



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: 7419/2021P**

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS                      APPLICANT**

and

**ZIHLANDLA MKHIZE  
SIBONELO NGOMA**

**FIRST RESPONDENT  
SECOND RESPONDENT**

---

**JUDGMENT**

---

**Nicholson AJ:**

[1] The relief sought in this application is somewhat unusual because the applicant seeks interlocutory relief, and in the event of the interlocutory relief being dismissed, in the very same papers, it seeks that the application be ventilated in full, and that the relief in the main application be granted.

[2] Accordingly, the applicant seeks an interlocutory order in terms of Rule 6(5)(e) of the Uniform Rules, for the filing of a further affidavit in addition to the founding affidavit together with ancillary relief. In the alternative, in the very same application, the applicant seeks an order in terms of s 48 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') for a forfeiture order for the property that will be described below.

[3] I shall first deal with the interlocutory application for the filing of further affidavits.

[4] On 14 September 2021, the applicant applied for a preservation order for various properties which was granted on 7 March 2022. Among the property is a Ford Ranger motor vehicle with registration number ND876184; and an amount of R25 700 in cash ('the property').

[5] As shall later become apparent, the purpose of the interlocutory application for the filing of further affidavits, is to strengthen its case with regard to the Ford Ranger, and does not introduce a new matter.

[6] It emerges from the papers that a forensic report was received by the Organised Crime Unit ('OCU') of the National Prosecuting Authority ('NPA') on 27 July 2022. The preservation application was filed on 8 September 2021. It is instructive that the preservation order was drafted and deposited to by the Asset Forfeiture Unit ('AFU'), a unit which like the OCU, also resorts under the NPA.

[7] Save for the property of the respondents' herein and other property that was returned to its owners, which are not relevant to this application, a forfeiture order forfeiting the remaining properties to the State was granted on 4 July 2022.

[8] The forensic report was signed on 27 August 2021 and as I have already stated, the application for the preservation order was filed on 8 September 2021, with the order being granted on 14 September 2021, which would mean that the forensic report was not available at the time of the filing of the preservation application. While I have not had sight of the forensic report, the applicant avers that the report strengthens its case for forfeiture.

[9] The replying affidavit was filed on 29 March 2022, after the filing of the answering affidavit on 22 March 2022, and a forfeiture order was granted on 4 July 2022 in respect of the other property.

[10] While the Organised Crime Unit received an affidavit in terms of s 212 of the Criminal Procedure Act 51 of 1977 pertaining to the forensic report on 5 April 2022, they only received the report itself on 27 July 2022. The exact date the report came to the attention of the applicant is unclear from the papers.

[11] The respondents oppose the application on the grounds that given that the founding affidavit is dated 27 August 2021, and that the application was launched on 8 September 2021 and granted on 14 September 2021, an inference may be drawn that the applicant was in possession of the s 212 affidavit at the time the application was launched; accordingly, it cannot be true that the applicant only received it on 5 April 2022. The respondents further aver that the chain evidence in the handling of the forensic report is inadequate and therefore inadmissible.

[12] Rule 6(5)(e) reads as follows:

'(e) Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.'

[13] Generally, in motion proceedings three sets of affidavits are exchanged: namely, the founding affidavit, answering affidavit and replying affidavit. Rule 6(5)(e) makes allowances for the filing of a further set of affidavits in the discretion of the court. It is trite that a court's discretion must be exercised judicially.

[14] In *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd*,<sup>1</sup> it was held that the court must take the following factors into consideration in determining whether or not to allow a further affidavit:

- (i) The reason why the evidence was not led timeously.
- (ii) The degree of materiality of the evidence.
- (iii) The possibility that it may have been shaped to "relieve the pinch of the shoe".
- (iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.
- (v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been heard and, before judgment is delivered, plaintiff asks for leave to

---

<sup>1</sup> *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C).



lead further evidence, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the Court.

(vi) The "healing balm" of an appropriate order as to costs.

(vii) The general need for finality in judicial proceedings.

(viii) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client.<sup>2</sup>

[15] If the court is satisfied on these points, it will generally be inclined towards allowing the affidavit to be filed.<sup>3</sup> Although as part of this judgment, I shall consider all eight points raised above, I do not intend dealing with each point individually.

[16] I pause to mention that an additional important ground in my view is the interests of justice. Put differently, the ultimate decision should not bring the interests of justice into disrepute or prejudice it.

[17] It is apparent from the papers that the applicant seeks to corroborate existing evidence and not to introduce new evidence. I say this because it is common cause that the Ford Ranger was at the scene of the crime and used both to transport the accused to the crime scene and to direct the trucks to the crime scene.

[18] The only issue in dispute is whether or not the Ford Ranger falls within the definition of instrumentality in terms of s 1 of POCA. In the circumstances, it would have served no purpose for the applicant to withhold the forensic report because the report strengthens the applicant's case. Accordingly, it must be accepted that it did not have the report at the time of the filing of this application.

[19] Furthermore, I am not called to make a final forfeiture order in the event of the additional affidavit being allowed. Accordingly, the respondents will be given an opportunity to oppose the facts contained in the forensic report. Therefore, the respondents will not be prejudiced.

---

<sup>2</sup> Ibid at 617B-F.

<sup>3</sup> *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604A-F.

[20] In the premises, I am of the view that the applicant should be allowed to file a further affidavit.

[21] Having found that the applicant is allowed to file a further affidavit, it is unnecessary to determine any issue in the forfeiture application at this point, and such issue can be determined once the further affidavits have been filed.

[22] While ordinarily costs ought to follow the result and in terms of *Porterstraat*, a consideration in determining whether to allow the further affidavit is 'the "healing balm" of an appropriate order as to costs'. In this instance the applicant is seeking an indulgence from the court, hence it cannot be said that costs follow the result. Further, it appears that should the applicant have had proper protocols in place to share information among its units, this application would have been unnecessary. Further still, it is not clear why the applicant did not wait for the forensic report before filing the preservation order application. It is not dealt with in the papers. Had it waited, this application would have been unnecessary.

[23] On the other hand, while I was given the assurances by Mr Matlamela that the respondents' heads of argument were handed to the respondents' attorneys of record timeously, the heads of argument were never filed but merely served on the applicant. Mr Matlamela advises me that he only became aware of that state of affairs a mere day or two before the hearing of this application. Such conduct by the respondents' attorneys is unacceptable. Furthermore, Ms Khan brought to my attention that in terms of an order by Mlotshwa AJ, the respondents' heads of argument should have been filed on 20 June 2023, however, they were only served on 6 July 2023 and they were never filed.

[24] Such conduct is unacceptable and must be deterred. For these reasons, I am of the view that there should be no order as to costs.

**Order**

[25] In the result, I make the following order:

1. Leave is hereby granted in terms of rule 6(5)(e) for the applicant to file a further affidavit;
2. The respondents are directed to deliver any answer to the applicant's further affidavit within 20 days of the service of the said affidavit upon them;
3. The applicant is directed to deliver any reply to the respondents' affidavit within 21 days thereafter.
4. There is no order as to costs.



**NICHOLSON AJ**

Date of hearing: 21 July 2023  
 Date handed down: 10 August 2023

**Parties**

For applicant: Ms Khan  
 Instructed by: State Attorney, KwaZulu-Natal  
 6<sup>th</sup> Floor, Metropolitan Life Building  
 391 Anton Lembede  
 Durban  
 Ref: 119/0012406/21/W/P10  
 Ref: 10/8/3/AFU: KZN/0023/2020

For first and second  
 respondents: Mr MA Matlamela  
 Instructed by: Dludlu Attorneys  
 131 – 133 Clark Road  
 Glenwood  
 Durban  
 Ref: M637/21