



**LESOTHO**

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV)50/2024  
CIV/APN/0025/2024**

**In the matter between -**

**MALERATO KHUTLISI T/A SHELLY  
BROWN CAR WASH**

**APPELLANT**

and

**THE OFFICER COMMANDING  
COUNTER COMMERCIAL CRIME UNIT**

**1<sup>ST</sup>RESPONDENT**

**COMMISIONER OF POLICE**

**2<sup>ND</sup>RESPONDENT**

**DIRECTOR GENERAL - DCEO**

**3<sup>RD</sup>RESPONDENT**

**LETSENG DIAMOND (PTY) LTD**

**4<sup>TH</sup>RESPONDENT**

**ATTORNEY GENERAL**

**5<sup>TH</sup>RESPONDENT**

**CORAM:** DAMASEB, AJA  
CHINHENGO, AJA  
VAN DER WESTHUIZEN, AJA

**HEARD:** 18 OCTOBER 2024

**DELIVERED:** 1 NOVEMBER 2024

### **SUMMARY**

*In terms of section 88 of the Money Laundering and Proceeds of Crime Act 4 of 2008 an order may be granted by the High Court to preserve property that is the proceeds of criminal activity. Sections 89 and 96 provide for an application to exclude property from the ambit of the order and to rescind the preservation order. The time period stipulated regarding exclusion, is peremptory. For rescission of the order the applicant must persuade the High Court of the interests of justice. The appellants did not adhere to the prescribed time limit; and failed to show that rescission was in the interests of justice.*

### **JUDGMENT**

**J VAN DER WESTHUIZEN, AJA:**

## **Introduction**

[1] This is an appeal against a judgment by Ralebese J in the High Court, delivered on 29 August 2024. The judgment dealt with an application for the rescission of and exclusion of property from the ambit of a preservation order under the Money Laundering and Proceeds of Crime Act (the Act) 4 of 2008.

## **Factual and litigation background**

[2] Based on an *ex parte* application in terms of section 88 of the Act, Banyane J in the High Court granted a preservation order on 7 February 2024. The applicants for the order were the first to third respondents in this appeal. The order related to properties, alleged to be proceeds of theft and fraud to the amount of about M66 262 082.04. According to the three respondents as applicants in the High Court the theft and fraud were committed by Tumisang Thahanyane of Tholo Energy (Pty) Ltd (Tholo).

[3] The applicant for rescission and exclusion (and the appellant in this Court) is Ms Malerato Khutlisi, trading as Shelly Brown Car Wash and Refreshments (Shelly Brown), of which she is the sole proprietor. The relief sought by the appellant is the exclusion of Shelly Brown in terms of section 100(2) and rescission of the preservation order, in terms of section 96 of the Act.

[4] The application for a preservation order resulted from a series of events, narrated by the High Court. In November 2023 a director of Tholo reported alleged theft and fraud by Thahanyane, who was the chief finance officer of Tholo, to the unit under the command of the first respondent. Investigations by the unit then allegedly revealed that between March 2017 and August 2023 he fraudulently transferred money from various bank accounts of Tholo into accounts of his companies, proprietorships, co-habitation partners, relatives, friends and co-workers. These were disguised as legitimate transactions. Funds were then withdrawn from the accounts to purchase movable and immovable property and to start businesses. The appellant was a cohabitation partner of Thahanyane. Shelly Brown's account was allegedly one of many unlawfully credited by him.

[5] Thus, the first, second and fifth respondents approached Banyane J (as the judge on urgent duty) in the High Court on 7 February 2024 with an urgent *ex parte* application for a preservation order. As stated above, the order was granted. The order listed property and prohibited a range of actions in connection therewith, including disposing of it, dealing with it, dissipating it, interfering with it, offering it as security and diminishing its value.

[6] Two days after the issuing of the order agents of the first two respondents proceeded to the appellant's premises to execute the order. Thus, she became aware of the order.

[7] Thereupon the appellant approached the High Court “to apply for the rescission and exclusion of (her) business from the implications of the forfeiture order and or reservation of property order”. In spite of the somewhat unclear wording of the appellant’s affidavit, which makes it look like the business has to be rescinded, it can be accepted that the appellant applied for (1) the rescission of the preservation order; and (2) exclusion of her property from the ambit of the order.

[8] The questions before the High Court, as well as this Court, are thus whether the applicant met the requirements for (1) rescission and (2) exclusion.

### **The Act**

[9] Legislation like the Act at the centre of this matter has been enacted in several countries over recent decades. Aspects of these laws often appear draconian, for the exceptional powers they entrust to law enforcement agencies, such as to approach courts on an *ex parte* basis. Therefore, it is useful to take note of the purpose of the Act, within the context of fighting crime.

[10] According to the Preamble of the Act it is “(a)n Act to establish an Anti-Money Laundering ... Unit; to enable the unlawful proceeds of all serious crimes to be identified, traced, frozen, seized and eventually confiscated; and to require accountable institutions to take prudential measures to help combat money laundering”.

[11] In Division 2 of the Act section 88 provides for “Preservation of property orders”. In terms of subsection (1) an order prohibiting a person *“from dealing in any manner with any property referred to in subsection (2)”* may be applied for *ex parte*. Subsection (2) states that the High Court shall make the order *“if there are reasonable grounds to believe that the property concerned - (a) is an instrumentality of a serious offence; or (b) is the proceeds of unlawful activities”*.

[12] Section 89(1) states that *“as soon as practicable after the making of the order, notice must be given to all persons known to have an interest in the property”*. Subsection (2) describes the manner in which the notice must be given.

[13] Section 89(3) provides that a person with an interest in the property which is subject to the preservation 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”*.

[14] Section 89(4) states:

*“An appearance under subsection (3) shall be delivered to the Authority within, in the case of -*

- (a) a person upon whom a notice has been served ...14 days after such service; or*
- (b) any person, 14 days after the date upon which a notice ... was published in the Gazette”*.

[15] Section 96 deals with *“Variation and rescission of orders”*. Section 96(1) states: *“A person affected by a preservation of property order may at any time apply for the variation or rescission of the order.”* In terms of subsection (2) *the High Court which made a preservation of property order - (a) may at any time vary or rescind the ... order if it deems it necessary in the interests of justice ...”*.

[16] A forfeiture order may follow on a preservation order. Forfeiture of property is dealt with in Division 3 of the Act. Section 97 states: *“If a preservation of property is in force the Authority may apply to the High Court for an order forfeiting to the Crown all or any of the property that is subject to the preservation of property order.”* The Court *“shall ... make an order applied for ... if the court finds on a balance of probabilities that the property concerned - (a) is an instrumentality of an offence; or (b) is the proceeds of unlawful activities”*.

[17] Section 100(1) and (2) provides for the exclusion of *“certain interest in property which is subject to the forfeiture order, from the operation thereof”*, if the Court finds on a balance of probabilities that the applicant for such an order *“(a) had acquired the interest concerned legally; and (b) neither knew nor had reasonable grounds to suspect that the property ... (ii) is the proceeds of unlawful activities (my emphasis)”*.

[18] The word “and” between (a) and (b) seems to render the two subclauses inherently contradictory and, indeed,

meaningless. How is it possible that the property was *legally* acquired and, at the same time, that the interested person knew, or could not reasonably expect, that it is the proceeds of *unlawful* activities?

### **Exclusion**

[19] In the High Court, as well as this Court, a range of arguments were put forward to support the appellant's request for exclusion. It is appropriate to start with the relevant prescribed time period.

[20] In paragraph [14] of the High Court judgment it is stated that the applicant (the appellant before this Court) knew about the preservation order on 9 February 2024. On 4 March 2024 she instituted the application for exclusion of her property. This was well after the expiry of the 14 days, determined in section 89(4) of the Act. The High Court is of the opinion that even though the timeline is mandatory, a court can condone non-compliance in the case of "a just cause". The High Court judgment mentions that the "*applicant did not even apply for condonation for bringing the application outside the mandatory timeline*". According to the High Court, the "*applicant's prayer for exclusion of her property ... was brought out of time and should on this ground alone be dismissed*".

[21] It is not necessary for this Court to rule - in this case - on the High Court's *obiter* view that condonation can be granted by a court. Condonation was never applied for.



[22] In this regard, the conduct of the Appellant's counsel is of some concern. When asked during oral argument about his client's lateness, his first response was that they had "in the meantime" applied for condonation. Upon being requested to guide the Bench to the condonation application in the papers before the Court, counsel referred to "page 4 of the record".

[23] The pages in the record referred to by counsel do not at all contain the condonation application regarding the lateness, referred to in the High Court judgment, as fatal for the application. Instead, they show the Appellant's Notice of Motion, stating that on 7 March 2024 an order would be asked ...*" condoning Applicant's non-compliance with the rules relating to time periods, service and be disposed of as urgent ..."*. It pertains to the urgency of the appellant's application for exclusion; and has nothing to do with the absence of a condonation application mentioned by the High court and put to counsel by this Court.

[24] Furthermore, this application was not made "in the meantime", as claimed by the appellant's counsel. The possibility of counsel having attempted to mislead this Court, was indeed mentioned from the Bench.

[25] The High Court correctly stated that the lateness of the application for exclusion, without any request for condonation, was in itself fatal for the application. Because of the potentially

serious consequences of an *ex parte* application, the Act provides safeguards. One of these is contained in section 89. Surely someone in the position of the appellant cannot be seen to disregard that provision, willy nilly without any explanation, and then simply to succeed with another application for exclusion.

[26] The High Court reasoned that even if the appellant had instituted the exclusion application within the prescribed timeline, her application was still bound to fail. The Court then dealt with each aspect of her submissions.

[27] The cautious approach of the High Court is appreciated, especially as its judgment can be appealed against. However, because of my view on the fatal effects of the uncondoned lateness of the appellant's application, it is not necessary to deal with the arguments of the parties and reasoning of the High Court on exclusion.

### **Rescission**

[28] After reaching its conclusion on exclusion, the High Court dealt with rescission. It based its analysis on section 96 of the Act. Subsection (1) states that a person affected by the preservation may "at any time" apply for rescission. The time limit of 14 days, set for applications to exclude property by section 89(4), does not apply to rescission applications.

[29] The High Court may rescind the order “if it deems it necessary in the interests of justice”. Thus, the only test the provision contains is necessity in the interests of justice. The word “may” seems to allow a court a discretion, even if the requirement is met.

[30] The High Court opined that the applicant for rescission bears the onus to satisfy it on a balance of probabilities that the preservation order should be rescinded in the interests of justice. When this is done, the Court has to exercise its judicial discretion. With respect, the High Court was correct in this regard.

[31] The High Court judgment states that section 96(2) does not set out the requirements for the grant of rescission. Thus, so the Court reasoned, the rescission application can be premised on the High Court Rules, or the common law. The appellant indicated her reliance on the common law. The High Court then considered several factors, partly under the common law.

[32] Depending on what exactly the High Court meant in this regard, I respectfully agree - in part - with the Court’s approach. The standard set by section 96(2) is the interests of justice. It is not altogether accurate that section 96(2) sets out no requirements for rescission. The interests of justice is a well-known test. The factors to be taken into account to determine the interests of justice depend on the context. Sometimes legislation spells out these factors; and in other situations, courts do so. For example, for the purposes of bail in the case

of murder with common purpose, section 109A of the Criminal Procedure and Evidence (Amendment) Act 10 of 2002 mentions “exceptional circumstances ... which in the interests of justice permit the release” of an accused person.

[33] Rules of Court focus on technical and procedural issues and tests such as that a judgment followed from a patent error or was erroneously sought and granted. Under common law, proof of a *bona fide* defence may feature prominently. With the High Court judgment’s formulation that the question whether the appellant has established grounds for rescission “either in the interests of justice or ... a bona fide defence to the preservation application should it be re-opened” I am unable to agree fully. In my understanding it is not a matter of “either or”. In a case like this, factors to be considered under common law may well be helpful in the search for the interests of justice.

[34] The questions in section 100(2) ([17] above) as to whether property was acquired lawfully, or whether a person was or should have been aware of its unlawful origins, may also be relevant regarding the interests of justice. In its analysis the High Court referred to this clause as well.

[35] The High Court then considered various arguments put forward in the rescission application before it. These were also argued in this Court. They included that the first and second respondents did not have standing to apply for the preservation order without joining the Directorate on Corruption and

Economic Offenses (DCEO) as the competent authority to have prosecuted the preservation application.

[36] According to the appellants, Letseng Diamond (Pty) Ltd had not been joined in the preservation order application, whereas the monies alleged to have been embezzled from Tholo were originally embezzled by Thabiso Moroahae of Tholo Energy. Furthermore, Banyane J granted the final preservation order *ex parte* without a return date. And, the appellant's business was a going concern with debts that needed to be serviced and employees to be paid. It was shut down, whereas a *curator bonis* had to be appointed. The appellants also spent considerable time on attacking the police as being corrupt and captured by Thabiso Morahae of Tholo, who allegedly went to court with unclean hands.

[37] The High Court quite meticulously analysed and responded to the appellants' submissions. *Inter alia*, it pointed out that the application for the preservation order was brought *ex parte*. The Act provides for *ex parte* proceedings. The Court pointed out that the application was *in rem*, aimed at the preservation of property, rather than at any person.

[38] As to the appellants' argument that the preservation order was issued without a *rule nisi*, the High Court correctly found that the Act is aimed at urgency and confidentiality, which is very understandable given its purpose to preserve property that is the proceeds of crime. Section 88 provides a safeguard.

The appellants, however, did not use the opportunity provided by section 88.

[39] The High Court judgment mentions that the appellant's founding affidavit was fraught with unsupported and irrelevant corruption claims against Moroahae, the former Police Commissioner and police officers.

[40] In spite of subtle differences in reasoning (mentioned above in [31] to [33]), the conclusions of the High Court cannot be faulted as erroneous or misdirected. The factors considered by the Court, whether under the common law, other tests for rescission, or simply in terms of section 96(2), the inevitable outcome is that it has not been shown by the appellants that rescission of the preservation order would meet the interests of justice require.

### **Conclusion**

[41] The appellants did not show either that the relevant property should be excluded from the ambit of the preservation order, or that the order should be rescinded. Section 88(3) and (4) provides a safety mechanism for persons with an interest in property affected by a preservation order, obtained through an *ex parte* application. The appellants' failure to comply with the time limit determined in subsection (4) is fatal for the exclusion application.

[42] As to rescission, section 96 does not state a time limit. It provides that the application may be brought to court at any time. However, the appellant's conduct regarding the opportunity provided by section 89(3) and (4) is a factor to consider regarding the interests of justice test in section 96. The appellants' arguments regarding exclusion and rescission are not only overlapping, but similar, if not the same.

[43] There is no reason to set aside the High Court's decision. The appeal must fail. Costs were awarded in the High Court. In this Court both sides asked for costs. Costs thus have to follow the result.

### **Order**

[44] The appeal is dismissed with costs.



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**J VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

I agree:



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**PT DAMASEB  
ACTING JUSTICE OF APPEAL**

I agree:



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**M CHIHENGO  
ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:**

ADV C.J LEPHUTHING

**FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 5<sup>TH</sup> RESPONDENTS:**

ADV N.C SEHLOHO