



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 18916/2022

In the application between:

WILLEM KLAASE N.O.

(In his capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

First Applicant

MARTHA KLAASE N.O.

(In her capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Second Applicant

MARGA KLAASE N.O.

(In her capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Third Applicant

WILBUR PAUL KLAASE N.O.

(In his capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Fourth Applicant

ALBERTO KLAASE N.O.

(In his capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Fifth Applicant

BRIAN PHILLIPUS KLAASE N.O.

(In his capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Sixth Applicant

ELTON SMITH N.O.

(In his capacity as trustee for the time being of the
WELBELOON BOERDERY TRUST IT1365/2008)

Seventh Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

First Respondent

HENDRIK VORSTER HATTINGH N.O.

Second Respondent

PETER MASKELL AUCTIONEERS CC

Third Respondent

**ANYONE WHO MAY HAVE BOUGHT THE FARM
KNOWN AS DE LA RAY FROM THE AUCTION**

Fourth Respondent

THE DEEDS REGISTRAR: CAPE TOWN

Fifth Respondent

In re:

In the application between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

WILLEM KLAASE N.O.

First Respondent

MARTHA MAGRIETHA KLAASE N.O.

Second Respondent

ALBERTO OSCAR KLAASE N.O.

Third Respondent

MARGA DIANA KLAASE N.O.

Fourth Respondent

WILBUR PAUL KLAASE N.O.

Fifth Respondent

BRIAN RUSSELL PHILLIPUS KLAASEN N.O.

Sixth Respondent

Date of hearing: 27 August 2024

JUDGMENT DELIVERED ON 9 OCTOBER 2024

GORDON-TURNER, AJ:

Introduction

1. This is Part B of an application by the six trustees (**the trustees**) of the Wellbeloon Boerdery Trust (**the trust**). In Part B, they seek an order in terms of section 53(3) of the Prevention of Organised Crime Act 121 of 1998 (**POCA**) rescinding the forfeiture order granted by default on

20 June 2024, in terms of section 48¹ read with sections 50 and 53² of POCA, for the forfeiture of an immovable property, being a farm situated in Piketberg, Western Cape (**the property**) held in the name of the trust.

2. The application is opposed by the first respondent, the National Director of

¹ **"48 Application for forfeiture order**

- (1) *If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.*
- (2) *The National Director shall give 14 days notice of an application under subsection (1) to every person who entered an appearance in terms of section 39 (3).*
- (3) *A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.*
- (4) *Any person who entered an appearance in terms of section 39 (3) may appear at the application under subsection (1)-*
 - (a) *to oppose the making of the order; or*
 - (b) *to apply for an order-*
 - (i) *excluding his or her interest in that property from the operation of the order; or*
 - (ii) *varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application."*

- ² Section 53 of POCA provides for forfeiture orders to be granted by default, and for variation or rescission of such default orders as follows:

"53 Forfeiture order by default

- (1) *If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 48 (1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who entered appearances in terms of section 39 (3) have knowledge of notices given under section 48 (2), the Court may-*
 - (a) *make any order by default which the Court could have made under sections 50 (1) and (2);*
 - (b) *make such order as the Court may consider appropriate in the circumstances; or*
 - (c) *make no order.*
- (2) *The High Court may, before making an order in terms of subsection (1), call upon the National Director to adduce such further evidence, either in writing or orally, in support of his or her application as the Court may consider necessary.*
- (3) *Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1) may, within 20 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court.*
- (4) *The court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate."*

Public Prosecutions (**NDPP**). The second respondent is the *curator bonis* appointed in terms of the preservation order (and subsequently in terms of the forfeiture order). The second, third, fourth and fifth respondents were joined to the application for purposes of the relief sought in Part A to interdict the transfer of the property pending the determination of Part B – which interdictory relief was granted on 23 April 2024. The second to fifth respondents did not participate in either part of the proceedings.

3. On 20 January 2023, prior to the grant of the forfeiture order, the NDPP was granted a preservation order, *ex parte*, in terms of Section 38 of POCA on the basis that there are reasonable grounds to believe that the property is ‘proceeds of unlawful activities’.³ The NDPP alleged that, in their application to the Department of Rural Development and Land Affairs (**the Department**) for the Land Redistribution for Agricultural Development grant (**the LRAD grant**), the trustees had acted unlawfully by making misrepresentations to the Department, resulting in the award of the grant to the trust. The award was applied, among other things, to the acquisition of the property.

³ The preservation application was based on section 38(2)(b) of POCA which provides:

“(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

- (a) ...;
- (b) is the proceeds of unlawful activities;
- ...”

Section 1 of POCA contains the definition:

“**‘unlawful activity’** means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.”

4. The subsequent forfeiture order was granted on the grounds that there was evidence on a balance of probabilities that the property was the proceeds of the trustees' misrepresentations.
5. Relying on section 48(2) of POCA and the fact that the trustees had not entered into an appearance in terms of section 39(3) to oppose the granting of a forfeiture order, the NDPP did not give the trustees notice of its forfeiture application. The forfeiture order was granted by default in the absence of the trustees.
6. The trustees contend that the wording of section 53(3) of POCA affords them the right to apply for rescission of the forfeiture order. That section provides that *"Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1) may, within 20 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court"*.
7. The applicants seek an order⁴ that:

"The forfeiture order granted by this court by default and in the absence of the applicants be rescinded, forthwith, to enable the applicants to file their opposing papers in the preservation and forfeiture applications for reconsideration of both the preservation order, and further adjudication of the forfeiture application, if necessary."

⁴ Notice of Motion, prayer 1.

8. The issues that require determination are:
 - 8.1. Do the trustees enjoy the right to apply for rescission in terms of Section 53(3) of POCA? ⁵
 - 8.2. Have the trustees made out a case for the grant of rescission?
 - 8.3. Are the trustees now entitled to have the preservation order reconsidered?

The preservation order

9. The preservation order granted on 20 January 2023 identified the property (giving its description as on the title deed), defined the prohibitions against dealing in any manner with the property, appointed the second respondent as *curator bonis* and defined his powers and duties, and made provision for persons holding an interest in the property to apply for payment of reasonable living expenses. The property being so preserved, and at risk of being forfeited to the state, was only the land and the improvements thereon. Farming implements and equipment and stock were not part of the

⁵ Section 47(3) of POCA, on which the trustees did not rely, also provides for rescission. That section provides:

- “(3)(a) Any person affected by an order in respect of immovable property may at any time apply for the rescission of the order.
- (b) A High Court which made an order in respect of immovable property:
- (i) may, if it deems it necessary in the interests of justice, at any time rescind the order; or
 - (ii) shall rescind the order if the relevant preservation of property order is rescinded.
- (c) If an order in respect of immovable property is rescinded, the High Court shall direct the registrar of deeds concerned to cancel any restriction endorsed by virtue of that order on the title deed of the immovable property, and that registrar of deeds shall give effect to any such direction.”

defined property.

10. Of importance to this rescission application, the preservation order:⁶
 - 10.1. Directed that the NDPP had to cause the notice of motion, supporting affidavits and the preservation order in prescribed form (collectively referred to as **the relevant process**) to be served by the Sheriff on the first to sixth applicants, and, as soon as practicable after grant of the preservation order, to publish it in the prescribed form in the Government Gazette;
 - 10.2. Provided that *“Any person who has an interest in the property and who intends opposing the application for an order forfeiting the property to the State or applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance to defend in terms of section 39(3) of the POCA.”*;
 - 10.3. Provided that such notice of intention to defend must be delivered to the NDPP, in the case of any person identified for service in terms of the order (i.e. the first to sixth applicants), within 14 calendar days of service, and for any other person, 14 calendar days after publication of the order in the Government Gazette.
11. The Sheriff’s returns of service⁷ reflected that he served the notice of motion, supporting affidavits and the preservation order (collectively

⁶ Record in the forfeiture application, page 384.

⁷ Record in the forfeiture application, pages 388 to 391.

referred to as **the relevant process**) upon the first to sixth applicants at two addresses in Vredenburg and one in Saldanha on 16 and 17 February 2023 handing a copy of the relevant process to “*ms M Wilschutt, Tenant*”, “*ms S Jordaan, Sister-in-law*” and “*ms E Titus, Occupant*”.

12. The Sheriff's returns of service do not state that he explained the nature and exigency of the relevant process to Mesdames Wilschutt, Jordaan and Titus. This may be explained by the fact that the notice of motion and founding affidavits run to 348 pages, and the preservation order is 10 pages in length.
13. On 24 February 2023, the NDPP caused a notice in terms of section 39 of POCA advising of the preservation order to be published in the Government Gazette No. 48105.
14. The first applicant explains that during the period that the preservation order was secured and served, the applicants were involved in civil litigation concerning the property instituted by the Special Investigating Unit (**SIU**), represented by the State Attorney. The applicants were represented in that litigation by Blackburn Attorneys in Paarl.
15. The application for the preservation order included a supporting affidavit by a senior special investigator in the Asset Forfeiture Unit (**AFU**) of the NDPP, Mr Ricardo Rhoda (**Rhoda**). Rhoda explained that one of his duties is to liaise with other law enforcement agencies, including the SIU regarding cases involving the implementation of chapters 5 and 6 of POCA. He set

out details of the SIU's investigation into the grant awarded by the Department to the trustees. He concludes that the acquisition of the property was fraudulent, and for the sole benefit of a limited number of individuals including the first and sixth applicants.

16. Upon receipt of the relevant process from Mesdames Wilschutt, Jordaan and Titus, the applicants referred the papers to Blackburn Attorneys for advice.
17. During March 2023, while the applicants were awaiting advice from Blackburn Attorneys, the *curator bonis* and an auctioneer (of the third respondent) visited the property and inspected it. The *curator bonis* showed the first applicant his letters of curatorship and explained that he was in control of the property. The first applicant contends that he informed the applicants that they need not worry, that they could continue their farming activities as usual and he would return in due course. The *curator bonis* did not return to the property. These allegations were baldly denied.
18. As required in terms of paragraph 14 of the preservation order, on 6 April 2023, the *curator bonis* delivered an interim report to the Registrar of the High Court, to the Master and to the AFU, in which he recommended that 'the Respondent' (which is understood as a reference to the trust or the trustees) remain in residence on the property and carry on farming activities, that 'the Respondent' was to ensure that the property was adequately maintained and insured and that the rates and other municipal expenses relating to the property are continuously paid up to date. He had

asked the Registrar of Deeds in Cape Town to record the conditions of the preservation order against the title deed of the property.

19. None of the applicants delivered notice of appearance to defend.

Events after service of the preservation order

20. On 4 May 2023, the NDPP launched the forfeiture application, without giving any notice to the applicants. The forfeiture order was granted in their absence on 20 June 2023, in terms of section 53(1) read with section 50 of POCA.
21. On 11 July 2023, the applicants were arrested on fraud charges and taken to police holding cells. The first applicant explained that his son, Hamilton Klaase (**Hamilton**), contacted Blackburn Attorneys on their behalf. According to the first applicant, Hamilton advised the applicants that Blackburn attorneys had responded to him that they could not assist the applicants as they do not deal with criminal cases. Neither Hamilton nor any attorney at Blackburn Attorneys deposed to a confirmatory affidavit.
22. The first applicant further explained that the applicants were then represented by an attorney from Legal Aid South Africa in their bail applications, and were released on R3000 bail each. The criminal case was transferred to the Specialised Commercial Crimes Court in Bellville (**SCCC**) for an appearance on 17 July 2023. The applicants appointed attorney Martin Green (**Green**) of Andre Reid Attorneys to represent them in the criminal case. Green is their attorney of record in these proceedings.

23. The first applicant contends that the applicants were unaware at all times that the preservation order and the relevant process that had been served on them were connected with a criminal case – this position is maintained regardless of the express and repeated reference throughout the preservation order to POCA, and despite the facts that the applicant cited in the order is the NDPP, and that there is express reference in the supporting affidavits to fraud on the part of one or more of the applicants.
24. During the applicants' first consultation with Green in mid July 2023, they furnished him with the relevant process served by the Sheriff in February 2023. They reported to Green that Blackburn attorneys, who also had copies of the relevant process, had not reverted to them with any 'update'. Green had a 'quick glance' at the papers and afforded his view that the "*purpose of the preservation application papers appears to be to preserve the farm pending the outcome of the criminal case*". He asserted that the preservation application was not part of his mandate as he had been appointed to represent the applicants in the criminal case only. Green deposed to an affidavit confirming the contents of the first applicant's founding affidavit "*insofar as they relate to me*". Neither affidavit explains why no steps were taken to apply for rescission of the preservation order under section 47(1) of POCA, nor why Green, who is the attorney of record for the applicants in the present rescission application, now has a mandate in regard to the POCA proceedings whereas he had none previously.
25. The first applicant explained that "*in view of Green's tentative opinion and*

advice and non-response from Blackburn Attorneys", the applicants took no further steps.

26. Green continued to represent the applicants in the criminal proceedings in the SCCC, which were postponed for trial until June 2024. Both Green and the applicants, so they say, had the impression that the preservation of the property was linked to the conclusion of the criminal proceedings⁸ – this impression appears to be the pretext for remaining supine about a potential forfeiture order, as the criminal proceedings were not then imminent. However, this alleged 'impression' is inconsistent with the first applicant's contention that the applicants were unaware at all times that the preservation order was connected with a criminal case.
27. The applicants' purported misapprehension about the import of the preservation order simply does not bear the test of scrutiny. The preservation order had attached to it an annexure "**B**" headed "*Notice in Terms of Section 39 of the Prevention of Organised Crime Act, 121 of 1998 (POCA)*". The notice was addressed to all persons who may have an interest in the property which was described in detail in the annexure. Those persons were cautioned that if they have an interest in the property they should understand that it is "*now at risk*". They were advised to obtain legal advice on whether their interest could be protected and, if so, on how

⁸ This view is mistaken: a forfeiture order (following upon a preservation order) can be obtained even if no crime is in issue. Section 50(4) of POCA provides that "*The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.*"

to protect it. The notice further alerts the reader that the NDPP would apply to this Court within 90 days of publication of the notice for a forfeiture order and that if they intend to oppose the application for a forfeiture order or to apply for an order excluding their interest from a forfeiture order, they must enter an appearance in terms of the order, failing which, they would not be given notice of the application for the forfeiture order or entitled to appear at the hearing, and in such a case, the Court may grant a default order forfeiting the property to the State under section 53 of POCA.

28. Even if Green neglected to explain the foregoing to the applicants (he does not say so in his confirmatory affidavit), then the other attorneys retained by the applicants, namely Blackburn Attorneys in Paarl, were in a position to advise the applicants on the import of the preservation order. Those attorneys were already alive to the role played by the SIU to which, as explained above, extensive reference was made in the founding papers for the preservation order. Blackburn Attorneys knew that the SIU civil litigation concerned the property. If no advice on the order had been given to the applicants, then the Court would have expected the applicants to file an affidavit from the responsible attorney at Blackburn Attorneys confirming that fact, but this was not done.
29. On 28 February 2024, the applicants learned from Hamilton, who was working as a manager on a neighbouring farm, that the property had been advertised for sale on auction.
30. The applicants instructed Green to investigate. The next day,

29 February 2024, Green contacted the *curator bonis* who apparently confirmed that an advertisement for sale by auction existed, but did not provide a copy as promised. On 7 March 2024, Green contacted the auctioneers mandated to arrange the public auction for the sale of the property (third respondent), who supplied a copy of the advertisement. Green reported back to the applicants on the same day. The first applicant maintains that the applicants and Green did not know the basis of the sale as they had only the preservation order. As the preservation order clearly spelt out the NDPP's intention to apply for a forfeiture order in relation to the property, the purported failure to make any connection between a forfeiture order and the sale of the property is remarkable.

31. Green endeavoured on 11 March 2024 to procure an undertaking to postpone the sale of the farm pending the outcome of the criminal case, which was refused by the NDPP. The applicants then applied to interdict the auction of the farm. Their application was dismissed on the grounds of self-created urgency, and because this rescission application had not yet been instituted.
32. The applicants contend that they only acquired actual knowledge of the existence of the forfeiture order which had been granted on 20 June 2023 during the hearing of the interdict proceedings on 13 March 2024. The NDPP's legal representatives provided a copy of the forfeiture application and the forfeiture order to the applicants' legal representatives that day.
33. The present application was instituted on 22 March 2024, that is within 20

days of the date upon which the applicants allege they acquired actual knowledge of the forfeiture order.

34. The applicants contend that, had they received full advice from Blackburn Attorneys, and had Green not misconstrued the effect of the preservation order when advising them in July 2023, they would have known of the [risk of a] forfeiture order earlier and would have instituted the rescission application at an earlier time.

The relief sought under section 53(3)

35. There is a paucity of reported cases concerning rescissions under section 53(3) of POCA. I intend to follow the approach of Miller J in the matter of *Hoffman v NDPP*,⁹ in which the learned judge held:

“[7] This application is obviously brought in terms of Section 53(3) of the Act which provides for the rescission or variation of forfeiture orders granted by default. Section 53(4) of the Act provides that the Court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate.

[8] Section 53 falls within Chapter 6 of the Act. Section 37(1) of the Act provides that all proceedings under Chapter 6 of the Act are civil proceedings. Section 62 of the Act makes the provision of the Uniform Rules of Court insofar as they are not inconsistent with the provisions of the Act applicable to

⁹ [2010] JOL 25001 (Tk) at paragraphs [7] to [9].

See also *Stemele and Another v National Director of Public Prosecutions* (3428/2015) [2017] ZAECPHC 44 (14 September 2017) at paragraph [15].

proceedings under Chapter 6 of the Act. I can think of no good reason why the phrase 'upon good cause shown' as used in Section 53(4) of the Act should be interpreted any differently from the way such phrase has been interpreted in relation to the rescission of default judgments in terms of rule 31(2)(b) of the Uniform Rules of Court.

[9] *In Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7 it was held that the applicant in an application for rescission must:*

- (a) give a reasonable explanation of his/her default and that if it is shown that his/her negligence was wilful or due to gross negligence the Court should not come to his assistance;*
- (b) the applicant must be bona fide and not merely intending to delay; and*
- (c) must show that he/she has a bona fide defence."*

36. Before deliberating whether these criteria have been met, there are two issues that require consideration. First, the NDPP argued that the applicants had failed to apply for condonation by their failure to bring the rescission application within 20 days from the date upon which they acquired knowledge¹⁰ of the forfeiture order, that is, 20 calendar days from 13 March 2024. The founding affidavit in this rescission application was deposed on 19 March 2024 and the papers appear to have been issued the same day. Accordingly, this application was launched within the 20 day period contemplated by section 53(3). The need to condone late filing of

¹⁰ This judgment assumes in favour of the applicants that actual knowledge is required, and constructive knowledge would not suffice. The possibility of constructive knowledge was not canvassed in the affidavits or in submissions by the parties' respective counsel.

the rescission application therefore does not arise. That is not to say that the trustees are relieved of their obligations to explain their default of appearance at the forfeiture application, and to show that, at least *prima facie*, they have prospects of success in defending the grant of a forfeiture order, if given an opportunity for it to be reconsidered.

37. The second issue raised by counsel for the applicants was whether the legislature intended to limit the right to apply for rescission of the default forfeiture order in terms of section 53(3) only to persons who filed a section 39 notice after being served with the preservation order and its accompanying application papers (which the present applicants did not do). Mr Titus submitted that the use of the words "*any person*" in section 53(3) clearly indicates that the legislature intended the provisions of this subsection to apply to all persons whose interests are affected by the default forfeiture order which was granted in their absence, and that the fact that the applicants in this matter were served with the preservation order does not deprive them of this right. The NDPP did not raise an express challenge to the applicants' *locus standi* in respect of section 53(3) of POCA: their point was framed as one of failure to seek condonation, which I understood to mean a failure to afford a reasonable explanation for the trustees' default of appearance at the hearing of the forfeiture application. While Mr Titus' submissions on the interpretation of section 53(3) of POCA are persuasive, I do not consider it necessary to make a finding thereon. Instead, I assume in favour of the trustees, that they enjoy standing, and focus instead on the extent to which they have satisfied the requirements for a rescission order.

Explanation for default

38. The applicants contend that the forfeiture order was granted in their absence by reason of the following:

38.1. The NDPP did not serve the forfeiture application papers upon them to enable them to exercise their right to appear at Court on the date of the hearing as contemplated in section 53(1). This submission may have had some force if the applicants were ignorant of the preservation order. That is not the case. The preservation order was duly served and pertinently alerted the applicants to the risk that a forfeiture order could be granted. Furthermore, the statutory provisions permitted the NDPP to dispense with serving the forfeiture application papers upon those persons, such as the applicants, who did not enter appearance to defend after receiving the preservation order.

38.2. The applicants complain that the Sheriff and the curator *bonis* did not explain the nature and exigency of the preservation order to them and that there was no personal service of the preservation order. On the latter issue, personal service was not required, and the form of service effected by the Sheriff complied with Uniform Rule 4(1)(a)(ii).¹¹ The complaint about explaining the preservation

¹¹ Section 62(2) of POCA makes the provision of the Uniform Rules of Court insofar as they are not inconsistent with the provisions of the Act applicable to proceedings under Chapter 6 of the Act.

order is neutralised by the first applicant's evidence that the applicants furnished copies of the preservation order and the preservation application papers to their two sets of attorneys. There is no evidence that the applicants addressed any questions to the curator *bonis* about the import of the preservation order or that he failed to satisfy their queries. There is no merit in this complaint.

38.3. The applicants complained that there was no citation of the trustees in the preservation application and the preservation order. It is correct that the headings to the papers in the preservation application cite only the NDPP as the applicant in those *ex parte* proceedings. However, it is not correct that the preservation order does not cite the applicants / trustees. Paragraph 17 of the preservation order specifically provides that the NDPP had to cause the sheriff to serve upon each of them, for which purpose their names and addresses were specified in the order.

38.4. Finally, the applicants complain they did not receive the expected

Uniform Rule 4(1)(a)(ii) provides:

- "4(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph(a) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
- (i) ...;
 - (ii) *by delivering a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like to the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, 'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected,"*

assistance or guidance from Blackburn Attorneys and therefore could not engage with the contents of the preservation order and the accompanying application. This complaint is not compelling, for reasons set out below.

39. The common law requires 'sufficient cause' to be shown before a default judgment may be set aside. The phrases 'good cause' and 'sufficient cause' have been held to be synonymous and interchangeable.¹²
40. The absence of 'wilful default' does not appear to be an express requirement under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause.¹³
41. Wilful default is characterised by indifference as to what the consequences would be rather than of wilfulness to accept them.¹⁴ In this regard Murray CJ states:

"A defendant may be most unwilling to suffer a judgment to be entered against him and the consequences of such a judgment are such that he cannot in fact be indifferent to them, particularly if (as in the present case) he has placed a plea and counterclaim on record.

¹² *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H - 353A.

¹³ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at para [6] (full bench).

¹⁴ *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 173A.

The true test, to my mind, is whether the default is a deliberate one - ie when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing."

42. Moseneke J expressed it as follows:¹⁵

"[8] Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.

[9] A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist."

(my underlining)

43. The narrative of events set out further above renders the applicant's explanation for their default in appearing at the hearing of the forfeiture

¹⁵ *Harris v Absa Bank Ltd t/a Volkskas* supra, at paras [8] and [9].

application unsatisfactory. It amounts to this: *"We knew about the preservation order served upon us, but two sets of attorneys neglected to advise us to oppose the forfeiture application"*.

44. Mr Titus, counsel who appeared on behalf of the trustees, submitted that they had relied on their lawyers for expert guidance, that POCA proceedings are complex and specialist in nature, that the evidence was that Blackburn Attorneys did nothing to assist, and Green struggled to comprehend the issues. Counsel submitted that the applicants were not sophisticated and should not be punished for the ineptitude or negligence of their attorneys.

44.1. I am not persuaded by counsel's characterisation of the applicants. The main protagonist at all times has been the first applicant, the second to sixth applicants being members of his immediate family who apparently benefitted from the steps he took on their behalf.

44.2. The first applicant was sufficiently knowledgeable to put in motion the process to obtain the LRAD grant, including appointing one Ralph Damonse (**Damonse**), a business planning agent, to assist the trustees.

44.3. The SIU procured an affidavit from the first applicant during an interview held on 27 May 2015, a copy of which was attached to the preservation application papers. In that affidavit he describes his attempts during 2006 to apply for funding for a different farm but later he heard about the property becoming available.

Correspondence addressed to him by the Department concerning his earlier unsuccessful application was attached to the preservation application papers.

- 44.4. In his 2015 affidavit the first applicant states that he was given Damonse's details and contacted him. The applicant addressed a businesslike letter on a trust letterhead to Damonse on 19 November 2007 appointing him as facilitator and business planning agent for the trust's land project. The letter of appointment spelled out seven tasks assigned to Damonse, including ensuring that the trust's application and business plan complied with the Department's requirements.
- 44.5. The first applicant stated in his 2015 affidavit that he approached 135 different people to join in the application for the LRAD grant. When it became expedient to do so, he persuaded some of them to resign to facilitate the approval of the grant. He attended the meetings convened by Damonse regarding the development of the business plan which would form part of the application for the grant. Once he started farming on the property, he sold certain substandard farming implements. He subsequently established a company with his neighbour called "*Welbeloon Potatoes (Pty) Ltd*" which plants potatoes and sells them to Simba.
- 44.6. Based on the contents of his own affidavits, the first applicant is demonstrably literate, intelligent, resourceful, accomplished in

organisational skills, and commercially astute.

45. It is difficult to accept that the first applicant did not understand the caution in the preservation order to enter an appearance to defend. However, it remains possible that, absent legal advice, he and the other applicants did not appreciate the legal consequences of their actions in failing to do so.
46. At all relevant times, the applicants were represented by at least one set of the two firms of attorneys. No confirmatory evidence has been adduced from Blackburn Attorneys concerning their alleged failure to advise the applicants, or regarding any possible misunderstanding of the process. It would have been astounding had they so attested given that Blackburn Attorneys are or were representing the applicants in defending an action brought on or about 1 June 2017 under WCHC case number 9724/17 by the SIU (**the SIU action**).
- 46.1. In the SIU action the plaintiffs are the SIU and the Minister of Rural Development and Land Reform (**the Minister**), and the defendants are the six applicants in this application, plus Damonse.
- 46.2. The plaintiffs pray for orders setting aside of the award of the LRAD project grant to the trust, alternatively an order declaring the award to be invalid, as well as orders for payment of the sum of R6 323 940.00 and interest thereon.
- 46.3. The particulars of claim set out that the SIU, authorised by virtue of Proclamation R8 of 2011 published in Government Gazette 34031

dated 18 February 2011 (**the proclamation**), conducted an investigation of the LRAD Project grant to the trust. In February 2016, based on evidence obtained during its investigation, the SIU concluded that the six applicants in this matter (the first applicant and his five family members) were the only real beneficiaries of the LRAD Project grant and that the other 44 applicants / beneficiaries would play no active or direct role in the founding operations.

46.4. Those beneficiaries simply constituted a “*rent-a-crowd*”, which was included in the business plan submitted to the Department for the sole purpose of persuading the Department to approve the grant and to increase the amount of the grant by an additional R4 890 688.00.

46.5. Contrary to what was alleged in the business plan, most of the 44 beneficiaries had no intention of working on the farm, and/or had alternative employment and would not have been able to work on the farm, and/or would not have been able to work on the farm as they were not staying near the farm and had no transport to get to it. Furthermore, save for the six trustees, almost all the other applicants / beneficiaries had no previous experience of farming. They were housewives, pensioners, and/or people who were unfit to work on a farm, and/or people working as general workers in other industries, and/or people who worked as drivers or in workshops. Very few of the other applicants or beneficiaries were

ever involved in small scale farming or commercial farming, or came from a history or background of farming activities involving subsistence farming, or had any particular work experience in the agricultural sector and/or relevant experience necessary to successfully conduct farming activities. Some beneficiaries were employed as government employees or employees at public entities and were therefore disqualified from being applicants / beneficiaries of an LRAD Project grant.

- 46.6. It was never intended that the other applicants or beneficiaries would contribute in the form of their own labour (*"sweat equity"*). False 'sweat equity' records had been submitted to the Department to create an impression of such contributions.
- 46.7. These misrepresentations, so it is alleged in the pleadings, were known by the trustees to be false and untrue and were made with the intention to induce the Department to award the LRAD Project grant, without any belief in their truth, and/or recklessly and carelessly.
- 46.8. In summary, the plaintiffs in the SIU action aver that the LRAD Project grant awarded to the Trust was occasioned by fraudulent misrepresentations, alternatively was occasioned by negligent misrepresentations, contrary to the legal prescripts and stipulations contained in the Land Reform – Provision of Land and Assistance Act 26 of 1993 (**the LRLA Act**) and the LRAD programme.

47. The pleadings in the SIU action are in the possession of the applicants' attorneys, Blackburn Attorneys, as they represent the applicants. The allegations in the pleadings regarding misrepresentations made by the applicants were echoed in the founding papers for the preservation order – which the applicants provided to both their sets of attorneys.
48. I have reservations about accepting that the trustees' explanation of their default is satisfactory. Their failure to enter an appearance to defend once the preservation order was served upon them is attributed to what appears to be inexcusable incompetence on the part of two firms of attorneys, one of which was engaged in civil litigation pertaining to the property directed at setting aside the award that enabled the trust to acquire the property (the SIU action), and the other in criminal litigation pertaining to fraud, also related to the property. It is difficult to regard their explanation as reasonable. As Jones AJA put it, with reference to other Appellate Division authority, in *Colyn v Tiger Food Industries Ltd trading as Meadow Feed Mills (Cape)*:¹⁶

“... While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development).¹⁷ Even if one takes a benign view the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which

¹⁶ 2003 (6) SA 1 (SCA) at paragraph [12].

¹⁷ 1965 (2) SA 135 (A).

has not merely some prospect, but a good prospect of success
(*Melane v Santam Insurance Company Ltd*).¹⁸

49. A caution has also been sounded by Miller JA in *Chetty v Law Society, Transvaal*.¹⁹

“... But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the appellant’s explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant’s prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof.”

50. In fairness to the applicants / trustees, and notwithstanding my grave reservations about their explanation for default of appearance, I intend to consider the defences that they indicated would be mounted against the forfeiture application, should they be afforded an opportunity to file full papers in opposition thereto as prayed.
51. I am mindful that while the applicants must show that they have a substantial defence, they are not required to show a probability of success; they need only show that they enjoy a *prima facie* case or that there are triable issues. They are not required to deal fully with the merits, but the grounds of defence must be set out with sufficient detail to enable the court

¹⁸ 1962 (4) SA 531 (A) at 532C-F.

¹⁹ 1985 (2) SA 756 (A) at 769D.

See also *Harris v Absa Bank Ltd t/a Volkskas* supra, at 532 H to I.

to conclude that there is a *bona fide* defence.²⁰

52. The applicants contend that they have three *bona fide* defences for purposes of these proceedings:

52.1. The material non-disclosure of a fact which should have been disclosed in *ex parte* proceedings;

52.2. The special defence of *lis alibi pendens*; and

52.3. A defence against the merits of the allegations of misrepresentation in their application (i.e. to the Department for the LRAD grant).

Alleged material non-disclosure and the defence of *lis alibi pendens*.

53. It is convenient to consider these defences together, as both pivot on the fulcrum of the SIU action.

54. In regard to the alleged material non-disclosure and breach of the *uberrimae fides* rule, the trustees allege that prior to institution of the preservation application, the SIU and the Department had already instituted a civil action for the recovery of funds allegedly derived from unlawful activities committed by the applicant, and had obtained an interim interdict restraining and prohibiting the applicants from encumbering and disposing of the property. The trustees complain that the NDPP failed to disclose these facts in the *ex parte* preservation application, and submit that this a

²⁰ *Sternele and Another v National Director of Public Prosecutions* supra, at para [19].

material non-disclosure and that it vitiates the preservation order rendering it susceptible to being rescinded *mero motu*.

55. The civil action in question is the SIU action referred to above.
56. The interim interdict in question was sought by the SIU and the Minister on or about 11 August 2017 under WCHC case number 14408/2017. The relief sought was a *rule nisi* pending a return day calling upon the six trustees (who are also the defendants in the action), to show cause why an order should not be made pending the finalisation of the action 'to be instituted' from directly or indirectly encumbering, alienating, selling, transferring or disposing of the property, and calling upon the Registrar of Deeds to show cause why it should not be interdicted and restrained from giving effect to such orders. Neither party dealt with the fate of the interim interdict proceedings, and no more can or need be said about them, save that if such interdict remains in force, it was complemented by the terms of the preservation order.
57. The applicants submit that the NDPP's failure to allude to the SIU action (and the related interdict proceedings) is a breach of the duty upon an applicant in *ex parte* proceedings, who bears a duty of utmost good faith to disclose all material facts within his knowledge which may influence the court in making its decision, and that once an order is made where material facts have been kept back, whether wilfully or *mala fide* or negligently which might have influenced the decision of the court whether to make a decision of not, the court has a discretion to set the order aside with costs on the

grounds of non-disclosure, which discretion does not compel dismissal or setting aside of the application even if the non-disclosure was material.²¹

58. The applicants contend that the cause of action in the SIU action is alleged fraudulent misrepresentation by the first applicant, which they state to be the same cause of action in the forfeiture proceedings. They submit that the purpose of the forfeiture order and the SIU action is the same, namely, to recover monies disbursed by the Department. They submit that the special defence of *lis alibi pendens* is available to them against the NDPP for prosecution of both the preservation and the forfeiture applications, that the State should not be permitted to do forum shopping while there are pending proceedings, just to frustrate them, and that the institution of the preservation and forfeiture applications is an abuse of process. The applicants submit that the SIU action, having been instituted first, must be adjudicated before the forfeiture application – and that this did not occur because the NDPP failed to disclose to the court the existence of the SIU action which “*is based on the same facts as the current proceedings.*”

²¹ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348 F to H.

And see:

Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma and Another v NDPP and Others 2009 (1) SA 1 (CC) at paragraph 102;

National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) at para [21];

NDPP v Braun, unreported judgment of the WCHC, Case no 220/2006, delivered on 20 September 2006, in which Traverso DJP set aside a preservation order by reason of a material non-disclosure in an *ex parte* preservation application;

And see the judgment of Bozalek J when the NDPP successfully applied on notice for the same relief, in *NDPP v Braun and another* 2007 (4) SA 72 (C).

59. The NDPP observed that Chapter 6 of POCA provides for a two stage process to forfeit property to the state. By operation of section 48(1) of POCA,²² an application for a forfeiture order can only be made if a preservation of property order is in place in regard to that property – this is the first stage. Section 40 of POCA provides that the preservation order expires 90 days after its publication in the Government Gazette unless an application for a forfeiture order is pending in respect of the property subject to the preservation order, or unless there is an unsatisfied forfeiture order in force, or unless the preservation order is rescinded before the period expires. The application for a forfeiture order must perforce be brought before the expiry of the 90 day period – this is stage two. Stage one is generally brought *ex parte*; stage two is not brought *ex parte*, but an order may be granted by default pursuant to section 53 of POCA. Stage two affords the Court an opportunity to consider any relevant additional or new material. If the forfeiture order is being sought by default, the Court may grant such an order, but it also enjoys the discretion to make such order as the Court considers appropriate in the circumstances or to make no order.²³ In a sense, the hearing of the forfeiture application operates as a ‘return day’ of the preservation order.
60. It is common cause that the existence of the SIU action and of the interim interdict was not made known to the Court²⁴ hearing the preservation application. The NDPP explained that the non-disclosure arose because

²² The wording of section 48(1) appears in footnote 1.

²³ The wording of section 53 appears in footnote 2.

²⁴ Ralarala AJ.

at the time the preservation application was instituted on 9 November 2022 the NDPP was not aware of the SIU action, and that it only came to the NDPP's attention shortly before the filing of the forfeiture application.

61. However, on the 'return day', i.e., when the forfeiture application was heard before Henney J, the NDPP disclosed the existence of the SIU action by way of a detailed practice note from its counsel dated in April 2023, to which the summons and particulars of claim in the SIU action were attached. The Court's attention was directed to the relief sought in the SIU action. Counsel for the NDPP, Mr Getye (who appeared in this rescission application also), submitted in his April 2023 practice note that the relief sought in the SIU action is a claim *in personam* sounding in money, while the relief sought in the section 48 proceedings is a claim *in rem* for forfeiture of the property to the State.
62. Mr Getye reported in the said practice note that the legal representatives of the plaintiffs in the SIU action (the State Attorney) had advised that if the section 48 forfeiture order was granted, the SIU action would be withdrawn, hence no prejudice would be suffered by the respondents (who are the applicants in this rescission application). However at the hearing of this application, both Mr Titus and Mr Getye advised me that the SIU action is set down for hearing on 17 October 2024.
63. Regarding material non-disclosure in *ex parte proceedings*, the learned

authors Ndzengu and Von Bonde have pointed out²⁵ that the original rule as developed in *Schlesinger*²⁶ was developed by the SCA²⁷ by adding two additional aspects, namely the reasons for non-disclosure and the consequences of setting aside the provisional order.

“[29] It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.”

64. To my mind, the first issue to be considered is whether the non-disclosure was material. The applicant's case, in effect, is that the non-disclosure was material because it concealed from the Court (Ralarala AJ) that the applicants were able to raise the dilatory defence of *lis alibi pendens*.

65. Wallis JA explains²⁸ the plea thus:

“As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated

²⁵ *The Duty of Utmost Good Faith in Asset-Forfeiture Jurisprudence – Some Lessons to Learn* Obiter, 2013 at 384 to 385.

²⁶ See footnote 21.

²⁷ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para [29].

²⁸ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) at para [2].

elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions."

66. The three requirements for a successful reliance on a plea of *lis pendens* are that the litigation is between the same parties; that the cause of action is the same; and that the same relief is sought in both.²⁹ Regarding the requirement of 'same parties', a defendant can raise the plea of *lis pendens* even though it is the plaintiff in the other proceedings on which the plea is based.³⁰ As for the requirement of the same cause of action, this could be relaxed if the circumstances justified doing so, such as when the central issue would be the same in both proceedings.³¹ Similarly, the requirement that the relief claimed has to be the same could be relaxed where the circumstances supported doing so, each case depending on its own facts.³²
67. Counsel for the applicants submitted that although the plaintiffs in the SIU action (the SIU and the Minister) differ from the applicant in the forfeiture application (the NDPP), they are all organs of state, and accordingly the same party – the State – is litigating against the applicants in both matters (both of which are civil³³ matters).

²⁹ *Ibid* at para [12].

³⁰ *Ibid* at para [23].

³¹ *Ibid* at para [24].

³² *Ibid* at paras [21 to [22].

³³ Section 37(1) of POCA provides that Chapter 6 forfeiture proceedings are civil not criminal.

68. Amorphously categorising these litigants as 'the State' is an oversimplification in my view.

68.1. The SIU's standing in the SIU action derives from Section 4(1)(c) of the Special Investigating Units and Special Tribunals Act 74 of 1996.³⁴ The Minister's standing in the SIU action is a function of the fact that the Department, which falls under his authority, disbursed sums to the trust by reason of the misrepresentations made to it.

68.2. The NDPP's standing in the forfeiture application derives from its mandate under Chapter 6 of POCA, which affords the NDPP exclusively the standing to bring Chapter 6 proceedings, the purpose of which is articulated in the preamble to POCA:

"AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which

³⁴ **"4 Functions of Special Investigating Unit**

(1) The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1)-

(a) ...;

(b) ...;

(c) to institute and conduct civil proceedings in a Special Tribunal or any court of law for-

(i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;

(ii) any relief relevant to any investigation; or

(iii) any relief relevant to the interests of a Special Investigating Unit;"

is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.

69. There is an overlap in the issues to be decided or that have been decided in the SIU action and in the forfeiture application respectively. Both require findings to be made regarding alleged misrepresentations by the trustees to the Department and how these influenced the Department to act. The NDPP needed also to persuade the Court, on a balance of probabilities, that the trust derived, received or retained the farm from or in connection with the fraudulent activities of the first applicant and/or second to sixth applicants, i.e. that the property is the proceeds of unlawful activities namely the fraud perpetrated by the applicants.
70. There is no dispute that the property was acquired by means of the grant awarded by the Department. There is no dispute that the grant was awarded pursuant to representations made by the trustees in its application and business plan submitted to the Department.
71. The dispute turns on the truthfulness of the representations so made. That issue, it seems to me, is the same in both sets of proceedings.
72. This brings me to the question if the relief sought is the same, or if this is a case where the 'same relief' requirement of a *lis pendens* plea should be relaxed.
 - 72.1. The SIU and the NDPP have distinct mandates: although their common focus is the LRAD grant to the trust, their respective objectives are not identical.

- 72.2. The SIU (with the Minister) is directing its attention in the SIU action to setting aside the LRAD award or having it declared invalid and to recovering the monies disbursed to the trust, in excess of R6 million.
- 72.3. The NDPP has directed its attention to forfeiting to the State an asset which is the proceeds of crime, for the purpose of deterring the particular crime and preventing further criminal activity as contemplated in the preamble to POCA quoted above.
- 72.4. The proceeds of sale of the forfeited property are uncertain in quantum and are likely to be for less than R6 million on a forced sale.³⁵ The sale proceeds will be paid³⁶ into the Criminal Assets Recovery Account³⁷ (**the Account**).
- 72.5. However, the Department could not call for payment to it from the Account of such amount as may be required to satisfy any judgment granted in its favour in the SIU action³⁸.
73. The relief sought, to my mind, is not the same. Even if I were to regard the parties as the same in both sets of proceedings (about which I have reservations), taking account of the distinct statutorily prescribed mandates

³⁵ The curator *bonis*' report of 6 April 2023 included the third respondent's report on 29 March 2023, assessing the open market value of the property to be R6 500 000.00, and the forced sale value as R3 900 000.00.

³⁶ Section 57(1) of POCA.

³⁷ Established in terms of section 63 of POCA.

³⁸ Section 69A read with section 68 of POCA provides for Cabinet to allocate money standing to the credit of the Account to specific law enforcement agencies or to institutions, organisations or funds established with the object to render assistance in any manner to victims of crime (and to allocate monies for the administration of the Account).

of the SIU and the NDPP respectively, this is not a proper case in which to relax the requirement that the relief sought should be the same.

74. In my view, a plea of *lis pendens* would not avail the applicants if they were afforded an opportunity to file opposing papers. That being so, the NDPP's failure to disclose the SIU action at the time of moving for the preservation order is not a material non-disclosure, nor is it likely to have influenced the Court to refuse the preservation order at the hearing in January 2023.

75. Even if I am mistaken in both these conclusions, it is clear that the same material made available to me – Mr Getye's April 2023 practice note and the attached SIU summons - was made available to the Court hearing the forfeiture application on the 'return day' of the preservation order. The facts concerning the applicants' first two defences (material non-disclosure and *lis pendens*) were then known. In these circumstances, the elements of *lis pendens* and the materiality of the non-disclosure were already able to be considered by the Court at the time the forfeiture order was moved.

75.1. Mr Getye's April 2023 practice note specifically highlighted the non-disclosure at the first stage, and spelt out the differences in the relief sought in the two sets of proceedings.

75.2. The Court³⁹ would have been cognisant of its powers under section 53 of POCA to make no order at all or to make orders other than a forfeiture order, such as:

³⁹ Henney J.

- 75.2.1. postponing the forfeiture application so that service of the forfeiture application could be effected on the applicants, or
 - 75.2.2. postponing the forfeiture application until after the SIU action had been determined, and / or
 - 75.2.3. setting aside the preservation order.
- 75.3. Henney J's Order commences with the words "*Having read the documents filed of record, having heard counsel for the applicant [the NDPP] and having considered the matter, ...*". There is no reason to believe that Henney J excluded from consideration the question whether the first Court (Ralarala AJ) might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the preservation order aside.
- 75.4. None of the alternative orders mooted above were granted, and instead the Court granted the forfeiture order. The non-disclosure point is now moot.
- 75.5. In these circumstances, even if rescission were granted and the applicants were afforded the opportunity to file opposing affidavits, the prospects of the Court setting aside the preservation order and the forfeiture order on the basis of material non-disclosure are remote, as are the prospects of the Court staying the forfeiture application until the SIU action is determined.

The applicants' defence on the merits

76. In regard to the merits of the forfeiture proceedings, the applicants contend that, for purposes of the rescission application they are not required to engage with all the averments set out in the preservation and forfeiture application papers, and need only do so once given leave to file opposing papers upon the grant of a rescission order. The applicants broadly deny the specific allegations made against them and contend that they have evidence to rebut the NDPP's version.
77. The founding affidavit in the preservation application was deposed by Gcobani Bam, a deputy director of public prosecutions with the NDPP. His affidavit set out the misrepresentations made to the Department as to monetary contributions that each of the 49 proposed beneficiaries would make to the farming enterprise on the property, and in relation to the beneficiaries' purported qualifications. Mr Bam's founding affidavit in the forfeiture application provided further details of the alleged misrepresentations. They are the same as those pleaded in the SIU action, summarised in paragraphs 46.4 to 46.6 above.
78. The applicants did not fully address these allegations in the rescission papers (nor did they refer to or annex their plea filed in the SIU action).
79. They confined themselves to the alleged misrepresentations about the employment status of members of the Klaase family (i.e., the six applicants / trustees), the experience of the beneficiaries in farming activities, and the

value of the Klaase family livestock.

80. The first applicant averred in his founding affidavit in the rescission application that:

80.1. He and the second applicant (his wife) disclosed the employment status of the Klaase family members, including their salaries, and that this appears from disclosure form "*Vorm 1: Verklaring deur Aansoekers*" a copy of which he attached to his affidavit.

80.2. The same disclosure form reveals the lack of experience of the beneficiaries, and the fact that save for the Klaase family and two others with limited experience, no others had farming experience.

80.3. The discrepancy regarding the value of livestock was an unintended typographical error and is not material.

81. The two page disclosure form attached to the first applicant's founding affidavit lists only twenty beneficiaries. It records the average income per family, which in seven instances was nil, but it does not record salaries per beneficiary. The form recorded that ten beneficiaries had limited technical agricultural experience, and ten had none. It says nothing about the other 29 beneficiaries.

82. Mr Titus submitted that the evidence put up in the rescission application (described above) was only a 'glimpse' or a 'sample' of what the applicants would be able to show, if given the opportunity to file papers, and to go further would be burdening the court. He submitted that they only needed

to make out a *prima facie* case, that what they had adduced showed that there are triable issues, and that the applicant's prospects of success were strong and should compensate for the applicants' weak explanation for their default of appearance at the hearing of the forfeiture application.

83. It is so that in the rescission papers, the applicants are not expected to comprehensively address the NDPP's papers in the preservation and forfeiture applications, which run to 444 pages (excluding the April 2023 practice note with its annexures). However, for reasons that follow, what the applicants have advanced falls short of addressing the cardinal issues so as to set up a *prima facie* case.
84. The LRAD programme covers farm acquisition costs or costs for acquiring shares for the qualifying beneficiaries who are primarily persons that are unable to make a significant own contribution and require a top-up grant to cover the farm purchase. To qualify for an LRAD grant, applicants must make a so-called 'own contribution' to the farming project (the amount of which affects the size of the grant on a sliding scale). An 'own contribution' can be in the form of free labour called 'sweat equity', valued at R5 000.00, but the business plan must show evidence that that the applicant intends to devote a significant amount of own labour towards the establishment and operation of the project. The individuals applicants must be black South African citizens of African, Coloured or Indian descent (i.e., from previously disadvantaged communities) over 18 years of age. They must be willing to work on or near the land concerned, operate or work on it and be committed

to use the grant to purchase land for agricultural activities.

85. The application made by to the Department by the first applicant and Damonse recorded that the number of persons who would benefit from the project would be forty-nine adults from five households: twenty-five women, seventeen youths, seven pensioners and twenty unemployed people, and that each would contribute R13 000.00 as 'sweat equity'. They recorded, among other things, that the applicants had employment experience of different aspects of small scale farming and commercial farming activities, and that the majority had worked most of their lives in the agricultural sector. In all, a picture was sketched of a feasible and potentially successful farming enterprise.
86. The first applicant's founding affidavit simply did not address the allegations (confirmed by his own 2015 affidavit supplied to the SIU) that beneficiaries signed up to become 'silent partners' of the Klaase family, and that the Klaase family always intended to buy out the other beneficiaries of the trust who were not willing and interested in the farming as soon as the farm reached beyond the breakeven point. He had thereby admitted to undermining the purpose of LRAD grants, which is to discharge the Department's responsibility to redistribute productive commercial agricultural farmlands to previously disadvantaged individuals.
87. In my view, the applicants' founding affidavit did not adequately set out a *bona fide* defence against the allegations of fraud. Their prospects of success are poor.

88. The applicants have not demonstrated good cause for rescission.
89. In the result, the application is dismissed with costs.



 GORDON-TURNER AJ

Appearances:

Counsel for the Applicants:

Adv Madoda Titus

Instructed by:

Mr Martin Green
 Andre Reid Attorneys

Counsel for the First Respondent:

Mr M Getye

Instructed by:

Mr A Kondlo
 State Attorney