45] The basic facts relevant to the appeal are these. The NDPP obtained a preservation order against the respondent *ex parte* on 28 September 2022. Section 39(1)(*a*) provides that a preservation order must be served 'as soon as practicable' after being obtained. The NDPP did not comply with this provision. It only served it after 11 months. The NDPP published the preservation order in the *Gazette* on 14 October 2022. On 11 January 2023, the NDPP issued the forfeiture application in terms of s 48. This was well within the 90-day period envisaged in s 40*(a)*. However,

the NDPP failed to serve the application until 17 August 2023, ie after 11 months, when it served it together with the preservation order.

In the high court

[46] The forfeiture application came before the high court on 27 October 2023 after several failed attempts. The respondent did not oppose the application. The high court had to interpret s 40*(a)*, which in relevant part reads:

'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 *Gazette* unless —

(a) there is an application for a forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order.'

[47] The high court held that to avert the lapsing of a preservation order, and make it pending as envisaged in s 40*(a)*, both the issue and service of the forfeiture application should take place within 90 days of the preservation order being published in the *Gazette.* It thus dismissed the application. The high court relied on *Levy.* In turn, *Levy* relied, among others, upon *Mahlangu.* In the latter case, the Land Claims Court, in the context of the Extension of Security of Tenure Act 62 of 1997, held that legal proceedings are commenced by the issue and service of summons.

[48] *Levy* rested on two premises. The first is that in adversarial proceedings, they cannot be said to be 'pending' where one of the parties was unaware of such proceedings. The second is that the word 'pending' is ambiguous and thus may be interpreted as requiring service of the application on a respondent or not doing so. POCA, the court said, '. . .ma[d]e serious inroads on the rights of an individual. . .'[37], and as such, its provisions had to be restrictively construed to limit violation of rights. The high court, relying on *Levy*, dismissed the forfeiture application brought by the NDPP but subsequently granted it leave to appeal to this Court.

In this Court

[49] The NDPP asserted that it can serve the forfeiture application after the 90day period referred to in s 40*(a)*, as long as the application was issued within that period.

[37] *Levy* para 9.

The first judgment comprehensively sets out the NDPP's submissions. It is therefore not necessary to regurgitate them here.

An overview of the interrelated provisions

[50] 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. Sections 38, 39 and 40 all fall under Chapter 6, Part 2 of the POCA, titled *Preservation of Property Orders*, while ss 48 and 50 fall under Part 3, titled *Forfeiture of Property*. The provisions therefore provide for a seamless three-step procedure from the obtaining of a preservation order until the property is forfeited. The first is the obtaining of a preservation order in terms of s 38. It is sought, and granted, by the high court on ex parte application, prohibiting any person from dealing in any manner with the property referred to in the order. For the preservation order to be granted, the court must, in terms of s 38(2), be satisfied that there are reasonable grounds to believe, among others, that the property concerned is the proceeds of unlawful activities.

[51] The second is the notification of the existence of a preservation order. Section 39(1) requires the NDPP to do two things after the granting of the preservation order: *Service* of the notice of the preservation order (s 39(1)*(a)*) and *publication* of the notice in the *Gazette* (s 39(1)*(b*)). The sub-sections are joined by 'and', which means they must be read conjunctively, ie both must be satisfied. The structure of s 39 seems to suggest that *service* of the preservation order must precede *publication* in the *Gazette*. This is because s 39(1) decrees that service has to take place 'as soon as practicable' and 'shall be served in the manner in which a summons whereby civil proceedings in the high court are commenced, is served', ie service through the sheriff, which can take place within a few weeks.

[52] The situation is different when it comes to publication in the *Gazette*. One must overcome administrative hurdles to have a document published there. In this context, publication in the *Gazette* is usually the final step of the two requirements. This, in my view, explains why s 40(*a*) links the duration of the preservation order to its publication in the Gazette rather than its service, setting a 90day expiry period unless a forfeiture application is pending before the high court.

[53] Section 39(3) provides for the entering of an appearance to defend by the two categories of persons mentioned above, ie those who receive the notice of a preservation order by way of service by the sheriff and those who receive it through publication in the *Gazette*. In terms of s 39(4), those who were notified of it by service must deliver their appearance to defend within 14 days after service, while those who received notice through publication in the *Gazette* must do so within 14 days of such publication. In each instance, the appearance to defend serves to give 'notice of [the person's] intention *to oppose the making of a forfeiture order* or to apply for an order excluding his or her interest in the property concerned from the operation thereof'. (Emphasis added.)

[54] Section 39(5) provides that the appearance to defend shall be accompanied by an affidavit stating: (a) full particulars of the identity of the person entering the appearance; (b) the nature and extent of his or her interest in the property concerned; and (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture application or applying for the exclusion of his or her interests from the operation thereof. This provision is significant because it creates procedural rights as set out in (a)–(c) above.

[55] The third and final step is an application for a forfeiture order in terms of s 48, read with s 50. Section 48(1) allows the NDPP to apply to the high court for forfeiture of the property which is subject to a preservation order. In terms of s 48(1), 'if a preservation of property order is in force', the NDPP may apply to the high court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order. In terms of s 48(2), the NDPP shall give 14 days' notice of such application, '…to every person who entered an appearance in terms of section 39(3)'. Such a notice must be served by a sheriff (s 48(3)). Thus, the forfeiture application comes at the tail-end of the process.

Analysis

[56] Section 40*(a)* must be interpreted in a unitary exercise, simultaneously considering the text, purpose and context of POCA.[38] In addition, the provision must

[38] *Endumeni* para 18.

be considered through the prism of s 39(2) of the Constitution, which enjoins us to construe it 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 delay.

[57] It is so that s 40*(a)* does not prescribe a time frame within which a forfeiture application should be served. If a statute decrees for something to be done without providing a time frame within which it has to be done, it is usually interpreted to mean that it has to be done within a reasonable period.[39] I consider a period of 90 days after publication of the preservation order in the *Gazette*, to be more than reasonable for the NDPP to serve the forfeiture application. The first judgment does not disagree with the general proposition that the forfeiture application must be served within a reasonable time after publication of the preservation order. Yet, it is silent on either: (a) what it deems to be a reasonable period within which a forfeiture application should be served; and (b) whether it considers a period of 90 days to be a reasonable period within which the forfeiture application must be served.

[58] The essence of the NDPP's argument is that once it applies for a forfeiture order, it can delay serving it for as long as it wishes. Considering s 40(*a)*, either on its own or in conjunction with the related provisions, there are no textual or contextual indicators for that proposition. On the contrary, there are strong indicators in the related provisions against it. That time is of the essence is clear from s 39(1). The provision sets the tone by commanding the NDPP to serve and publish the preservation order 'as soon as practicable after the making of the order'. In terms of s 39(4)(*a*), a person who is served with a preservation order must deliver his or her appearance to defend within 14 days of service.

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[39] *S v Mohamed* 1977 (2) SA 531 (A) at 543C; *Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (TKS); *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* [2010] ZASCA 105; [2011] 1 All SA 343 (SCA); 2011 (3) SA 570 (SCA); 2010 BIP 307 (SCA) para 23; *Camps Bay Rate Payers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, And Others* 2001 (4) SA 294 (C) at 306H-307G.

[59] In *Knoop*, this Court described the relationship between the preservation and forfeiture stages of proceedings as 'closely intertwined and symbiotic'.[40] It also made this trenchant observation:

'Inherent in Chapter 6 of POCA is the recognition that *forfeiture should proceed without undue delay.* This explains the fourteen-day limit for a person to enter an appearance after receipt of notice of the preservation order, as well as the cut-off of ninety days for the institution of a forfeiture application. *The aim is to progress towards the forfeiture stage as soon as possible*'. [41] (Emphasis added.)

[60] These *obiter* dicta put paid to the notion that the NDPP is entitled to delay the service of the forfeiture application. This should be the end of the debate. Although the interpretation of s 40(*a*) was not in issue there, its dicta about the need for a speedy disposal of preservation and forfeiture proceedings are apt in the interpretative exercise for that provision. We are, in any event, bound by the *Knoop* dicta that '*forfeiture should proceed without undue delay'*, and that *'[t]he aim is to progress towards the forfeiture stage as soon as possible*'.

[61] The first judgment can only depart from these dicta if it concludes either that they are clearly wrong[42] or that they were expressed without any reasoned analysis.[43] But none of these can be said about the *Knoop* dicta. In *Steenkamp v South African Broadcasting Corporation* (*Steenkamp*),[44] this Court held that it will not lightly depart from a view previously expressed by it, particularly by five of its members sitting together, even if expressed *obiter*.[45] *Knoop* is a unanimous judgment of five members of this Court, and its dicta should not be lightly departed from or ignored. By ignoring its dicta, the first judgment goes against the authority of this Court as expressed in *Steenkamp*.

[62] The NDPP has 90 days after the publication of the preservation order during which it could serve the forfeiture application. That period, in my view, is more than

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[40] *Knoop* para 44.
[41] *Knoop* para 42.
[42] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 7.
[43] *Richman v Ben-Tovim* [2006] ZASCA 121; 2007 (2) SA 283 (SCA); [2007] 2 All SA 234 (SCA) para 8.
[44] *Steenkamp v South African Broadcasting Corporation* [2002] 2 All SA 180 (A); 2002 (1) SA 625 (SCA) (*Steenkamp*).
[45] Ibid para 12.

reasonable to serve a court process. Failure to do so leads to unreasonable delays, which, in turn, adversely affect the administration of justice. The fate of the property that is the subject of a preservation order must be determined within a reasonable time. The Legislature deemed 90 days a reasonable period for notifying all interested persons of the preservation order, thereby making it ripe for a forfeiture application.

[63] When viewed against these considerations, the interpretation asserted by the NDPP runs into difficulties. On the architecture of the interrelated provisions, the lapse of the 90day period is the penultimate step towards the forfeiture application. In other words, it is envisaged that once the 90 days expire, and the period for entering an appearance to defend in terms of s 39(2) has expired, the path would have been cleared for the forfeiture application in terms of s 48 to be considered by the court.

[64] On the interpretation asserted by the NDPP, if it has issued the forfeiture application within 90 days of publication in the *Gazette*, the application is pending, and it is entitled to sit idly and not serve it on a respondent. The potential for abuse of preservation orders is inherent in that interpretation. The NDPP could unduly prolong the duration of a preservation order by simply issuing a forfeiture application and then delaying serving it. The present case illustrates that. As mentioned, the preservation order was only served 11 months after it was issued.

[65] According to the NDPP, there is no time limit for serving the forfeiture application. Thus, a preservation order could go on indefinitely, as long as the forfeiture application has been issued. This is obviously untenable. As cautioned in *Endumeni*, we must avoid an interpretation that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation.[46]

Constitutional values

[66] The interpretation preferred by the NDPP and accepted by the first judgment is at odds with both constitutional values and the common law. As regards the former, the Constitutional Court pointed out in *Fraser v ABSA*,[47] that while POCA plays a

[46] *Endumeni* para 26.
[47] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) para 46.

legitimate and vital role in combating crime, it could also have potentially far-reaching and abusive effects. The Court made a similar observation in *Mohunram v National Director of Public Prosecutions.*[48] It said that statutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime. And yet, 'there is no gainsaying that, in effect, it is draconian'.[49]

[67] The above remarks were made in the context that forfeiture applications under POCA invariably implicate property rights of respondents. The effect of a preservation order is that it prohibits any person from dealing in any manner with the property referred to in the order. There is therefore no question that the preservation and forfeiture provisions of POCA limit the right to enjoy property fully. For that reason, we must construe s 40(*a*) and related provisions in accordance with the rights and values protected in the Constitution, as commanded in s 39(2) of the Constitution. The Constitutional Court explained this in *Makate v Vodacom*:[50]

'[I]f the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. . . .'[51]

[68] Following the above principles, we are enjoined to adopt a construction that minimally interferes with the constitutional right affected by the provisions. Interpreting s 40(*a*) to mean that the NDPP has an unlimited right to delay the determination of a forfeiture application by failing to serve it within 90 days does not achieve that purpose. It conflicts with what s 39(2) of the Constitution dictates. Section 39(2) is not a judicial expedience that a court can dispense with when convenient. It is a constitutional injunction which binds all courts to apply it. The first judgment accepts that a preservation order has the effect of limiting a person's right to their property. Despite

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[48] *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC); 2007 (2) SACR 145 (CC).
[49] Ibid para 118.
[50] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).
[51] Ibid paras 88 and 89.

this, the first judgment does not consider at all how this intersects with the injunction of s 39(2).

[69] The NDPP has not suggested that it would suffer any hardship, inconvenience or prejudice if required to serve the forfeiture application within 90 days after the publication of the preservation order. As mentioned, the application must be served by a sheriff. It does not take much to do so. On the contrary, the prejudice to a person whose property is the subject of a preservation order is evident if a forfeiture application is not timeously adjudicated on. And it cannot be finally adjudicated upon until it is served. There is no provision in POCA by which a respondent can expedite the adjudication of the forfeiture application.

Failure to notify respondent of proceedings

[70] The NDPP's case is further weakened by the fact that the preservation order was not served 'as soon as practicable' as commanded in s 39(1). It was served simultaneously with the forfeiture application, 11 months after it was granted. In such circumstances, it is difficult to accept how the application could be said to be 'pending'. Thus, for Mr Gcaba, until both the forfeiture application and the preservation order were served simultaneously, he would have been oblivious to the fact that the NDPP was pursuing any POCA proceedings against him. As aptly remarked in *Union Government v Willemse*:[52]

'A demand cannot be considered to be made until it is communicated to the person who is required to comply with it. Nor can any summons have any effect as a summons until it is served on the party who is called upon to obey it'[53]

[71] In the circumstances, it cannot be said that the forfeiture application is 'pending' between the NDPP and the respondent where the latter is unaware of such proceedings. As I see it, until at least the preservation order is served under s 39(1), a forfeiture application cannot be considered by the court. Therefore, the forfeiture application in the present case could not have been pending, because the preservation order had not been served as envisaged in s 39(1). Consequently, on this basis, the NDPP's application could not succeed.

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[52] *Union Government v Willemse* 1922 OPD 14 at 17.
[53] Ibid at 17.

[72] As already observed, ss 39(1)(*a*) and (*b*), which provide for service and publication respectively, are linked by the word 'and', indicating that both must be fulfilled. This is because they target two different groups of persons. First, those on whom the NDPP must serve the preservation order, identified as 'persons known to [the NDPP] to have an interest in property which is subject to the order'. Second, those who must be notified of the preservation order by publication in the *Gazette*, namely, the general public, including potential interested parties in the preserved property.

[73] In the scheme of the relevant provisions, the only category of people who would be 'deemed' to have been notified are those envisaged in s 39(1)(*b*), who would obtain knowledge of the preservation order by publication in the *Gazette*. But the category of persons envisaged in s 39(1)(*a*), upon whom it is mandatory to serve, cannot be 'deemed' to have obtained knowledge because they would have, as a matter of fact, been served with the preservation order.

The first judgment

[74] The first judgment postulates that 'it may also not be possible to direct a preservation order to an identifiable person because the ownership of the property may be unknown'. The first judgment further states that '[t]his would render the requirement of service nugatory where people do not deliver notice in terms of s 39(3) to oppose the application after the publication of the order'.

[75] It is unclear how any of the above has a bearing on the interpretative exercise of s 40(*a*), or how s 39(3) would be rendered nugatory. If, at the preservation order stage, the NDPP does not have an identifiable person to associate the preserved property with, it is not required to serve the preservation order under s 39(1)(*a*). This is because, as that section explicitly states, the NDPP must 'give notice of the order to all persons known to [it] to have an interest in property subject to the order'. It follows that if the NDPP is unaware of such persons, it bears no obligation to give notice under s 39(1)(*a*). In such cases, the NDPP only needs to publish the preservation order in the *Gazette* in accordance with s 39(1)(*b*).

[76] The central thesis of the first judgment is that because proceedings in terms of Chapter 6 of POCA are in *rem*, it suffices for the forfeiture application to be 'pending' if the NDPP merely issued the application without serving it. For this proposition, the first judgment relies on *MV Jute Express.* The first judgment also relies on the obiter remarks in *MV Jute Express* that all civil proceedings commence with the issuance of a summons. In *Seaspan*, this Court departed from *MV Jute Express*, and held that an action in *rem* is commenced by *service* of a writ. This put paid to the central thesis of the first judgment that all civil proceedings commence on the issue of summons.

[77] That notwithstanding, both *MV Jute Express* and *Seaspan* concerned the interpretation of s 1(2) and related provisions of the Admiralty Jurisdiction Regulation Act, which concern a highly technical field of the law. It is thus not helpful as an interpretative aid in construing the word 'pending' in the specific context of s 40(*a*).

[78] This underscores the importance of context when interpreting a provision with reference to an unrelated statutory provision. The Constitutional Court pointed out in *Mhlungu* that in the normal meaning of the term 'pending', proceedings 'are pending if they have begun but not yet finished, but the term may have different connotations according to its context. Dodson J also correctly observed in *Mahlangu* that 'generalised statements that proceedings commence on the issue of summons, on closer analysis, relate to a particular context'. He further pointed out that the statements are not valid in all instances. He cited as an example the law on prescription, where the proceedings only become pending between the parties when the running of prescription is interrupted by the issue *and* service of summons, as held by this Court in *Kleynhans v Yorkshire Insurance Company*.[54] There are statutory exceptions as well, for example, s 1(4) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, which provides that legal proceedings under that Act are instituted by service of process on an organ of State.

[79] As part of its reasoning for its preferred interpretation of s 40(*a*), the first judgment invokes the post-forfeiture provisions, such as rescission of the preservation order, as 'safeguards'. This is unhelpful. The issue we have to determine is the pathway to obtaining a forfeiture order. If, on a proper construction of s 40(*a*), the

[54] *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A) at 552B.

forfeiture application must be issued and served within 90 days of the publication of the preservation order, it is irrelevant that the order can be rescinded later.

[80] The first judgment holds that s 40(*a*) does not require the NDPP to serve the forfeiture application within 90 days of the publication of the preservation order in the *Gazette*. But the first judgment provides no guidance as to when the forfeiture application must be served. This, in my view, is a significant weakness in the first judgment. The absence of such guidance leaves it to the NDPP's whims when to serve the forfeiture application. This creates uncertainty. The first judgment offers no reflection on this aspect.

Uncertainty in the law

[81] Recently, this Court held in *Schoeman v Director of Public Prosecutions* (*Schoeman*)[55] that every judgment must 'account for the systemic consequences of its decision'. By offering no insights about the uncertainty its order is likely to create, the first judgment fails this critical injunction. Writing for the majority in *Schoeman*, and commenting on the uncertainty likely to result from the first judgment in that case, Unterhalter JA asked:[56]

'The first judgment offers no reflection upon the consequences of its decision. What is the law after the first judgment is handed down?'

[82] I ask the same question here. Having determined that the NDPP is not obliged to serve the forfeiture application within 90 days of the publication in the *Gazette*, what is the law as to when the NDPP is required to serve the forfeiture application after the publication of the preservation order? Can it, in its discretion, serve it after a month, six months, a year, two years, five years, or even ten years? As was the case here, the NDPP served the application after 11 months. How should Judges in the various divisions of the high court approach forfeiture applications served inordinately long after publication of the preservation orders? Should they insist that the NDPP apply for condonation for such delays, even though there is no provision for condonation application in POCA? If there has to be condonation, what is the cut-off point beyond

[55] *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA) para 88.
[56] Ibid para 87.

which such condonation should be sought? These are pertinent questions that require clarity. The first judgment offers none.

[83] Two related principles of statutory interpretation are apposite here. The first is that, if possible, a statute must be interpreted to avoid a *lacuna*, as held by this Court in *Davehill v Community Development Board* [57] relying on *Koller, N O v Steyn, N O En 'n Ander*.[58] This was recently affirmed by the Constitutional Court in *Shiva Uranium v Tayob.*[59] The second is a need for statutory interpretation to achieve reasonable certainty, as recognised by the Constitutional Court in *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal*[60] and in *Affordable Medicines Trust v Minister of Health.*[61]

[84] What these decisions entail is that the law must indicate to those affected, what is required of them, so that they may regulate their conduct accordingly. Stated in a different but relevant context of the need to follow precedent in *Ruta v Minister of Home Affairs*,[62] the Constitutional Court emphasised that without certainty, predictability and coherence, '[t]he courts would operate without map or navigation, vulnerable to whim and fancy'.[63] This is how courts are likely to operate in the absence of any guidance or a time frame for when the NDPP is required to serve the forfeiture application.

[85] In my view, the NDPP's interpretation of s 40(*a*) faces formidable difficulties. These, in turn, weaken the foundational thesis of the first judgment. By contrast, the interpretation requiring the NDPP to issue and serve the forfeiture application within 90 days of the publication of the preservation order provides certainty to the forfeiture procedure. It permits a harmonious interpretation of s 40(*a*) with its related provisions, and presents no anomalies, absurdities, or difficulties. Considering the language,

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[57] *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) at 300C-D.
[58] *Koller, N O v Steyn, N O En 'n Ander* 1961 (1) SA 422 (A) at 429B-C.
[59] *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* [2021] ZACC 40; 2022 (2) BCLR 197 (CC); 2022 (3) SA 432 (CC) para 38.
[60] *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) para 87.
[61] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 108.
[62] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).
[63] Ibid para 21.

purpose, and context of s 40(*a*) and related provisions, it is the more preferable construction.

The specific facts of the present matter

[86] The appeal should fail for the simple reason that the NDPP flouted the relevant provisions of the POCA. As mentioned, s 39(1)(*a*) requires the NDPP to serve the preservation order on the respondent 'as soon as practicable' after it has been granted. The NDPP failed to serve the preservation order as envisaged in that section. It served the preservation order on 17 August 2023, some 11 months after it was granted. It was served together with the forfeiture application. I have already alluded to *Knoop*, in which this Court addressed the close relationship between preservation and forfeiture proceedings, and the need for the NDPP to apply for the forfeiture order as soon as the preservation order has been published.

[87] The question is simply whether the NDPP complied with the *Knoop* dicta where it failed for 11 months to: (a) serve the preservation order 'as soon as practicable' after obtaining it; (b) serve a forfeiture application after issuing it. The ineluctable answer is No. The NDPP failed to observe the *Knoop* dicta, and for that reason, its appeal should fail.

[88] It must also be borne in mind that the notice of application for a forfeiture order is not required to be served personally upon a respondent. Section 48(3) provides that it 'shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served'. Apart from personal service, rule 4(1) of the Uniform Rules of Court provides the various other manners in which a document may be served, which do not entail personal service. Therefore, the NDPP cannot complain that it had difficulty in effecting personal service on the respondent because he was evading service.

[89] The question that remains unanswered by the NDPP is why there would be a need to issue a forfeiture application and delay serving it for more than three months. If there had been any legitimate reasons for this, the NDPP would have disclosed them. It has not, and I find none. The NDPP's failure to serve the forfeiture application timeously is not adequately explained. The NDPP says that the failure was due to 'lack

of coordination between it and the State Attorney'. It is not clear what this is supposed to mean. The NDPP does not say that it attempted to serve the application but was unsuccessful.

[90] In the absence of a proper explanation, I attribute its failure to serve the forfeiture application for 11 months to sheer ineptitude. The NDPP is an organ of the State and must conduct itself as a model litigant. To borrow from Cameron J in *MEC for Health, Eastern Cape v Kirland Investments*:

'Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly'. [64]

[91] The procedural lapses by the NDPP in this application demonstrate how its preferred interpretation of s 40(*a*) would lead to uncertainty, unpredictability and incoherence in our law. A court, especially an appellate court like ours, can ill afford to condone such an outcome. The high court was correct in its conclusion.

Order without reasons

[92] The high court dismissed the application without reasons on 27 October 2023 and only furnished reasons upon request. The first judgment states that we should not comment on this issue as the NDPP did not raise it. This misses the point because this Court does not require a complaint by any of the parties for it to pronounce on matters of judicial accountability, of which an order without reasons is. The practice of issuing orders without reasons has been deprecated by both this Court and the Constitutional Court,[65] even though none of the parties had raised it.

[93] Although the application was unopposed, it was not a typical unopposed motion. A complex question of interpretation was debated before the Judge, with different divisions of the high court holding divergent views on the matter. Significantly, there is no case from Kwazulu-Natal on the issue. Therefore, this was a significant

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[64] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* t/a Eye and Laser Institute [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 82.

[65] *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27D; *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC); [2009] 9 BLLR 847 (CC) para 14.

case because whatever the outcome, it bound all Judges in that division. Moreover, since the order issued was one of dismissal of the NDPP's application, it had far-reaching implications, not only for the NDPP but also for Judges within the division. Between the time the order was made and the reasons provided, the Judges in KwaZulu-Natal were bound by the order without reasons behind it. For these reasons, it was inappropriate for the Judge to grant an order without giving reasons.

[94] Commenting on a similar situation recently, this Court in *MEC for Health, Gauteng Provincial Government v AAS obo CMMS* remarked:

'Although the high court subsequently furnished reasons upon request, its failure to do so when it made the order remains unexplained. It often happens that a court, due to reasons of urgency or expediency, makes an order without reasons. But, in those circumstances, the salutary practice is to inform the parties that the reasons for the order would follow in due course. There is no indication in its subsequently furnished reasons that any of the above circumstances necessitated the high court to grant an order without reasons, or that it had intended to give them later'. [66]

These remarks are worth reiterating here.

Conclusion

[95] In all the circumstances, had I commanded the majority, I would dismiss the appeal.

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T MAKGOKA

JUDGE OF APPEAL

[66] *MEC for Health, Gauteng Provincial Government v AAS obo CMMS* [2025] ZASCA 91; 2025 (6) SA 152 (SCA) para 160.

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