



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 669/2020

In the matter of:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS
(EX PARTE APPLICATION)**

APPELLANT

Neutral citation: *The National Director of Public Prosecutions (Ex Parte Application)*
(Case no 669/2020) [2021] ZASCA 142 (7 October 2021)

Coram: SALDULKER, PLASKET and MBATHA JJA and MOLEFE and
UNTERHALTER AJJA

Heard: 27 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 October 2021.

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – ss 26 and 38 – Uniform Rules of Court – preservation of property order – urgency – whether the appellant must prove urgency when applying for a preservation order.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Roelofse AJ sitting as court of first instance):

- 1 The appeal is upheld.
- 2 The order of the high court is set aside and substituted as follows:
 - (a) The appellant may re-enroll the application in terms of s 38(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), in its original form as an *ex parte* application, with the Registrar of the high court.
 - (b) The application must be set down in accordance with rule 6(4)(a) of the Uniform Rules of Court.
 - (c) A judge of the high court, as soon as may be reasonably and practically possible after such re-enrolment, shall consider and deal with the application as an *ex parte* application, without need for service, and decide the application on its merits in accordance with the requirements for the making of the order sought as laid down in s 38(2) of POCA.'

JUDGMENT

Molefe AJA (Saldulker, Plasket and Mbatha JJA and Unterhalter AJA concurring):

[1] This is an appeal against an order made by Roelofse AJ in the Mpumalanga Division of the High Court, Mbombela (the high court), striking from the roll an *ex-parte* application in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) for a preservation order. The core issue in this appeal is whether the appellant, the National Director of Public Prosecutions (the NDPP), is required, when bringing an application in terms of s 38 of POCA, to deal with urgency in the founding affidavit, and to make out a case for urgency before the merits of the matter may be determined.

[2] The facts are briefly that on 16 August 2019, three men were found in a timber plantation in Mpumalanga in possession of the carcasses of 11 grey duiker, four bush buck, one mountain reed buck and one serval cat, which had recently been poached. The carcasses and the rifle with which the animals were hunted were found in a Toyota Hilux vehicle (the vehicle) which belonged to one of the men.

[3] The three men were arrested and charged with a number of offences in the Graskop Magistrates' Court (the magistrates' court), where they were subsequently admitted to bail. The vehicle and the rifle were seized by the South African Police Service (SAPS) on 16 August 2019. The seizure was effected in terms of s 20 of the Criminal Procedure Act 51 of 1997 (the CPA).¹

¹ This provision authorises the State, in accordance with Chapter 2 of the CPA, to seize an article which, *inter alia*, 'is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence' or 'which may afford evidence of the commission or suspected commission of an offence'.

[4] The case was, without the knowledge of the prosecution, struck from the criminal roll on 30 January 2020, and no reasons were provided on the record as to why this occurred. The magistrate, *mero motu*, without an application brought on notice to the prosecution, and in violation of the CPA,² ordered the police to return the vehicle to one of the accused, the registered owner of the vehicle.

[5] This turn of events prompted the NDPP to apply to the high court for a preservation order in terms of s 38 of POCA. The matter served before Roelofse AJ who raised a concern about the delay in the bringing of the s 38 application. He struck the matter from the roll on the basis that urgency had not been established, as required by a practice directive of the court, although he accepted that a proper case had been made out for the granting of a preservation order on the merits. He granted the NDPP leave to appeal to this Court.

[6] The NDPP does not accept that the requirements for urgency were not satisfied. The core issue which has to be addressed in this appeal is whether the NDPP is required, when bringing an application in terms of s 38 of POCA, to make out a case of urgency in the founding affidavit before the merits can be determined. This requires a consideration of the legislation, the practice directive, and case law, particularly the judgment of this Court in *Ex parte National Director of Public Prosecutions*³ (*Ramadhani*).

[7] The starting point in this appeal is s 38 of the POCA, which sets out the procedure that may be used to apply for a preservation order. It provides:

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

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

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

² *S v Vorster and Another* 2006 (1) SACR 611 (T).

³ *National Director of Public Prosecutions* [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) The case concerned a preservation order in relation to a vehicle owned by one Mr Ramadhani.

(b) is the proceeds of unlawful activities; or

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

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order. . . .’

[8] Rule 6(4)(a) of the Uniform Rules of Court governs the procedure for setting down *ex parte* applications. It provides that every application brought *ex parte* shall be filed with the Registrar and set down before noon on the court day but one preceding the day on which it is to be heard. The court may dispense with the forms and service provided for in the rules, and may dispose of such matter at such time and place and in such manner, and in accordance with such procedure (which shall as far as practicable be in terms of the rules) as it deems fit.

[9] The Constitutional Court held in *National Director of Public Prosecutions and Another v Mohamed NO and Others*,⁴ that s 38(1) ‘. . . means no more than that, if the National Director is desirous of obtaining an order under s 38, she or he may use an *ex parte* application. . .’. In other words, the procedure prescribed by the statute that may be used in an application for a preservation order is an *ex parte* application — which dispenses with notice to the respondent and service of the papers.

[10] In *Ramadhani*,⁵ this Court decided an appeal against an order of the Mpumalanga Division of the High Court striking from the roll an *ex parte* application for a preservation order. This Court held:

10.1 that a then existing provision of a practice directive of the Mpumalanga Division of the High Court governing *ex parte* POCA applications was inconsistent with Uniform Rule 6(4)(a) and with s 38 of POCA;

⁴ *National Director of Public Prosecutions and Another v Mahomed N O and Others* 2003 (1) SACR 561; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) para 33.

⁵ *Ramadhani* paras 29-33.

10.2 that the practice directive could not be applied to restrict, undermine or negate these provisions;

10.3 that ex parte applications in terms of s 38 are by their nature urgent; and

10.4 that the approach to an ex parte application brought in terms of s 38(1) should be that a judge in chambers ought to consider the application and make the appropriate order as soon as it is reasonably and practically possible after such an application has been filed with the Registrar.

[11] Pursuant to the *Ramadhani* judgment, the relevant practice directive was amended to bring the directive into conformity with the judgment. That practice directive was followed by one issued on 9 January 2020. The two practice directives embody similar provisions. Paragraph 11.3 of the January 2020 practice directive provides that applications in terms of POCA 'shall be initiated by enrolment thereof on the unopposed roll or urgent roll provided urgency is justified'.⁶ In terms of paragraph 11.5 of the January 2020 practice directive, '[i]n granting an application brought ex parte . . . under [section] 38 of POCA, the court shall issue a rule nisi by completion of Form C to this Practice Directive seen in the context of the case of NDPP V Mohamed and Others 2003 (4) SA 1 (CC) at paras [32] and [51]. . .'.⁷

[12] It is important to highlight that paragraph 8 of the practice directive deals with unopposed applications. According to paragraph 8.1, unopposed applications are heard on Mondays and Fridays of the first, fourth and seventh weeks of every term, and the number of matters to be heard each day is limited to 100 matters divided between two judges. Paragraphs 8.4 and 8.5 deal with the setting down of unopposed matters. These paragraphs state:

'8.4 The applicant shall ensure that papers are ready, i.e. indexed, paginated and bound together and filed with the Registrar's clerk by not later than 12h00 on a Monday and Friday preceding the hearing on the following Monday and Friday of the motion week.

⁶ Paragraph 11.2 of the July 2019 Practice Directive contains a similar provision.

⁷ Paragraph 11.4 of the July 2019 Practice Directives contains a similar provision.

8.5 The Registrar's clerk shall prepare the files and hand them over to the respective Judges by not later than 16h00 on a Monday and Friday preceding the week of hearing as indicated in 8.4 above.'

[13] Urgent applications may, according to paragraph 10.1 of the practice directive, ' . . . be heard at 10h00 on every Tuesday of each week', and according to paragraph 10.3, it is only in exceptional circumstances that urgent application will be heard at a different time or a different day. This paragraph regulates the setting down of 'normal' urgent application. They 'must be filed with the Registrar by no later than 12h00 on Thursday of the preceding week to enable the Registrar to prepare and submit in time the file(s) to the judge on the urgent roll'. Paragraph 10.7 of the practice directive is one of the number of paragraphs dealing with *ex parte* applications. It provides that '[a]ll *ex parte* applications must be enrolled on the unopposed motion roll and unless urgency is averred and satisfied in the papers, it may be enrolled on the urgent roll'. (It appears that the word 'unless' is intended to be 'if'.)

[14] This Court in *Ramadhani* explained how a practice directive stands in relation to a statute, the Uniform Rules and the common law. Seriti JA held in this respect, that:

'The practice directive is subordinate to any relevant statute, the common law and the Uniform Rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and, their purpose is to supplement the rules of court. In this case, the court a quo afforded the practice directive statutory force overriding both s 38 of POCA and rule 6(4)(a) of the Uniform Rules which is impermissible. The practice directive should not negate the provisions of s 38 and rule 6(4)(a) of the Uniform Rules. In my view the portion of the practice directive dealing with *ex parte* applications is not applicable to *ex parte* applications brought in terms of s 38.'⁸

[15] The practice directives require an applicant in an urgent application to set out explicitly the circumstances which render the matter urgent. They further emphasise that while an application may be urgent, it may not be sufficiently urgent to be heard at the

⁸ *Ramadhani* para 31.

time selected by the applicant. Furthermore, the practice directive provides that should the directives regarding urgent applications not be adhered to, the application will be struck off the roll. On the other hand, the NDPP contends that s 38 applications are by their nature inherently urgent, and there is no need to establish urgency in such matters.

[16] It is important to note that the *Ramadhani* judgment was not the first judgment to pronounce on the nature of applications in terms of s 38 of POCA. The *Ramadhani* judgment quoted with approval the dictum in the *National Director Public Prosecutions v Alexander and Others*,⁹ where the court stated that it was to be presumed that the Legislature intended POCA proceedings to be ‘inherently sufficiently urgent’.

[17] Regrettably, the aforementioned approach was overlooked by Roelofse AJ. The high court practice directives are incompatible with the nature of POCA applications and rule 6(4)(a). The misclassification of the s 38 applications as ordinary urgent applications was irregular.

[18] The set down of urgent applications and unopposed applications in terms of paragraph 11.3 read with paragraphs 8.4 and 10.2 of the practice directives are clearly in conflict with the Uniform Rules. They set strict timelines and requirements as to the hearing of a s 38 POCA application, thereby detracting from *Ramadhani*, where this Court held that such applications must be heard as soon as reasonably and practicably possible, as they are inherently urgent. It is untenable to give effect to s 38 of POCA by recourse to practice directives that may delay the hearing of an application for a forfeiture order.

[19] Practice directives provide essential guidance for the daily functioning of the courts. Practice directives may not derogate from legislation, the common law or rules of court that have obligatory force. A statute that permits the use of a procedure so as to make its enforcement effective must be adhered to. The competence of the courts to give practice directives is an important means by which the work of the courts may be carried

⁹ *National Director Public Prosecutions v Alexander and Others* 2001 (2) SACR 1 (T) at 13A-D.

out. However, practice directives must facilitate what a statute requires. Practice directives should not place obstacles in the way of achieving the objects of a statute.

[20] The high court, therefore, erred in the following respects. Firstly, in not finding that by its very nature, an application for a preservation order is inherently urgent, and that the appellant was entitled, as a matter of law, to approach the court *ex parte*, and by way of notice provided for in rule 6(4)(a), without having specifically to make out a case for urgency. Secondly, the high court erred in treating the practice directive as if it has statutory force that overrides the provisions of the POCA and the Uniform Rules. As the court below misdirected itself in these respects, when it struck the matter from the roll, the appeal must succeed.

[21] In the result, I make the following order.

1 The appeal is upheld.

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

‘(a) The appellant may re-enroll the application in terms of s 38(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), in its original form as an *ex parte* application, with the Registrar of the high court.

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

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

D S MOLEFE
Acting Judge of Appeal

APPEARANCES:

For Appellant: A J Freund SC (appearing with S J van der Walt)
Instructed by: The State Attorney, Mbombela
The State Attorney, Bloemfontein.