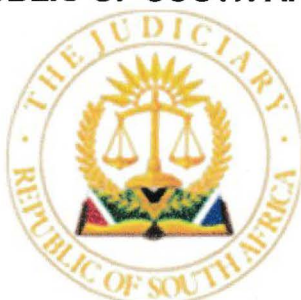
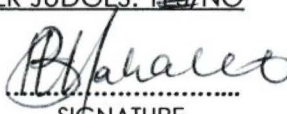


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/40451

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	28/10/2020
	DATE
	
	SIGNATURE

In the matter between:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

ERIC ANTHONY WOOD

First Defendant

MAGANDHERAN PILLAY

Second Defendant

LITHA MVELISO NYHONYHA

Third Defendant

REGIMENTS CAPITAL (PTY) LTD

Fourth Defendant

(In Liquidation)

REGIMENTS FUND MANAGERS (PTY) LTD

Fifth Defendant

REGIMENTS SECURITIES (PTY) LTD

Sixth Defendant

ASHBROOK 15 (PTY) LTD

First Respondent

CORAL LAGOON 194 (PTY) LTD

Second Respondent

ERGOLD PROPERTIES NO 8 CC

Third Respondent

MARCYTOUCH (PTY) LTD

Fourth Respondent

MAGANDHERAN PILLAY N.O. in his capacity as trustee of the Pillay Family Trust IT9190/03	Fifth Respondent
LITHA MVELISO NYHONYHA N.O. in his capacity as trustee of the Nyhonyha Family Trust IT 11919/96	Sixth Respondent
MAGDELINE SEKGOPI NYHONYHA N.O. in her capacity as trustee of the Nyhonyha Family Trust IT 11919/96	Seventh Respondent
ERIC ANTHONY WOOD N.O. in his capacity as trustee of the Zaza Share 1 Trust IT 01484/06	Eighth Respondent
TRUSTEGIC (PTY) LTD N.O. in its capacity as trustee of the Zaza Share 1 Trust IT 01484/06	Ninth Respondent
CEDAR PARK PROPERTIES 39 (PTY) LTD	Tenth Respondent
LITTLE RIVER TRADING (PTY) LTD	Eleventh Respondent
KGOKO CONSORTIUM (PTY) LTD	Twelfth Respondent

J U D G M E N T

MAHALELO, J:

[1] On 18 November 2019 the applicant obtained a provisional restraint order against the parties pursuant to the provisions of s 26 of the Prevention of Organised Crime Act, No 121 of 1998 ("*POCA*"). The order was lengthy and contained detailed provisions which are not necessary to repeat. It was granted in the usual format coupled with a rule *nisi*. The defendants and respondents were, in terms of the provisional order, *inter alia*, prohibited from

disposing or dealing in any manner with any of the realisable property held or controlled by them which is mentioned in annexure "A". A *curator bonis* was appointed to take possession of all such property pending the finalisation of an application for a confiscation order in terms of section 18 of POCA. This is the extended return day of the rule *nisi*.

[2] Added to the application for the confirmation of the rule *nisi* is the application by the NDPP to vary the provisional restraint order to increase the cap amount of the restraint. Both applications are opposed. The parties filed extensive papers. In response to the founding affidavits the defendants and respondents filed answering papers to which the applicant filed a consolidated reply in respect of all the answering affidavits.

[3] There are six defendants who have been cited as persons or entities who stood to be prosecuted and other twelve respondents were cited as persons or entities who allegedly hold an interest in or are in possession of realisable property that the applicant sought to restraint and who may therefore be affected by the restraint order sought.

[4] On 16 September 2020 Regiments Capital was placed under final liquidation. Two provisional liquidators were appointed to take over its affairs and a Rule 15(2) notice was issued to all the parties. All this happened while the judgment in the matter was reserved. Because the provisions of s 36 of POCA were then triggered the parties were requested to file supplementary heads of argument. I remain thankful to them.

The parties before Court

[5] The applicant is the National Director of Public Prosecution represented in these proceedings by Adv Cronje. In what follows I will refer to the applicant as NDPP. The first defendant is Eric Anthony Wood an adult businessman of 213 Jutland Place, Sandhurst, Sandton. The second defendant I Maghanderan Pillay, an adult businessman residing at 44 8th Avenue Houghton, Johannesburg, Gauteng. The third defendant is Litha Mveliso Nyhonyha an adult businessman resident at 18 Clonmore Road, Bryanston, Gauteng. The fourth defendant is Regiments Capital (in liquidation) a private company incorporated under the laws of the Republic. For practical purposes and reasons of convenience I shall refer to the first to third defendants by name and the fourth defendant as Regiments Capital. Regiments Capital holds 100% of the share capital of the fifth and six defendants. It also holds 59.82% of the share capital in the first respondent Ashbrook 15 Proprietary Limited (Ashbrook). The issued share capital of Regiments Capital is in turn held as follows:

- (a) 33% by the trustees for the time being of the Pillay Family Trust, Master's registration number IT 9190/03 (the Pillay Family Trust);
- (b) 32% by the trustees for the time being of the Zara 1 Trust, Master's registration IT 01484/06 (the Wood Family Trust);
- (c) 20% by the trustees for the time being of the Nyhonyha Family Trust, Master's registration number IT 11919/96 (the Nyhonyha Family Trust); and
- (d) 15% by Nyhonyha in his personal capacity.

[6] The fifth defendant is Regiments Fund Managers Proprietary Limited. The fifth defendant is a wholly owned subsidiary of Regiments Capital (Regiments Fund Managers). The sixth defendant is Regiments Securities, a private company incorporated under the laws of the Republic of South Africa. The sixth defendant is a wholly owned subsidiary of Regiments Capital (Regiments Securities).

[7] The first respondent is Ashbrook. Ashbrook Share Capital is held as follows:

- (a) Regiments – 59.82%
- (b) Ergold Properties No 8 CC – 13.09%
- (c) Lemoshanang Investment Pty Ltd – 13.29%
- (d) Marcytouch Pty Ltd – 9.37%
- (e) Rorisang Basadi Investments Holdings Pty Ltd – 4.42%

[8] The second respondent is Coral Lagoon 194 Proprietary Limited, wholly owned by Ashbrook. Coral Lagoon held 1,354,435 shares in Capitec (the Capitec Shares). The third respondent is Ergold, a close corporation whose sole member is Pillay Family Trust, represented by Pillay. Its registered address is Pillay's residential address. The fourth respondent is Marcytouch, a private company registered under the company laws of South Africa. Its registered address is Nyhonyha's residential address. Nyhonyha is its sole director and shareholder. Fifth respondent is Pillay N.O. in his capacity as sole trustee of the Pillay Family Trust. The sixth respondent is Nyhonyha

N.O., in his capacity as sole trustee of the Nyhonyha Family Trust. The seventh respondent is Magdeline Sekgopi Nyhonya N.O., in her capacity as trustee of the Nyhonyha Family Trust. The eighth respondent is Wood N.O. in his capacity as trustee of the Wood Family Trust. The ninth respondent is Trustegic Pty Ltd in its capacity as trustee of the Wood Family Trust. The tenth respondent is Cedar Park Properties 39 Pty Ltd (Cedar Park) with its registered address at 35 Ferguson Road Illovo, Johannesburg. Cedar Park is wholly owned by the Kgoro Consortium which in turn is majority owned by Regiments Capital. The eleventh respondent is Little River Trading Pty Ltd (Little River) with registered address at 35 Ferguson Road Illovo, Johannesburg. It is wholly owned by Regiments Capital. The twelfth respondent is Kgoro Consortium, with its registered address as 35 Ferguson Road Illovo, Johannesburg. Kgoro Consortium is wholly owned by Regiments Capital.

The interlocutory application

[9] On the date of hearing I dismissed the application by the NDPP to file a transcript of Mr Ian Sinton (Sinton)'s evidence given at the State Capture Commission on 12 March 2019. I undertook to give reasons for the order in the judgment.

[10] The basis for the application was that an incorrect transcript of the evidence of Sinton was mistakenly annexed to the founding papers in the *ex parte* court. The NDPP summarised the evidence at paragraph 69 to 85 of her founding affidavit. She indicated that the transcript that was attached was of Sinton's evidence of 17 September 2018 instead of 12 March 2019. She

further indicated that Sinton's sworn statement formed part of the papers before the *ex parte* court. She contended that her intention was not to file a further affidavit therefore, the provisions of Rule 6(5)(e) do not find application. The NDPP submitted that she wished to file the said transcript only for the convenience of the court as she would not refer to it when she argued the main application. She further pointed out that if the court were to refuse her application she would suffer no prejudice to her case.

[11] The application was opposed. The basis for the opposition being that the relief sought by the NDPP is not procedurally competent. Multiple contentions were raised in this regard.

[12] It was contended on behalf of the defendants and respondents that the alleged transcript is self-standing, it is not attached to any affidavit which identifies it, attests to its origin and explains its omission. It was further argued that because an affidavit in civil proceedings represents evidence which has been presented, it cannot be amended and annexures cannot be simply swapped. Further that the evidence that was placed before the *ex parte* court is a matter of record, the defendants and respondents have not been given an opportunity to consider the transcript which the NDPP sought to file when they prepared their answering affidavits. Counsel for the defendants and respondents furthermore pointed out that the NDPP's application is made at a prejudicially late stage, in already deferred proceedings even after the parties had agreed before court that no additional papers or further applications were to be filed. They say that the NDPP failed to lay adequate basis in her founding affidavit for the indulgence requested.

[13] I have considered the prejudice which the defendants and respondents would suffer if the transcript were to be allowed. The transcript is said to be lengthy with about 2 000 pages. It was introduced at a very late stage, approximately two days before the date of hearing of the application. The opposing parties have not been given an opportunity to deal with it and their answers were informed by the documents that were attached to the founding affidavit. For those reasons I dismissed the application.

The Act

[14] The purpose of POCA and the justification, *inter alia*, for provisional restraint orders against realisable property as an effective mechanism to meet the Act's overall purpose has been eloquently summarized in *NDPP v Mohammed N.O. & Others*.¹ The idea is that criminals should be stripped of the proceeds of their offences to remove the incentive of crime. POCA uses two mechanisms to achieve this end, which are set forth in Chapter 5 (comprising subsections 12 to 36) and Chapter 6 (comprising subsections 37-62). In the present matter we are concerned with the provisions of Chapter 5, which provides for the ultimate forfeiture of the benefits derived from crime, but its confiscation machinery may only be invoked when the "*defendant*"² is convicted of an offence. The purpose of a restraint order is to preserve sufficient property to satisfy a reasonably anticipated confiscation order.

[15] Whilst the effect of POCA appear harsh because the Act intercepts the property rights of individuals who may be entirely innocent of any complicity

¹ 2002 (4) SA 843 (CC) at pars [14] to [16]

² This is the appellation used in POCA. "*Defendant*" is defined in section 12(1) as a person against whom a prosecution for an offence has been instituted, and one who is to be charged with an offence on the basis envisaged in section 25(1)(b)

with crime, the Constitutional Court has found the provisions of POCA not only to be consistent with the Constitution, but to be a “*friend*” to its aims, as is evidenced from the following observation by Cameron J in *NDPP v Elran*:³

*“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.”*⁴

[16] Section 18 of POCA is designed to enable the court to deprive a convicted person of the proceeds of crime. The section empowers the court which has convicted a person of an offence, to make a confiscation order which has the effect of a civil judgment. The order made against a convicted person is for payment to the State of any amount the court considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

[17] The amount relates to a “*benefit*” a person has derived from illegal activities, and in terms of section 12(3) a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of the Act received or retained any proceeds of unlawful activities. The amount for which a confiscation order may be made may not exceed the lesser of the value of the defendant’s proceeds of the offences or

³ 2013 (1) SACR 429 (CC)

⁴ At par [70]

related criminal activities referred to in s 18(1), or the net value of the sum of the defendant's property and certain defined gifts made by the defendant. Section 19(1) defines the "*value of a defendant's proceeds of unlawful activities*" to be "*the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person*".

[18] Section 26(1) authorises the National Director of Public Prosecutions to apply to a High Court on an *ex parte* basis for an order prohibiting any person from dealing in any manner with any property to which the order relates. In this regard section 26 provides as follows:

"26 Restraint orders

(1) The National Director may by way of an ex parte application apply to a competent 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 to which the order relates.

(2) A restraint order may be made –

(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

(b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;

(c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.

(3) (a) A court to which an application is made in terms of ss (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.

(a) If the defendant has been absent during a period of 21 days from his or her usual place of residence and from his or her business, if any, within the Republic, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the Gazette, or may direct some other mode of service."

[19] Section 25 of the Act provides for circumstances in which a restraint order may be made. The relevant portions of s 25 read as follows:

"25. Cases in which restraint orders may be made – (1) A High Court may exercise the powers conferred on it by section 26(1) –

(b) When –

(i) that court is satisfied that a person is to be charged with an offence; and

- (ii) *it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person."*

[20] Counsel for the NDPP submitted that the NDPP has complied with the requirements for the confirmation of the rule *nisi* as set out in section 25 of POCA above.

[21] It is common cause that a prosecution has not yet been instituted against the defendants and that proceedings against them have not concluded. It is alleged that they will face charges of *inter alia*, corruption, money laundering and fraud. The offences are said to arise from the following: It is not disputed that Pillay and Nyhonyha are the sole directors of the Regiments companies. Wood was a director of Regiments companies until 13 October 2016 when he was removed by a resolution of shareholders. Although different versions have been provided, the evidence discloses that he was employed by regiments Capital until 29 March 2016 when he resigned but that he remained doing work for Regiments. It is alleged that during their directorship in the Regiments companies they committed the offences of corruption, fraud and money laundering in relation to Transnet SOC Ltd (Transnet) and the Transnet Defined Benefit Fund (the Fund). It is said that Regiments Capital obtained contracts unlawfully fro Transnet either directly, or indirectly as a subcontractor to McKinsey, it implemented those contracts and their proceeds illegally. The NDPP alleges that Transnet paid the Regiments Companies more than R1 billion arising from the unlawful contracts. It is contended that all this constituted proceeds of crime. The

NDPP says that the offences were part of the State Capture project aimed at enriching the defendants, the Gupta family and their associates.

[22] The Fund sued Regiments for R848 million which was said to be in respect of criminal offences committed against it. The Regiments paid the Fund R639 million in settlement of the claims. On 2 October 2019 Regiments also concluded a settlement agreement with Transnet in which it agreed to pay R180 million to Transnet on 2 October 2020. These settlement agreements were publicly announced in the press and the media. The Regiments denied their involvement in the crimes alleging broadly that there was no wrongdoing on their part. They questioned the NDPP's intention to charge them and they disputed that they may be convicted. They disputed that they had received or retained a benefit, they averred that the NDPP has failed to meet the jurisdictional requirements of section 25 of POCA in that on the evidence she has presented, they argued, there are no grounds reasonably to believe that a confiscation order may be made against them. They have raised various other defences and *in limine* points which I deal with herein below.

[23] Counsel for Regiments with other defendants and respondents making similar argument contended that the provisional restraint order was improperly sought and obtained on an *ex parte* basis and that the NDPP offended against the trite principles of full disclosure when an applicant approaches Court on an *ex parte* basis.

Ex parte proceedings

[24] It was contended that the Regiments defendants and respondents should have been given notice of the application and there was no good reason why the application was brought urgent, *in camera* and *ex parte* in the light of the relevant facts in this matter. Counsel for Regiments submitted that it has been held that courts will grant *ex parte* orders only when it is essential. He criticized the reasons advanced by the NDPP why she elected to follow that course of action, in particular, the statement by Adv Cronje that once the accused persons in a criminal matter learn that the State is taking action to deprive them of their ill-gotten gains, they will attempt to dissipate such property while it is still possible for them to do so lawfully. He submitted that the *audi alteram partem* rule is a requirement of natural justice and taking a decision adverse to someone without giving them a chance to defend themselves represents a drastic departure from the first principle of understanding what is fair and just. He referred the court to the cooperation which Regiments directors offered to the NDPP in the investigations which the NDPP allegedly ignored. In regard to the duty of utmost good faith he referred court to what was said in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 257 (SCA) (REDISA)⁵ that:

“[89] In regard to the use of *ex parte* proceedings, the court a quo said that the Minister had made out a sufficient case that the urgent and drastic action was needed in view of the ‘underhand and secretive manner’ in which Redisa’s executive directors had acted. In my view and having regard to the rules in application proceedings, this was not

⁵ 2019 (3) SA 257 (SCA) (REDISA) para 89 to 90

the conclusion that could reasonably be reached on the papers. On the contrary, I am firmly of the view that it was an abuse to seek the provisional order ex parte ...

[90] The Minister's skewed disclosure and non-disclosure were extensive. They related to matters that must have influenced the judges hearing the ex parte applications. Indeed, I do not think that ex parte orders would have been granted. If fair disclosure had been made. The Minister gave no satisfactory explanation of her inadequate disclosure and material non-disclosure."

[25] He also referred to *National Director of Public Prosecutions v Scholtz*⁶ and *Van der Heever v National Director of Public Prosecutions*⁷ to substantiate his argument. He argued that section 26(1) of POCA does not confer on the NDPP an additional or stronger right but simply restates the common law principles.

[26] Section 26(1) permits the NDPP to approach court on an *ex parte* basis. It is not couched in peremptory terms. The term "*may*" confers a discretion on the NDPP to follow the *ex parte* route. Nowhere in the section is the NDPP expressly or by implication prevented from pursuing that option, the exigency of the situation may dictate the choice to be made⁸. Counsel for the Regiments further argued that the NDPP has since 2017 to investigate the matter and nothing happened in November 2019 that would have required her

⁶ 2014 JDR 006 NKC para 15

⁷ 2012 JDR 223 (GNP) P10

⁸ NDPP V Scoltz supra

to act as she did. I do not agree. Adv Cronje explains the timing of the application at para 7 of the founding affidavit:

“the timing of this application is necessitated by the fact that the defendants’ assets will immediately be released from an anti-dissipation order currently in force in favour of the Transnet Defined Benefit Fund. The likely consequences of which will be that the defendants’ most important liquid assets in the form of shares and cash are dissipated.”

[27] The anti-dissipation orders referred to by Adv Cronje are the orders of Tsoka J and Van der Linde J, they form part of these papers. Adv Cronje explains that the Regiments assets were going to be released from the anti-dissipation interdicts once a settlement agreement between the Fund and Regiments was implemented. The settlement agreement was implemented on 21 November 2019 two days after the provisional order was issued. On 21 November 2019 the orders of Tsoka and Van der Linde JJ fell away. I am constrained to agree with the NDPP that had she not urgently obtained the provisional restraint order two days earlier Regiments would have once more had control over disposal of its assets, and it is highly likely that if the NDPP’s application was brought on notice Regiments would have exercised that control to placed its assets beyond her reach. I am satisfied that the NDPP was justified in approaching the court on an *ex parte* basis.

Non-disclosure

[28] It was contended that the NDPP failed to honour her duty of utmost good faith in that she failed to disclose material facts to the court granting the

ex parte order. The material facts not so disclosed is said to include *inter alia*, the order granted by Vally J on 26 September 2019, the Settlement Agreement between the Regiments and Transnet, the manner in which the TSDBF Settlement Agreement was implemented, the cooperation offered by the defendants, that the NDPP did what is called “*straw man’s*” disclosure by filing affidavits deposed to by the defendants in other litigation in an excised form and the interests of minority shareholders. It is common cause that the material referred to above did not form part of the papers in the *ex parte* court. The question to be answered is therefore, whether the non-disclosure was material and whether it influenced or might have influenced the *ex parte* court in coming to a decision. I do not propose to deal with all the alleged non disclosures. They are lengthy, I find it unnecessary to deal with all of them in the present case. For purposes of coming to a decision in this matter I will confine myself to the alleged non-disclosures of Vally J’s order of 26 September 2019 and the Transnet Settlement Agreement. This should however not be construed that other alleged non disclosures have not been considered. Before I deal with the alleged non-disclosures it is necessary to first set out the legal principles and the authorities.

[29] It is trite that approaching court *ex parte* is a serious departure from the ordinary principles applicable to civil proceedings. An *ex parte* application, by its nature, places only one side before the court.⁹ It is, therefore, our law that an applicant in an *ex parte* application bears the duty of utmost good faith in

⁹ *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA)

placing before the court all the relevant material facts that might influence a court in coming to a decision to borrow from the words of *H J Erasmus, et al.*¹⁰

“Good faith is a sine qua non in ex parte applications. If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an ex parte application. The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interest of innocent third parties ...”

[30] In *National Director of Public Prosecutions v Basson*¹¹ Nugent AJA held:

“[21] Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order even if the non-disclosure or suppression was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E to 349B).”

¹⁰ Superior Court Practice (1994), p B1-41-42

¹¹ 2002 (1) SA 419 (SCA) at 428 para [21]

[31] In *National Director of Public Prosecutions v Kyriacou*¹² Mlambo AJA pronounced:

"[17] Counsel for the respondent submitted that the appellant should be non-suited for failing to disclose in the ex parte application that the trial court had granted a forfeiture order in terms of section 34(1) of the Criminal Procedure Act and the amount thereof. It was submitted that such disclosure was called for as it is likely to have influenced the court whether to grant the provisional order or refuse it. It is common cause that the s. 34 order was not referred to in the papers.

[18] It is correct that utmost good faith must be observed when initiating an ex parte application, and failure to disclose and present fully and fairly all known material facts may constitute a ground to dismiss an application. The duty to disclose extends to all facts which might influence a court in coming to its decision.

[19] The learned judge in the court a quo had a discretion, on being appraised of all the facts, to either set aside the provisional order or confirm it. An important consideration in the court a quo was the question whether the court that granted the provisional order might properly have been influenced by the non-disclosure of the s. 34 order to refuse relief. The learned judge in the court a quo heard full argument on this issue but elected to discharge rule on another ground. He did not deem it necessary to deal with this one. I can see no reason to have discharged the order by reason of the non-

¹² 2004 (1) SA 379 (SCA) at 387

disclosure in question. Had disclosure been made the s. 34 order would not have been the answer to a confiscation order. There was, in addition, as already said the matter of related criminal activity and the force of the presumptions."

[32] In *REDISA*¹³ the court held:

"Disclosure – legal principles

[45] The principle of disclosure in ex parte proceedings is clear. In NDPP v Basson this court said: 'Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the nondisclosure or suppression was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B).'

[46] The duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, audi alteram partem. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

¹³ At para 45 to 52

[47] *The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defence of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.*

[48] *As Waller J said in Arab Business Consortium, points in favour of the absent party should not only be drawn to the judge's attention, but must be done clearly: 'There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough.'*

[49] *The ex parte litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the judge's attention from the force and substance of the*

absent respondent's known or likely stance on the matters at issue. Generally, this will require disclosure in the body of the affidavit. The judge who hears an ex parte application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.

[50] In regard to the court's discretion as to whether to set aside an ex parte order because of nondisclosure, Le Roux J said in Schlesinger v Schlesinger: '(U)nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.'

[51] This is consistent with the approach in English law, that if material nondisclosure is established a court will be 'astute to ensure that a plaintiff who obtains [an ex parte order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty'.

[52] As to the factors that are relevant in the court's exercise of its discretion whether or not to set aside an ex parte order on grounds of nondisclosure, in NDPP v Phillips this court said that regard must be had to the extent of the nondisclosure, the question whether the judge hearing the ex parte application might have been influenced by proper

disclosure, the reasons for nondisclosure and the consequences of setting the provisional order aside.”

The order of Vally J

[33] Regiments defendants and respondents contended that the NDPP failed to disclose to the court which granted the *ex parte* order that Regiments' assets would remain subject to an anti-dissipation order granted by Vally J on 26 September 2019 once the TSDBF anti-dissipation orders fell away. This is so, it was contended, because paragraph 1.5 of that order provided that pending finalisation of the dispute as to whether ZARA 1 is a 32% shareholder in Regiments, Regiments may not:

- (a) make any distribution to shareholders unless it is made proportionately between Regiments Shareholders, or with ZARA 1's consent, or in terms of an order of court to the contrary.
- (b) Remove, encumber, dispose of, deal with, diminish the value of, forego, or reduce control over any of their assets, whether held directly or indirectly by them, or acquiesce in any such steps being taken and whether such assets are solely or jointly owned or solely or jointly controlled and whether those assets are held on the date of this order or acquired thereafter, other than in terms of the TSDBF settlement agreement or in the ordinary course of business unless prior written notice has been given to ZARA 1's attorney, or with consent of ZARA 1, or in terms of an order of court to the contrary.

[34] Counsel for Regiments and respondents argued that the effect of Vally J's order is that Regiments was to use the proceeds of the TSDBF settlement that were distributed to it to settle its creditors and that Regiments was not permitted to dissipate the remaining assets until the dispute as to whether ZARA 1 was a 32% shareholder in Regiments was resolved unless any distribution or dealing in its assets proportionately benefited ZARA 1, was with ZARA 1's consent or was pursuant to a court order.

[35] Regiments defendants say that what the NDPP did not disclose to the court, which was apparent from Nyhonyha's affidavit of 4 September 2019, which was attached to the founding affidavit is that, the relationship between Regiments, on the one hand, and ZARA 1 and Wood, on the other is acrimonious. They submitted that there was no prospect that Regiments would declare a proportional dividend before its dispute with ZARA 1 had been resolved. According to Regiments the dispute remains and the order of Vally J would have continued to operate accordingly.

[34] Regiments argued that had the NDPP disclosed these facts to the court granting the *ex parte* order, it would have been clear that Regiments had undertaken multiple proceedings to use its "*liquid assets, in the form of shares and cash*" to pay its creditors and this undertaking was embodied in Vally J's order. Regiments contended that this should have been disclosed to the *ex parte* court and that the NDPP's non-disclosure resulted in that court granting an order which is at variance with the order granted by Vally J, rendering it in material respect incapable of being implemented. It was therefore contended that the NDPP breached its duty of good faith when she knowingly withheld

the order of Vally J from the court in order to persuade it to grant an order that conflicted with the existing order and that had the *ex parte* court been told about the order of 26 September, it should have influenced it in its decision to grant or refuse the application. On that basis alone it was argued that the rule *nisi* be discharged.

[37] The NDPP contended that Vally J's order is not sufficiently relevant to warrant disclosure. She submitted that the said order had nothing to do with the issues the court granting the *ex parte* order was faced with on 18 November 2019, being to decide whether the restraint was justified and if so, to which amount. The NDPP argued that the order of Vally J did not resolve any issues which has a bearing on the application. She submitted that the order was by agreement between the parties which principally settled a dispute between Regiments' Companies and Wood as to whether Regiments' shares in Capitec should be sold, partly in settlement of the claim by the Fund against Regiments Companies and how the proceeds should be distributed as between companies, shareholders and the creditors. The NDPP therefore argued that the said order is not an anti-dissipation order and it would not have influenced the court in arriving at its decision. She pointed out that the test for disclosure is whether Vally J's order was "*sufficiently relevant*" to warrant disclosure. She referred the court to what was held by the Constitutional Court in *Thint (Pty) Ltd v The National Director of Public Prosecutions and Others*; *Zuma v The National Director of Public Prosecutions and Others*¹⁴ that:

¹⁴ 2009 (1) SA 1 (CC)

"It follows that, in cases such as the present, an applicant for a search and seizure warrant will inevitably have to make a judgment as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that renders it practically impossible for the State to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges."

[38] The NDPP appeared to have had concerns about the sufficiency of Vally J's order. She contended that that order does not do what the Regiments defendants and respondents say it does i.e it does not preserve the assets of Regiments'. Even if it is to be accepted that the NDPP had concerns as to whether Vally J's order was sufficient, I do not think that she was entitled to withhold that order from the court granting the *ex parte* order. The concerns which she may have had about the sufficiency of that order should in my view have formed part of her founding affidavit along with Vally J's order. This in my view, would have enabled the *ex parte* court to make a determination whether her concerns were valid. I agree with Counsel for Regiments that it was not appropriate for NDPP to pick and choose what should be drawn to the attention of the *ex parte* court particularly given that she relied on the lapse of the TSDBF anti-dissipation orders as the justification for her resorting to the urgent *ex parte* proceedings. There can be no doubt that Vally J's order was for the same reason of equal force and relevance to the application and failure to disclose it to the *ex parte* court is simply indefensible. The order is material. Even if I am wrong in my conclusion, I still have to deal with the alleged non-disclosure of the Transnet Settlement Agreement.

The Transnet Settlement Agreement

[39] Counsel for Regiments contended that the NDPP failed to bring to the attention of the ex parte court that Transnet and Regiments concluded a settlement agreement in terms of which, inter alia, Regiments would pay Transnet R180 million in full and final settlement of any claim by Transnet against Regiments including, inter alia, Transnet procurement of the 1064 locomotives and the funding procured from China Development Bank for Transnet. Regiments contended that even though the settlement was concluded on 2 October 2019, the NDPP knew or at best, had she exercised due care and made enquiries and conducted investigations as are reasonable in the circumstances, she should have known because:

- (a) Nyhonyha's affidavit in the Regiments Business Rescue application which the NDPP attached to the founding affidavit (albeit excising the relevant portion) states that Regiment and Transnet had concluded a Settlement Agreement to the effect that Regiments would repay Transnet R180 million.
- (b) On 12 November 2019 Transnet CEO publicly announced that Transnet had concluded a settlement with Regiments which settlement was widely reported in the press.
- (c) The announcements were overshadowed by the testimony of Transnet senior officials in the State Capture Commission where it was stated that Regiments and Transnet were engaged in settlement negotiations.

[40] Regiments further submitted that it is on the basis of the claims that Regiments and Transnet have settled which the NDPP relied upon to obtain the *ex parte* order and quantify the value of the restraint. Regiments argued that NDPP should have disclosed the Settlement Agreement to the *ex parte* court because it is not only relevant but also material to the determination of the restraint amount.

[41] The NDPP contended that the Settlement Agreement between Regiments and Transnet to repay Transnet R180 million is not relevant to justify disclosure. In any event, so the argument goes, Adv Cronje became aware of the Settlement Agreement after the interim order was granted. The NDPP submitted that payment of the agreed amount without admission of liability is not relevant towards the determination of whether the restraint order should be granted. According to her, the agreed amount is only relevant to the determination of the appropriate cap on the restraint order. I disagree with with argument.

[42] In her replying affidavit, the NDPP does not dispute that she was in possession of Nyhonyha's affidavit in Regiments' Business Rescue application before she launched her original application in this matter. Having perused that affidavit, I am not persuaded that the NDPP became aware of the Transnet Settlement Agreement after the interim order was granted, the more- so if it was publicly announced in the press a month before she applied for the interim order. *"The applicant must thus be scrupulously fair in*

presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.”¹⁵

[43] Surely if the court granting the ex parte order was informed that the Settlement Agreement concluded between Transnet and regiments was in full and final settlement of the claims by Transnet against Regiments, he might have wanted to know more about it and it may have influenced the court in coming to its decision. It is not necessary to show that the non-disclosure was wilful or *mala fide*.¹⁶

[44] The next question to answer is whether there has been a serious non-disclosure as would entitle the court to discharge the rule nisi. Amongst the

¹⁵ REDISA Para 47

¹⁶ Schlesinger v Schlesinger 1979 (4) SA 342

factors which the Court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose are at least:

1. The extent to which the rule has been breached;
2. The reasons for the non-disclosure;
3. The extent to which the first Court might have been influenced by proper disclosure;
4. The consequences from the point of doing justice between the parties.¹⁷

[45] If the failure to disclose Vally J's order stood alone, I might perhaps have been persuaded to exercise my discretion in favour of the NDPP. If material facts are not disclosed in an *ex parte* application or the facts are deliberately misrepresented the court the order will be erroneously granted.¹⁸ It follows from what I have said that I have come to the conclusion that the non - disclosure was material.

[46] In the result the following order is made:

Order

1. The Provisional order including the Rule Nisi is discharged.
2. The NDPP is ordered to pay costs of the application, including costs of the interlocutory application. (The costs will include costs consequent upon employment of two counsel where applicable, and the costs of senior counsel where applicable)

¹⁷ Superior Court Practice, Erasmus, Vol. 2 at 01-61 to 01-62.'

¹⁸ Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C - E.



M B MAHALELO

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

Appearances:

On behalf of the Applicant: Saller)	Adv Gm Budlender SC (with Adv K
Instructed by:	State Attorney (per J Tagane)
On behalf of first defendant, eighth and ninth respondent:	Adv E Killian SC
Instructed by:	Fairbridges Wertheim Becker Inc.
On behalf of second defendant, third and fifth respondent:	Adv Cilliers SC (with Adv A Ramlaal)
Instructed by:	Govender Patel Dladla Inc.
On behalf of third defendant, fourth and seventh respondent: Ngcangisa)	Adv Dorfling SC (with DG
Instructed by:	Moroka Attorneys
On behalf of fourth to sixth defendant, first to second and tenth to twelfth respondent: Mckenzie and Adv T Scott)	Adv Gauntlett SC (with Adv AC
Instructed by:	Smit Sewgoolam Inc.
Date of hearing:	28, -1/6 JUNE 2020
Date of Judgment:	26 October 2020