**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 07/23918**

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Applicant

and

**RAZEENA MOOLLA** Respondent

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**J U D G M E N T**

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**MOSHIDI, J:**

INTRODUCTION

[1] This application raises a rather technical yet important and novel issue. The crisp issue is whether the preservation order obtained by the applicant

against the respondent had lapsed when the applicant issued and served a forfeiture notice of application on the respondent. The applicant seeks a forfeiture order against the respondent in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 ("*POCA*"). The subject of the forfeiture order sought is the immovable property of the respondent described as Erf 468, Mayfair West, Johannesburg, under Title Deed Number T4061/2004 ("*the property*"). The correct description of the property becomes more relevant later.

THE BRIEF RELEVANT BACKGROUND

[2] In the light of the narrow issue to be determined in the application, I deemed it unnecessary to set out in full the history of the matter. Pursuant to information received that the occupants of the property were manufacturing and dealing in drugs, the South African Police Service ("*SAPS*"), on 9 July 2006 raided the property. On arrival, the SAPS encountered the respondent and her husband Leyakat Ali Khan ("*Khan*"). At the time, Khan admitted that the manufacturing of drugs was indeed taking place at the property. However, the respondent's version has since changed on this aspect. On securing the property, the SAPS found the finished product of CAT, chemicals and equipment used to manufacture the CAT. All these items were found in different rooms. Subsequent forensic tests revealed that the substance seized at the property was indeed CAT (Methacathinone) listed in Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992. The value was estimated at R1 million. The respondent and Khan were arrested.

[3] On 9 October 2007, the applicant, as usual, obtained an *ex parte* preservation order against the respondent in terms of s 38(1) read with s 74(1)(a) of POCA. Section 38(1) of POCA provides as follows:

> "***38. Preservation of property orders.***– *(1) The National Director may by way of an 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;*
>
> *(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.*
>
> *(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.*"

Pursuant to the order, the papers served on the respondent drew her attention to the fact that the applicant will, within 90 days, apply in terms of s 48 of POCA for an order declaring the property forfeited to the State. The respondent was also informed of her right to oppose the forfeiture application. In the context of the present application, it becomes necessary to deal more fully with the provisions of s 48 of POCA. For present purposes, however, it

suffices to record that pursuant to the granting of the preservation order, there was protracted litigation between the parties. The upshot was that the preservation order granted in favour of the applicant would lapse 90 days after the date on which notice of the making of the order is published in the Government Gazette. This is provided for in terms of s 40 of POCA. The preservation order was published in the Government Gazette on 14/12/2007. The preservation order was to lapse on 13/3/2008. This was common cause.

[4] In giving notice to the respondent and, indeed all interested parties in the property, and publishing the preservation order in the Government Gazette, the applicant did so in compliance with s 39 of POCA, which provides as follows:

> "***39. Notice of preservation of property orders.***– *(1) If a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order –*
>
> *(a) give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and*
>
> *(b) publish a notice of the order in the Gazette.*
>
> *(2) A notice under subsection (1)(a) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.*
>
> *(3) Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her 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.*
>
> *(4) An appearance under subsection (3) shall be delivered to the National Director within, in the case of -*

*(a) a person upon whom a notice has been served under subsection (1)(a), 14 days after such service; or*

*(c) any other person, 14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette.*

*(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.*"

On the other hand, s 40 of POCA, which regulates the lifespan of a preservation order, and which is of critical importance to the present application, provides as follows:

"***40. Duration of preservation of property orders.***– *(1) 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;*

*(b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or*

(c) *the order is rescinded before the expiry of that period.*"

The provisions in s 40(a) are of particular relevance in the context of the present application. S 48 provides for the application foreshadowed in s 40(a), and reads as follows:

> "***48. 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.*
>
> *(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 the 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.*"

THE MAIN ISSUES TO BE DETERMINED

[5] The critical and determinative issues in the present application alluded to earlier, require to be set out in greater detail. These are that, in terms of s 40 of POCA, quoted above, the preservation order should expire 90 days after the date on which notice of the making of the order is published in the Gazette. The preservation order was published in the Government Gazette

on 14/12/2007. The 90th day therefore fell on 13/3/2008. On the latter date, the applicant issued, through the Registrar of this Court, a forfeiture notice of application in terms of the provisions of s 48 of POCA in respect of the property. The notice of motion was served on the respondent's erstwhile attorneys of record, Biccari Bollo and Mariano, on 14/3/2008. This was clearly on the 91st day of the publication in the Government Gazette. The respondent's attorneys aforesaid did not only serve and file a notice of opposition, but also filed and served on the applicant a notice in terms of Rule 30 of the Uniform Rules of Court on 26/3/2008. On 10/6/2008, the respondent filed and served a short answering affidavit dealing mainly with what the respondent alleged was a defective notice of motion served on her by the applicant on 14/3/2008. However, the respondent, later, and pursuant to some interlocutory proceedings between the parties, filed and served an answering affidavit dealing with the merits of the forfeiture order application. This was on 12/12/2008.

[6] At the commencement of the hearing of the present application, and by agreement between the parties, the Court was requested to first determine the question whether there was in fact in place a preservation order when the applicant launched the present application, in terms of s 48 of POCA. This, by necessary implication, also involved the correct construction to be placed on the provisions of ss 39 and 40 of POCA, as well as the purpose of POCA.

[7] In advancing its case, counsel for the applicant firstly argued that the preservation order had not lapsed, before the expiration of the 90 days as the forfeiture application was pending before the Court. In this regard, the applicant, whilst admitting that the forfeiture application was issued on 90th day after publication in the Government Gazette and served on the respondent on 91st day, urged the Court to condone the 1 day non-compliance with the relevant statutory requirements. The alternative argument advanced was that the Court ought to use its inherent jurisdiction to condone the applicant's failure to comply with the statutory time-limits since the applicant had demonstrated substantial compliance with the provisions of POCA.

[8] On the other hand, counsel for the respondent, in urging the Court to find that the preservation order had in fact lapsed, relied on, *inter alia*, *Levy v National Director of Public Prosecutions* 2002 (1) SACR 162 (W), as well as certain provisions of the Constitution, notably ss 25 and 39(2) of the Constitution of the Republic of South Africa Act, 106 of 1996. It was also argued on behalf of the respondent that, not only was the notice of application for the forfeiture order defective, but the service thereof on the respondent's attorneys, instead of service on the respondent, was defective, and not in accordance with the Rules of Court.

[9] Indeed, the provisions, purpose and scope of POCA are by and large stringent and invasive. Little wonder that in *Mohamed NO v Director of National Public Prosecutions and Another* 2002 (2) SACR 93 (W), the constitutionality of the process governing the granting of preservation orders

was challenged by a number of applicants. In concluding that the procedure prescribed in Chapter 6 of POCA for the obtaining of a preservation of property and a seizure order was unconstitutional, Cloete J (as he then was) at para [21] observed that:

> "*The procedure envisaged in chap 6 of the Act therefore constitutes a gross invasion of the rights of a person affected by a preservation of property order. The legal representatives of the NDPP and the Minister emphasised that a preservation of property order (and accordingly the concomitant seizure order) are of limited duration, in that in terms of s 40 (a) of the Act they expire 90 days after the date on which notice of the making of the preservation of property order is published in the Government Gazette , unless there is an application for a forfeiture order 'pending' before the High Court in respect of the property which is subject to such preservation order (Levy v National Director of Public Prosecutions 2002 (1) SACR 162 (W)); and that the provisions of chap 6 are aimed at the expeditious determination of an application for a forfeiture order. That is no answer. An infringement of a right does not cease to be such because it is of limited duration. The essential question is whether the infringement can be constitutionally justified*."

The matter was referred to the Constitutional Court. However, the latter, in setting aside the decision of the High Court, and referring the matter back to the High Court, and in *National Director of Public Prosecutions v Mohamed NO* 2002 (2) SACR 196 (CC) at para [14], described the purpose of POCA as follows:

> "*[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure*

> *that they are far removed from the overt criminal activity involved. 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.*"

Furthermore, and previously in *S v Dlamini* 1999 (2) SACR 51 (CC) at para [68], Kriegler J, said:

> "*[68] Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. …*"

[10] From the above legal principles, it is more than plain that the rather stringent and peremptory provisions of POCA ought not to be liberally interpreted. This is more so in instances of non-compliance, as is the case in the present application. Although forfeiture orders remain extremely useful weapons in the fight against organized crime, it is imperative to strike a delicate balance between the constitutional rights of the individual involved and the obligation to eliminate crime.

[11] I now turn to the arguments advanced on behalf of the applicant as set out above. The crisp issue is whether the issuing of the preservation order with the Registrar of this Court on 13/3/2008, i.e. on the 90th day following publication in the Government Gazette on 14/12/2007, and before service thereof on the respondent on 14/3/2008, it can be argued that the

preservation order was "*pending*" before this Court, as envisaged in s 40(a) of POCA. The applicant indeed argued that the preservation order had not lapsed. The issue was pertinently raised and resolved by Goldstein J in *Levy v National Director of Public Prosecutions (supra)*. In exactly similar circumstances as in the present matter where the forfeiture application was filed with the Registrar within the 90th day and served on the applicant's attorneys 91 days after the date of the publication in the Government Gazette in terms of s 39(1)(b) of POCA, Goldstein J at para [9] concluded that:

> "*At best for the National Director the word 'pending' is ambiguous and thus may be interpreted as requiring service of the application on a respondent or not doing so. Where a statute makes serious inroads on the rights of an individual the Court ought to lean in favour of a construction which will result in such inroads being as limited as possible. Compare Mahlangu at para [31]. It follows that service of the application is necessary to make it pending. I find support for this view in the consideration that, if it were to be held that service on the Registrar is sufficient to render an application pending, the person bound by the preservation order would have no knowledge that he was bound before service on him occurred, since there is no obligation on a prospective respondent to enquire at the Registrar's office whether an application has been delivered there (Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 781G).*"

The application for a forfeiture order served on the respondent was set aside. For the same reasons present in the current application, the conclusion that by the time the application for a forfeiture order was brought, the preservation order had lapsed, became irresistible. The applicant therefore in terms of s 48 of POCA was not entitled to bring the application.

[12] In addition, in *Mahlangu and Another v Van Eeden and Another* [2000] 3 All SA 321 (LCC), in a review in terms of s 20(1)(c) of the Extension of Security of Tenure Act 62 of 1997, the Court was called upon to review a decision of the second respondent, a magistrate of the Delmas Magistrate's Court, in proceedings where the first respondent, as plaintiff, sued the first and second applicants for eviction. In setting aside the magistrate's decision, and at para [27], Dodson J said:

> "*For the above reasons, I am of the view that when pending proceedings are referred to at common law, they are proceedings which have commenced by the service and not the mere issue of summons.*"

In my view, the same procedure applies to motion proceedings.

[13] There is indeed an additional reason why the provisions of POCA, in the circumstances of the present matter, ought to be construed in favour of the respondent. That is, that the property forming the subject matter of the preservation order, and the concomitant and intended forfeiture order, constitutes the residence of the respondent and her family. The respondent's right to property, which property the applicant allege was an instrumentality of an offence referred to in Schedule 1 under POCA, is in fact a right entrenched in the Bill of Rights. In this regard, s 25(1) of the Constitution provides:

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

Furthermore, this Court, like every other Court, is obliged in terms of s 39 of the Constitution, to have regard not only to the Constitution, but also to promote the values, spirit and purport of the Bill of Rights in interpreting the provisions of legislation like POCA. It follows that any attempt by the applicant to deprive the respondent of the property acting in terms of the provisions of POCA, must be procedurally fair, justified, and strictly in accordance with the Constitution.

[14] In advancing his argument, counsel for the applicant, although admitting to the correctness of the decision in *Levy v National Director of Public Prosecutions (supra)*, however, contended with less optimism and vigour and rather strangely, that this Court was bound by a subsequent judgment delivered by Gassner AJ, in the Western Cape High Court. This is the case of the *National Director of Public Prosecutions and Van der Berg* (unreported case number 5597/06) in which judgment was delivered on 22 December 2008. In that case, the National Director of Public Prosecutions applied for a forfeiture order of certain property and movables in terms of s 48, and read with s 50 of POCA. The basis of the application included that the property and the movables represented the proceeds of unlawful activities within the meaning of s 50(1)(b) of POCA. At the hearing, the respondents raised, *inter alia*, by way of a point *in limine*, the defence that the forfeiture application was invalid inasmuch as it was not served on the respondents personally within the 90-day period as prescribed by s 40 of POCA. The service of the forfeiture application was served on the respondents' attorneys, being the address they chose when entering an appearance to defend in

terms of s 39(3) of POCA. Gassner AJ found that there was no merit in the respondents' point *in limine* in that the service of the forfeiture application was effected at their chosen service address within the ninety-day period specified in s 40 of POCA. Gassner AJ went on to conclude that, "*Furthermore, section 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 section 48(1), as read with section 40 of POCA*". This finding was clearly in reference to *Noah v Union National South British Insurance Co* 1979 (1) SA 330 (T) at 332H in which Eloff J (as he then was) presided. The submission that the decision in the *National Director of Prosecutions v Van der Berg (supra*) takes precedence over that in *Levy v National Director of Public Prosecutions (supra)*, and is binding on this Court, is undoubtedly incorrect and indeed misplaced. This is so on the basis of the trite and basic doctrine of *stare decisis*. See in this regard *Sebastian and Others v Malebane Irrigation Board* 1953 (2) SA 55 (T). Although the *National Director of Public Prosecutions v Van der Berg* case (*supra*) may have some persuasive authority, this Court is certainly not bound thereby. On the contrary, this Court is bound by the *Levy v National Director of Public Prosecutions* case unless I was satisfied that such a decision was clearly wrong. See *Vorster and Another v AA Mutual Insurance Association Ltd* 1982 (1) SA 145 (T) at 155B-C. I am unable in these circumstances to make such a finding. In any event, Goldstein J, in *Levy v National Director of Public Prosecutions* has persuasively

distinguished the interpretation of the relevant provisions of the Statute applicable in the *Noah v Union National South British Insurance Co Ltd* from the interpretation of the provisions of s 40(a) in the present application. Furthermore, the facts in *National Director of Public Prosecutions v Van der Berg* regarding the time when the application for a forfeiture order was served on the respondents (within the ninety-day period prescribed by s 40 of POCA), are clearly distinguishable from the facts of the instant application. Therefore the contentions advanced on behalf of the applicant in this regard were plainly without merit.

WHETHER APPLICANT COMPLIED SUBSTANTIALLY

[15] In what appeared to be a last-ditch argument, counsel for the applicant strongly urged the Court to exercise its inherent jurisdiction in order to condone the applicant's non-compliance with the relevant provisions of POCA as a strict interpretation of the time-limits may lead to grave injustice. In any event, so the argument proceeded, the applicant has complied substantially with the applicable provisions of POCA. In this regard, reliance was placed on *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A), as well as other related cases which dealt with the interpretation and distinction between peremptory and discretionary statutory requirements. In the *Nkisimane and Others v Santam Insurance Co Ltd* case, the Court was concerned with the interpretation of the provisions of s 25 of the Compulsory Motor Vehicle Insurance Act 56 of 1972. After dealing with the historical

interpretations placed on peremptory and directory statutory requirements, Trollip JA at p 434A-D said:

> "*These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in Lion Match Co Ltd v Wessels 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587A-C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non- or defective compliance therewith may not have any legal consequence (see, for example, Sutter v Scheepers 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see JEM Motors Ltd v Boutle and Another 1961 (2) SA 320 (N) at 327 in fin - 328B and Shalala's case supra at 587F-588H, and cf Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646C-E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see, for example, Rondalia Versekeringskorporasie Bpk v Lemmer 1966 (2) SA 245 (A) at 257H-258H).*"

[16] Based on the above principles of interpretation of statutory requirements; the stringent provisions of POCA; and the compulsory deference to the Constitution, it is clear that the relevant statutory requirements are indeed peremptory. Strict compliance therewith is called for in the circumstances particularly bearing in mind the scope, and purpose of POCA. For example, the provisions of s 38(2) and 38(3) of POCA dealing with preservation orders, employ the peremptory words "*shall*". Similarly, the provisions of s 39 of POCA dealing with the duty of the National Director of

Public Prosecutions to give notice of the preservation order to all known persons who have an interest in the property which is subject to the order; the publication of the notice in the Gazette; the manner of service of the notice; the manner of the delivery of an appearance to defend; and what particularity the appearance to defend should contain, all use the word "*shall*". Furthermore, s 40 of POCA, which is pertinent to the present application, provides that, "*a preservation order shall expire 90 days after the date on which the notice of the making of the order is published in the Gazette …*". Indeed, s 48 of POCA, which deals with the application by the National Director of Public Prosecutions for a forfeiture order, also use the word "*shall*" in relation to the giving of notice of the application to every person who has entered an appearance to defend, as well as the service of the notice, "*in the manner in which a summons whereby civil proceedings in the High Court are commenced is served*". In the "*Trilingual Legal Dictionary*", 3rd ed, the authors V G Hiemstra and H L Gonin, define the word "*shall*" as "*(in wetlike voorskrifte) moet; - be binding as bindend; no person – niemand mag; - be entitled is geregtig …*". In the Concise Oxford Dictionary, 10th edition, the word "*shall*" is defined as "*expressing a strong assertion or intention expressing an instruction or command*". In the Australian case of *Commissioner for Housing for the Australian Capital Territory v Smith* (unreported, Supreme Court, ACT, 14/3/1995), Higgins J considered the interpretation of the words "*shall*" and "*may*". Higgins J said, "*The present contention refers to the obverse proposition, that is, that 'shall' might, at times, import a discretion rather than a duty to act. It is now to be assumed, it seems to me, that the legislature will always have intended to counter a*

*discretion where 'may' has been used in an enactment and to have created a duty to act when the term 'shall' has been used*". All of the above suggest convincingly that the provisions of POCA, relevant to the present application are peremptory in nature and make no rule for discretionary intervention. Each case must, of course, be decided on its own merits.

[17] In the present matter, it is not only extremely difficult to find room to condone the applicant's non-compliance with the applicable provisions of POCA, but also to find that there has been substantial compliance, as argued by counsel for the applicant. The difficulties facing the applicant were further compounded. In the first place, the applicant has not placed any evidence whatsoever before the court explaining its non-compliance with the provisions of POCA. There was no application for condonation of the non-compliance save for the submissions in argument. A party seeking the indulgence of a court would ordinarily make substantive application for such relief. For good measures, the forfeiture application issued with the Registrar of this Court on 13/3/2008, and served on the respondent on 14/3/2008, was materially defective. It omitted the date on which the application for the forfeiture would be made to court. It bore no date, and was unsigned. Subsequent attempts by the applicant to rectify the errors proved ineffective. Furthermore, the description of the property forming the subject matter of the preservation Court order and the subsequent forfeiture order, was given differently in various documents. For example, in the preservation order of 9/10/2007, the property was described as "*Erf 468 Mayfair West, City of Johannesburg under Title Deed Number T4061/2005*". In the defective notice of motion for the

forfeiture order referred to above, the title deed description of the order was given as "*Title Deed Number T4061/2004*". In the *ex parte* application in terms of s 38(1) read with s 74(1)(a) of POCA for a preservation order, dated 14/10/2007 the title deed number of the property is described as "*Title Deed Number T4061/2004*". The Deeds Office property search report printed on 29/8/2006, described the title deed number as "*T4061/2004*". One order granted by Malan J (as he then was) in the matter on 5/8/2001 in regard to the property gave the title deed number as "*T4061/2004*". This plethora of discrepancies, in such an important and crucial matter, affecting the property rights of the respondent, is such that any discretion, inherent or otherwise, could hardly be exercised in favour of the applicant in the circumstances. It is a far cry from the contention of the applicant that it has complied substantially in this matter.

[18] The reliance by the applicant for condonation on the yet to be reported case of the *National Director of Public Prosecutions v Charlton Tuso Matjeke* (Case No 17051/2004), a judgment of Motata J, in the then Transvaal Provincial Division, does not advance the applicant's case in any significant manner. The facts in that case were clearly distinguishable from the facts in the present matter. In that case, the preservation order in favour of the applicant was published in the Government Gazette on 16 October 2004 in terms of the Court order. The subsequent forfeiture application was filed at Court on 5/11/2004. This was on the 91st day after the publication in the Government Gazette. The applicant applied for condonation of the one day

non-compliance with the statutory requirements set out in ss 40 and 48 of POCA. In granting the condonation application, Motata J at para [16] said:

> "*I am of the view that condonation should be granted since the applicant deposed of its supporting affidavits on the 4th of November 2004, which falls on the 90th day after publication in the Government Gazette. The filing of the application was one day late and the applicant in no way attempted to disregard the existence of the time restraints and it further did not prejudice any interested party. Furthermore the late filing did not subvert the intention and purpose of the act and provisions set out in POCA.*"

In the present application, and by way of contrasts, the applicant has not filed a formal condonation application. Secondly, and as stated earlier, the forfeiture application served on respondent on 14/3/2008, was materially defective. It was also not in conformity with the format prescribed by the Uniform Rules of Court. In fact, the respondent argued that the entire application was a nullity. I was inclined to agree. Furthermore, prior to the hearing of the matter, when one of the above discrepancies was brought to the attention of the applicant, the applicant did absolutely nothing by way of amending its papers. In these circumstances, it could hardly be contended, as found in the Motata J judgment (*supra*), that "*the applicant in no way attempted to disregard the existence of the time restraints*" and "*did not prejudice any interested party*". The judgment in the Motata J matter clearly concerned the forfeiture of what appeared to be relatively old motor vehicles and cash of R450,00 which the applicant alleged were an instrumentality of an offence as listed in Schedule 1 of POCA, namely theft. The present application concerns immovable property, a residence, which is not of an insubstantial monetary value. The distinction between the two cases cannot

be ignored. In arriving at its decision, this Court was largely influenced, not only by the peremptory provisions of POCA, but also the relevant binding provisions of the Constitution described earlier. It is indeed trite that a court will use its inherent powers to condone non-compliance only in rare cases.

THE SERVICE OF THE FORFEITURE APPLICATION

[19] In the light of the conclusion I reach in this application, it was unnecessary for me to consider in any great detail the further submission of the respondent that the service of the forfeiture application on her attorneys of record was not in accordance with the statutory requirements set out in ss 39(2), 39(3) and 48(3) of POCA. It was equally unnecessary for me to decide the issue conclusively. However, a close scrutiny of the above provisions suggests that the service of the forfeiture application on the respondent's attorneys of record may have been perfectly proper. This is so because s 39(3) of POCA, quoted earlier, provides that any person who has an interest in the property which is the subject to the preservation order may enter an appearance giving notice of his/her intention to oppose the making of a forfeiture order. Furthermore, s 39(5) of POCA, also quoted earlier, specifically and in peremptory terms, provides that an appearance to defend in terms of s 39(3) "*shall contain full particulars of the chosen address for delivery of documents concerning further proceedings under this Chapter …*" (my underlining). More relevantly, s 48(2) of POCA, which deals with a forfeiture application, enjoins the applicant in the present matter to give 14 days notice of an application for a forfeiture order to every person who

entered an appearance in terms of s 39(3) above. As noted above, the provisions of both ss 39(2) (dealing with the notice in respect of a preservation order), and s 48(3) (dealing with the notice for a forfeiture application), provide that such notice shall be served on the respondents, "*in the manner in which a summons whereby civil proceedings in the High Court are commenced*, *is served*". From the above, the ordinary grammatically meaning and interpretation of the provisions of ss 39 and 48 of POCA, suggest strongly and persuasively that a notice of intention to oppose ought equally to play the role of an address at which processes should be served in proceedings in terms of POCA. Indeed in *National Director of Public Prosecutions v Seleoane and Others* [2003] 3 All SA 102 (NC) the Court had the occasion to consider a point *in limine* raised by the respondents on the basis of the provisions of s 42(2) of POCA, that the notice for a forfeiture order application should have been served on them by the Sheriff, in a manner provided for in the Rules, and not merely filed at the address of the attorneys. At para [21] the Court said: "*When regard is had to the requirements* [in section 39(5)] *that the entrance of appearance has to contain an address for delivery of documents, it is not clear what the purpose of section 48(3) of the Act was intended to be. In any event, it is at least clear that the legislature intended that people like the first and second respondents should receive proper notice of applications for forfeiture and that this has clearly happened in this case. Insofar as it may be necessary I therefore condone the fact that the notice of the application for forfeiture was not served on the first and the second respondents (compare Consani Engineering (Pty) Ltd v Anton Steinecker Maschinen fabrik GmbH* 1991 (1) SA 823 (T))". In the present application the service of the forfeiture

application on the respondent's attorneys of record indeed had the effect that the respondent duly entered an appearance to oppose the application. This concludes my comments on the issue of the service of the notice of the forfeiture application on the respondent.

CONCLUSION

[20] I also conclude on the point *in limine* raised by the respondent that the relevant provisions of ss 39, 40 and 48 of POCA are invasive, stringent and require strict compliance therewith; that the applicant has not made out a case for this Court to use its inherent jurisdiction to condone the applicant's non-compliance with such provisions; that the applicant has in fact not complied substantially with the relevant provisions; that the service of the notice of the forfeiture application on the respondent's attorneys of record may be regarded as proper service; and that the present application qualifies to be dismissed with costs, for all the aforegoing reasons. There is clearly nothing preventing the applicant from commencing proceedings *de novo* against the respondent and complying properly with the applicable provisions of POCA as set out in this judgment, especially in what appears to be a *prima facie* case against the respondent on the merits.

[21] I must, before making an order, express my gratitude to both counsel, Mr Zehir Omar for the respondent, and Adv Feroze Latif for the applicant, for the manner in which they argued their respective cases. Their additional heads of argument filed later were equally extremely invaluable.

ORDER

[22] In the result I make the following order:

1. The point *in limine* raised by the respondent that the preservation order had expired when the notice of the forfeiture application was served, is upheld.

2. The application for the forfeiture order is dismissed.

3. The applicant shall pay the costs of the application.

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**D S S MOSHIDI**
**JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

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| COUNSEL FOR THE APPLICANT | ADV F LATIF |
| INSTRUCTED BY | DPP, JOHANNESBURG |
| COUNSEL FOR THE RESPONDENT | ADV Z OMAR |
| INSTRUCTED BY | ATTORNEYS ZEHIR OMAR SPRINGS |
| DATE OF HEARING | 4 JUNE 2010 |
| DATE OF JUDGMENT | 28 JULY 2010 |