



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 756/2023

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

HERMANUS JOHANNES VAUGH VICTOR N O

JOHANNA NINI MAHANYELE N O

CAROLINE MMAKGOKOLO LEDWABA N O

(jointly the First Respondent in their capacities

as the joint provisional liquidators of

Tariomix (Pty) Ltd (in liquidation)

Masters Ref No M000016/2023

First Respondent

DAM MOHASOA N O

T P MAMAHLODI-SOFE N O

(jointly the Second Respondent in their capacities

as the joint provisional trustees of the insolvent estate of

Louis Petrus Liebenberg)

Master's Ref No T242/2025

Second Respondent

MPONYANA LAZARUS LEDWABA N O

SANDRA JOAN MC KENZIE N O

(jointly the Third respondent in their capacities

as the joint trustees of the insolvent estate of

Magdalena Petronella Kleynhans

Master's Ref No T2485/2024

Third Respondent

Neutral citation: *The National Director of Public Prosecutions v Victor N O and Others* (Case no 756/2023) [2025] ZASCA 31 (31 March 2025)

Coram: MBATHA, HUGHES, MEYER, MATOJANE and KOEN JJA

Heard: 20 March 2025

Delivered: 31 March 2025

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – funds kept in bank accounts of company and directors the proceeds of an unlawful investment scheme and the instrumentality of certain offences – National Director of Public Prosecutions (NDPP) having obtained preservation of funds order against company and its directors in terms of s 38 of POCA – preservation order reversed on reconsideration – appeal noted but lapsed – company placed under final winding-up – NDPP and liquidators both seeking to exercise their powers in respect of disputed funds – whether appeal should be reinstated.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose J, sitting as court of first instance):

The application for condonation and reinstatement of the appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Meyer JA (Mbatha, Hughes, Matojane and Koen JJA concurring):

[1] This is an appeal against the order of the Gauteng Division of the High Court, Pretoria, *per* Mokose J, dated 22 August 2022 (the high court), overturning a preservation of property order granted by Davis J on 18 March 2021 in terms of s 38 of the Prevention of Organized Crime Act 21 of 1988 (POCA).¹ The appeal is with leave of the high court.

[2] On 5 March 2021, the Financial Intelligence Centre (FIC) issued a directive (the directive) to ABSA Bank Limited (ABSA) and to Nedbank Limited (Nedbank) in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA) to freeze the funds that were kept in the bank accounts held in the names of Tariomix (Pty) Ltd (Tariomix),² Mr Louis Petrus Liebenberg (Mr Liebenberg),³ and Ms Magdalena Petronella Kleynhans (Ms Kleynhans)⁴ (jointly referred to as the respondents). The directive had a limited

¹ Subsections 38(1) and (2) of POCA reads:

‘(1) The National Director may by way of an *ex parte* application apply to the 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;
(b) is the proceeds of unlawful activities; or
(c) is property associated with terrorist and related activities.’

² Tariomix has since been liquidated and was substituted by its liquidators as the first respondent.

³ The estate of Mr Liebenberg has since been provisionally sequestrated and was at the hearing of this appeal substituted by consent with its provisional trustees as the second respondent.

⁴ The estate of Ms Kleynhans has since been sequestrated and was at the hearing of this appeal substituted by consent with its trustees as the third respondent.

lifespan of 10 days expiring on 18 March 2021, whereafter the funds would be freely available for use by the respondents. Mr Liebenberg and Ms Kleynhans are the directors of Tariomix.

[3] The appellant, the National Director of Public Prosecutions (the NDPP) accordingly brought an *ex parte* application in terms of s 38 of POCA. It sought the preservation of funds kept in certain bank accounts of the respondents. The basis of the application was that the funds were the proceeds of unlawful activities or an instrumentality of an offence.

[4] The grounds on which the NDPP relied were that Tariomix, Mr Liebenberg and Ms Kleynhans operated a fraudulent investment scheme - a Ponzi scheme – relating to diamonds in terms whereof innocent members of the public were duped and incited to pay large funds to Tariomix as investors for the purchase and selling of alleged diamonds. In reality, there were never any diamonds purchased, and the funds invested by the general public were utilised by Mr Liebenberg and Ms Kleynhans for their own gain and to the detriment of the investors and other creditors of Tariomix.

[5] On 18 March 2021, Davis J granted the preservation of property order on an *ex parte* basis (the preservation order). On 19 April 2021, the respondents launched a reconsideration application of the preservation order in terms of rule 6(12)(c) of the Uniform Rules of Court.⁵ Having reconsidered the preservation order, the high court set it aside with costs on 22 August 2022. In setting aside the preservation order, the high court reasoned that the NDPP had failed to establish the requirements under s 38(2) of POCA for obtaining a preservation order. On 3 July 2023, it granted the NDPP leave to appeal to this Court.

[6] In the meantime, on 23 February 2023, Tariomix was placed under provisional winding-up by the North West Division of the High Court, Mafikeng, at the instance of one of its major creditors, ABSA Bank Limited, whereafter joint provisional liquidators were appointed during March 2023. Tariomix was placed under final winding-up during April 2024. The estates of the directors of Tariomix were subsequently also sequestrated and trustees were appointed to their insolvent estates.

⁵ Rule 6(12)(c) of the Uniform Rules of Court reads:

‘A person against whom an order was granted in such person’s absence in an urgent application may by notice set down the matter for reconsideration of the order.’

[7] In terms of rule 8(1) of the Supreme Court Rules,⁶ the NDPP was obliged to lodge with the registrar of this Court six copies of the record of the proceedings in the court *a quo* on or before 3 November 2023. It did so only on 20 March 2024. The appeal had accordingly lapsed. An application for condonation was thus required to revive it.⁷ The NDPP lodged an application seeking condonation for the late filing of the record of the proceedings; reinstatement of the appeal that had lapsed; and leave to file its heads of argument within six weeks after the filing of the record of the proceedings. This application must be adjudicated before the appeal can be decided.

[8] Factors which usually weigh with this Court in considering an application for condonation and reinstatement of a lapsed appeal are trite.⁸ They include a reasonable and full explanation covering the entire period of the delay and the prospects of success on the merits of the appeal. The explanation for the delay given by the NDPP falls far short of a full, complete and satisfactory explanation. But as this Court said in *Valor IT v Premier, North West Province and Others*⁹ ‘very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point).’ I, therefore, propose to first consider whether the NDPP has strong merits of success that may trump its unsatisfactory explanation for the delay.

[9] Once the appeal had lapsed, the *curator bonis* appointed in terms of s 42(1) of POCA¹⁰ paid the money in the account of Tariomix over to the liquidators of Tariomix.

⁶ Rule 8 of the Supreme Court Rules reads:

‘An appellant shall within three months of lodging of the notice of appeal lodge with the registrar six copies of the record of the proceedings in the court *a quo* and deliver to each respondent such number of copies as may be considered necessary or as may reasonably be requested by the respondent.’

⁷ *Court v Standard Bank of Ltd; Court v Bester NO and Others* 1995 (3) SA 123 (A) at 139F-H.

⁸ See, for example, *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] All SA 251 (SCA) paras 11-15; *Miles Plant Hire v Commissioner SARS* [2015] ZASCA 98 paras 12-13.

⁹ *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62 (SCA); [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 38.

¹⁰ Section 42(1) of POCA reads:

(1) Where a High Court has made a preservation of property order, the High Court shall, if it deems it appropriate, at the time of the making of the order or at a later time-

(a) appoint a *curator bonis* to do, subject to the directions of that High Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely-

- (i) to assume control over the property;
- (ii) to take care of the said property;
- (iii) to administer the said property and to do any act necessary for that purpose; and
- (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and

The funds are currently kept by the liquidators and are administered for the benefit of the creditors of Tariomix to be applied in accordance with the provisions of the Insolvency Act 24 of 1936.

[10] The facts relating to the unlawful scheme are largely common cause between the liquidators and the NDPP. The liquidators argue that they are best suited to deal with the funds forming the subject of the preservation order. That will allow the investors to prove claims against the insolvent estate of Tariomix and to allow them to be paid a dividend of the moneys lawfully owed to them in accordance with the insolvency law. The NDPP, on the other hand, persists in its claim that the preservation order should be reinstated until the forfeiture proceedings are disposed of.

[11] I subscribe to the views expressed by Keightley J in *Prinsloo N.O. and Others v NDPP and Others*.¹¹ There, the NDPP also obtained an order to preserve the funds obtained by a company which duped investors into paying funds to the company, which had also conducted an unlawful investment scheme. That company was also placed under final winding-up. The liquidators also laid claim to the funds forming the subject of the preservation order. On that aspect of the case Keightley J concluded:¹² 'I conclude that there is no good reason to deprive the investors of their ordinary rights to pursue their claims through the winding-up process in this case. To retain the disputed funds under restraint would amount to an arbitrary deprivation of their property rights. It would not serve a proper public purpose in that it would place unnecessary hurdles in the path of the ongoing winding-up process, which had already commenced by the time the restraint order was granted.'

[12] A preservation order is the precursor to an application for the forfeiture of the property preserved as provided for in Chapter 6 of POCA. The preservation order that was granted *ex parte* was not revived by the noting of the appeal to this Court.¹³ The forfeiture application thus also lapsed. The investors have a legitimate claim against the initially preserved funds, and rely on the liquidators, through the exercise of their

(b) order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the *curator bonis*.

¹¹ *Prinsloo N.O. and Others v NDPP and Others* ((Case No. 7907/2020) An unreported judgment of the Gauteng Division of the High Court, Johannesburg, dated 10 December 2020(*Prinsloo N.O.*)).

¹² *Ibid* para 80.

¹³ *National Director of Public Prosecutions v Rautenbach and Others* [2004] ZASCA 102; [2005] 1 All SA 412 (SCA); 2005 (4) SA 603 (SCA) paras 12-13.

statutory powers, to effect a distribution of the funds. These rights are protected under s 25(1) of the Constitution¹⁴ from arbitrary deprivation.

[13] The NDPP argues that not all investors in the unlawful investment scheme were innocent members of the public. In support of this argument it relies on a conclusion of fact to that effect in its founding affidavit. No primary facts, on which the conclusion could be founded, were however alleged. No particulars of the identity or identities of the particular investor or investors or the grounds on which acts of turpitude had been given. The remarks of Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd*¹⁵ are pertinent:

'Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[14] Nevertheless, the NDPP may object to the claims of investors (creditors) against the insolvent estate of Tariomix at the meetings of creditors held in terms of the provisions of the Insolvency Act¹⁶ if it believes the investor was complicit in the unlawful investment scheme. It may object to the liquidators' account at any time before its confirmation by the Master.¹⁷ If the NDPP is aggrieved by a decision, ruling or order of the Master or officer presiding at a meeting of creditors, it may bring it under review by the court.¹⁸ It may also invoke the provisions of POCA in respect of any specific payment that may accrue to an investor, if it can establish a factual basis that the particular investor was complicit in the unlawful scheme.

¹⁴ Section 25(1) of the Constitution of the Republic of South Africa reads:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

¹⁵ *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972(1) SA 464 (D & CLD) at 469 C- E.

¹⁶ Insolvency Act 24 of 1936.

¹⁷ Section 111(1) of the Insolvency Act.

¹⁸ Section 151 of the Insolvency Act.

[15] The NDPP, therefore, has not established any prospects of success, let alone strong prospects of success in the appeal, that might otherwise have trumped its unsatisfactory explanation for the delay.

[16] In the result, the following order is made:

The application for condonation and reinstatement of the appeal is dismissed with costs, including those of two counsel.

P.A. MEYER
JUDGE OF APPEAL

Appearances

For appellant:

DP Skosana SC with S Jozana

Instructed by:

State Attorney, Pretoria

State Attorney, Bloemfontein

For first respondent:

J Hershenson SC with R Leeuw

Instructed by:

Strydom Rabie Inc, Pretoria

Symington & De Kok Inc,
Bloemfontein

For second and third respondents:

P Lourens

Instructed by:

F.J. Senekal Inc., Bloemfontein