

DISPUTE RESOLUTION ALERT

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ACCIDENTS HAPPEN BUT DOES THAT MAKE SOMEONE LIABLE?

The Stedalls hosted a weekly prayer group at their home. Mrs Aspeling and her 30-month old child (C) often attended these prayer meetings, at the Stedall's home which had a fenced swimming pool. During the prayer group sessions, C would play with her toys on the floor or on the patio within sight of her mother.

CORPORATE INVESTIGATIONS: THE STATION WAGON, THE HEROIN AND THE PRESERVATION OF PROPERTY ORDER: SECTION 38 OF THE PREVENTION OF ORGANISED CRIME ACT, NO 121 OF 1998

The Prevention of Organised Crime Act, No 121 of 1998 (POCA) is one of several pieces of legislation in South Africa's arsenal of anti-corruption and anti-money laundering legislation.

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The High Court found that both parties were negligent: the Stedalls for their failure to secure the swimming pool's gates and Mrs Aspeling for her failure to keep C under constant watch.

The crucial question was, irrespective of whether the Stedalls were negligent, whether the failure to secure the gates was wrongful in the particular circumstances.



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On 27 July 2004 a fellow prayer-group member gave the mother and C a lift to the meeting. This member decided to leave the meeting early and so, together with C's mother, she went to the car to retrieve C's baby car seat to place it in another member's car who had offered to take them home. It took a while to remove the car seat and when the mother returned to the house there was no sign of C. She then alerted the rest of the prayer group and everyone went to look for C. The mother found C lying face down in the swimming pool and immediately dove in and lifted her out of the water. C survived, but suffered severe brain damage.

In the recently reported case of *Stedall & Another v Aspeling & Another* 2018 (2) SA 75 (SCA) the Aspelings sued the Stedalls for their and C's damages. The High Court found that both parties were negligent: the Stedalls for their failure to secure the swimming pool's gates and Mrs Aspeling for her failure to keep C under constant watch. The court apportioned blame on the basis that the Stedalls were twice as culpable as Mrs Aspeling.

The Stedalls, with the High Court's leave, appealed to the Supreme Court of Appeal, challenging the trial court's conclusion that, in all the circumstances, they should be held liable for damages in delict.

The Aspelings' counsel argued that the homeowners (the Stedalls) were negligent in failing to secure the swimming pool's gates. The Aspelings therefore relied on a negligent omission. However, a negligent omission, as relied on by the Aspelings, is not necessarily regarded as *prima facie* wrongful.

The Aspelings should not only have alleged that the negligent omission upon which they relied had been wrongful, but also had to plead the facts upon which reliance was placed in support of that contention. However, the Aspelings only alleged the Stedalls' negligent failure to take reasonable steps to ensure that the swimming pool gate was closed or properly secured.

The crucial question was, irrespective of whether the Stedalls were negligent, whether the failure to secure the gates was wrongful in the particular circumstances. The circumstances were that of a parent bringing her child to a home on a visit, being aware there was a pool on the premises, supervising the child, becoming momentarily distracted and, whilst so distracted, her child wandering off, falling into the swimming pool and suffering brain damage.

ACCIDENTS HAPPEN BUT DOES THAT MAKE SOMEONE LIABLE?

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Leach JA concluded that the Aspelings failed to establish that negligence on the part of the Stedalls led to C being injured. However, he stated that this did not imply that “the second appellant (sic)” (intending to refer to C’s mother, the second respondent) was negligent in the tragic affair.



Leach JA, writing for the full court, held that the Aspelings failed to establish the element of wrongfulness on the part of the Stedalls and their claim had to fail on that basis alone. The appeal succeeded since the Stedalls’ conduct was not wrongful. Because of this finding it was not necessary to consider the question of the Stedalls’ alleged negligence. Leach JA, for completeness, stated that the Aspelings failed to establish their claim on this basis as well:

There is no absolute duty upon a landowner to ensure that any person upon his property will not be injured in some way. The sources of potential danger to a toddler in a normal domestic household and garden are numerous, and no homeowner can be expected to guard against all the harm that might befall a young child. On the other hand, a homeowner can reasonably expect that a child will be supervised and guarded from harm by its supervising parent, and could not foresee that the parent would be distracted whilst caring for its child.

While the court made reference to a number of foreign judgments, it did not go into the details of each, choosing, rather, to draw attention to the clear theme running through the cases:

Common to all is the sentiment that where small children are in the care and under the supervision of their parents whilst visiting the home of another, the duty to keep the child safe lies with the former and the homeowner should not be held liable in the event of the child falling into the swimming pool when the parent is distracted.

Leach JA concluded that the Aspelings failed to establish that negligence on the part of the Stedalls led to C being injured. However, he stated that this did not imply that “the second appellant (sic)” (intending to refer to C’s mother, the second respondent) was negligent in the tragic affair. Accidents unfortunately do happen, but the fact that an accident happens does not mean that someone must be held liable.

Willie van Wyk and Sune Beetge



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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



CORPORATE INVESTIGATIONS: THE STATION WAGON, THE HEROIN AND THE PRESERVATION OF PROPERTY ORDER: SECTION 38 OF THE PREVENTION OF ORGANISED CRIME ACT, NO 121 OF 1998

Section 38 of POCA makes provision for preservation of property orders - that is, an order prohibiting any person from dealing with any property in any manner, subject to the exceptions and conditions which are specified in the order.

By providing a mechanism in s38 of POCA to obtain a preservation of property order by way of an *ex parte* application, the legislature was cognisant of the challenges which are unique to obtaining such an order.



The Prevention of Organised Crime Act, No 121 of 1998 (POCA) is one of several pieces of legislation in South Africa's arsenal of anti-corruption and anti-money laundering legislation.

The purpose of POCA is, amongst others, to:

- introduce measures to combat organised crime such as money laundering and racketeering activities;
- provide for the recovery of the proceeds of unlawful activity;
- provide for the civil forfeiture of property that has been used to commit an offence; and
- prescribe penalties for those found guilty of committing offences in terms of the Act.

Section 38 of POCA makes provision for preservation of property orders - that is, an order prohibiting any person from dealing with any property in any manner, subject to the exceptions and conditions which are specified in the order.

These orders are obtained by way of an *ex parte* application by the National Director of Public Prosecutions (NDPP). *Ex parte* applications are applications made to court without giving the affected party notice of the application. In order to obtain one, the NDPP may apply to the High Court if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence, the proceeds of unlawful activities or associated with terrorist and related activities. In appropriate circumstances, property which is the subject of a preservation of property order may ultimately be forfeited to the State.

The manner in which these orders are applied for was considered in a recent judgment of the Supreme Court of Appeal: *The National Director of Public Prosecution (ex parte application)*, (905/2017) [2018] ZASCA (86) (31 May 2018).

The facts of the case concerned an application that the NDPP had made to preserve a Toyota Prado station wagon covertly transporting 50 kilograms of heroin from Mozambique to South Africa. The heroin had an approximate street value of R50 million.

The matter was initially heard in the Pretoria High Court, where it was struck off the roll and the NDPP was directed to serve the application on the alleged owner of the motor vehicle prior to the matter being adjudicated. The NDPP was aggrieved by the Pretoria High Court's decision and sought leave to appeal from the Supreme Court of Appeal.

By providing a mechanism in s38 of POCA to obtain a preservation of property order by way of an *ex parte* application, the legislature was cognisant of the challenges which are unique to obtaining such an order. In particular, a preservation of property order is likely to be sought on an expedited and confidential basis during an investigation into criminal activity by the South African Police Service. Under such circumstances, it is critical for the property concerned to be preserved as soon as possible. In order to accomplish

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Notification to the owner of the relevant property is not required prior to adjudication of the application.



preservation of the property, s38 of POCA was designed to prevent persons with an interest in the property from attempting to interfere with, dispose of or destroy the property and thereby compromise the investigation process. If notice has to be given to the affected party prior to obtaining the order, there would be a substantial risk of interference or disposition of such property.

In light of the above, s39 of POCA requires the NDPP to give notice to all persons known to have an interest in the property as soon as possible after a preservation of property order is granted. This is consistent with s48 of POCA, which requires the NDPP to give notice of the preservation of property to all persons known to have an interest in it prior to forfeiture of the property to the State. It is evident from the wording of s38 as well as the provisions of s39 and s48 that the legislature intended for notification of a preservation of property order to be provided to persons with an interest in the property after the preservation of property order has been granted and not before that time.

In its decision, the Supreme Court of Appeal overturned the decision of the Pretoria High Court and found that, as soon as possible after an application for a preservation of property order has been filed by the NDPP, a judge in Chambers ought to consider the application and make the appropriate order. In the circumstances, notification to the owner of the relevant property is not required prior to adjudication of the application.

The Supreme Court of Appeal reasoned further that people with an interest in the property which is the subject of a preservation of property order would have been given sufficient opportunity to protect their interests in respect of the property after a preservation of property order is granted and prior to its forfeiture to the State.

The finding of the court accords with the spirit and purpose of POCA, as highlighted in its preamble, to provide for a civil remedy for the preservation, seizure and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.

Zaakir Mohamed and Krevania Pillay



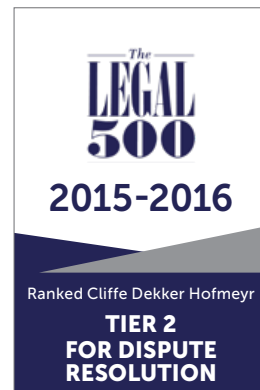

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