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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **62601/2021**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 2 February 2023

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

and

TEMPLAR CAPITAL LTD

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

INTRODUCTION

[1] On 23 March 2022 the court granted a preservation order in terms of the provisions of section 38 (2) of the Prevention of Organized Crime Act, act 121 of 1998 (“POCA”) in respect of the following property:

1.1 all claims held by Templar Capital Limited (“Templar”) against Optimum Coal Mine (Pty) Ltd.

- [2] The applicant, the National Director of Public Prosecutions (“NDPP”), duly brought an application, in terms of the provisions of section 48(1) of POCA, for an order forfeiting the property identified in the preservation order.
- [3] The parties in the forfeiture application are *ad idem* that a forfeiture order should be granted, and the matter has been set down, in terms of section 50(1), for the court to consider whether such order should be granted.
- [4] At the commencement of the hearing, Griffin Line General Trading LLC (“Griffin”) brought an application for the postponement of the matter in order to afford Griffin an opportunity to file an application for leave to intervene.
- [5] I propose to consider the postponement application first.

POSTPONEMENT

- [6] In *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC), the Constitutional Court summarised the principles applicable to an application for postponement at 1112 C-G as follows:

“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into

account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.

[5] What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.”

[7] Bearing the aforesaid in mind, I turn to the merits of the application. I pause to mention, that the application is opposed by the NDPP.

[8] Griffen, a company incorporated in the United Arab Emirates, served the application for postponement on the evening prior to the hearing of the matter. Griffen’s attorney, Christiaan Frederick Krause (“Krause”), deposed to the affidavit in support of the application and stated the following in respect of the lateness of the application:

“ I learnt of the affidavits that were filed on Case Lines only on the 20th of January. ... It was only on Friday the 26th of January 2024 that I was informed that the matter was placed as a special matter before her Ladyship Mdme Jansen (sic!) van Nieuwenhuizen for the 30th..... I could only consult counsel and take instructions from my client on 29 January when I received the instructions to launch this application.”

[9] Curiously absent from the explanation is the source of Krause’s “information”. In the result, Krause’s expose fails dismally to comply with the requirement that “a full and satisfactory explanation of the circumstances that give rise to the application” should be provided.

[10] Insofar as the reason for the postponement is concerned, Griffin relies on an *"Injunction prohibiting disposal of Assets"* order that was granted *ex parte* by the Supreme Court of Bermuda on 16 September 2020. Templar is cited as the second respondent and the relevant portion of the order reads as follows:

"4. DISPOSAL OF ASSETS

Until further Order of the court, the Second Respondent must not-

- (1) Remove from Bermuda any of its assets which are in Bermuda up to the value of \$74 577,285; or*
- (2) In any way dispose of, deal with or diminish the value of his assets whether they are in or outside of Bermuda up to the same value."*

6. *The prohibition in paragraph 4 in relation to the Second Respondent's assets extends to the following assets in particular-*

- (1) TLC's interest, right, options and/or claims in and over Optimum Coal Mine (Pty) Ltd in business rescue proceedings in South Africa (OCM Claim);*
- (2) Any shares or any other interest whether held directly or indirectly by the Second Respondent in respect of any debt to equity conversion of the OCM Claim within the business rescue proceedings in South Africa and/or distribution related thereto including but not limited to shares in New OCM;*

19. Persons outside Bermuda

- (1) Except as provided in paragraph (2) below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.*

(2) *The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court;*

(i) *The Second Respondent or his officer or agent appointed by power of attorney;*

(ii) *Any person who-*

(A) Is subject to the jurisdiction of this court;

(B) ...

(C) ...

(iii) *Any other person, **only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.***” (own emphasis)

[11] Mr Louw SC, counsel for Griffin Line, emphasised during his address that the enforcement of the Injunction order is the sole reason for the postponement. The postponement will afford Griffin Line an opportunity to intervene in the forfeiture application in order to enforce the Bermuda court order. In the result, the enforcement will be an impediment to the forfeiture order sought by the NDPP in terms of section 50(1) of the POCA.

[12] The NDPP with reference to *Jones v Krok* 1995 (1) SA 677 AD pointed out that the Bermuda Injunction order is not, at this stage, enforceable in South Africa. The relevant passage in *Jones* appears at 685 B – C and reads as follows:

“As is explained in Joubert (ed) The Law of South Africa vol 2 (first reissue) para 476, the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided...”

- [13] A number of requirements, which is not for present purposes applicable, then follows.
- [14] Notwithstanding the lapse of a period of more than three years, Griffin has failed to date to take the necessary steps to enforce the Bermuda court order.
- [15] Without an enforceable court order, Griffin has no *locus standi* to intervene in the forfeiture application and the application for postponement stands to be dismissed.

FORFEITURE

Legal Framework

- [16] It is intrusive at this stage to have regard to the statutory requirements applicable to a forfeiture application.
- [17] Section 50(1) of POCA provides as follows:

*“50(1) The High Court **shall**, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned-*

(a) is an instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities.” (own emphasis)

- [18] Section 52 makes provision for the exclusion of interests in property.
- [19] Bearing the aforesaid requirements in mind, I now turn to the facts relied upon by the parties in support of the forfeiture order.

Facts

- [20] The facts set out *infra* are common cause between the parties. The facts are summarised in the heads of argument filed on behalf of the NDPP and I quote freely from the heads.
- [21] Between November 2016 and January 2018 Centaur Ventures Limited (“CVL”), CVL and Optimum Coal Mine (Pty) Ltd (“OCM”) concluded 13 contracts for the purchase and sale of coal (“the mining loan”). CVL made pre-payments for the coal in aggregated amount of R 2 038 021 322, 13. I pause to mention, that the claims arising from the pre-paid amount are now hold by Templar.
- [22] OCM was placed in business rescue on 19 February 2018. The business rescue practitioners recognised the pre-payments in respect of which OCM had not delivered coal as claims in the business rescue. The parties are *ad idem* that an amount of R 255 333 820, 89 of the aggregated amount, were the proceeds of crime as set out *infra*.

The Eskom MSA Payment to Trillian

- [23] McKinsey and Company Africa (Pty) Ltd (“McKensey”) concluded a six-month Master Services Agreement (“MSA”) with Eskom, in terms of which it would provide consultancy services to Eskom. Although Trillian Financial Advisory (“Trillian”) was not part of the agreement and did not do any consultancy work, it was nominated by Eskom officials as a BEE partner to McKinsey.
- [24] As a result, Eskom unlawfully and ostensibly under the MSA paid an amount R108 145 261 to Trillian. Trillian laundered the amount to CVL via Centaur Mining (Pty) Ltd (“Centaur”) as repayments of a mining loan between Centaur and Trillian. The amounts were utilised by CVL to pay OCM.
- [25] The unlawful amounts paid by Eskom to Trillian in terms of the MSA, were the source of the following payments by Trillian to Centaur which were on-paid to CVL and were utilised by CVL to pay OCM:

25.1 On 22 December 2016 Trillian paid an amount of R 50 000 000, 00 to Centaur, which was on-paid by Centaur to CVL on 30 December 2016 and provided the source for a payment of R 48 505 552, 25 by CVL to OCM on 5 January 2017;

25.2 On 11 January 2017 Trillian paid R 10 215 906, 00 to Centaur Mining which commingled with the on-payment to Centaur Mining of R9 400 000, 00 cutting edge “loan” repayment to Trillian to source a R20 000 000, 00 payment from Centaur Mining to CVL and provided the source for a R 20 000 000, 00 payment by CVL to OCM on 16 January 2017;

25.3 On 24 February Trillian paid R 27 000 000, 00 and on 27 February 2017 R 23 000 000, 00 to Centaur Mining, which provided for a payment of R50 000 000, 00 by Centaur Mining to CVL on 28 February 2017. The R 50 000 000, 00 was the source of a payment of R 39 639 709, 64 by CVL to OCM on 3 March 2017.

[26] In the full bench decision in *Eskom Holdings SOC Limited v McKensey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019), the payments by Eskom to Trillian in terms of the MSA were declared unlawful.

Trillian Fixed Deposit

[27] An amount of R 119 972 653, 64 was funded from the round tripped proceeds of a Trillian fixed deposit at the Bank of Baroda. The fixed deposit emanated from the following source:

27.1 Regiments Fund Managers (Pty) Ltd Capital (“RFM”) was appointed by the Transnet Second Defined Benefit Fund (“TSDBF”) to administer two asset portfolios with a combined value of R9 million. The appointment gave RFM access to TSDBF’s Nedbank account and RFM transferred monies from the account without lawful *causa* or consent from TSDBF.

27.2 an amount of R 160 000 000, 00 stolen by RFM from TSDBF was paid to the Bank of Baroda as a fixed deposit.

[28] After the fixed deposit was released by the Bank of Baroda, it was laundered from Trillian to CVL via Centaur as repayments of the Centaur mining “loan” to Trillian and then on to OCM in the guise of pre-payments for the supply of coal.

[29] Having had regard to the aforesaid facts, I am satisfied, on a balance of probabilities, that the amount of R 255 333 820, 89 is the proceeds of unlawful activities.

Amount to be forfeited

[30] The undisputed facts prove that only R 255 333 820, 29 of the total prepayments in the aggregated amount of R 2 083 413 562, was proceeds of crime. This represents 12,26% of the total prepayments.

[31] The CVL claims in the business rescue of OCM were recognised for voting purposes in the OCM business rescue plan at R 1 385 253 008,62. The actual monetary value of the CVL claims are, however, since the adoption of the OCM business rescue plan estimated at no more than 20% of R 1 385 253 008,62 because pre-commencement creditors of OCM who elected to be paid in cash, are entitled to a cash payment of only 20% of their claims.

[32] Furthermore and in terms of the OCM business rescue plan, the CVL claims are to be exchanged for equity in Liberty, to whom the assets, business, and compromised liabilities of OCM will be transferred. Taking into account that 43,79% of the value of the business of OCM has been forfeited in terms of an order in the case of *National Director of Public Prosecutions v Knoop N.O. and Others* (Gauteng Division, Pretoria, case nr 62604/2021) (1 February 2024), the value of the claims held by Templar falls to be reduced by 43.79%.

[33] Accordingly, a proportional order of forfeiture is a forfeiture amount of R19 031 376, 03 and such order will follow.

Costs

[34] The parties have agreed that Liberty Coal (Pty) Ltd will pay the NDPP's costs of R 4 million.

ORDER

The following order is granted:

1. The amount of R19 031 376,03 is declared forfeited under section 50(1)(b) of the Prevention of Organised Crime Act 121 of 1998 ("POCA").
2. Liberty Coal (Pty) Ltd is ordered to pay an amount of R19 031 376,03 into the Criminal Assets Recovery Account established in terms of sections 63 of POCA, Account number 8[...] held at the South African Reserve Bank, Vermeulen Street, Pretoria, within 10 days of this order being made.
3. Liberty Coal (Pty) Ltd shall pay the applicant an amount of R4 million in settlement of the applicant's claim for costs in the preservation and forfeiture applications under the above matter.

**N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
DIVISION, PRETORIA**

DATES HEARD:

30 January 2024

DATE DELIVERED:

2 February 2024

APPEARANCES

For the Applicant: Advocate M Chaskalson SC
Assisted by: Advocate M Sibande

Instructed by: Kunene Rampala Inc

For the Respondent: Advocate A Bham SC
Advocate P Stais SC
Advocate J Brewer
Advocate L Quillan

Instructed by: Tabacks Attorneys

Griffin Line: Advocate Louw SC

Instructed by: Krause Attorneys Inc