IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: BISHO)

Case NO. 298/2018

SIMPHIWE QWEMEME	**1ST APPLICANT**
LULALMA QWEMEME	**2ND APPLICANT**
KHOLISWA QWEMEME	**3RD APPLICANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
SEAN CHRISTENSEN	**2ND RESPONDENT**

Neutral citation:

Heard:

Delivered:

JUDGMENT

DAWOOD J

1. The applicant herein sought the following relief:

   "1. The late filing of this application be, and is hereby, condoned;

2. *That the Forfeiture Order granted by the above Honourable Court on 19 June 2018 in Case No. 298/2018 be, and is hereby, rescinded;*
3. *That the Applicants (Respondents in the Forfeiture Application), be granted leave to oppose the Forfeiture Application in Case No. 298/2018; as provided for in Section 49 and/or Section 53 of the Prevention of Organized Crime Act 12 of 1998, alternatively as provided for in the Uniform Rules of Court;*
4. *That the Applicants (Respondents in the Forfeiture Application), be granted leave to file their answering affidavits in opposition to the Forfeiture Order; as provided for in Section 49 and/or Section 53 of the Prevention of Organized Crime Act 121 of 1998, alternatively as provided for in the Uniform Rules of Court;*
5. *That the First Respondent (Applicant in the Forfeiture Application) be granted leave to file a Replying Affidavit, if any; as provided for in the Uniform Rules of Court;*
6. *Costs of this Application, only in the event of it being opposed."*

2. The respondent did not oppose the application for condonation and condonation was granted at the commencement of argument, so I shall not deal with the merits or demerits of that aspect of the application.
3. As correctly pointed out it is trite law that in order to successfully apply for rescission the applicants must ordinarily show:
   a) Good or sufficient cause;
   b) Reasonable explanation for the default;
   c) That the application is *bona fide*; and
   d) That there is a *bona fide* defence that carries some *prima facie* prospect of success against the forfeiture case targeting the property.
4. The first applicant very briefly *inter alia* alleged:
   i) That he and the third applicant had inherited cattle from his deceased father's estate, he 80 -100 cattle and she 40 – 60 which grew to over 300 cattle.
   ii) That he owned a bottle store and then commenced a butchery.
   iii) The property where the bottle store and butchery operated was acquired and registered in his name on 23 March 1983.
   iv) He acquired various other assets.
   v) He purchased the Rocklands Farm on 23 October 2000 together with his wife, the second applicant herein.

vi) At the time of his arrest there were approximately 300 head of cattle that belonged to the second, third applicant and him.

vii) He further put up bank statements in respect of the business.

viii) He states that this establishes that he was operating a legitimate farming and butchery business.

ix) That the vehicle was paid for from the business. The Toyota Hilux 2.8 4x4 indicating that it was purchased from the legitimate funds of Chizama Butchery and not proceeds of unlawful activity. The vehicle was registered in Kholiswa's name and payment made from proceeds of sale of cattle belonging to her.

x) The issue of instrumentality has also been placed in dispute and whether or not there was a sufficiently close enough relationship between the properties to the actual commission of the offence to render it an instrumentality.

xi) The judgment of the Supreme Court of Appeal, in a majority judgment in the matter of *Brooks*[1] was referred to by the applicants, in which illicit diamond dealing was alleged to have been conducted from a property, his Lordship Ponnan JA, held that:

> "it is true that some of the transactions were concluded at the property, but they might just as well have occurred in a multitude of other locations – as many actually did. But, that some of the transactions were concluded there, as also, at other places was purely incidental to their commission."

The court held further that:

> "The location of the property itself played no distinctive role in the commission of the offences."

Therefore, the court found that the use of the property did not render it "an instrumentality" of an offence.

The court in *Brooks* highlighted the fact that "[*t*]*he Bill of Rights provides that no law may permit arbitrary deprivation of property*" and

[1] *Brooks and Another v National Director of Public Prosecutions* 2017 (1) SACR 701 (SCA) at para 61.

that civil asset forfeiture proceedings constitute a serious incursion into well-entrenched civil protections, particularly those against the arbitrary deprivation of property.[2]

And it concluded that "[t]here is no justification for resorting to the remedy of civil forfeiture under POCA as a *substitute* for the effective and resolute enforcement or ordinary criminal remedies."[3]

xii) Another case that is helpful with regard to these issues is that of Cameron J where in *National Director of Public Prosecutions v Elran*[4] he held *inter alia*:

> "There is no constitutional challenge to these provisions. We therefore have no reason to approach the powers POCA confers on courts with reserve. We should embrace POCA as a friend to democracy, the rule of law and constitutionalism —and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them[5]."
>
> "…
> "'Instrumentality of an offence' means any property which is concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
> …
> …Chapter 6, which is headed "Civil Recovery of Property", makes provision for orders to be made for the forfeiture of property which is tainted because it is linked to the commission of crime either because it is proved, on a **balance of probabilities,** to be an "**instrumentality** of an offence" referred to in **Schedule 1** of the Act or because it is proved, according to the same standard of proof, **to be "the proceeds of unlawful activities"**. Such orders may be made **even if no one has been convicted of having used the property or of having been guilty of the unlawful activities of which the property is said to be the proceeds**"
> Chapter 5 of the Act provides for the making of confiscation orders against persons convicted of offences, which orders are designed to force the convicted persons to disgorge the proceeds they have received as a result of the offences of which

[2] Ibid at para 62.
[3] Ibid at para 64.
[4] 2013 (1) SACR 429 (CC).
[5] Ibid at para 70.

they have been convicted and as a result of other criminal activity which the court finds to be sufficiently related to those offences. **Before making a confiscation order the court concerned holds an enquiry in order to determine the value of the benefits received by the accused in connection with the criminal activity in respect of which the order is to be made**. [6] (my emphasis.)

xiii) The applicants have established that at least some of the property that has been forfeited was acquired a substantial period prior to the forfeiture.

xiv) I am of the view that the applicants have put up enough to pass muster to establish a *bona fide* defence which *prima facie* carries some prospects of success.

xv) The respondent has put up some compelling arguments and contentions to gainsay the applicant's contentions and these may well ultimately be found to be meritorious.

xvi) I however am firmly of the view that these issues can properly be ventilated at the hearing of the main application where the version of the applicants and the respondent can be properly and fully tested and ventilated even, if necessary, by the hearing of oral evidence.

xvii) The issue of instrumentality will then be fully canvassed to determine if the immovable property fell within the definition of instrumentality and also whether the other assets were proceeds of crime that fell within the ambit of assets that could be subject to a forfeiture order.

xviii) The applicants have constitutionally entrenched rights to property and should in the interest of justice be given an opportunity to be heard and for the issues to be fully ventilated with their version being placed before the court dealing with the forfeiture order to ensure that they are given every opportunity to exercise these rights, whatever the ultimate outcome.

xix) The applicants have intended to exercise these rights front the outset *albeit* it failed attempts to properly do so in the past.

[6] *National Director of Public Prosecutions SA v Carolus and others* [2000] 1 All SA 302 (A) at paras 11, 17 and 21.

xx) The applicants have been extremely dilatory in launching this application and although condonation was granted and they are being granted the order they seek, the opposition was warranted and there are as correctly pointed out still outstanding documentations and issues that need to be properly and fully canvassed.

5. I have deliberately not focused or dealt on the shortcomings in the applicant papers as raised by the respondent predominately due to it being in the interest of justice to permit the matter being fully ventilated.
6. In view of that stance, I did not wish to express my views prematurely on issues raised by the respondent which will fall within the purview of the court that is seized with hearing the main application.
7. I am however not disposed to granting a costs order in favour of the applicants since they are being granted an indulgence to present their version despite the numerous delays and failures to set their house in order timeously; purely to allow them to protect and preserve their constitutionally entrenched rights.
8. I accordingly make the following order:
   a) The late filing of this application be, and is hereby, condoned;
   b) That the forfeiture order granted by the above Honourable Court on 19 June 2018 in Case No. 298/2018 be, and is hereby, rescinded;
   c) That the applicants (respondents in the forfeiture application), be granted leave to oppose the forfeiture application in Case No. 298/2018 and file their answering affidavit within 20 (twenty) days of granting of this order;
   d) That the first respondent (applicant in the forfeiture application) be granted leave to file a replying affidavit, if any; within 20 (twenty) days of the filing of the applicants answering affidavit on or before the 24th of January 2020; and
   e) That each party pay their own costs.

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DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:	7 NOVEMBER 2019
DATE JUDGMENT DELIVERED:	14 JANUARY 2020

Appearances

Counsel for the Applicant:	Mr LIDDELL
Instructed by:	HENRY VAN BREDA 57 RECREATION ROAD SOUTHERNWOOD EAST LONDON
Counsel for the Respondent:	MR FRENCH
Instructed by:	STATE ATTORNEY 17 FLEET STREET EAST LONDON