

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 2667/2017

Date heard: 17 October 2019

Date delivered: 11 February 2020

REPORTABLE

In the matter between:

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA	First Applicant
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MOOVILE (PTY) LTD	Second Applicant
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WILLEM JANSEN VAN VUUREN	Third Applicant
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And

CPAD FARM HOLDINGS	First Respondent
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MONGEZI ALFRED MDE	Second Respondent
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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
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MINISTER OF RURAL DEVELOPMENT AND

LAND REFORM

Fourth Respondent

MIKE TIMKOE TRUSTEES CC

Fifth Respondent

DONALD GEORGE DUKE JACKSON

Sixth Respondent

MASTER OF THE HIGH COURT

Seventh Respondent

REGISTRAR OF DEEDS CAPE TOWN

Eighth Respondent

JUDGMENT

Goosen J:

[1] The first applicant (referred to hereinafter as the Land Bank) seeks an order varying the terms of a forfeiture order obtained at the instance of the third respondent (hereinafter the NDPP) in terms of s 53(1)(a) of the **Prevention of Organised Crime Act (POCA)**¹.

[2] The forfeiture order was granted by Majiki J on 13 January 2015. In terms of paragraph 1 thereof the Honeyville Farm in the district of Humansdorp (hereinafter the property) was declared forfeit to the state. Paragraph 5 thereof provided that the fifth respondent (hereinafter Timkoe), who was appointed AS the *curator bonis* to the first respondent (CPAD), the erstwhile owner of the property was required “to cause

¹ Act No. 121 of 1998

the property to be handed back to the [fourth respondent (hereinafter the Department)] for re-allocation". It further provided that "this will be regarded as payment to the state".

[3] What the applicant now seeks is a variation of paragraph 1 to read that the forfeiture is "*subject to the rights of bondholders*". It also seeks a declaration that Timkoe be entitled to proceed with the sale of the property subject to the rights of the bondholders. The effect of this latter declarator will be to negate paragraph 5 of the forfeiture order.

[4] Much of the factual background is common cause between the parties. The second and third applicants were granted leave to intervene as applicants in the application by Van Zyl DJP on 9 July 2019. Their particular interest in the relief sought will emerge from the outline of the relevant facts. Although the facts may not be in dispute there is some contention as to the appropriate starting point. The Land Bank sets the starting point at 13 April 2007 on which date CPAD as registered owner of the property caused a mortgage bond to be registered over the property in favour of the Land Bank. The department, on the other hand, sets the starting point at an earlier date, with reference to the forfeiture application, prior to CPAD becoming the registered owner of the property. I shall outline the facts with reference to the Land Bank's chronology and return hereunder to the earlier period when dealing with the department's case.

[5] It is common cause that as at 13 April 2007 CPAD was the registered owner of the property. On that day a mortgage bond was registered in favour of the Land Bank. In 2008 the Land Bank commenced legal action against CPAD to recover

amounts owing to it pursuant to the credit facility extended to CPAD, in the amounts of R559 401,90 and R5 216 367,03 respectively. The judgment included interest on the capital sums (from 31 July 2008) and an order declaring the property executable. On 14 October 2014, the sheriff acting pursuant to a warrant of execution, attached the property.

[6] During October 2014 the NDPP launched an application in terms of s 38 of POCA for a preservation order in respect of the property. A preservation order was granted and Timkoe was appointed as curator *bonis* to take control of the property. A copy of the preservation order was served on the Land Bank. The Land Bank instructed an attorney, Mr Gregory Parker (Parker) to represent it and protect its interests.

[7] Parker wrote to Mr Warren Myburgh (Myburgh), an attorney in the State Attorneys' office attached to the Asset Forfeiture Unit and representing the NDPP in the preservation proceedings, on 17 November 2014. Parker confirmed that the Land Bank held a first mortgage bond over the property and that he held instructions to enter an appearance to exclude the Land Bank's interests in the property.

[8] On 18 November 2014 Parker met Myburgh and advocate Freda Hack, an employee of the Asset Forfeiture Unit. Myburgh and Hack confirmed that the Land Bank's interest as mortgage holder would be excluded from the forfeiture order to be obtained. This was confirmed by email dated 19 November 2014. Parker informed Myburgh that service of the forfeiture application could be effected on his office. On 21 November 2014 Parker dispatched an email to Myburgh enclosing statements

reflecting the amounts owed by CPAD to the Land Bank². On 13 December 2014 Parker enquired of Myburgh when the forfeiture application might be expected. No reply was received. A forfeiture order was granted on 13 January 2015.

[9] On 20 November 2015 Parker wrote to Myburgh expressing concern at the terms of the order. Myburgh replied, expressing the view that the order was “*subject to bonds which rank in both time and efficacy*”. This stance was repeated in a meeting held between Parker and Myburgh and advocate Kingsley, representing the NDPP. It appears that these assurances satisfied the Land Bank.

[10] During or about February or March 2015 Timkoe, the appointed curator *bonis*, was approached by the third applicant who is the occupant of the property. An offer to purchase the property was made by the third applicant in an amount of R7. 5 million. Timkoe submitted same to Parker who in turn submitted same to the Land Bank for approval. After obtaining a valuation of the property the Land Bank advised that it required a revised offer of R8 million.

[11] It appears that Timkoe entered into negotiations with the purchasers and on 25 May 2015 a Deed of Sale was entered into between Timkoe and the third applicant (Van Vuuren) on behalf of a company to be incorporated (i.e. what came to be the second applicant), for a purchase consideration of R8 million.

[12] It is the conclusion of the Deed of Sale which sparked the need for the present application. That is so because upon being advised of the sale agreement,

² These statements are not included in the papers.

the Department objected. The sale agreement would result in the Land Bank receiving the full proceeds of the sale, less any fees payable to Timkoe. The Department, however, took the view that it was entitled to the property as provided in the forfeiture order.

[13] Before setting out the issues which arise for decision and the contentions of the various parties, it is appropriate to touch briefly on the period prior to 13 April 2007. The period is not addressed in the Land Bank's papers. Reference is, however, made to the preservation application in the Land Bank's papers. It is not annexed. It was stated in the founding affidavit that it would be made available at the hearing. It was not. I did, however, call for the file from the Registrar. The Department refers in its answer to the fraud perpetrated upon it being the very reason a preservation order and subsequent forfeiture order was sought. Accordingly, for this reason too regard necessarily must be made to the facts giving rise to the preservation order.

[14] What emerges from the preservation application (and subsequent forfeiture application) is the following. The responsibility of the Department, in terms of policy, is to redistribute productive commercial land to previously disadvantaged individuals. It does so in accordance with several legislative provisions.³ In order to achieve these objects funds and grants are made available. One such is the Land Redistribution and Agricultural Development Grant (the LRAD grant). The LRAD grant is available to beneficiaries to cover the costs of acquiring land and/or shares

³ The Extension of Security of Tenure Act, 62 of 1997; The Land Reform (Labour Tenants) Act, 3 of 1996; The Restitution of Land Rights Act, 22 of 1994 and the Land Reform: Provision of Land and Assistance Act, 126 of 1993.

in agricultural enterprises. A Special Investigation Unit investigation of fraud and/or corruption in the Land Reform Programme identified fraud and/or corruption in respect of the property which is the subject of the application. In essence, it took the form of an LRAD grant being approved for the purchase of the property which was to be transferred to a Trust of which 39 previously disadvantaged individuals were the beneficiaries. An amount of R2 617 017 was paid out in grant funding on 2 August 2006 to acquire the property. As a result of certain fraudulent misrepresentations the property was transferred to and registered in the name of the first respondent (CPAD) of which the third respondent (Mde) is a director. At the time of transfer a mortgage bond was registered in favour of the Land Bank to secure a loan in an amount of approximately R5. 5 million. This fraudulent conduct forms the subject of a pending criminal prosecution of CPAD; Mde and one Pakade, a former official in the employ of the Department.

[15] It is on the basis of these allegations, which founded the NDPP's application for a preservation and forfeiture order, that the Department contends that it is a victim of the criminal conduct and, accordingly, entitled to share in the proceeds of the forfeited property.

[16] Essentially two questions arise for determination. They correspond to the form of the relief sought by the Land Bank. The first is whether the forfeiture order ought to recognise the rights of the Land Bank as mortgage holder. The second is whether the sale of the property ought to proceed as envisaged by the declarator.

[17] It is common cause that the Land Bank did not, following the granting of the preservation order, enter an appearance in terms of s 39(3) of **POCA**. The section provides that:

“Any person who has an interest in the property which is subject to the preservation of property 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.”

[18] The Land Bank contends that it was assured by the representations made by Myburgh and Kingsley that it was unnecessary since the forfeiture of the property automatically would cater for such rights. It is for this reason that it did not enter an appearance and apply for the exclusion of its interest in the property.

[19] It is also common cause that the Land Bank did not receive notice of the application for the forfeiture order. That order was granted by default as provided by s 53 of **POCA**. Upon becoming aware of the forfeiture order the Land Bank immediately raised its concerns with Myburgh. It was again assured that the forfeiture order:

“did not purport to refer to any other pre-existing rights, which were recognised throughout.”

[20] Myburgh also indicated that the NDPP would not oppose an amendment to the order to give effect thereto.

[21] The Land Bank, no doubt with its concerns assuaged, did not avail itself of wither a variation in terms of s 47 or any other remedy at that stage. The reliance upon the assurances given on behalf of the NDPP was misplaced. Mr Buchanan SC, who appeared for the Department took no issue with the Bank's failure to enter appearance or otherwise secure its interests. By this, I understood the Department to accept that the Land Bank was wrongly advised in light of the assurances given. It was accordingly not the Department's position that the Land Bank was precluded from asserting its rights and interests in the property. Indeed Mr Buchanan's submissions proceeded from the premise that both the Bank and the Department were victims of the fraud and that they ought to benefit from the forfeiture in proportion to the capital losses each had incurred. It was in support of this argument that reliance was placed on the judgment in ***National Director of Public Prosecutions v Levy and Others***⁴

[22] Mr Buchanan accordingly accepted that the forfeiture order ought to be varied to protect the Land Bank as bondholder. It should be recorded here that the sixth respondent is the holder of a second mortgage bond over the property. The application papers cite the sixth respondent as second bondholder but despite a reference to later paragraphs in the founding affidavit, no averments are made in relation to the sixth respondent. The sixth respondent also did not participate in the proceedings.

[23] The Department did not bring a counter application for amendment or variation of the terms of the forfeiture order. It sought merely to argue that, in line with the approach adopted in the ***Levy*** judgment, an appropriate order balancing the

⁴ [2004] 4 ALL SA 103 (W)

rights of the victims of the fraud ought to be made, by ensuring that upon disposal of the property the proceeds should be divided *pro-rata* the capital losses incurred by the Land Bank and the Department.

[24] Insofar as the second and third applicants were concerned the Department's stance was that Timkoe's powers as *curator bonis* are limited. He had no power to enter into a deed of sale and accordingly such a deed is of no force and effect. To the extent that the second and third applicants seek an order to the contrary their application stands to be dismissed.

[25] **Levy** concerned an application for a forfeiture order in terms of s 48 of **POCA**. What was at issue in that matter was the exclusion of the interests of certain respondents. The unlawful activity comprised the operation of an "*investment pyramid scheme*". The respondents, who were investors, sought the exclusion of their interests in the property to be forfeited. Each of the respondents' sought exclusion of specified amounts, being the value of their respective interests in the property. It is not necessary to canvas these details. What is of significance is the finding as to the nature of the interest that may be excluded.

[26] Van Oosten J held the following⁵:

"Interest" is widely defined in the Act as "including any right". The forfeiture order in terms of section 50 of the Act may only be made subject to section 52, which provides for the exclusion of interests in

⁵ **Levy** (*supra*) at 110i

property from the operation of a forfeiture order, on application thereto by an interested party. Such party may either oppose the application for a forfeiture order or apply for an exclusionary order.”

[27] The learned judge went on to find⁶:

“In my view, and again importing the aids to which I have previously referred, a restrictive interpretation as contended for, would truncate the overall purpose of the Act. Section 52 of the Act permits a person with an “interest in the property” to intervene in the forfeiture proceedings and the Court may then “exclude certain interests in property which is the subject of the order from the operation thereof”. It was clearly the intention of the Legislature to protect the interests of innocent third parties who have become the victims of a fraudulent activity. The measures provided for in the Act, ie preservation and forfeiture, are in the nature of execution in an ordinary civil action. Ordinarily a plaintiff in a civil action, having a claim sounding in money against the defendant would only be entitled to payment of his or her claim once judgment has been entered in his or her favour and following upon the execution process. In granting the forfeiture order in terms of the Act, the court, in effect, pronounces judgment declaring the property to be executable. It is then that the rights of interested parties become relevant. In casu the monies of the second and third respondent were used to pay the purchase price of the property. Their interest in the property accordingly is the equivalent of those amounts.”

⁶ At 111a-d

[28] Based on this finding the court granted a forfeiture order but provided therein that the property be disposed of and that the said respondents be paid the specified value of their interests (together with certain costs) and that the balance of the proceeds upon disposal be paid into Criminal Assets Recovery Account established under s 63 of the Act. The learned judge also provided for the circumstance that the purchase price of the property is less than the aggregate of the sums excluded.

[29] Mr Buchanan enjoined the court to adopt an approach which recognised that both the Land Bank and the Department were innocent victims and that they were entitled to share in the proceeds of the disposal of the property in proportion to their respective losses. Mr Beyleveld SC, for the Land Bank, submitted however, that the Department was not a victim of the unlawful activity. It was also submitted that the extent of the Department's losses are not established on the papers and that there is accordingly no basis to determine an amount to be excluded. Mr Beyleveld further argued that **Levy** is, in any event, distinguishable inasmuch as the respondents in that matter held no security (either in the form of a ranking mortgage bond or as judgment creditors) as in the present matter. Accordingly, the proportional sharing of the proceeds did not apply.

[30] I accept that the facts in **Levy** differ. However, the approach to the determination of interests and the underlying purpose of **POCA**, in my view, find application in the present matter. As noted by Van Oosten J, **POCA** seeks to protect the interests of innocent third parties who have become the victims of a fraudulent activity. There is no reason in principle why an organ of state or Department of State cannot rank as a victim of fraudulent activity alongside a private individual or

corporate entity. The fact that forfeiture occurs to the state does not preclude an organ or component of the state being the holder of a recognizable interest in the property which is worthy of protection as against other victims or the state itself.

[31] Forfeiture, it should be noted does not occur into the revenue accounts of the state in general. Section 63 establishes a separate account, namely the Criminal Assets Recovery Account. The management of that account is regulated by Chapter 7. The funds which comprise the account may only be utilized in accordance with s 69A. The relevant portion of s 69A provides as follows:

"69A Utilisation of Account and accountability

(1) The property and money allocated to, or standing to the credit of, the Account may be utilised by Cabinet, after considering the recommendations of the Committee, for-

(a) the allocation of property and amounts of money from the Account to specific law enforcement agencies;

(b) the allocation of property and amounts of money from the Account to any institution, organisation or fund contemplated in section 68 (c); and

(c) the administration of the Account.

(2) . . .

(3) (a) Whenever Cabinet allocates property or money under subsection (1) to a specific law enforcement agency or to an institution, organisation or fund contemplated in section 68 (c)-

(i) Cabinet shall indicate the specific purpose for which that property or money is to be utilised; and

(ii) the Minister shall forthwith cause all particulars of such allocation to be tabled in Parliament.

(b) Property or money allocated under subsection (1) may not be utilised for any other purpose than that specified in terms of paragraph

(a) (i)."

[32] What these provisions indicate is that the proceeds of crime obtained by way of, *inter alia*, forfeiture proceedings are to be applied:

"... to be combating of organised crime, money laundering and the financing of terrorist and related activities."⁷

[33] Thus, absent the exclusion of particular interests in confiscated property, the forfeited proceeds of criminal activity do not become generally available to those organs of state or departments who may suffer loss on account of such unlawful activity.

[34] I am accordingly of the view that the broad principle enshrined in the approach set out in **Levy** is no less applicable to an organ of state or state entity. That principle is that such entities may, in accordance with the procedures set out in **POCA**, obtain exclusion of their interests in property to be forfeited. It will, of course, be necessary to establish such interest.

⁷ Preamble to **POCA**.

[35] That brings me to the argument that the Department failed to establish that it too has a quantifiable interest in the property. I am unable to agree with Mr Beyleveld that this was not established. His submission did not, in my view, take cognisance of that which was before the court considering both the preservation order and the forfeiture order. Both the Land Bank and the Department referred to those papers. This court, in any event, cannot ignore that which was before the court whose order this court is called upon to vary.

[36] A reading of those papers indicates that an amount of R2. 68 million was paid out in the form of LRAD grants to enable the beneficiaries to acquire the property. It appears from the copy of the charge sheet drawn against CPAD, the second respondent and the departmental official involved, that this amount together with the R5. 5 million bond finance supplied by the Land Bank was appropriated to pay the purchase price of the property. Contrary to the conditions of approval of the financing the property was registered in the name of CPAD thus excluding the identified beneficiaries. What these allegations establish, in my view, is that both the Land Bank and the Department suffered losses as a result of the fraud perpetrated upon them. They are, accordingly, both victims of the unlawful activity.

[37] That, however, is not the end of the matter. I shall deal hereunder with the procedural issues that arise. Mr Buchanan argued that since both the Land Bank and the Department suffered losses they should participate in the proceeds of disposal in proportion to such losses. The argument does not, however, take into account that the Land Bank holds security in the form of a mortgage bond and that it perfected such security by obtaining a judgment against CPAD and an order authorizing

execution against the property. The judgment includes both capital and interest. There is nothing in the papers before me which quantifies this interest. The preservation application papers refer only to the value of the mortgage bond.⁸ I can conceive of no reason why the Land Bank's interest in the property should be limited in these circumstances, to the capital losses suffered.

[38] In **Levy**, Van Oosten J described the process by which property is forfeited to the state as being the effective entry of judgment and the authorizing of attachment and execution against the property.⁹ That this is indeed so is to be gleaned from a careful reading of the provisions of Chapter 6 of **POCA** which provides for civil recovery of the proceeds of unlawful activity. Two provisions are worthy of emphasis.

[39] Section 56, which deals with the effect of a forfeiture order provides:

"(1) Where a High Court has made a forfeiture order and a curator bonis has not been appointed in respect of any of the property concerned, the High Court may appoint a curator bonis to perform any of the functions referred to in section 57 in respect of such property.

(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the curator bonis on behalf of the State.

(3) Upon a forfeiture order taking effect the curator bonis may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property."

⁸ No reference is made to the judgment debt.

⁹ **Levy** *supra* at 111c

[40] Section 57, in turn, states that:

“(1) The curator bonis must, subject to any order for the exclusion of interests in forfeited property under section 52 (2) (a) or 54 (8) and in accordance with the directions of the Committee-

(a) deposit any moneys forfeited under section 56 (2) into the Account;

(b) deliver property forfeited under section 56 (2) to the Account; or

(c) dispose of property forfeited under section 56 (2) by sale or any other means and deposit the proceeds of the sale or disposition into the Account.

(2) Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.

(3) No person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, shall be eligible to purchase forfeited property at any sale held by the curator bonis.

(4)

(5) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose.”

[41] What these sections contemplate is that the property which is declared forfeit immediately vests in the curator *bonis* on behalf of the state and must be disposed of

and the proceeds deposited in the Criminal Assets Recovery Account established in terms of s 63. An order forfeiting property may, of course, exclude an interest in such property as provided for in s 54(1).

[42] Two important issues arise in consequence of these provisions. Both highlight issues as to the efficacy of the forfeiture order which is the subject of the application. The first concerns the interplay between paragraph 1 and paragraph 5 of the order. On the one hand, the property is declared forfeit to the state, no doubt with the statutory consequences that flow from such order as provided by sections 56 and 57. On the other hand, the property is to be handed back to the Department in terms of paragraph 5, and this in lieu of payment to the state. Several questions arise: Is this to be construed as an exclusion of an interest in the property? Or the exclusion of property itself? If it was intended that an interest be excluded what interest was so excluded? Was it the loss suffered by the Department to which reference was made in the preservation papers or the loss suffered by the Land Bank in the form at least of the mortgage bond liability (to which reference was also made)?

[43] In my view, paragraph 5 of the order cannot, in the light of paragraph 1, be construed as an exclusion of interest contemplated by s 54(1). Instead, it must be construed as an order to which effect cannot be given. When regard is had to the terms of the forfeiture order sought by the NDPP, I am inclined to hold that the order in paragraph 5 was granted in error, presumably per *incuriam*.

[44] The second issue is more fundamental. I have already referred to the fact that the preservation and forfeiture papers make no reference to the fact that the Land

Bank had, at the time of the application, obtained judgment against CPAD and an order declaring the property executable. It appears from the papers before me that a warrant of execution had been issued and that the property was under attachment.

[45] Given that the forfeiture process is itself a form of attachment for purposes of execution, the forfeiture order cannot, without more, override or displace a prior judicial attachment of the property. Ordinarily once a property has been attached further or later writs are lodged with the sheriff. Where there are competing claims those may be adjudicated by interpleader proceedings. In other instances, the Rules of Court make provision for the distribution of the proceeds of any sale in execution.¹⁰

[46] In this instance, the forfeiture order was granted without regard to the prior attachment of the property at the instance of the Land Bank. In my view, such order could not have been made, in fulfilment of the objects of **POCA**, without recognition of the rights and interests of the Land Bank as mortgage holder and indeed as judgment creditor.

[47] It follows from this that neither paragraph 1 nor 5 of the forfeiture order can stand in their present form. This brings to the fore the procedural questions referenced above. I have already mentioned the fact that no appearance was entered by the Land Bank. There was, for this reason, no application to exclude its interest in the property. The preservation order was sought *ex parte*. The application was prosecuted by the NDPP, Asset Forfeiture Unit. It does not appear that the

¹⁰ See Rules 45 and 46 of the Uniform Rules of Court.

Department received notice of the application. Even if it did, it did not enter an appearance seeking to exclude its interest in the property thereby securing recovery of the losses it suffered. Both the Land Bank and the Department (the latter by way of concession) now effectively seek exclusion of their respective interests. I say this mindful of the fact that the Department nevertheless seeks return of the property so that it may be reallocated to beneficiaries in accordance with its policy.

[48] The procedural difficulty lies therein that the Land Bank seeks exclusion of its interest by twofold device i.e. an order that the forfeiture subject to the rights, bondholders and by *ex poste facto* authorising a disposal of the property contrary to the terms of the forfeiture order. Equally difficult is the position of the Department which in effect seeks a variation (seemingly including an authorized disposal of the property) without having framed a counter application.

[49] Notwithstanding these procedural issues, the forfeiture order in its present form must be varied not only to properly give effect to the provisions of **POCA** but also to facilitate the final resolution of the matter. That can be achieved, it seems to me, by rendering forfeiture subject to the rights of the bondholder as was sought. It can further be achieved by giving effect to s 57(1)(c), i.e. by authorising disposal of the forfeited property by sale or other means. To the extent that this conflicts with paragraph 5 of the existing order I have already stated that that order is in conflict with paragraph 1 and cannot, in the light thereof stand. Since both the Land Bank and the Department have established defined interests in the property such interests ought to be excluded from the forfeited property.

[50] In the case of the Land Bank, its interests (indeed its rights) consist in the judgment it holds against CPAD. That should be readily capable of valuation. In the case of the Department, its interests consist in the loss suffered in respect of the payment of LRAD grants. The papers in the preservation application (as referenced in this application) attach a value of R2. 68 million to that loss.

[51] That leaves the question of the interests of the proposed beneficiaries. As I understood it the Department seeks to protect that interest by return of the property so that it may be reallocated. Whether that can be achieved by settlement between the parties is a matter which is not precluded by the administration of the property in the hands of the curator *bonis*.

[52] The final aspect for consideration concerns the position of the second and third applicants. They intervened as applicants in support of the Land Bank's variation application and to secure the execution of the deed of sale by which they seek to purchase the property.

[53] Mr Buchanan argued that the deed of sale entered into by Timkoe, as curator, is of no force and effect since Timkoe, pursuant to paragraph 5 of the forfeiture order, had no authority to concluded such sale. Timkoe conceded this. Notwithstanding the fact that paragraph 5 of such order conflicts with paragraph 1 thereof it cannot be ignored. The plain meaning of the order is that Timkoe was not authorized to dispose of the property by sale or other means. Accordingly, effect cannot be given to the deed of sale concluded with the third applicant on behalf of

the second applicant. In the light of the order I propose to make, however, the disposal of the property by sale to the second applicant may yet occur.

[54] Finally, there is the issue of costs. In the light of the variation of the forfeiture order to exclude the established interests of both the Land Bank and the Department it must be found that the Land Bank, as applicant, enjoyed substantial success in the application. The exclusion of the Department's interest in the property does not alter that. However, both the Land Bank and the second and third applicants have not succeeded in securing a declarator regarding the deed of sale in respect of the property. In this respect, the Department successfully opposed the relief. In this respect, therefore, the second and third applicants were unsuccessful and they should pay the costs of the fifth respondent's opposition to said relief. It will be for the taxing master to determine such costs. Since both the Land Bank and the Department were partially successful an appropriate order will be that each bears their own costs.

[55] I therefore make the following order:

1. Paragraph 1 of the order of Majiki J dated 13 January 2015 is amended by the insertion at the end thereof the phrase "*subject to the rights of bondholders*".
2. Paragraph 5 of the order is hereby deleted and replaced with the following:

*"5. In terms of s 57 of **POCA** the curator bonis is authorized as of the date on which the forfeiture order takes effect, to perform all the powers and functions specified in the Act including the following:*

5.1 *To dispose of the property by sale, public auction or other means after due notice of the proposed disposal and the terms thereof having been given to the first applicant, and fourth and fifth respondents' attorneys and further subject to the conditions set out in paragraph 5A below.*

5.2 *After deduction of the curator bonis' fees and expenditure and further after deduction of all related and incidental costs and charges in respect of or relating to the sale and transfer of the property and in terms of the provisions of s 52(2) of the Act, to pay from the balance of the proceeds of the sale, if any, the following amounts:*

5.2.1 *to the first applicant and amount equal to the value of the first applicant's judgment as at the date of disposal of the property;*

5.2.2 *to the fourth respondent an amount equal to the value of the grant funds paid to facilitate acquisition of the property;*

*and thereafter to deposit the remaining balance of the proceeds, if any, into the Criminal Assets Recovery Account established in terms of s 63 of **POCA**.*

5.3 *To perform any ancillary acts which in the opinion of the curator bonis are necessary but subject to any directives of the Criminal Assets Recovery Committee, established under s 65 of the Act"*

3. Paragraph 5A is hereby inserted in the order:

"5A *In the event that the disposal of the property is for a purchase price in an amount less than the aggregate of the sums referred to in 5.2.1 and 5.2.2 above then in that event the sums paid to*

the first applicant and fourth respondents shall be in proportion to the sums set out in 5.2.1 and 5.2.2 above.”

4. The first applicant and fourth respondent shall each pay their own costs.
5. The second and third applicants shall pay the fourth respondent's costs occasioned by the opposition to the application, such to include the costs of two counsel.

JUDGE OF THE HIGH COURT

Appearances:

Obo the 1st Applicant: *Adv A. Beyleveld SC*

Instructed by *Greyvensteins Inc, 104 Park Drive, Port Elizabeth*

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Obo the 2nd and 3rd Applicant: *Adv T. Zietsman*

Instructed by *Schoeman Oosthuizen Inc, 167 Cape Road, Port Elizabeth*

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Obo the 4th Respondent: *Adv R.G. Buchanan SC / Adv A Desi*

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