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

CASE NO: 2023-132147

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

11 MARCH 2025

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

EDWIN THABO LETHOPA

First Respondent

BROUGH CAPITAL (PTY) LTD

Second Respondent

ZIPPYKIND PARTNER (PTY) LTD

Third Respondent

VERTEX LEGAL (PTY) LTD

Fourth Respondent

CRABY SYSTEMS (PTY) LTD

Fifth Respondent

GNEDCCI INSTITUTE (PTY) LTD

Sixth Respondent

FUR GROUP (PTY) LTD

Seventh Respondent

SUPERSTAR BETS (PTY) LTD

Eighth Respondent

HOLISTIC SUPERBET SHARED SERVICE (PTY) LTD

Ninth Respondent

1111 HOLDINGS (PTY) LTD

Tenth Respondent

EDWIN THABO LETOPA (PTY) LTD

Eleventh Respondent

CELEBRYT INTERNATIONAL (PTY) LTD

Twelfth Respondent

NTC CAPITAL (PTY) LTD

Thirteenth Respondent

NTC GLOBAL TRADE FUND (PTY) LTD

Fourteenth Respondent

ET BATAUNG (PTY) LTD

Fifteenth Respondent

THABO LETOPA (PTY) LTD

Sixteenth Respondent

ARBITRAWALLET (PTY) LTD

Seventeenth Respondent

NTC PROPERTY INVESTMENT (PTY) LTD	Eighteenth Respondent
K2023806767 (SOUTH AFRICA) (PTY) LTD	Nineteenth Respondent
THE KOULEHAE SACCO TRUST (IT002956/2022)	Twentieth Respondent
VENTEL MANAGEMENT (PTY) LTD	Twenty-First Respondent
ARBITRAWALLET (PTY) LTD	Twenty-Second Respondent
BATEE TOURS (PTY) LTD	Twenty-Third Respondent
VENTEL PROPERTY (PTY) LTD	Twenty-Fourth Respondent
MIDDELVLEI TENACRES PROPERTIES (PTY) LTD	Twenty-Fifth Respondent
LODE YETHEMBE MINING (PTY) LTD	Twenty-Sixth Respondent
THE BATAUNG LEMATHIYANE FAMILY TRUST (IT002297/2012)	Twenty-Seventh Respondent
ZIPPYKIND PARTNER (PTY) LTD	Twenty-Eighth Respondent
MPHO NGOZWANE	Twenty-Ninth Respondent

Summary: Civil procedure – application for forfeiture of preserved assets in terms of section 48(1) of POCA – whether preserved property comprising bank accounts are instrumentality of an offence and funds held therein are instruments of offences and thus susceptible to an order for forfeiture in terms of section 50(1) of the Prevention of Organised Crime Act 121 of 1998 – whether the application constitutes an abuse of process warranting a punitive cost order against the National Director of Public Prosecutions – when it is, courts should not hesitate to deprecate such abuse to vindicate violated constitutionally entrenched property rights.

JUDGMENT

MODIBA J:

Introduction

- [1] Orders for civil forfeiture provided for in section 50(1) of the Prevention of Organized Crime Act¹ (POCA) are a laudable mechanism for preventing perpetrators of crime from benefitting from their ill-gotten gains. However, such orders have a draconian effect on those who have an interest in forfeited property

¹ Act 121 of 1998.

because they are only alerted that the property in which they have an interest has been judicially attached when a preservation order is served or when they read about it in the Government Gazette (if they ever get to read the publication). This is so particularly because in the most cases, POCA forfeiture orders are preceded by an application for preservation of property targeted for forfeiture, granted *ex parte* and in camera.

- [2] Orders for forfeiture are also granted on a lower quantum of proof than that applicable in criminal cases and without respondents being charged or even convicted of a criminal offence. Yet, they do not only deprive respondents of their property, but they also visit upon them the stigma of criminal wrongdoing, effectively reversing the constitutionally entrenched presumption of innocence. They may also constitute arbitrary deprivation of property. Therefore, orders for forfeiture inflict substantial prejudice.
- [3] Although there are safeguards provided for in POCA and given meaning by our courts when interpreting its provisions, preservation and forfeiture applications can be used as a *weapon in terrorem*. Where they are so used, courts should not hesitate to deprecate such abuse.
- [4] The NDPP sought [on 12 December 2023] and was granted an order [the following day] preserving the funds held in the bank accounts that appear in schedule A to the notice of motion dated 27 March 2024 (the preserved assets) on the basis that the bank accounts are an instrumentality of an offence and the cash held therein are instruments of offences referred to in schedule 1 of POCA namely, fraud and money laundering. Most of the respondents are the account holders. The first respondent, Thabo Edwin Letopa (Mr Letopa) is central to the NDPP's case against the respondents. It is common cause that he controls the

entities that are cited as the respondents. The fourteenth respondent NTC Global Trade Fund (Pty) Ltd (NTC) is equally central to the NDPP's case because she alleges that deposits Mr Letopa took from members of the public were paid into a bank account held in its name.

- [5] The South African Reserve Bank (SARB) had placed a soft block on the respondents' bank accounts. It was due to lapse on 13 December 2023. This is what prompted the NPA to apply for the preservation order on an urgent basis.
- [6] A liquidation application against NTC is pending. The NDPP intends considering claims submitted by its creditors, including claimants who are victims of crimes allegedly committed by NTC when the preserved funds have been forfeited to the state.
- [7] It is largely on the same basis the NDPP obtained a preservation order that she seeks an order for the forfeiture of the preserved assets. She specifically relies on the following grounds:
- (a) non-compliance with section 7(1) of the Financial Advisory and Intermediary Services Act² (FAIS Act) by Mr Letopa and NTC;
 - (b) non-compliance with the South African Reserve Bank (SARB) foreign exchange regulations by Mr Letopa and the implicated entities;
 - (c) operation of a Ponzi scheme by Mr Letopa and the implicated entities.
- [8] In this judgment, unless otherwise specified, all references to statutory provisions are to the FAIS Act.

² Act 37 of 2002.

- [9] The respondents deny all the above allegations. They contend that the forfeiture application is nothing but a rehash of the allegations in the preservation application. The NDPP fails to establish the allegations. Even if she had established the allegations, they [the allegations] do not sustain the grounds on which the NDPP relies. Therefore, the respondents further contend, the NDPP has failed to make out a case for forfeiture.
- [10] Before I consider the grounds on which the NDPP seeks an order for forfeiture as well as the respondents' basis for opposition, it is appropriate that I elaborate on the NDPP's allegations. Thereafter, I determine the NDPP's points *in limine* and outline the applicable legal principles. Lastly, I determine the question of costs.

The NDPP's allegations

- [11] The NDPP alleges that the National Prosecuting Authority's³ (NPA) Asset Forfeiture Unit (AFU) s investigated the affairs of the respondents after the National Consumer Council (NCC) received a tipoff from an anonymous caller, alerting it that Mr Letopa operates a website with the following URL <https://trade.momentumsecurities.co.za> (the website). The website mimics that of the well-known Momentum financial services entity (Momentum). Consumers are lured to invest through the website under the belief that they are investing with Momentum while in fact, they are paying money into banking accounts owned or controlled by Mr Letopa. Mr Letopa owns multiple companies. In some of these companies he is a sole director. He masquerades as a financial service provider through these companies, taking deposits from the public in contravention of the law.

³ An organ of state which is responsible for public prosecutions and for matters incidental to instituting criminal proceedings, headed by the NDPP (Section 179 of the Constitution).

[12] AFU solicited assistance from the Financial Sector Conduct Authority (FSCA) to investigate the affairs of Mr Letopa. Wendy Serfontein (Ms Serfontein) of the FSCA conducted the investigation and made the following findings:

(a) on 10 July 2014, Mr Letopa applied to be granted a license as an authorised financial services provider (FSP). On 25 September 2014, the application was rejected because he did not meet the fit and proper requirements set out in the FAIS Act;

(b) on 15 November 2023, Ms Serfontein conducted a search on the FSCA records and found that Mr Letopa is not an authorised FSP or a representative of an FSP. She also found that NTC is not and was never an authorised FSP;

[13] AFU requested SARB to investigate whether Mr Letopa's companies were authorised to offer financial services to members of the public. The scope of the SARB investigation included all cross-border transactions in the name of Mr Letopa, other individuals and/or his entities for the period 01 November 2022 to 17 November 2023. SARB decision to put a soft block on bank accounts associated with Mr Letopa followed this investigation.

[14] The FSCA has made the following further findings on which the NDPP relies in the forfeiture application. Upon investigating persons and entities referenced in Ms Serfontein's report, she [Ms Serfontein] found that:

(a) Willie Marius Venter (Mr Venter) is linked to two companies that lodged applications for FSP licences on 30 November 2023. The first is the seventeenth respondent, Arbitrawallet (Pty) Ltd (Arbitrawallet). The second is Coin Link (Pty) Ltd (Coin Link). Coin Link is not party to these proceedings. Mr

Venter is a 33.3% shareholder in Arbitrawallet and a director in Coin Link. He provided the e-mail address [m\[...\]@arbitrawallet.net](mailto:m[...]@arbitrawallet.net) [presumably to FSCA];

(b) Mr Venter was previously linked to Transferme (Pty) Ltd, an authorised FSP, as a representative until 1 March 2023;

(c) Sakhile Matsimela was linked as a director and 33.3% shareholder in Arbitrawallet. Matsimela provided the e-mail address [s\[...\]@voxitrade.com](mailto:s[...]@voxitrade.com), linking him to Voxitrade Exchange Inc (Voxitrade);

(d) Voxitrade Exchange Inc, Index Venture Partners (Pty) Ltd (Index Venture) and Outsource Compliance Services (Pty) Ltd (OCS) were authorized as FSPs. It is unclear from the founding affidavit how Index Venture and OCS are linked to the respondents. Apart from Arbitrawallet, these entities are not cited in these proceedings.

[15] AFU also requested the Financial Intelligence Centre (FIC) to investigate Mr Letopa. A bald averment is made in the founding affidavit that the FIC report pointed out that Mr Letopa was involved in unlawful activities. The particulars of such activities are not set out. Since the NDPP does not specifically rely on the findings of the FIC in the same way she relies on the FCSA and SARB findings, which she particularised in her founding affidavit, I entertain the FIC bald finding no further in this judgment.

[16] It is against the background set out above that the NDPP alleges that:

(a) Mr Letopa contravened section 7(1) which prohibits acting or offering to act as an FSP without an FSP licence issued in terms of section 8. Section 7(1) also prohibits acting as a representative of an FSP without being appointed as a representative of an authorised FSP in terms of section 13;

(b) Mr Letopa contravened SARB Regulations, with specific reference to the Exchange Control Regulation (ECR) 2(4)(a) and/or 2(2)(4)(b) read with ECR 22 in that:

(i) his inward funds were reported under the incorrect category and/or the funds were used for another purpose;

(ii) the website of Arbitrawallet advertised that it traded in "... buying, selling and exchanging Foreign currency including US dollars" and also "offers investment opportunities in foreign currency and crypto arbitrage". Arbitrawallet is not authorised to buy, sell and exchange foreign currency;

(c) from the evidence gathered, it can be safely accepted that there are reasonable grounds to believe that Mr Letopa and his multiple companies committed fraud and money laundering.

The NDPP's points in limine

[17] The NDPP has attacked the respondents' opposition on the following points in limine.

(a) NTC is not authorised to oppose this application;

(b) a confirmatory affidavit was not filed on behalf of the 29th respondent;

(c) the respondents did not seek condonation for the late filing of their section 39 notice.

[18] The respondents thrifted through all these points in limine. Their opposition is unassailable.

Alleged lack of authority to oppose the application on behalf of NTC

[19] The NDPP contends that NTC is not authorised to oppose this application either because it has been placed in business rescue or liquidation proceedings are pending against it. Therefore, the NDPP further contends, if it is in business

rescue, then its business rescue practitioner ought to have deposed to an affidavit on its behalf and not Mr Letopa.

- [20] The NDPP raises two conflated issues; namely, the authority to depose to an affidavit and the authority to oppose the application. Conflated as the two issues are, the complaint based on any of them is unsustainable and falls to be dismissed.
- [21] The NDPP failed to follow the procedure set out in uniform rule 7(1) to impugn Letopa's authority to oppose this application on behalf of NTC. Letopa did not need to be authorised to depose to an affidavit on behalf of NTC. It is sufficient that he has personal knowledge of the facts on which NTC relies.

No confirmatory affidavit deposed to by the twenty ninth respondent

- [22] The respondents undertook to deliver a confirmatory affidavit on behalf of the twenty ninth respondent. They subsequently duly delivered it. Therefore, the point *in limine* that a confirmatory affidavit has not been filed by the twenty ninth respondent has been purged.

No condonation for the section 39 notice

- [23] The NDPP contends that the respondents failed to deliver a notice in terms of section 39(4)(a) of POCA within 14 days of service of the order but instead waited for publication of the order in the Government Gazette, which the NDPP contends is not applicable to them. The NDPP contends that the respondents had to apply for condonation for the late filing of their notice but failed to do so.
- [24] The respondents deny this. They correctly contend that they could not have been expected to deliver a notice in terms of s 39(4)(a) of POCA within 14 days of service of the preservation order as such service did not occur. The NDPP put up no proof that the preservation order was duly served on them.
- [25] The respondents delivered their section 39(5) notice on 4 March 2024 in accordance with section 39(4)(b) of POCA, being within 14 days after the date

upon which the NDPP published notice in the Government Gazette. I therefore find that, the respondents complied with section 39 of POCA. In any event, the NDPP did not set aside the respondents' section 39 notice as an irregular proceeding. It is apparent from the papers filed that the NDPP investigated the respondents' version as set out in the notice. Subsequent to that investigation, it instituted the forfeiture application. The forfeiture application is fully ventilated and ready for hearing. The NDPP's success in this application does not lie in merely attacking the section 39 notice as she seeks to do. Even if she did, the respondents' answering affidavit has been filed and until it too has not been set aside as an irregular step. Therefore, this court ought to have regard to it, particularly because the respondents' constitutional rights to be presumed innocent and not to be arbitrarily deprived of their property is implicated.

Applicable legal principles

- [26] The applicable legal principles are elaborately set out in the respondents' heads of argument. The NDPP took no issue with them.
- [27] Chapter 6 of POCA provides for civil forfeiture of property. When she seeks an order for forfeiture of preserved assets, the NDPP is required to bring an application in terms of section 48(1) by giving 14 days' notice of the application to persons who filed a section 39(3) notice after being served with a preservation order or in the case of non-parties, after the preservation order was published in the Government Gazette. In terms of section 48(4)(a), such persons may inter alia, oppose the application. In terms of section 50(1) of POCA, the court will grant the forfeiture order if it finds on a balance of probabilities that the preserved property is an instrumentality of an offence referred to in schedule 1.
- [28] When confronted with applications for forfeiture, courts have grappled with the contours of the powers they derive from section 50(1) of POCA. They have observed that a forfeiture order is a unique remedy used to combat organised crime. It is not punitive but remedial. Its purpose is to remove the incentive for crime and not to punish the offender.⁴ It rests on the legal fiction that the property

⁴

National Director of Public Prosecutions v Mohamed NO 2002 (4) SA 843 (CC) par 15.

and not the person with an interest in the property has contravened the law. Hence, charging that person or securing his or her criminal conviction is not a prerequisite for the granting of a forfeiture order.

[29] Courts have consistently observed that orders for civil forfeiture are draconian because they allow forfeiture of property on the basis that it is an instrumentality of a criminal offence, without the owner being charged or convicted and; the quantum of proof is lower than that applicable in criminal proceedings. Therefore, casting the net too wide may result in arbitrary deprivation of property thus seriously encroaching into entrenched constitutional rights and yielding an unjust outcome.⁵

[30] Although section 50(1) is couched in peremptory terms, to stifle its potentially draconian effect by ensuring that an order for civil forfeiture does not result in arbitrary deprivation of property, courts have resorted to the standard of proportionality. A court seized with an application in terms of section 48(1) of POCA is required to strike a balance between the laudable societal quest to combat organised crime on the one hand, and unwarranted interference with individual rights to property on the other. Forfeiture orders must be weighed against the purpose they serve.⁶

[31] The approach to determining whether a proper case is made for an order for forfeiture to be granted has become trite. It is as follows:

(a) first, it must be established that the preserved property is an instrumentality of an offence;

⁵ Prophet v National Director of Public Prosecutions at paragraph [38].

⁶ Prophet footnote 6 at paragraph [123] to [127].

(b) then, a proportionality enquiry is embarked upon to weigh the severity of the interference with individual rights to property against the extent to which the property was used to commit a criminal offence, bearing in mind the nature of the implicated offence.

[32] In *Mahomed*, the court held that when determining whether preserved assets are an instrumentality of an offence and thus liable to civil forfeiture, the following questions should be asked - whether the implicated offence is a crime that:

- (a) renders conventional criminal penalties inadequate;
- (b) requires extraordinary measures for its detection, prosecution and prevention;
- (c) warrants the extraordinary measures akin to those appropriate to organised crime as envisaged in POCA;
- (d) has some rational link, however tenuous, with racketeering, money laundering and criminal gang activities.

[33] Negative answers to these questions would be an important indication that forfeiture may be disproportionate.⁷ An additional consideration in the proportionality analysis is whether the crime in relation to which the property was used is subject to asset forfeiture provisions. If it is, it is a relevant and important factor whether subjecting the property to forfeiture under POCA would be redundant or doubly punitive. Furthermore, forfeiture must be rationally connected to the purpose of chapter 6 of POCA. There must be a reasonably direct link between the property subject to forfeiture and the crime committed. Further, the property must play a reasonably direct role in the commission of the offence.⁸

⁷ *Mahomed* at paragraph [124-126].

⁸ *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) par 44.

- [34] The purpose of POCA, is to supplement criminal remedies in appropriate cases and not to merely serve as a convenient substitute. Therefore, having perpetrators of crime criminally charged and sentenced should be the first resort in combating crime.⁹
- [35] In terms of section 37 (2) of POCA, factual disputes stand to be resolved according to the seminal Plascon Evans rule.¹⁰
- [36] The NDPP must make out her case in her founding affidavit in such a way that the respondents are informed of the case to meet.¹¹ This is not a technical requirement, when a party is facing the prospects of being deprived of their property without being convicted of a criminal offence, a case the respondent is required to answer must be clearly set out.¹²

Whether the NDPP makes out a case for forfeiture

Non-compliance with the FAIS Act

- [37] The NDPP alleges that Mr Letopa and his companies have contravened section 7(1). This provision provides as follows:
- “(1) ...a person may not act or offer to act as a-
- (a) financial services provider, unless such person has been issued with a licence under section 8; or

⁹ National Director of Public Prosecutions v Van Staden 2007 (1) SACR 338 (SCA) par 7; National Director of Public Prosecutions v Kleinbooi [2008] 2 All SA 455 (C) 463C, 464F.

¹⁰ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984 \(3\) SA 623 \(A\)](#) at 634E - 635C. See also National Director of Public Prosecutions v Braun 2009 (6) SA 501 (WCC) par 38; National Director of Public Prosecutions v Bosch 2009 (2) SACR 547 (KZD) par 30

¹¹ Janse van Rensburg v The National Director of Public Prosecutions 2007 JDR 0177 (SCA) par 23-24

¹² National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA) par 44.

(b) a representative, unless such person has been appointed as a representative of an authorised financial services provider under section 13.”

[46] Section 1 defines an FSP as any person, other than a representative, who as a regular feature of the business of such person furnishes advice, or furnishes advice and renders any intermediary service, or renders an intermediary service.

[47] Section 1 defines an intermediary service as:

“... subject to subsection (3) (b), any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

(a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

(b) with a view to-

(i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;

(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or

(iii) receiving, submitting or processing the claims of a client against a product supplier;”

[48] In terms of section 1(2), a financial product excludes any financial product exempted from the provisions of the FAIS Act by the registrar by notice in the Government Gazette, taking into consideration the extent to which the rendering of financial services in respect of the product is regulated by any other law.

[49] The NDPP obtained a preservation order based on the allegations set out earlier in this judgment. While the allegations were found to have established a basis for

the preservation order to be granted, they are insufficient to sustain a forfeiture order for reasons set out below.

[50] It is common cause that except for the second respondent Brough Capital (Pty) Ltd, the respondents are not authorised FSPs or representatives of FSPs. The mere fact that Letopa is not a registered FSP does not constitute non-compliance with section 7(1). The allegation that Letopa misrepresented that he is a FSP is not established. The allegation was made by an anonymous caller to the NCC. All that the NDPP established, based on the evidence by Ms Serfontein is that Mr Letopa and NTC are not a registered FSP or authorised representatives. The fact that Mr Letopa and NTC are not registered FSPs does not sustain a finding that they misrepresented to members of the public that they are so authorised. Not a single affidavit by a person to which he made such a misrepresentation was filed.

[51] Further, the NDPP has not put up any evidence to establish that Mr Letopa, or any of the respondents operated the website or received payments from the website. The allegation also emanates from the report by an anonymous caller to the NCC. The NDPP has therefore failed to prove that Mr Letopa and the NTC lured members of the public to make deposits into bank accounts of companies controlled by him on the guise that they were investing with Momentum.

[52] The respondents' version is that NTC raises capital by issuing debentures which a debenture holder acquires for a fixed cost through the Arbitrawallet platform, Arbitrawallet.net subject to the applicable terms and conditions. Debenture holders earn 1% interest per annum on the value of the debentures held. NTC does not use the amounts paid by later debenture holders to repay earlier debenture holders. It uses funds raised `by issuing debentures to trade in

cryptocurrencies through a separate legal entity and to invest in various other business endeavours. Profits generated are paid as an additional return to debenture holders based on the value of the debentures that they hold. A debenture holder is entitled to sell their debentures back to the NTC in accordance with the terms of the debenture agreement.

[53] I accept the respondents' version based on the Plascon Evans rule. Nonetheless, the NDPP's case suffers from the following serious impediments:

- (a) the NDPP is required to make out its case in its founding affidavit so that it is clear what case the respondents are required to meet. There, it makes out no case that Letopa and the companies controlled by him issued debentures in contravention of section 7(1).
- (b) Since the NDPP's case is not based on the issuing of debentures, it may not rely on the respondents' version to establish a case for forfeiture. The respondents set out their version in their section 39(3) notice. Notwithstanding that the NDPP enjoyed more than 90 days prior to bringing this application to investigate whether the issuing of debentures by the respondents constitutes breach of section 7 (1) read with the definitions of financial product and intermediary service in section 1(1) and 1(2) of FAIS Act, it persists with the allegations that led to the granting of the preservation order without proof of such allegations but more importantly, without investigating whether the respondents' business activities constitute non-compliance with the FAIS Act.
- (c) The fact that the respondents were not called to answer to a case based on the issuing of debentures simply means that they have not been afforded an opportunity to rely on any defences that are available to them, such as that provided for in section 1(2). It could well be that

the issuing of debentures falls within exempted financial products in terms of section 1(2). It is not for this court to conjure up a case for the NDPP.

(d) contravention of section 7(1) is not an offence referred to in schedule 1 of POCA

Alleged non-compliance with Exchange Control Regulations

- [54] The respondents correctly contend that the NDPP has provided no evidence to establish that they have contravened ECR 2(4)(a) and/or 2(2)(4)(b) read with ECR 22 [of the SARB Exchange Control Regulations]. The high-water mark of her case is a screenshot of the Arbitrawallet website advertising that it traded in “... *buying, selling and exchanging Foreign currency including US dollars*”, which she asserts constitutes a contravention of the SARB exchange control regulations. The respondents’ version that Arbitrawallet has never bought, sold, or exchanged foreign currency, including US dollars and that its website reflects an earlier idea for the Arbitrawallet business which it never pursued for various commercial reasons is not far-fetched that this court is unable to reasonably accept it.

Alleged Ponzi scheme

- [55] The Ponzi scheme allegations are also not established. The NDPP has not furnished any evidence to prove that any of the respondents use funds from later debenture holders to repay earlier debenture holders.
- [56] Mr Letopa alleges that the business model and the use of irredeemable profit-sharing debentures has been patented. He furnished NDPP with financial statements of NTC for the year ended 31 August 2023, which reflect that the company has total equity and liabilities of R91 516 519. Its bank statement

reflects that it holds a bank account in its own name and makes regular payments to debenture holders.

- [57] The respondents have provided a detailed account of their business activities which the NDPP does not dispute. Their version is as follows: NTC is a property holding company. Its approved financial statements for the year ended 31 August 2023 reflects that it has total equity and liabilities of R26 912 420. It acquires immovable properties which it owns, rents, or sells to generate a profit. It owns a commercial property in Centurion that it acquired for R4 million and a residential development in Vosloorus that it acquired for R12 million. It made an offer to acquire a residential development in Southdale for R6 million. The offer fell through because of the preservation order.
- (b) Middelvlei Tenacres is a property development company. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R7 622 779. It develops properties owned by NTC Property.
- (c) Arbitrawallet acquired Brough on 7 September 2023 for R1 250 000. Brough is a pension fund and asset manager. It holds a FAIS FSP licence. It generates revenue by earning fees associated with providing these services to its clients.
- (d) Lode Yethembe Mining is a Wibank-based coal mining company. It has a prospecting right and has applied to the Department of Mineral Resources for a mining right in respect of certain coal resources.
- (e) Superstar Bets develops software for sports betting. It was acquired for a purchase consideration of R12 million of which R3.2 million has been paid. Its financial statements for the year ended 31 August 2023 reflects that the company has total equity and liabilities of R915 271.

- (f) Ventel Management acquired shares in a contract mining company based in the Northern Cape for R1 million. It has also won a tender to provide mining services in the diamond industry. Its approved financial statements for the year ended 31 August 2023 reflect that it has total equity and liabilities of R15 684 638.
- (g) Zippykind Partner buys motor vehicles through lay buys, pawning and instalment takeovers. Its approved financial statements for the year ended 31 August 2023 reflect that it has total equity and liabilities of R47 803 460.
- (h) Carby Systems is a software provider to Zippykind. The software facilitates the transactions that Zippykind engages in. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R272 506.
- (i) Vertex Legal develops and provide software for lawyers. Its approved financial statements for the year ended 31 August 2023 reflect that it has total equity and liabilities of R413.
- (j) Gnedcci Institute is a chamber of commerce and business forum. It negotiates opportunities on behalf of small business owners and provides accounting training for non-accounting executives.
- (k) Holistic Superbet Shared Service (Holistic) is a procurement company. If a company in the group needs equipment, then Holistic procures the equipment and lease the equipment to that company. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R25 480 868.
- (l) 1111 Holdings is the intellectual property company. Any trademark or patent associated with any of the respondents is registered in this company. An example would include the software that Carby Systems provides to Zippykind. Its approved financial statements for the year ended 31 August 2023 reflects that it has total equity and liabilities of R33 475 888.

- (m) Celebryt International is an events management company. It has signed contracts with musicians. It hosts music functions. It also owns Alphapac Media, which is an artist management company. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R213 684.
- (n) Fur Group is a business whose existence precedes NTC. It was initially envisaged that Fur Group would be a private equity company. However, this did not materialise, and Fur Group has not made any investments.
- (o) NTC Capital is a company that was started before NTC. It is a private equity company that owns investments in two farms. One is a cattle farm, and one is a sheep farm. NTC Capital also has an investment in a software company called Mbumbatel which provides voice over IP software. Its approved financial statements for the year ended 31 August 2023, reflects that the company has total equity and liabilities of R10 325 803.
- (p) ET Bataung's provides administrative services including processing invoices and payments, payroll management and accounting services to other companies in the group. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R58 161.
- (q) Arbitrawallet provides a digital eWallet system via an app. Arbitrawallet created this software. Its approved financial statements for the year ended 31 August 2023 reflect that the company has total equity and liabilities of R41 633 233.
- (r) NTC Employees Administration has contracts with employees that provide labour to the various companies in the group. It serves as a labour broker within the group.
- (s) Batee Tours is a shuttle company. It provides shuttle services and airport transfers. It gets business by word of mouth and referrals from travel agencies. Some of the Zippykind vehicles are used in its business. Its

approved financial statements for the year ended 31 August 2023, reflect that the company has total equity and liabilities of R356 132.

(u) Ventel Property is a newly formed property company. Its purpose is to make an offer to buy properties at an auction. However, this fell through because of the preservation order.

(v) Ventel Management is a management company whose sole purpose is to provide management services to companies in the group.

[58] The companies work in tandem as part of the group, sourcing and providing services to each other. The companies have their own bank accounts. Commercial arrangements between the companies are on commercial terms and are documented. They derive funds from the debentures. No evidence has been provided that NTC used money raised from earlier debentures to pay later debenture holders. According to the respondents, to date, R476 139 461.32 has been raised through the debentures. This amount can be verified against the debenture certificates issued to debenture holders. It equates to the NDPP's own calculation of R484,825,443.71 credited to NTC's account. NTC has paid out R212,930,431.77 to debenture holders. Collectively, R160,597,692.75 has been preserved by the NDPP. The balance of R104 million has been applied in acquisitions and investments in and through other companies in the group. An amount of \$104,843,691.00 is held in a brokerage account of NTC that has not been preserved by the NDPP.

Whether the preserved assets are instruments of the offence of fraud and money laundering

[59] To succeed in this application, the NDPP must establish that the preserved assets are an instrumentality of a scheduled offence in the sense that they played

a part in the commission of the offence.¹³ What I find most startling about the NDPP's case is that she seeks a forfeiture order on the premise that the preserved assets are instruments of the crimes of fraud and money laundering which are crimes referred to in schedule 1 of POCA. Yet, she makes no allegations to sustain such a finding. She relies on the alleged contravention of section 7(1) and the SARB exchange control regulations. Her allegations do not even begin to meet the elements of fraud and money laundering. She may have formulated her case in this manner because fraud and money laundering are scheduled in POCA whereas non-compliance with section 7(1) is not. Although contravention of the SARB exchange control regulations is listed in item 33 of schedule 1 of POCA and while operating a Ponzi scheme may fall within some of the offences scheduled in POCA such as money laundering, as already found, no evidence is presented to sustain a finding that the preserved assets were acquired as a result of these or any offence. The NDPP's case is incoherent and completely devoid of any merit.

¹³ National Director of Public Prosecutions v Ro Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA) at paragraphs [53] and [59].

[60] I must accept the respondent's version that the respondent entities transferred funds and made payments to one another for commercial purposes and in the ordinary course of business. The NDPP did not seriously dispute it and it is not far-fetched.

[61] For all the above reasons, I must find that the NDPP has failed to establish that the preserved assets are instrumentalities of the offences of fraud and money laundering and that she presented no evidence to establish that the respondents contravened section 7(1) of POCA and the ECR and that they operated a Ponzi scheme. Embarking on the proportionality exercise will therefore serve no purpose. Her application in terms of section 48 (1) of POCA must fail.

Costs

[62] The respondents complain that the NDPP abused the court process and acted unconstitutionally when it warranted that it would respect the safeguards in POCA to limit the prejudice those affected by the preservation order sought and granted in their absence and which would have adverse impact on their right to deal with their property and to be heard. It undertook to serve the preservation order on the respondents as soon as possible as required in terms of section 39(1) of POCA and publish it in the government gazette within 14 days of it being granted as required in terms of section 39(3). Doing so would afford anyone who wanted to participate in the forfeiture proceedings and anyone with a legitimate interest in the property who wanted to exclude their interest in the property from forfeiture, an opportunity to do so at forfeiture stage of the proceedings. Therefore, the Court did not need to be concerned about the infringement of their rights at the preservation stage.

- [63] It follows that if the NDPP did not progress the preservation proceedings to forfeiture stage, she would effectively deny parties affected by the preservation order an opportunity to exercise their right to oppose the application for an order for forfeiture in order to vindicate their property rights.
- [64] The NDPP failed to fulfil her undertaking to serve the preservation order and application on the respondents. She also did not publish the preservation order in the Government Gazette, as required by section 39(3) of POCA as took more than two months to do so. As a result of these failures, the rights of respondents and those of other persons affected by the preservation order were infringed in a manner not contemplated by the POCA. These undertakings were incorporated in the preservation order and were thus binding on the NDPP. By failing to fulfil them, she breached the preservation order and acted unconstitutionally.
- [65] The respondents submit that the NDPP's conduct is so egregious and abusive of the court process and of the statutory scheme in POCA that it cannot be tolerated and ought to be deprecated by setting aside the preservation order and dismissing the application for forfeiture, with punitive costs.
- [66] The respondents have demonstrated that the NDPP breached the preservation order by failing to comply with both of these safeguards: she did not *serve* notice of the preservation order together with the documents filed in support of the application on the respondents, nor did she *publish* the preservation order in the Government Gazette timeously.

- [67] I am satisfied that the conduct of the NDPP complained of warrants a punitive cost order against her (in her official capacity). The NPA is an organ of state, established in terms of the constitution. It enjoys extraordinary and wide-ranging constitutional and statutory powers, the exercise of which inevitably will potentially encroach on the constitutional rights of others. It is for that reason that the constitution imposes on it as an organ of state the duty to act in accordance with the law and to promote, respect and fulfil constitutional rights. This includes the duty to respect court orders.
- [68] The NDPP's conduct in obtaining a preservation order *ex parte* and in camera but failing to fulfil the terms of the order aimed at securing the respondents' right to present a version in a section 39 notice and oppose the present application, failing to properly investigate the allegations against the respondents as well as findings made by FAIS and SARB and bringing a forfeiture application which is not supported by facts calls for deprecation by this court. Her conduct falls short of the heightened standard imposed on public litigants as principal agents of the constitution to fulfil procedural requirements and to tread carefully when dealing with rights.¹⁴ Although court recently applied this standard when considering a personal cost order against a public official, I have not been advanced with any reason why the principles should not equally apply to a state institution such as the NDPP, were her institution did not only fail to meet the heightened standard in litigation but where the litigation is not supported by fact, constitutes an abuse of process and where the respondent's constitutional rights are implicated.
- [69] All these considerations warrant the award for costs on a punitive scale against the NDPP.

¹⁴ Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) AT PARAGRAPH 155 And Zuma v Office of the Public Protector (unreported, SCA case no 1447/2018 dated 30 October 2020) at paragraphs [39]–[41].

[70] In the premises, the following order is made:

Order

[1] The application is dismissed with punitive costs.

[2] Such costs shall be inclusive of the costs of two counsel were so employed.

[3] The preservation order granted by this court on 13 December 2023 under the above case number is set aside.

**LT MODIBA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances

Counsel for Applicant: Adv W DL Phahlane, assisted by Adv S Chikuni
Instructed by: The State Attorney, Pretoria

Counsel for Respondents: Adv G Wickins, assisted by SC Adv T Scott
Instructed by: Smit Swegoolan Inc, Saxonwold

Date of Hearing: 13 November 2024

Date of Judgment: 11 March 2025

MODE OF DELIVERY:

This judgment is handed down electronically by transmission to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery is deemed to be 11 March 2025 at 10h00.