**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **NO** |
| **Of Interest to other Judges:** | **NO** |
| **Circulate to Magistrates:** | **NO** |

**Case No: 4647/2023**

In the matter between:

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Appellant

and

**MAINE MANAGEMENT & CHARTERED ACCOUNTANT (PTY) LTD** Respondent

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**JUDGMENT BY:** MHLAMBI, J

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**HEARD ON:** 25 JULY 2024

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**DELIVERED ON:** 24 DECEMBER 2024

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[1] The applicant obtained two preservation orders under two application case numbers, 4395/2023 and 4647/2023, on 21 August 2023 and 5 September 2023, respectively. The orders froze the amounts of R1 971 657.75 and R2 215 084.00, with interest held at the First National Bank with account number 6[…].

[2] On 25 January 2024, two applications for the reconsideration of the preservation orders served before Naidoo, J, and were dismissed with costs. On 2 May 2024, the two applications for the forfeiture orders served before me and I granted the following order:

'1. The Court, in its discretion, permits the filing of the attached affidavit hereto as a further affidavit in applications 4395/2023 and 4647/2023.

2. The application is postponed to 25 July 2024 to enable the respondent to file a further opposing affidavit.

3. Costs shall stand over for later adjudication.'

Background

[3] On 3 March 2022, the Mangaung Metropolitan Municipality awarded a tender to the respondent to verify municipal customers who qualified as indigent customers in line with the Municipal Indigent Policy. The contract commenced on 7 March 2022 and terminated on 6 March 2023 but was extended to 31 August 2023. The qualification criteria for indigent support were fully set out in the policy. Once an indigent's application was received, the responsible municipal official verified all the information upon registration. The application is then submitted to the relevant supervisor for review and approval. The Municipality's supervisor, Salome Mamakhooa, compiled all pre-approved and rejected applications and handed them to the manager.

[4] On 15 June 2023, the respondent issued two invoices for R1 971 657.75 for work done according to the tender. A payment requisition for the invoices was completed on 27 June 2023, approved for payment by the municipality, and paid. Salome Mamakhooa Mokhooa (Mokhooa), employed as Customer Service Manager, denied that she completed the requisition nor signed it. On 17 August 2023, she had access to a requisition cheque for R2 215 084.00 in favour of the respondent. On investigation, she was presented with the respondent's two invoices for that amount for the indigent verifications from 1 May 2023 to 15 May 2023. The requisition bore the name and signature of Boitumelo Letshego Moiloa (Moiloa), a Data Analyst Manager who acted as a general manager of revenue at the time.

[5] At the heart of both applications is the applicant's belief that the respondent did not render services to the Municipality because the payment requisition was

fraudulent. When the money was paid to the respondent, it became proceeds of a crime in contravention of section 5 of POCA.

The Further Affidavit

[6] On 19 July 2024, the respondent filed its supplementary and explanatory heads of argument and stated that the court permitted a further affidavit by the respondent and granted leave to the applicant to answer it, but the latter failed to do so. At the application hearing, the respondent would submit that the affidavit's contents were not disputed.

[7] On 25 JULY 2024, Ms Khumalo, the applicant's legal representative, informed the court that the applicant would not file a further opposing affidavit as undertaken and ordered by the court because the municipality did not provide the information the applicant requested. In any event, that affidavit would not change the applicant's approach and attitude to the case, namely, that the money paid by the municipality represented proceeds of unlawful activities. The applicant maintained that the respondent issued paid invoices even though no work was done.

[8] In permitting the filing of further affidavits, I considered that a matter should be adjudicated upon all the facts relevant to the issues in dispute. I was satisfied that a proper and satisfactory explanation as to why the facts had not been put before the court earlier and the filing of the additional affidavits caused no prejudice. I considered the degree of materiality of the evidence and the general need for finality in judicial proceedings. The matter had not been argued, and no judgment was reserved.

[9] The respondent stated in its further affidavit that before the court granted the preservation orders, at least five payments were made to it with the active participation of Mokhooa, who verified and signed off the payments.[1] In its reply to the Rule 6(5)(E) application, filing a further affidavit, the applicant did not contest this allegation. When the two payments forming the subject matter of

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[1] Para 6.

the preservation orders were paid, the municipality was under the administration of the National Government, and the National Cabinet Representative had to approve the payments before they could be made. Even though Mokhooa was the project manager, Mr Jabu Khoale was the acting senior accountant who audited the respondent's work and prepared a requisition for Mokhooa to sign. When she refused to sign the requisition for payment, he took it to Moiloa, Mokhooa's direct supervisor, for signature.[2]

[10] The respondent stated further that the hard copies of the documents were stored by a company called the Document Warehouse Company for safekeeping. On 1 August 2023, before the municipality paid the invoices, a team consisting of the Acting General Manager, Moiloa, the Acting Senior Accountant, Mr Khoale, and the National Cabinet Representative, Mr Vusi Kunene, went to the warehouse to confirm that the work was done. Mokhooa refused to attend to the warehouse. Moiloa signed the requisition form instead of Mokhooa and was satisfied that the services were rendered for the first payment of R1 971 657.75. On 7 August 2023, the Acting Chief Financial Officer authorised and confirmed the final payment. The exact process was followed with the payment of R2 215 084 on 12 August 2023. The Acting Chief Financial Officer and the National Cabinet Representative were satisfied with the processes before payment was effected. No one was misled.

[11] The applicant failed to respond to the respondent's allegations in the supplementary affidavit. In its objection to the respondent's Rule 6(5)(E) application, it could not respond to paragraphs 11,12 and 13 of the respondent's affidavit. These paragraphs state that the Acting Chief Financial Officer confirmed with Moiloa, Mokhooa's direct superior, that she was the one who signed the requisition form, whereafter the former authorised the final payment as he was statutorily entitled to. The Acting Chief Financial Officer and the National Cabinet Representative teams satisfied themselves that the work was done and payments were made.[3] On 25 July 2023, an email was sent to

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[2] Para 8.

[3] Paras 11 and 12 of the respondent's Rule 6(5)(E) affidavit.

Mokhooa enquiring whether there were any issues, and the email was not responded to.[4]

[12] In its objection and reply to the Rule 6(5)(E) application, the applicant stated that the respondent was raising issues that might be detrimental to its case if the evidence were accepted. This would harm its case, and a costs order would not remedy the prejudice.[5] Should the court accept the respondent's further affidavit, the applicant was entitled to a reply in the interests of justice. As indicated above, the applicant was permitted to file a reply to address the issues raised in the respondent's further affidavit. It failed to do so.

<u>Application 4647/2023</u>

[13] Application 4647/2023 is based on Mokhooa's statement dated 4 September 2023[6] in which she stated that on 17 August 2023, she had access to a cheque for R2 215 084.00 in favour of the respondent for indigent verifications between 1 May 2023 to 15 May 2023. She neither signed nor requested the requisition number 19006 for that amount. The requisition cheque showed that Moiloa was the Financial Manager (which she was not) who checked, verified, and certified that the respondent rendered goods and services without documentation.

[14] The cheque application form shows Moiloa signed it on 15 June 2023, and the Finance Directorate approved the payment on 7 August 2024.

[15] In March 2023, she raised her concerns with Moiloa that she would not sign or approve invoices for services not rendered by the respondent. Moiloa said that she was going to sign them herself. She confirmed that from that time henceforth, Moiloa approved and signed for services not rendered by the respondent in respect of indigent projects without her knowledge. She was the custodian responsible for the requisition chequebook to process the respondent's invoices. The chequebook went missing from her office after she refused to sign invoices for services not rendered. The respondent did not give

[4] Para 13.
[5] Para 10.
[6] Page 74 of the Index.

her any indigent applications for verification and approval. Consequently, no applications were loaded onto the system after the council approval from the customer service department.

Discussion

[16] The real issue is whether the money held in the respondent's First National Bank account should be declared forfeited to the State as representing proceeds of unlawful activities. The applicant contended that it should be so. According to the applicant, the money would not have been paid if someone had not forged Mokhooa's signature and written a forged document to request a requisition payment from the municipality.[7] The respondent contended that the court would have to find that the respondent falsified the two invoices, had an internal arrangement for payment circumventing Mokhooa, and did not do any work in terms of the contract. The municipality did not have a complaint against the respondent, and there was no evidence that it criticised its invoices.

[17] The respondent contended furthermore that Mokhooa was not interested when payments were to be made, to do her job and verify payments. This had to be done by the senior accountant, who took the requisition form to her senior, Moiloa, for signature. Her original complaint to the police was that she asked for an investigation as she did not know who signed for the money and used her name. She had the requisition form at this time, and the respondent emailed the account to her. She should have realised that the chief financial officer authorised the payment and that Moiloa had signed the requisition. She should have mentioned this in her affidavit to the police.

[18] Considering her alleged conversation with Moiloa in March 2023, it is strange that she did not know who signed for the money. The signatures on both requisition forms are the same. It is equally strange that the requisition book disappeared for months without her launching an investigation for its recovery.

[7] Para 39: Applicant's heads of argument.

[19] The Court shall make a forfeiture order if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities. The applicant submitted in its founding affidavit that 'the property was the proceeds of unlawful activities, in particular money laundering, fraud as well as forgery and uttering as contained in section 6 of Prevention of Organised Crime Act 121 of 1998 (POCA) as well as items 19 and 20 of POCA.'[8] The applicant referred to the documents and annexures filed in support of the preservation applications and stated that the present applications continued from those papers that should be incorporated in these applications.[9]

[20] Paragraphs 37 to 42 of Mr Mradla's supporting affidavit in application number 4395/2023, upon which the application was based,[10] read as follows:

'**Property as Proceeds of Offences**

37. There are reasonable grounds to believe based on the evidence of Makhooa as well as the glaring differences between the signatures, that Makhooa did not sign the payment requisition and that the approved payment requisition should not have been approved.

38. There are reasonable grounds to further believe that Mokhooa did not monitor the monthly performance of Maine Management, which is why the payment requisition was forged.

39. The property was paid to Maine Management on the strength of the payment requisition that was fraudulently completed and presented to the Municipality for payment.

40. The property directly flows from the offences and had it not been for the fraudulent payment requisition, the property would not have been paid to Maine Management.

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[8] Para 6.
[9] Para 24.
[10] See para 22 of the founding affidavit.

41. It is clear from the investigations of Ralekoa that on 07 August 2023 prior to the property being transferred to Maine Management's account, it operated on an overdraft.

42. There if (sic) no other conclusion to be drawn except that the property sought to be preserved is the direct proceeds of the offences.'

[21] There is neither evidence nor a basis for the allegations of forgery and fraud, and neither is the conclusion that was arrived at.[11] What is stated in these paragraphs confirms that Makhooa did not do her job and monitor the respondent monthly as required. This explains why she failed to respond to emails, and the accountant had to refer the requisition to the acting general manager, revenue management, for her attention. The respondent's performance was subject to monthly performance monitoring, which the project manager, Mokhooa, should communicate to the respondent.[12] It is stated in the founding affidavit that the respondent failed to liaise with Mokhooa to obtain the scope of work, and on 15 June 2023, the respondent issued two invoices for R1 971 657.75 for work allegedly done.[13] This creates the impression that there was no communication between the project manager and the respondent from inception, and that the invoices were a surprise.

[22] The respondent submitted that the relief for a forfeiture order is final, and the court can grant it if it finds that the respondent's version raises fictitious disputes of fact, is palpably implausible, farfetched, or so untenable that it is justified in rejecting it on the papers. In the circumstances, I cannot find that the respondent's version is fictitious or farfetched and reject it. The applicant must prove on a balance of probabilities that it is entitled to the relief sought, which it failed to do. It failed to show that the money was an instrumentality of an offence or the proceeds of unlawful activities. Consequently, the applications should be dismissed.

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[11] Paras 38,40 and 42.
[1212] Annexure NM3, para 4; para 28.5 of the FA.
[13] Para 28.6.

[23] The respondent is entitled to the costs of the application as the successful party. The respondent sought an indulgence for the postponement of the application on 2 May 2024, and I find that it should pay the costs for such postponement.

[24] I, therefore, make the following order:

**Order:**

1. The applications under case numbers 4395/2023 and 4647/2023 are dismissed.

2. The respondent must pay the costs for the postponement of the proceedings on 2 May 2024.

3. The applicant is to pay the costs of the applications, which shall include counsel's fees, which will be taxed on scale C.

**MHLAMBI, J**

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