THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1072/2023

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

SHIRLEY DALI BACELA **FIRST RESPONDENT**

MAFISA TEG TRANSPORT (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *National Director of Public Prosecutions v Bacela and Another* (1072/2023) [2026] ZASCA 33 (23 March 2026)

Coram: MAKGOKA ADP, MATOJANE and GOOSEN JJA

Heard: 11 September 2025

Delivered: 23 March 2026

Summary: Civil Procedure – Prevention of Organised Crime Act 121 of 1998 – s 48(3) – whether forfeiture application must be served on respondents by Sheriff despite them being represented by an attorney in the proceedings – intersection between rules 17 and 4(1)*(a*A*)* of the Uniform Rules of Court.

Principle of *stare decisis* – need for lower courts to follow binding authority of the Supreme Court of Appeal – Statutory interpretation – principles restated.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Hendricks JP, Djaje ADJP and Mtembu AJ, sitting as court of appeal):

1 The appeal is upheld with costs, including costs of two counsel.
2 The order of the High Court of the North West Division of the High Court, Mahikeng, is set aside and replaced with the following:
'1 The appeal is upheld with costs.
2 The matter is remitted to the North West Division of the High Court, Mahikeng, for the determination of the merits of the forfeiture application.'

JUDGMENT

Makgoka ADP (Matojane and Goosen JJA concurring):

[1] The appellant, the National Director of Public Prosecutions (the NDPP) appeals against an order of the majority of the Full Court of North West Division of the High Court, Mahikeng (the Full Court). That Court dismissed the NDPP's appeal against an order of a single Judge (the High Court), dismissing the NDPP's application for forfeiture of property in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA). The appeal is with the special leave of this Court.

[2] The appeal arises from the following facts. The NDPP served a preservation order on the respondents in terms of s 39 of POCA. The respondents entered a notice of intention to defend through an attorney, and nominated the attorney's office for service of documents in the pending forfeiture proceedings. The NDPP subsequently served the forfeiture application on the attorney.

[3] The High Court concluded that the service was defective and dismissed the NDPP's forfeiture application. Aggrieved by that decision, the NDPP appealed to the Full Court, which, by majority, dismissed the appeal. The appeal is opposed by the first respondent, Ms Dali Bacela (Ms Bacela), and the second respondent, Mafisa Teg Transport and Projects (Pty) Ltd (Mafisa).

[4] The issue in the appeal is whether such service was valid and effective, in view of s 48(3) of POCA, which requires the application to be 'served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.'

Factual background

[5] Ms Bacela is an alleged drug dealer with three previous convictions for offences under the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs and Drug Trafficking Act). Mafisa is a private company of which Ms Bacela is the sole director. The NDPP alleged that she used Mafisa as a conduit for illicit drug activities, including drug trafficking and money laundering.

[6] Consequently, on 22 June 2017, the NDPP applied for and obtained a preservation order against all assets registered in the names of Ms Bacela and Mafisa. These assets included immovable property, bank accounts, investment and retirement policies, and movable property such as vehicles, trucks, tractors, and trailers. The NDPP claimed that Ms Bacela had used these properties as instruments of crime, including money laundering. She has three previous convictions for various offences under the Drugs and Drug Trafficking Act. A *curator bonis* was appointed over the property, who subsequently valued the preserved and recovered assets at R3 509 391.

[7] The preservation order was served on the respondents on 6 July 2017. Section 39(3) of POCA provides for interested parties to enter an appearance to oppose the forfeiture of the property under a preservation order. On 19 July 2017, the respondents, through their attorneys of record, served a notice of intention to oppose the granting of a forfeiture order, in which they nominated their attorneys' offices as the *address 'at which they will accept notice and service of all processes'*. (Emphasis added.)

[8] Section 39(5) of POCA states:

'(5) An appearance under subsection (3) shall contain *full particulars of the chosen address for the delivery of documents concerning further proceedings* under this Chapter and 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 order or applying for the exclusion of his or her interests from the operation thereof.' (Emphasis added.)

[9] Pursuant to these provisions, the respondents filed a sworn declaration addressing the issues set out in *(a) – (c)*. Importantly, the declaration contains the following statement:

'The RESPONDENT is duly assisted in this matter and the appearance to oppose the Final Forfeiture Order is duly filed by MESSRS CG MATABOGE ATIORNEYS, OFFICE NO: 106 FRANS VOS BUILDING, No: 32 NELSON MANDELA DRIVE, RUSTENBURG, C/O MESSRS KGOMO INC, MOTHEO HOUSE, No: 56 SHIPPARD STREET, MAHIKENG.'

[10] In addition, the respondents delivered a comprehensive answering affidavit of 93 pages without annexures and 111 pages with annexures. They sought to refute each allegation in the founding affidavit supporting the forfeiture application.

In the High Court

[11] On 26 September 2017, pursuant to s 48(3) of POCA, the NDPP applied for a forfeiture order regarding the property subject to the preservation order. On 17 October 2017, the NDPP served the application on the respondents' attorneys, at the address nominated in the notice of intention to oppose. On 13 March 2018, the respondents filed a detailed answering affidavit addressing the allegations against them and sought the dismissal of the forfeiture application.

[12] At the hearing of the forfeiture application on 18 May 2018, the respondents raised a preliminary point that the NDPP had failed to comply with s 48(3) of POCA because the forfeiture application was not served on the respondents by the Sheriff, but by hand on the respondents' attorneys. The application was adjourned for argument on this point. After the adjournment, the NDPP served the forfeiture application on the respondents through the Sheriff.

[13] The application resumed on 15 June 2018. In response to the respondents' preliminary point, the NDPP argued as follows: The respondents were already represented by an attorney and had indicated that further documents in the matter could be served at that attorney's offices. Therefore, service on the attorneys was valid and effective under rule 4(1)*(a*A*)* of the Uniform Rules of Court. This rule permits service on an attorney who already represents a party in the proceedings. The respondents contended that rule 4(1)*(a*A*)* applies only to interlocutory applications. Since a forfeiture application is not an interlocutory application, but a standalone application, rule 4(1)*(a*A*)* did not apply. I will examine this rule in detail later.

[14] In its judgment, the High Court agreed with the respondents and reasoned as follows: s 48(3) stipulates that service must follow the method required for serving a summons that initiates civil proceedings in the High Court. Civil

proceedings can be commenced either by means of a summons or a notice of motion in the High Court. Section 48(3) explicitly refers to a summons, assuming the service of a civil summons. Section 1(1) of the Superior Courts Act defines a civil summons as a document that initiates civil proceedings. A summons initiating proceedings in the High Court is addressed to the Sheriff under rule 17(1) of the Uniform Rules of Court. The Sheriff has a statutory duty to execute all summonses and processes directed to him or her, to make a return of how they were executed to the court and to the party in whose name they were issued, and to deliver them to the party in whose name they were issued. Therefore, s 48(3) requires the Sheriff to serve the forfeiture application.

[15] Regarding the applicability of rule 4(1)*(a*A*)* and whether a forfeiture application is an interlocutory application, the High Court held that, although a preservation order precedes the forfeiture order, the main application remains the forfeiture application. Therefore, a forfeiture application is not regarded as an interlocutory application. As a result, the High Court concluded that, to comply with s 48(3), the forfeiture application must be served by the Sheriff. Consequently, service by the State Attorney on the respondents' attorney did not meet the service requirements in s 48(3) of POCA and was deemed defective. For these reasons, the High Court upheld this point and dismissed the forfeiture application without considering its merits. The High Court subsequently granted leave to appeal to the Full Court.

In the Full Court

[16] As mentioned, the Full Court was not unanimous. The majority (per Djaje ADJP and Hendricks JP concurring) held that the intention of the Legislature about s 48(3) was to be deduced from the word 'shall' in the section. The majority of the Full Court accordingly held that s 48(3) is 'clearly peremptory as non-compliance thereto, although not having a penalty, [has] dire consequences'.

This, the majority said, is due to 'the very serious consequences of forfeiture orders'. It was thus 'important for the notice of the forfeiture application to come to the attention of the respondent'. Consequently, the majority of the Full Court dismissed the appeal with costs. The minority (per Mtembu AJ) would have upheld the appeal, holding that service on the respondents through their attorneys was valid, pursuant to rule 4(1)*(a*A*)*.

In this Court

[17] The parties maintained their respective contentions, as advanced before the High Court and the Full Court. I set out the relevant legislative provisions before considering the Full Court's reasoning and the issue on appeal.

[18] Section 48 of POCA, in the relevant part, reads:

'Application for forfeiture order

(1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

(2) The National Director shall give 14 days' notice of an application under subsection (1) to every person who entered an appearance in terms of section 39(3).

(3) *A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served*.

. . . .' (Emphasis added.)

[19] The manner of service envisaged in s 48(3) is one set out in rule 17(1) of the Uniform Rules of Court, which reads:

'Every person making a claim against any other person may, through the office of the Registrar, sue out a summons or a combined summons *addressed to the Sheriff directing him to inform the defendant* inter alia that, if he disputes the claim, and wishes to defend he shall —

(a) within the time stated therein, give notice of his intention to defend;

(b) . . . .' (Emphasis added.)

[20] Rule 4(1) echoes rule 17(1), and provides, in relevant part:

'(1)*(a)* Service of any process of the court directed to the Sheriff and subject to the provisions of paragraph *(a*A*)* any document initiating application proceedings shall be effected by the Sheriff in one or other of the following manners:

. . . .'

[21] Rules 17(1) and 4(1)*(a)* set out a default position that service is to be effected by the Sheriff. These rules should be read with rule 4(1)*(a*A*)*, which provides:

'Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.'

[22] Thus, rule 4(1)*(a*A*)* carves out an exception to the default position set out in rules 17(1) and 4(1)*(a)*. The purpose of rule 4(1)*(a*A*)* is to make it unnecessary for litigants in pending proceedings to have an application served by the Sheriff if the attorney of record has a mandate to accept service of the court process.

[23] The issue is whether service of the forfeiture application on the respondents' attorney, rather than on the respondents by the Sheriff, is valid. The majority of the Full Court concluded that, because forfeiture proceedings are 'draconian' in nature, strict compliance with s 48(3) was necessary, and the forfeiture application had to be served by the Sheriff. The majority relied on *Mohunram v NDPP* (*Mohunram*),[1] for that conclusion. With respect to the majority, reliance on *Mohunram* was misguided for two reasons. First, the majority did not explain how serving the forfeiture application at the attorney's office by hand, rather than through the Sheriff, would violate the respondents' rights, let alone in a 'draconian' manner.

[1] *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).

[24] Second, *Mohunram* concerned three substantive issues:(a) whether the property concerned was an instrumentality of an offence; (b) the meaning of 'offence' in the context of civil forfeiture authorised by Chapter 6 of POCA; and (c) whether the forfeiture sought in this case was disproportionate. The 'draconian nature' of forfeiture proceedings was raised in the minority judgment of Moseneke DCJ in the context of the proportionality enquiry. Thus, the reliance on this case by the majority was inapt.

[25] The majority stated that it was 'important for the notice of the forfeiture application to come to the attention of the respondent[s].' But this occurred. As noted, the respondents submitted a detailed response to the forfeiture application. Despite this, the majority inexplicably concluded that the State Attorney's omission to serve the forfeiture application on the respondents through the Sheriff was fatal. The majority should have found that the purpose of s 48(3) had been achieved. The sworn declaration and the answering affidavit clearly demonstrate that the respondents have not been prejudiced by the forfeiture application not having been served by the Sheriff.

Discussion

[26] This Court has previously considered the application of rule 4(1)*(a*A*)* in *Finishing Touch v BHP Billiton* (*Finishing Touch*).[2] The facts were briefly these. BHP Billiton Energy Coal SA Ltd (BHP) was involved in a dispute with the Minister of Mineral Resources (the Minister) over the ownership of a mining right. It obtained an interim interdict against the Minister and other parties (the State respondents), preventing them from granting any prospecting rights to a third party, pending a review application. The State respondents were represented by the State Attorney in the interdict proceedings. BHP's attorneys later issued

[2] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA).

the review application. Instead of serving it on the State parties through the Sheriff, they served it by hand on the State Attorney after receiving confirmation that the State Attorney was still representing the State respondents. The State respondents subsequently filed a notice of opposition but did not file any answering affidavits. The review was granted, and BHP was awarded the mining right.

[27] BHP later discovered that two prospecting rights over properties overlapping with those on which BHP had been granted rights had been issued to Finishing Touch, despite the interim interdict. BHP filed an urgent application for an interim interdict to preserve the status quo pending the finalisation of internal appeal and/or review proceedings. Finishing Touch opposed the application, among other reasons, arguing that the papers in the review application were not properly served on the State respondents, as they were only handed to the State Attorney rather than served by the Sheriff. In response, BHP cited the provisions of rule 4(1)*(a*A*)*.

[28] This Court observed that the proceedings concerning the application for an interdict and the review were 'intimately linked' because they involved the same prospecting rights and parties. The Court also held that the State respondents' waiver of compliance with the service requirements could not benefit Finishing Touch, as it could never have been prejudiced by it. This Court made these trenchant observations:

'The arguments advanced on behalf of BHP with regard to service of the review application are sound. It is evident that the State Attorney's office was acting as attorneys of record in respect of the whole matter. The fact that each application had been allocated a different case number is, in my view, irrelevant. The purpose of all the proceedings was to determine the identity of the legal holder of the prospecting rights. The litigation was continuous and one has to have regard to its history over time. The same parties were involved on broadly the same

issues. And, as I have mentioned, the remedy may have differed from one case to the next but the subject matter was the same.'[3]

[29] Consequently, this Court concluded that the review application had been properly served and thus dismissed the appeal. Faced with the binding authority of *Finishing Touch*, the respondents sought to distinguish it on two grounds. First, they argued that, in that matter, 'the review application was served on the attorney and not on all the respondents'. Second, they contended that, although an interdict and a review may be closely linked, this differs from the situation concerning a preservation order and a forfeiture order.

[30] Regarding the first ground, it is immaterial that the review application was served on the attorney and not on all the respondents. The key fact is that the review application was served on the State Attorney, who represented the State respondents in the interdict proceedings. The same principle applies here. I see no meaningful distinction. If anything, the situation here is stronger for the proposition that service on the attorney was effective. This is because, in *Finishing Touch*, service was effected on the State Attorney as it had represented the State respondents in previous interdict proceedings. In the present case, the NDPP served the forfeiture application on the respondents' attorney, not for that reason, but because the respondents, in their notice of intention to defend, had expressly nominated the office of the attorney as the address for service of documents in the forfeiture proceedings.

[31] As regards the second ground, this Court in *Finishing Touch* held that service on the State Attorney was valid and effective because: (a) the interdict and the review were closely connected, and (b) the State Attorney had represented the State respondents in the interdict proceedings.

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[3] Ibid para 28.

[32] In the context of POCA proceedings, I cannot think of a closer link than that between a preservation order and a forfeiture order. Section 48(3) is part of interconnected provisions within POCA, alongside ss 38, 39, 40, and 50. Sections 38, 39, and 40 are all under Chapter 6, Part 2 of POCA, titled '**Preservation of Property Orders**', whereas ss 48 and 50 fall under Part 3, titled '**Forfeiture of Property**'. These provisions create an interlinked two-step process from the issuance of a preservation order to the final forfeiture of the property.

[33] The first step is for the NDPP to obtain a preservation order under s 38. It is applied for and granted by the High Court on an *ex parte* basis, preventing any person from dealing with the property specified in the order in any manner. Once issued, the NDPP must, pursuant to s 39(1)*(a)*, serve the preservation order on interested parties and publish it in the *Government Gazette* (the *Gazette*) as required by s 39(1)*(b)*. The second step is for the NDPP to apply for a forfeiture order under s 48, read with s 50.

[34] When these provisions are viewed in this light, the close connection between preservation orders and forfeiture orders is self-evident. As this Court observed in *NDPP v Victor*,[4] '[a] preservation order is the precursor to an application for the forfeiture of the property preserved as provided for in Chapter 6 of POCA'.[5] This close link between the two procedures prompted this Court in *Knoop v NDPP*[6] to describe them as 'closely intertwined and symbiotic'.[7]

[35] An interdict and a review generally do not have a dependent relationship, as neither relies on the other. However, this Court in *Finishing Touch* found the

[4] *National Director of Public Prosecutions v Victor N O and Others* [2025] ZASCA 31; 2025 (1) SACR 561 (SCA).
[5] Ibid para 12.
[6] *Knoop N O and Others v National Director of Public Prosecutions* [2023] ZASCA 141; [2024] 1 All SA 50 (SCA); 2024 (1) SACR 121 (SCA).
[7] Ibid para 44.

connection between them sufficient to allow service by hand on the State Attorney under rule 4(1)*(a*A*)*. Conversely, in POCA applications, the connection is much stronger, since a forfeiture order cannot exist without a preservation order. Therefore, *Finishing Touch* is not distinguishable.

[36] The approach in *Finishing Touch* to eschew highly technical defences is reflected in three recent judgments of this Court: *Motloung v The Sheriff, Pretoria East* (*Motloung*),[8] *Minister of Police v Molokwane* (*Molokwane*),[9] and *Minister of Police v Miya* (*Miya*).[10]

[37] In *Motloung,* this Court considered the validity of a summons issued but not signed by the Registrar of the High Court. Rule 17(3)*(c)* of the Uniform Rules of Court makes it peremptory for a Registrar to issue and sign a summons. In this instance, the Registrar had allocated a case number, stamped it with a stamp bearing his name, designation as Registrar, and the date, but inadvertently omitted to sign it. The Sheriff considered that an unsigned summons was a nullity and refused to serve it. This Court held that, despite the peremptory wording of rule 17(3)*(c)*, the Registrar's failure to sign a summons was susceptible to condonation. It accordingly condoned the omission and held that the summons was valid.

[38] *Molokwane and Miya* concerned non-compliance with s 2(2) of the State Liability Act 20 of 1957 (the State Liability Act). Subsections (1) and (2), which, at the relevant time, read:

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[8] *Motloung and Another v The Sheriff, Pretoria East and Others* [2020] ZASCA 25; 2020 (5) SA 123 (SCA) (*Motloung*).
[9] *Minister of Police and Others v Molokwane* [2022] ZASCA 111.
[10] *Minister of Police v Miya* [2024] ZASCA 71; 2025 (3) SA 130 (SCA).

[39] '(1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.
(2) The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant … has been issued, *serve a copy of that summons… on the State Attorney*.' (Emphasis added.)

[40] In *Molokwane*, a summons was served on the Minister but not on the State Attorney. Subsequently, albeit belatedly, the State Attorney delivered a notice of intention to defend the action on behalf of the Minister and subsequently delivered a plea. It was contended that, because no copy of the summons was served on the State Attorney, the respondent's summons was a nullity, as s 2(2) of the State Liability Act was couched in peremptory terms requiring service of the summons on the State Attorney within seven days after it was issued. Thus, so went the contention, a court had no power to condone such non-compliance.

[41] This Court rejected that submission. It noted that the purpose of the requirement to serve a summons on the State Attorney was to ensure that the Minister was legally assisted by the State Attorney. If the State Attorney provides such legal assistance, the requirement is satisfied, even if the summons is not served on the State Attorney by the Sheriff within seven days of the proceedings commencing.

[42] In *Miya*, this Court considered the reverse situation to *Molokwane*. The summons was served on the State Attorney in compliance with s 2(2)*(b)*, but not on the Minister, as required by s 2(2)*(a)*. Despite this, the State Attorney filed a notice of intention to defend on behalf of the Minister and the NDPP. The Minister filed a special plea, contending that service on the State Attorney alone rendered the summons a nullity because the provisions of s 2(2) were obligatory. This

Court, drawing heavily on *Molokwane*, rejected that contention. It held that, on the facts of the case, it was clear that the Minister was fully aware of the proceedings against him, and that this achieved the purpose of s 2(2) of the State Liability Act.

[43] The upshot of these authorities is that courts do not countenance excessively technical defences and would rather decide cases on their merits, especially in the absence of prejudice. As Rumpff JA famously stated in *Republikeinse Publikasies v Afrikaanse Pers Publikasies*:[11]

'[I]t is desirable to repeat what is of general application, namely, that the Court does not exist for the Rules but the Rules for the Court'.[12]

To this, should be added Schreiner JA's observation in *Trans-African Insurance Co Ltd v Maluleka*:[13]

'But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'[14]

[44] It follows that the service of the forfeiture application on the respondents' attorney was valid and effective pursuant to rule 4(1)*(a*A*)*. This conclusion makes it unnecessary to consider whether the subsequent service by the Sheriff was effective. This was raised before the High Court in the context of s 40*(a)* of POCA, which provides that a preservation order shall expire 90 days after its publication in the *Gazette* unless a forfeiture application is 'pending' before the High Court in respect of the property. The respondents had asserted that the service had occurred outside the 90-day period and was therefore ineffective. To the extent this issue might still be considered relevant, it was settled by this Court

[11] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A.
[12] Ibid at 783A, as translated by Gorven JA in *Motloung*. The original reads:
'. . . [I]s dit wenslik om te herhaal wat in die algemeen van toepassing is, nl dat die Hof nie vir die Reëls bestaan nie maar die Reëls vir die Hof. . .'
[13] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A).
[14] Ibid at 278F-G.

in *NDPP v Gcaba*,[15] where the majority held that service of the forfeiture application need not take place within 90 days of the publication of the preservation order in the *Gazette*. It was sufficient if the application had merely been issued within that period.

[45] Before concluding, I feel constrained to comment on two aspects of the majority judgment. The first concerns the majority's failure to follow the binding authority of this Court's decision in *Finishing Touch*. Nowhere in its judgment did the majority advert to the decision. This raises the principle of precedent. The High Court is bound by the authority of this Court and remains so bound until this Court itself decides otherwise or the Constitutional Court does so.[16]

[46] It often occurs that the majority's attention is not drawn to binding authority. However, that is not the case here, as the minority judgment relied on *Finishing Touch* and mentioned it several times. The majority inexplicably ignored the binding authority of this Court. This is gravely concerning. As cautioned by the Constitutional Court in *Camps Bay v Harrison*:[17]

'. . . *Stare decisis* is . . . not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'[18]

[47] The second issue concerns the approach to statutory interpretation adopted in the majority judgment. Although we uphold the appeal and set aside the majority's order, certain pronouncements might be regarded by some judges in the North West Division as correct or having precedential weight. This is

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[15] *National Director of Public Prosecutions v Gcaba* [2026] ZASCA 4.
[16] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC); 2002 (2) SACR 105 (CC) para 61; *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 7.
[17] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC).
[18] Ibid para 28.

particularly so because the majority consisted of the two most senior members of the Division, namely the Judge President and the Deputy Judge President.[19] It therefore behoves this Court to clarify the law.

[48] Regarding the court's role in an interpretative exercise, the majority said:

'In deciding the issue of condonation we should be mindful of the warning in *Sefatsa and Others v Attorney General, Transvaal and Another* 1989 (1) SA 821 (A) where it was said that the court cannot have an inherent power which would entitle the court to act contrary to an express provision of an Act of Parliament.

The courts' function is to interpret statutes and in instances of ambiguity in a statute, the court can exercise its discretion to fill in the gaps so as to bring the provisions of the statute in line with the meaning and purpose thereof. The provisions of section 48(3) of POCA are clear and unambiguous and there can be no difficulty with its interpretation. It is therefore not necessary for this Court to interpret section 48(3) or condone any non-compliance.'[20]

[49] The most concerning aspect in this passage is the statement that 'the court cannot have an inherent power which would entitle the court to act contrary to an express provision of an Act of Parliament'.[21] To the extent this suggests that courts must yield to the will of the Legislature in statutory interpretation, it is alarming. Parliamentary sovereignty gave way to constitutional supremacy with the advent of our constitutional democracy. As Botha[22] explained more than 30 years ago:

'There are at least three reasons that the traditional South African approach to legislative interpretation is no longer applicable under the new Constitution. First, the old system of parliamentary sovereignty has given way to constitutional supremacy. Gone are the days where the legislature in its wisdom could enact anything and everything it wished. The Constitution

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[19] Djaje DJP was the Acting Deputy Judge President when the matter was heard.
[20] Paragraphs 18 and 19 of the judgment of the Full Court.
[21] Paragraph 18 of the judgment of the Full Court.
[22] C J Botha '*Interpretation of the Constitution'* (Paper delivered at the conference 'Towards a new Constitution', held by the VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 28 to 29 March 1994). A revised version of the paper is available at https://journals.co.za/doi/epdf/10.10520/AJA02586568_99 [Accessed on 10 March 2026.]

is the supreme law of the land, against which all legislative, executive and judicial acts will be tested. Instead of an omnipotent legislature, the Constitution will reign supreme.'[23]

[50] What is further disconcerting is that the majority relied on an apartheid-era case to interpret s 48(3), in clear contradiction of established jurisprudence by this Court and the Constitutional Court. The approach to statutory interpretation which enquires whether a provision is 'peremptory' or merely 'directory', was jettisoned by the Constitutional Court over 20 years ago in *African Christian Democratic Party ACDP v Electoral Commission* (*ACDP*).[24]

[51] *ACDP* explained that the purposive approach to interpretation has rendered all previous attempts to determine whether a statutory provision is directory or peremptory based solely on its wording and subject matter obsolete. The question was therefore 'whether what the applicant did constituted compliance with the statutory provisions assessed in light of their purpose'. The Constitutional Court clarified that a 'narrowly textual and legalistic approach' should be avoided. This was confirmed by the Constitutional Court in *All Pay v SASSA*,[25] where it was held that the strict mechanical approach of drawing formal distinctions between 'mandatory or peremptory' had been discarded.

[52] The majority also said that s 48(3) was 'unambiguous', and therefore, there was no need to interpret it. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*),[26] this Court did away with the so-called golden rule of statutory interpretation, in terms of which it was first enquired whether the provision is ambiguous or not. *Endumeni* teaches that interpretation now involves

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[23] Ibid at 258.
[24] *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305

[25] *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 30.
[26] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

a unitary exercise simultaneously considering the language, context, and purpose of the document.

[53] For all the above reasons, the majority of the Full Court misdirected itself on the law and unduly emphasised form over substance. Mtembu AJ was correct in his minority judgment. The appeal must succeed. As noted, the High Court did not consider the merits of the forfeiture application. Therefore, the matter must be remitted for that purpose. Costs must follow the result.

Order

[54] The following order is made:

1 The appeal is upheld with costs, including costs of two counsel.

2 The order of the majority of the Full Court of the North West Division of the High Court, Mahikeng, is set aside and replaced with the following:

'1 The appeal is upheld with costs.

2 The matter is remitted to the North West Division of the High Court, Mahikeng, for the determination of the merits of the forfeiture application.'

T MAKGOKA

JUDGE OF APPEAL

Appearances:

For appellant:	L Nkosi-Thomas SC (with S de Villiers)
Instructed by:	State Attorney, Mahikeng
	State Attorney, Bloemfontein
For respondents:	D J Combrink (Heads of Argument having been prepared by B Roux SC)
Instructed by:	CG Mataboge Attorneys, Rustenburg
	MM Hattingh Attorneys Inc., Bloemfontein.