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

Case Number: 46195/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

DATE: **06/02/25**

SIGNATURE

In the matter between:

WILDEBEESFONTEIN PROPERTIES AND PROJECTS

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

In the *ex parte* Preservation Application:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

In re:

An application for a forfeiture order in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998.

JUDGMENT

INTRODUCTION

- [1] This is an application in terms of Rule 6(12)(c) of the Uniform Rules of Court by the applicant for a reconsideration of a preservation order granted by this court in terms of section 38 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA"). The order was granted on 14 September 2021 and it relates to all positive balance and interest accrued in First National Bank account number 6[...] in the name of Wildebeesfontein Properties and Projects.
- [2] The preservation order was granted in terms of an *ex parte* application by the National Director of Public Prosecutions ("NDPP"). Paragraph 9 of the order provides that any party who is affected by the order may on good cause shown, apply for reconsideration.
- [3] The parties will be referred to as per their citation above in the reconsideration application.
 - [3.1] Wildebeesfontein Properties and Projects as the applicant; and
 - [3.2] National Director of Public Prosecutions as the respondent.
- [4] The respondent opposes the application.
- [5] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter

RELIEF SOUGHT BY THE APPLICANT

- [6] The relief sought by the applicant is as follows:

"1. The rule nisi/preservation order of property of property issued by Honourable Judge Davis on the 14 day of September 2021 is reconsidered and discharged.

2. *The release from its control, the property or positive balance and interest accrued in First National Bank account number 6[...] held in the name of Wildebeesfontein Properties and Projects.*
3. *First National Bank is authorised to release from its control the property that is in its custody through preservation of order granted on the 14 day of September 2021.*
4. *Applicant (the respondent in casu) is ordered to pay the costs on attorney and client scale.”*

APPLICANT’S CASE AND THE FACTORS THAT MUST BE TAKEN INTO ACCOUNT IN THE RECONSIDERATION OF THE EX PARTE ORDER

- [7] The applicant It argues that the principle of “audi alteram partem rule” must always be applied unless in exceptional circumstances. In this regard, the applicant referred the court to *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*¹ where the court held: “[11] *It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.*” The Applicant also contends that it ought to have been served with the application which was brought on *ex parte* basis in violation of the *audi artem partem* principle and the violation of Rule 6 of the Uniform Rules because it was not urgent and no exceptional circumstances were put before Davis J on why it (applicant) did not need to be served with the application.
- [8] The applicant denies that the money in the preserved account is the proceeds of the commission of crime. The applicant also denies that the property under preservation order amounts to R17 094 000. The amount in the account stands at R6 633 792.
- [9] It is also denied that the people in Evaton West bought stands from the applicant. Cosmopolitan Projects, FNB, and Space Securitization have been selling stands and bond houses in Evaton West.

¹ (CCT 59/00) [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (26 September 2001).

- [10] The preserved account was opened by the Wildebeesfontein Properties and Projects co-operative to perform duties on behalf of the Wildebeesfontein community as reflected on the certificate of the Co-operative. Two directors are authorised to sign on behalf of the co-operative.
- [11] According to Mr Molifi, the amount paid is used for provisioning of services to the land allocated and electricity for which are essential services that every person has to pay. They even assist their members to build better homes for their families.
- [12] Instrumentality: The respondent must prove that the property is an instrumentality of the offence or proceeds of unlawful activities. The respondent is not punishing the applicant but the whole community that the applicant represents. In this regard, the applicant referred the court to *Singh v National Director of Public Prosecutions*² where the court held: “[17] The NDPP had to prove facts giving rise to reasonable grounds for believing that the property is an instrumentality of the offence of dealing in dependence producing drugs.”
- [13] Non-disclosure of material facts: The applicant argues that the respondent failed disclose that there is an ongoing litigation about the same subject matter property, that has been filed at the Land Claims Court (“LCC”). The applicant and its community are the ones who initiated investigation because the officials of the Department of Human Settlement and the Emfuleni Local Municipality were participating in the looting of the land that is under claim at the LCC. The respondent must disclose all the material facts whether for or against the applicant. The respondent must not make vague statements that the applicant sold stands in other areas of land belonging to either Municipality or Government without mentioning which ones were sold.

² (268/2006) [2007] ZASCA 82 (1 June 2007).

- [14] The applicant argues that it is trite that whenever an applicant approaches the court on urgent basis, the applicant should display full honesty.
- [15] Utmost good faith: The applicant is of the view that the respondent did not act in utmost good faith when getting the preservation order against the applicant's property. In this regard, the applicant referred the court to *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others*³ where the court held: "*It is by now axiomatic that in an ex parte application, the applicant is required to observe the uberrima fides (utmost good faith) rule. This rule requires that all material facts which might influence a court in coming to a decision must be disclosed.*"
- [16] According to the applicant, no money has been used for the benefit of the directors but has been used for the benefit of the Wildebeesfontein community. The allocated land belongs to the Wildebeesfontein community and the projects done by the applicant are for the betterment of the community in their area.
- [17] Prejudice: The applicant argues that the preservation order under scrutiny is causing a tremendous prejudice in many ways. The members of the community of Wildebeesfontein farm are not able to meet their day to day expenses. The employees and their families who depend on the salaries that are paid from preserved property or account are also affected. The applicant is also unable to defend the application because the account that has been preserved was used primarily for the community's daily needs and for litigation. According to the applicant, the respondent has launched a bogus and frivolous court application on urgent basis that had caused unnecessary stress to the respondent's directors and the Wildebeesfontein community. This has subjected them to unnecessary legal costs hence their call for punitive costs against the respondent.

³ (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008).

- [18] The applicant also argues that the order should be reconsidered because the money in the account is commingled and commingled funds can never be regarded as proceeds.
- [19] The applicant also referred the court to *Ex parte: National Director of Public Prosecutions*⁴ raising the issue of the relationship between a bank and its customer as a defence.

RESPONDENT'S CASE

- [20] On alleged prejudice, the respondent contends that POCA authorises a High Court to grant a preservation order in respect of property believed on reasonable grounds to be proceeds or instrumentalities of criminal offences. An order of this kind preserves property to which it applies until a forfeiture order is granted, a request for forfeiture is refused or the preservation order lapses. The effect of a preservation order is that no one may deal in any manner with property forming the subject matter of the order unless authorised by the High Court which has issued the order. In terms of section 44 of POCA, a High Court may permit payment of reasonable living and legal expenses from the property that is subject to a preservation order. In an attempt to soften the effect it has on fundamental rights, POCA makes allowance for payment of living and legal expenses from the seized assets during the currency of the preservation order. However, these expenses which must be reasonable are not given merely upon request. The applicant must meet certain requirements.
- [21] According to the respondent, the applicant argues that the order should be reconsidered because the money in the account is commingled and commingled funds can never be regarded as proceeds. However, the applicant failed to attach any proof in support of this alleged commingling or facts in support thereof. Furthermore, the applicant did not provide any explanation for this omission. On this issue, Nemaorani, in her supporting affidavit, analysed the bank statements of the

⁴ (1540/2018) [2018] ZAFSHC 100 (12 June 2018).

applicant and her conclusion was that the only money received into the account was cash deposits from the purchase of stands. No other money was paid into this preserved applicant's account.

- [22] According to the respondent, the applicant argues that the respondent failed disclose that there is an ongoing litigation about the same subject matter property, that has been filed at the Land Claims Court. On this issue, the land claims matters were not within the knowledge of the respondent when the preservation application was filed and when responding to the reconsideration application.
- [23] The respondent submits that the application to reconsider is wholly without merit and falls to be dismissed.
- [24] It is respondent's submission that the preservation order was necessitated by the applicant's unlawful activities.
- [25] As a result of the investigations conducted by Nemaorani and the Department of Human Settlement (Thabo Makgato and Moses Mpendulo Radebe) there are reasonable grounds to believe that the money in the applicant's account is the proceeds of fraud/theft and/or possible money laundering. The sole signatory of the preserved applicant's account is Mr Molifi. Nemaorani was furnished with a copy of the police docket, Evaton West CAS 401//11/2019 wherein it became clear that the applicant and its directors were benefitting from illegal activities.
- [26] Makgato states that the Department of Human Settlement ("Department") bought 777 erven in Evaton West from Erinite (Pty) Ltd and Space Securitization (Pty) Ltd in April 2019 for R113 480 850. The purpose of the purchase was to allocate the erven to qualifying beneficiaries. The investigation revealed that the people occupying the land in Evaton West bought the stands from the applicant through Mr Molifi. The investigation also revealed that all 777 stands in Evaton West were sold for R22 000 each and the money was deposited into the applicant's First National Bank account number 6[...]. The proceeds or the amount of money from the illegal selling of

777 stands is R17 094 000. The affidavits of Dorothy Ntaje and Matseliso Alina Pule were attached to the affidavit of Nemoarani. They stated that they bought stands from the applicant, Wildebeesfontein Properties and Projects.

[27] On 21 November 2019, the High Court, Johannesburg, under case number 2019/39645, granted the Department an order against the persons occupying the 777 erven illegally and to prohibit them from erecting structures.

[28] The investigations further revealed that the applicant sold stands in other areas as well. These stands are also on the land that belongs to either the municipality, government or the Department. The affidavit of Felicity Vanessa Human, who is employed by the Emfuleni Municipality was attached to the affidavit of Nemaorani. It indicates that the applicant is selling land that belongs to the municipality and that the purchasers are connecting water and electricity illegally.

PURPOSE AND NATURE OF PRESERVATION ORDERS

[29] Section 38 falls in Chapter 6 of POCA. The primary focus of this chapter is on property that has been used to commit an offence or which constitutes the proceeds of crime, rather than the offenders themselves. The guilt or wrongdoing of the owners or possessors of property is not primarily relevant to the proceedings. See: *NDPP v Mohamed NO*.⁵

[30] As mentioned in *Mohamed NO supra* a two-stage approach is provided for in Chapter 6 of POCA. During the first stage a preservation order is obtained. The purpose of a preservation order is to preserve the particular property until the court is able to deal with the NDPP's application for forfeiture of the property in favour of the State during the second stage.

[31] The court must grant a preservation order in terms of s 38(2)(b) if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities. See: *Mohamed NO supra* at para [22]. The two other

⁵ [\[2002\] ZACC 9](#); [2002 \(4\) SA 843](#) (CC) at para [\[17\]](#) and *NDPP v R O Cook Properties, 37 Gillespie Street Durban (Pty) Ltd and Seevnarayan (Seevnarayan)* [2004 \(2\) SACR 208](#) (SCA) at para [20].

circumstances set out in s 38(2)(a) and (c) are not relevant for purposes hereof.

LEGAL PRINCIPLES APPLICABLE TO EX PARTE APPLICATIONS

[32] Preservation orders are often brought by the NDPP *ex parte*. This is allowed and the rationale is clear. It is important to note that the granting of such orders deprives the affected party of a fundamental right to be heard, *i.e.* an opportunity to state their case. These applications should be considered and adjudicated with regard to s 34 of the Constitution: the right to a fair hearing. Yacoob J stated the following at paragraph [11] in the unanimous judgment of *De Beer NO v North-Central Local Council and South-Central Local Council and others*:⁶ “*It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.*”

[33] In *NDPP v Braun and another*,⁷ Traverso DJP made it clear that applications under s 38 of POCA do not relieve the NDPP from the normal burden imposed on every applicant who approaches the court for an *ex parte* order. She continued that it “should be invoked where there is some good cause or reason for the procedure such as genuine urgency or where the giving of notice would defeat the very object for which the order is sought.”

[34] Traverso DJP summarised the principles applicable to *ex parte* applications in paras [22] to [27] with reference to the *locus classicus*, *Schlessinger v Schlessinger*,⁸ as well as the SCA judgment of Southwood AJA in *Powell NO and others v Van der Merwe NO and others*.⁹ I do not intend to repeat that. In the first judgment Le Roux J made the point that “...*unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.*” In the latter judgment Southwood AJA went further and

⁶ [\[2001\] ZACC 9](#); [2002 \(1\) SA 429](#) (CC).

⁷ [2007 \(1\) SACR 326](#) (C) at paras [20] and [21].

⁸ [1979 \(4\) SA 342](#) (W) at 349A – B.

⁹ [2005 \(1\) SACR 317](#) (SCA).

stated that “....the approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out or, as in this case, because they have not been sufficiently investigated.....”

[35] Sutherland J emphasised that the “principle of *audi alteram partem* is sacrosanct’ and “*the only times that a court shall consider a matter behind a litigant’s back are in exceptional circumstances.*” The learned judge explained that this means that “it must mean ‘very rarely’ - only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation is allowed.” See: *South African Airways SOC v BDFM Publishers (Pty) Ltd and others*.¹⁰

[36] In *Thint v NDPP*,¹¹ the Constitutional Court reiterated that an applicant in *ex parte* applications bears a duty of utmost good faith in placing all the relevant material facts within his/her/its knowledge before the court. The court accepted that the test of materiality should not be so high to render it “*practically impossible for the State (in that case – or in my view any other applicant –) to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges.*”

ANALYSIS/EVALUATION OF THE EVIDENCE WITH REFERENCE TO LEGAL PRINCIPLES

[37] I intend to deal firstly with legal principles and some case law whereafter I shall consider the evidence and submissions of counsel. As a starting point, it is important remember that in *SCHLESINGER v SCHLESINGER*¹² the court held: “*The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to*

¹⁰ **2016 (2) SA 561** (GJ) at para [22].

¹¹ **2009 (1) SA 1** (CC) at para [102].

¹² **1979 (4) SA 342** (W).

make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."

- [38] The effect of the relationship between a bank and its customer is that a bank becomes entitled to funds deposited in the customer's account, but obliged to give effect to the customer's payment instructions. See: *Muller NO and another v Community Medical Aid Scheme*.¹³ The bank becomes the owner of the funds deposited and the customer obtains a personal right or claim against the bank based on the bank/customer relationship.
- [39] It is important to deal with some aspects of POCA and applicable authorities before I evaluate the evidence. The legislature intended to introduce strict measures to combat organised crime and in the process to *inter alia* provide for the recovery of the proceeds of unlawful activity. I refer to the long title and preamble of POCA. Clearly the intention is to ensure that criminals are not only severely punished by the introduction of severe sentences, but also to prevent these criminals from benefitting from their heinous deeds. I shall consider two relevant definitions and some authorities.
- [40] "Proceeds of unlawful activities" are broadly defined in s 1 of POCA. It relates to *"any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, ..., in connection with or as a result of any unlawful activity, ... and includes any property representing property so derived."*
- [41] The Constitutional Court stated in *S v Shaik*¹⁴ that this definition is widely cast, especially if the definition of *"property"* is considered. *"Property"* is defined as *"money or and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof."*

¹³ [2012 \(2\) SA 286](#) (SCA) para [13].

¹⁴ [\[2008\] ZACC 7](#); [2008 \(5\) SA 354](#) (CC) at para [\[25\]](#)

- [42] It is accepted that the court in *Shaik* dealt with Chapter 5 and not Chapter 6 of POCA, but the principle enunciated remains applicable.
- [43] I dealt with the test applicable to these kinds of proceedings *supra*, but it is perhaps apposite to reiterate that the SCA stated in *Singh v NDPP*¹⁵ that, in *casu*, the respondent (NDPP) must “...prove facts giving rise to reasonable grounds for believing that the property is an instrumentality of the offence” (or constitutes the proceeds of unlawful activities.)
- [44] According to the respondent (NDPP), the applicant argues that the order should be reconsidered because the money in the account is commingled and commingled funds can never be regarded as proceeds. However, the applicant failed to attach any proof in support of this alleged commingling or facts in support thereof. Furthermore, the applicant did not provide any explanation for this omission. In this regard, Nemaorani, in her supporting affidavit, analysed the bank statements of the applicant and her conclusion was that the only money received into the account was cash deposits from the purchase of stands. No other money was paid into the preserved applicant’s account.
- [45] According to the respondent (NDPP), as a result of the investigations conducted by Nemaorani and the Department of Human Settlement (Thabo Makgato and Moses Mpendulo Radebe) there are reasonable grounds to believe that the money in the applicant’s account is the proceeds of fraud/theft and/or possible money laundering. The sole signatory of the preserved applicant’s account is Mr Molifi. Nemaorani was furnished with a copy of the police docket, Evaton West CAS 401//11/2019 wherein it became clear that the applicant and its directors were benefitting from illegal activities.
- [46] According to the respondent (NDPP), the investigation revealed that the people occupying the land in Evaton West bought the stands from the applicant through Mr Molifi. The investigation also revealed that all 777 stands in Evaton West were sold for R22 000 each and the money was deposited

¹⁵ [2007] SCA 82 (RSA) at para [17].

into the applicant's First National Bank account number 6[...]. The proceeds or the amount of money from the illegal selling of 777 stands is R17 094 000. The affidavits of Dorothy Ntaje and Matseliso Alina Pule were attached to the affidavit of Nemoarani. They stated that they bought stands from the applicant, Wildebeesfontein Properties and Projects.

- [47] According to the respondent (NDPP), the investigations further revealed that the applicant sold stands in other areas as well. These stands are also on the land that belongs to either the municipality, government or the Department. The affidavit of Felicity Vanessa Human, who is employed by the Emfuleni Municipality was attached to the affidavit of Nemaorani. It indicates that the applicant is selling land that belongs to the municipality and that the purchasers are connecting water and electricity illegally.
- [48] I have dealt with the information that was before Davis J who granted the preservation order in this matter on 14 September 2021. The applicant argues that if the court had before it the information the applicant now furnishes, the preservation order would have been not granted. Uniform Rule 6(12)(c) provides that: (c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.
- [49] This subrule affords the court hearing the application for reconsideration a wide discretion in respect of hearing additional facts and circumstances raised by the applicant for reconsideration. *"The dominant purpose of the subrule is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. The rationale is to address the actual or potential prejudice because of an absence of audi alteram partem when the order was made"*. [See Erasmus Superior Court Practice, RS 22, 2023, D1 Rule 6-60 and the cases cited therein.]

CONCLUSION

[50] In reconsidering the matter, and taking account of all the additional facts, circumstances and information placed before me, it appears to me that the respondent (NDPP) has made out a case for the belief that the property preserved in terms of the preservation order of 14 September 2021, is indeed the proceeds of unlawful activities.

[51] I am consequently of the view that even if the additional information that the applicant has placed before this court were to have been in front of Davis J who granted the preservation order on 14 September 2021, such order would still have been granted, as there is *prima facie* evidence of unlawful activities, which led to the applicant being paid the monies that are the subject of the preservation order.

ORDER

[52] In the circumstances, I make the following order:

[52.1] The application for reconsideration is dismissed with costs, including the costs of counsel.

T E JOYINI
ACTING JUDGE OF THE HIGH COURT, PRETORIA

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Date of Hearing:

22 January 2025

Date of Judgment: 6 February 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 6 February 2025 at 10h00.

