

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT DIVISION)**

CASE NO: 891/2019

In the matter between:

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

Applicant

and

NATHAN V D WESTHUIZEN

Respondent

In re: R75 514 in cash (the property) seized by the South African Police Service
members (the SAPS) in Pefferville, East London on 19 July 2019

JUDGMENT

GQAMANA J:

- [1] The Applicant (“NDPP”) filed an application in terms of section 48 of the Prevention of Organised Crime Act, 121 of 1998 (“POCA”), seeking an order forfeiting to the State the Respondent’s property which was seized by the police on 18 July 2019.¹ That application was met with a number of points *in limine* raised by the Respondent. His contention was that, the application is

¹ See Notice of Motion dated 5 November 2019.

fatally defective due to failure to comply with Rule 6(1), (2), (3) and (5)(a) and (b)(iii) of the Uniform Rules.² The relevant sub-rules read:

- “(1) Save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.
- (2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only.
- (3) Every petition must conclude with the form of order prayed and be verified upon oath by or on behalf of the petitioner.
- (5)(a) Every application other than one brought *ex parte* must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given.
- (b) In a notice of motion the application must—
 - (iii) set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.”

[2] In my view, this matter should be disposed of on the point about non-compliance with rule 6(1) and therefore I will devote my energy for the purposes of the order issued below solely on this point. However, before doing so, I need to sketch out the factual backdrop and history of the litigation hereto, in order to demonstrate the unfortunate manner on how the NDPP’s case was pursued.

[3] This journey began by an *ex parte* application instituted in this court in terms of s 38(1) of POCA on 1 August 2019, by the NDPP. An order in that regard

² Index, p125; para 9.

was granted on 6 August 2019 in favour of the NDPP in respect of the cash in the amount of R75 514,00 (the Respondent's property) which was seized by the police in Pefferville, East London on 19 July 2019.³

[4] Subsequent thereto and in compliance with paragraph 4 of the aforesaid order, a notice of such order was published in the Government Gazette on 23 August 2019.⁴ Thereafter, on 4 September 2019, the Respondent entered an appearance and gave notice of intention to oppose the making of a forfeiture order. Accompanying the Respondent's aforesaid notice was a detailed affidavit deposed to by the Respondent setting out the basis of his defence.⁵

[5] Thereafter, on 5 November 2019, the NDPP issued the present application in terms of the provisions of section 48 of POCA which reads:

- “(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 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 and 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.
- (4) Any person who entered an appearance in terms of section 39(3) may appear at the application under subsection (1)-
 - (a) to oppose the making of the order; or
 - (b) to apply for an order-
 - (i) excluding his or her interest in that property from the operation of the order; or
 - (ii) varying the operation of the order in respect of that property,
 and may adduce evidence at the hearing of the application.”

³ See Index, pp 53–55.

⁴ P56 – 57.

⁵ Index pp 86–89.

[6] The notice of motion was on short form and the Respondent was neither cited nor was he afforded the opportunity to file the answering affidavit.⁶ The notice was supported by an unsigned so-called “founding affidavit” of Ms Nicole Peters. The application was to be heard on 12 November 2019. On 7 November 2019, the Respondent filed a notice of opposition.⁷ A day later,⁸ the NDPP removed the matter from the roll by filing a notice of removal.⁹ Three days thereafter, on 11 November 2019, the NDPP again filed another notice of motion¹⁰ and on the face of this notice, the application was to be heard on 26 November 2019. Furthermore, in terms of this notice, the Respondent was given 14 days to deliver his answering affidavit. The notice was served on the Respondent’s attorney on 11 November 2019.¹¹ Contrary to the period of 14 days to file the answering affidavit, the application was set down prematurely. Appreciating this short-coming, the NDPP file a “Notice of Withdrawal” on 21 November 2019.¹²

[7] Fast forwarding, on 7 January 2020, the Respondent’s attorney penned a letter to the NDPP’s attorneys, placing on record the following:

- “1. We refer to your Notice of Withdrawal dated 21 November 2019 and to your letter dated 11 December 2019.
2. As indicated to our letter dated 20 November 2019, we are of the view that your application is fatally defective in that both your Notice of Motion and Founding Affidavit contain various instances of non-compliance with the Uniform Rules of Court.
3. We alerted yourselves to those defects in our aforementioned letter and called upon yourselves to remedy same in accordance with the Uniform Rules alternatively, to withdraw the application...”

⁶ Index, pp 36–37.

⁷ Index, pp 59–60.

⁸ On 8 November 2019.

⁹ Index, pp 61–62.

¹⁰ Index pp 64–66.

¹¹ Index p66.

¹² Index p67.

This letter concluded with the proposal that the NDPP should withdraw the application, tender the Respondent's costs and to institute a proper application which complies with the provisions of Rule 6. The proposal was not accepted. The application was not withdrawn.

[8] Instead, on 23 January 2020, a notice of intention to amend was filed on behalf of the NDPP.¹³ Thereafter, on 11 February 2020, a notice setting down the matter for hearing on 3 March 2020 was filed by the NDPP's attorneys.¹⁴ On receipt of the notice of set down, the Respondent filed a notice in terms of Rule 30(2)(b)¹⁵ on 18 February 2020. Soon thereafter on 25 February 2020, the NDPP removed the matter from the roll¹⁶ of the 3 March 2020.

[9] Thereafter, on 17 July 2020, a notice of withdrawal was filed on behalf of the NDPP.¹⁷ This notice reads:

“BE PLEASED TO TAKE NOTICE that the Applicant herein files a Notice to Withdraw the Forfeiture Application filed on 21 November 2019.”

[10] On 20 August 2020, a notice of set down was filed on behalf of the NDPP¹⁸ and the date of the hearing was 01 September 2020. On 27 August 2020, the Respondent then filed his answering affidavit in opposition to the NDPP's forfeiture application.¹⁹ The NDPP's case was badly handled from the inception of the s 48 of POCA application, but the litigation itself was not vexatious.

¹³ Index, pp 63–65.

¹⁴ Index p109.

¹⁵ Index pp 74–79.

¹⁶ Index p112, Notice of Removal from the roll.

¹⁷ Index p113.

¹⁸ Index p114.

¹⁹ Index pp 116–144.

[11] Reverting to the points raised by the Respondent, that the application is defective because the founding affidavit of Ms Peters²⁰ is not signed by a Commissioner of Oaths as prescribed in regulations 2, 3 and 4 of the regulations published in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. Faced with this objection, the NDPP filed a filing notice attaching thereon an identical founding affidavit which was attested and commissioned on 21 September 2020, almost a year after the original so-called founding affidavit was filed. There was no condonation application nor an explanation for this belated and irregular attempt to substitute the unattested statement of Ms Peters.

[12] In terms of rule 6(1) of the Uniform Rules, a notice of motion must be supported by an affidavit as to the facts upon which an applicant relies for the relief. If there is no affidavit before a court in support of the relief claimed, as a consequence of that, there is no evidence upon which the relief could be granted. In motion proceedings the affidavits constitute evidence that would have been necessary in a trial and also serves as pleadings,²¹ setting and defining the issues to be adjudicated.

[13] It is also trite that, an affidavit is a statement in writing sworn to before someone who has authority to administer an oath, it is solemn assurance of facts known to the person who states them and sworn to as his statement before a commissioner of oaths.²² In the instant matter the unattested statement of Ms Peters²³ (the so-called founding affidavit) is neither

²⁰ Index pp 40–52.

²¹ Herbstein Van Winsen: *The Civil Practice of the High Courts of South Africa*, 5th edition, Volume 1 p 439.

²² *Wingaard v Grobler* 2010(6) SA 148(ECG) para 8 and the cases cited therein.

²³ Index pp 40–52.

commissioned nor signed before a Commissioner of Oaths and that is a fatal defect incapable of condonation.²⁴

[14] Furthermore the unattested statement of Ms Peters is *pro non scripto* and because of that, the NDPP has not placed evidence before me in support of the relief claimed in her application in terms of s 48 of POCA. An affidavit substitutes as the testimony of a witness.²⁵ Accordingly, the NDPP's application stands to be dismissed on this basis alone without having regard to the other points *in limine* raised by the Respondent as mentioned in paragraph 1 above.

[15] With regards to costs, the Respondent seeks punitive costs as against the NDPP. The submission advanced on his behalf was that, the NDPP was informed that the application was fatally defective but no action was taken in terms of the rules to cure such defect or to withdraw the application and to institute it *de novo*. It was argued further that the application or the conduct of the NDPP was vexatious. Indeed a court may award punitive costs order against a party as its sign of displeasure where, for instance, a conduct of such party was vexatious, or such party's conduct amounts to an abuse of court process.²⁶ However on the facts herein, I disagree with the Respondent's counsel that the NDPP's conduct in these proceedings was vexatious or it amounts to an abuse of court process. The NDPP obtained a preservation order against the Respondent's property. In order to have such property forfeited to the State, the present application was instituted. However, in support of her application, an unattested statement of Ms Peters was filed,

²⁴ Wingardt (*supra*) at para [9].


²⁵ *Venmop 275 (Pty) Ltd Cleverlad Projects (Pty) Ltd* 2016(1) SA 78 (GJ) at 86A.

²⁶ *Public Protector v South Africa Reserve Bank* 2019(6) SA 253 (CC) at para [8].

sadly her case was badly handled by her attorneys. In the exercise of my discretion, I am not satisfied on the facts herein that a punitive costs order against the NDPP is warranted.

[16] In the result the following order is issued:

1. The application is dismissed.
2. The Applicant is ordered to pay the Respondent's costs of this application on a party and party scale.

A handwritten signature in black ink, appearing to read 'N GQAMANA', is written over a horizontal line.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : *X Nelani*

Instructed by : State Attorney

EAST LONDON

Counsel for the Respondents : *D T Young*

Instructed by : Changfoot Van Breda Inc. Attorneys

EAST LONDON

Heard on : 3 June 2021

Delivered on : 15 June 2021