IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

CASE NO: 5833/2023

5325/2023

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

11 June 2025
DATE

[redacted]
SIGNATURE

In the matter between:

JACOBUS HOSEA JORDAAN **FIRST APPLICANT**

ELZA JORDAAN **SECOND APPLICANT**

and

THE NATIONAL DIRECTOR
OF PUPLIC PROSECUTIONS **FIRST RESPONDENT**

JOHAN FRANCOIS ENGELBRECHT N.O **SECOND RESPONDENT**

GNJ MINING (PTY) LTD **THIRD RESPONDENT**

JOZA LOGISTICS (PTY) LTD **FOURTH RESPONDENT**

JUDGMENT

Moleleki AJ

[1] This is an application by the applicants in terms of section 26 and 44 of the Prevention of Organised Crime Act 121 of 1998 (POCA) for the variation of the provisional preservation of property order granted by this Court on 15 November 2023 in case number 5325/2023 (the provisional preservation order), as well as the variation of the provisional restraint of property order in case number 5833/2023 (the provisional restraint order) dated 21 December 2023, for the release of legal and living expenses to the applicants.

[2] The first and second applicants are husband and wife who hold dual citizenship in both South Africa and Namibia. They are also directors of the third and fourth respondents respectively. The First Respondent (The NDPP) and the second respondent (the *curator bonis*) are opposing this application.

[3] The return days of the provisional preservation and restraint orders were extended on numerous occasions. A date for the hearing of the application has not been allocated yet.

[4] It is common cause that on 30 December 2024 a preservation order was granted in Namibia in terms of the Namibian statutory provisions preserving all bank accounts of the first and second applicants and related entities in Namibia.

[5] As a consequence of the orders, the *curator bonis* was authorised to take into his possession the property of the applicants and to administer the realisable property.

Background

[6] It is alleged that the first and second applicants together with thirteen others, were part of a syndicate charged with multiple serious offences of illegal coal mining,

theft of coal from the State, multiple contraventions of environmental legislation as well as money laundering offences in contravention of Chapter 3 of POCA. The offences are said to involve millions of Rands. The allegations above gave rise to criminal charges being laid against the applicants and thirteen others. These criminal charges are pending and the trial is set for 3 to 28 November 2025 in the Middleburg High Court of this Division. Following these allegations, funds were therefore restrained.

[7] The applicants, therefore, seek the release of funds in order to pay the reasonable living expenses of the first and second applicants as well as the legal expenses of the first to fourth applicants as follows:

7.1 R6 200 000.00 for the reasonable legal expenses.

7.2 Monthly payments in an amount of R148 767.05.

Issues to be Adjudicated

[8] The central issues to be decided upon are whether the applicants have complied with the jurisdictional requirements provided for in section 26 and 44 of POCA, thus, making out a case for an order to provide for their reasonable living expenses and for their reasonable legal expenses.

The Applicant's Case

[9] The applicants contend that the effect of the orders in the Republic of South Africa (RSA Orders) and Namibia is that the applicants currently have no access to any funds or any unrestrained realisable property, whether movable, immovable or cash. The applicants are opposing the confirmation of the provisional orders in the main application. However, due to the numerous postponements of the provisional orders, a period of one year and four months has elapsed without the opportunity to be heard in response to the relief sought in the main application. The applicants contend further that there is a criminal case pending against them, which has been set down for hearing for four weeks in November 2025. The discovered documents in respect of the criminal case are voluminous and will require about two weeks of preparation by their legal representatives.

[10] For the past 18 months to date, the applicants have, therefore, not had any funds available to pay legal fees, nor did they have funds to pay for their reasonable living expenses. It is for this reason that they seek relief for the variation of the provisional orders, in order to make provision for the payment of expenses in the amounts claimed. The applicants' submission is that such amounts are reasonable under the circumstances.

[11] The applicants maintain that they have met the requirements of both section 26(6) in respect of the restraint order and section 44(1)(a) and (b) in respect of the preservation order in that:

11.1 They have an interest in South African assets under the control of the *curator* to the value of R128 million;

11.2 They have disclosed all their assets as required; and

11.3 They cannot meet their expenses out of property that is not subject to the preservation or restraint orders.

The Respondents' Case

[12] Both respondents (the first and the second respondents) contend that the applicants have failed to prove any of the jurisdictional requirements envisaged in section 26 and section 44 of POCA to be successful with their application.

[13] It was pointed out by the respondents that the applicants are obligated to disclose under oath and furnish the court with a sworn statement of their unpreserved and unrestrained property and to explain why they cannot provide for their reasonable living expenses from their unreserved and unrestrained assets.

[14] The respondents oppose the application for living and legal expenses on the grounds that the applicants did not take the court into their confidence by failing to acquaint the court with various material facts. Full disclosure, honesty and absolute good faith are therefore peremptory requirements for an applicant in an application of this nature. The second respondent submitted that the applicants relied on incorrect facts in some respects. The applicants have on several occasions failed to and or refused to disclose assets and to repatriate the sum of R50 million which was

transferred to Namibia shortly before the granting of the orders to which this application is related.

[15] It is submitted that the applicants, alternatively, the second applicant, failed to disclose all property interests and submit a sworn and full statement of all their assets and liabilities. This includes the property held in the trust of which the second applicant is a trustee, the Umbila Trust. Further investigations by the second respondent revealed that the second applicant is the trustee of Umbila Trust and the various motor vehicles that are registered to the trust were not disclosed as required in terms of the court orders. In terms of the fourth report by the second respondent dated 14 December 2024, the list of the vehicles which the second applicant failed to disclose is annexed to the second respondent' supplementary affidavit.

[16] Therefore, the contention by the applicants that they do not have any other assets, is, according to the second respondent, simply incorrect. This makes the applicants' contention that they cannot meet any expenses from unrestrained or unpreserved property fallacious. The second respondent rejects the applicants' contention that the non-disclosure of property was a bona fide oversight, maintaining that, from the outset, they did not intend to disclose such property.

[17] The applicants stated that they never made or received any income without disclosing it to the second respondent. This, according to the second respondent, is incorrect in that game was removed by the second applicant and income to the value of R524 752.50, generated therefrom was not disclosed and remains unaccounted for. The applicants failed to give an explanation regarding this sum of money in their replying affidavits.

[18] The contention by the *curator* is that the applicants are required to make full disclosure of their interests, assets and liabilities. In addition, the applicants ought to have taken the second respondent into their confidence when it came to the required disclosures. However, according to the second respondent, the applicants made a vague disclosure and therefore, they cannot be assisted with the relief sought in respect to their reasonable living expenses.

[19] In so far as reasonable legal expenses are concerned, the *curator* contends that the relief sought in the Notice of Motion supported by the founding affidavit is premature as the court was not furnished with the required information to consider whether the legal costs as stated concur with the maximum allowable cost for such services. The *curator*'s submission is that the applicants have failed to appreciate that section 45 of POCA is not concerned with the applicants' belief that the fees are not extravagant or whether there are sufficient funds available in the restrained or preserved property to adequately provide for legal costs claimed by the applicants. Therefore, the court may only allow reasonable legal costs in so far as they relate to legal costs that arise from the provisional restraint and preservation orders that were granted. Of importance is what the court will regard as reasonable legal fees, having regard to the maximum allowable costs for such services.

[20] The *curator* further submits that, although the applicants annexed three statements of account generated by their attorneys, the attorneys' fee agreement with the applicants is irrelevant in an application of this nature. Absent such an agreement, neither the *curator* nor the court is in a position to determine how these costs are derived. For this court to consider the amount claimed, the applicants should have prepared a detailed statement and or invoices of the services rendered and to be rendered by the legal practitioners, per the maximum allowed costs in terms of the tariff tables. Further that, the amount of R1 163 351.97 claimed by the applicants does not reflect the maximum allowed costs for the alleged services as required by section 45 of POCA.

[21] The NDPP and the *curator* submitted further that, the material non-disclosure of all the relevant facts were revealed by the historical facts of the matter as follows:

21.1 In the urgent application for living and legal expenses dated 22 May 2024, the applicants claimed the release of R3 000 000.00 for all their historical and future legal expenses; R293 349.81 per month for their living expenses and an amount of R614 585.78 from one of the bank accounts of the Second Applicant.

21.2 In terms of the current application they are claiming the release of R6 200 000.00 for all their historical and future legal expenses and R148 767.05 per month for their living expenses.

[22] This, according to the respondents, would mean that in a short period of 8 months, the applicants' historical and future legal expenses have increased by R1 200 000 and their living expenses have been reduced by R144 582.76 per month. The contention by the NDPP and the *curator* is that it can be deduced that the applicants have been dishonest under oath about their real legal and living expenses.

[23] It is contended that the applicants ignored and have done everything possible to circumvent the provisional restraint order dated 21 December 2023 by not disclosing all their assets both in South Africa and Namibia. Despite the fact that they were ordered in terms of section 26(7) of POCA to disclose within ten days of knowledge of the order, a description and whereabouts of all their realisable property to the second respondent by way of affidavit. The applicants, therefore, failed after more than 13 months to comply with the provisional order to repatriate all their realisable assets from Namibia to South Africa.

[24] The first and second respondents contend that POCA does not make provision for legal entities like the third and fourth respondents to apply for legal and living expenses. In any event, in terms of the provisional preservation and restraint orders, the third and fourth applicants fall under the control and administration of the *curator bonis*, who administers the businesses. Seeing that the third and fourth applicants are under the *curator*, the first and second applicants do not, therefore, have *locus standi* (legal authority) to bring an application for living and legal expenses for legal entities.

Prevention of Organised Crime Act

[25] Crucial to this application are the provisions of POCA. I, therefore, find it necessary at this stage to consider the provisions of POCA and the approach our Courts have adopted.

[26] Section 26(1) provides:

> "The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates."

[27] Section 26(6) provides:

> "Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit –
>
> (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
>
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate.
>
> If the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

[28] The purpose of POCA is to foster the prevention of crime, to strip criminals of the proceeds of their crimes, thus removing the incentive for crime, and not to punish them.[1] As noted by the Constitutional Court, the provisions of POCA provide a framework for a strategy for the combating of modern organised criminal activity. The purpose is achieved, in part, by ensuring that the proceeds of criminal activity and those assets utilised as an instrumentality of crime can be wrested from the control of the alleged criminal and, following a process of forfeiture to the State, be utilised for combating crime. This broad scheme, in terms of which assets may be seized, preserved and ultimately confiscated, is however not intended merely to enrich or benefit the State. On the contrary the seizure and forfeiture of assets is subject to a range of checks and safeguards designed to balance the interests of the State in the restrained or preserved assets and those of third parties who may have an interest in such assets.[2]

[29] The effect of a restraint order is to place the property beyond the control of an applicant and into the hands of a *curator bonis* pending the outcome of the criminal

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[1] *National Director of Public Prosecutions v Mohamed NO and Others* 2002 (4) SA 843 (CC) para 15.

[2] *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC).

proceedings. All property held by an applicant may be subject to restraint, in addition to property transferred to him or her after the restraint order is imposed.[3]

The release of funds in terms of section 26

[30] A person who applies to the High Court in terms of section 26(6) to make provision for reasonable living and/or legal expenses must satisfy the court that he or she has disclosed under oath all his or her interests in property subject to the restraining order and that he or she cannot meet the expenses for which an allowance is sought out of the unrestrained property. Both of these requirements must be met to enable a court to exercise its discretion in favour of the person so applying. When the court is satisfied, it may make such provision as it may think fit.

[31] While section 44(1) empowers a court to make provision for living and legal expenses, section 44(2) provides that a court shall not afford living and legal expenses unless it is satisfied that –

31.1 The person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and

31.2 The person has disclosed under oath all his or her interests in the property and has submitted to that court a sworn and full statement of all his or her assets and liabilities.

[32] It is established that section 26 relates to restraint orders and its provisions are similar to those of section 44. The requirements of section 44(2)(a) and (b) are preconditions of section 44(1). The first precondition under section 44 is need and the second is disclosure. The only difference between section 26 and 44 is that section 44(2) expressly stipulates that a court shall not make provision for legal or living expenses unless the person whose assets are restrained or preserved satisfies the two preconditions.

[33] In so far as the application in terms of section 44(2) is concerned, the applicant, when applying for an order for expenses from the preserved property, must disclose

[3] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 12.

under oath all his or her interests in the property and he or she must submit a sworn and full statement of all his or her assets and liabilities. The main reason disclosure is required is to satisfy the court that the applicant is unable to meet the expenses out of the property not subject to the preservation order.[4]

[34] Therefore, for the court to be able to determine that the applicant is unable to meet the expenses, the information required to be disclosed must have been furnished. Without knowing the extent of the applicant's interest in the preserved property, the court may have difficulty in establishing how much is available in the preserved property from which it can authorise payment of expenses. The reason for the submission of a sworn and full statement of all assets and liabilities is to enable the court to have a full picture before it determines whether there is unpreserved property from which the applicant can meet the expenses, and if so, how much provision can reasonably be made from the unpreserved property for such expenses.[5]

Full Disclosure

[35] The applicants are required to satisfy the court that they have made a full disclosure under oath of all their interests in the restrained property. The provisional restraint order required the applicants to disclose and surrender all property held by them, either specifically listed in Annexure "A" and/or all property at any time before or after the granting of the order, whether in their respective names or not, including all property held for or on their behalf by any person. The order limits the extent of realisable property to be restrained to the value of R264 000 000.00.

[36] Paragraph 19 of the provisional restraint order reads as follows: "In terms of section 26(7) of POCA, the defendants and respondents be and are hereby ordered to disclose, within ten (10) days after getting knowledge of this restraint order, to the *curator* on affidavit or in such form as the *curator* may deem necessary, a description and the whereabouts of all realisable Property".

[4] *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) para 81.
[5] Ibid para 113.

[37] In order to reach a determination which is fair and just in view of the objects and wording of POCA, together with constitutionally protected fair trial rights, the circumstances of each case have to be considered.[6]

[38] The applicants must satisfy the court that they have made full disclosure under oath of all their interests in the restrained property, if they are to succeed in terms of section 26. It was averred on behalf of the applicants that they have disclosed all their interests in the restrained property. The provisional restraint order authorised the *curator* to take the realisable property into his possession and control, whether such property is situated in or outside the Republic of South Africa. The allegations by the NDPP are that the restrained assets derive from illegal coal mining, theft of coal, multiple contraventions of environmental legislation as well as money laundering. It is from the business of selling coal that the NDPP base their criminal charges. Without incriminating themselves in any way, the applicants are expected to disclose their interests in the property. They are, however, silent on this aspect.

[39] On the other hand, the provisional preservation order was granted on 15 November 2023. The order covered all property that belonged to the applicants. In their affidavits in support of this application, the applicants stated that all their assets and those of the entities of which they are directors and/or shareholders of, in both the Republic of South Africa and Namibia have been seized, restrained and preserved. Further that, as matters currently stand, they do not have any income or access to any funds, except for an amount of approximately R58 818.49 per month which they receive from rental and monthly annuity pay-out respectively, as well as old age grant from the Republic of Namibia in the amount of N$3 200.

[40] The first and second applicants brought this application seeking an order authorising payment of the living expenses for themselves as well as legal expenses for themselves and other entities for which they are directors. In this respect, the contention by both the NDPP and the *curator* is that the first and second applicants do not have legal authority to act on behalf of the two entities. The *curator* contends that he is unable to act outside of the court order to make payments which are not

[6] *Fraser* at fn 4 above para 72.

authorised in terms of the court orders. Vally J in *Regiments Fund Managers (Pty) Ltd v and Others v Nel NO. and Another*[7] granted leave to appeal his decision to the Supreme Court of Appeal on the basis that there were two different approaches on whether applicants whose property is vested in under the control of a *curator* have the authority to initiate or defend the entity during litigation.

[41] When orders are made in terms of POCA in matters of this nature, the purpose is to preserve assets that are the subject of the restraint order. The owners of such assets are therefore divested of all control over the assets. Such assets will then be placed under the control of the *curator bonis* who will care for and administer the assets. It is for this reason that when a restraint order is granted, the owners of the assets or any other persons are restrained from dealing with such assets and only the *curator* is entitled to deal with the assets on behalf of the owners. I, therefore, agree with the contention by the respondents that the first and second applicants do not have authority to initiate litigation on behalf of the entities.

[42] There was an amount of R50 million which was transferred to Namibia shortly before the granting of the orders to which this application is related. The applicants, and the second applicant in particular, failed to submit a sworn and full statement of all their assets and liabilities. This includes the property held in Trust, the Umbila trust, of which the second applicant is a trustee. Any assets related to the trust, including vehicles, were not disclosed. In response, when confronted about the assets they had failed to disclose, the applicants' contention was that the non-disclosure was a *bona fide* oversight. Game was removed from one of their farms and income to the value of R524 752.50 was generated therefrom. This was not disclosed, and the money remains unaccounted for. One would have expected the applicants to address this issue in their affidavits, but they did not.

[43] From the facts of this matter, it is clear that the applicants ignored the orders of this Court by not disclosing all their assets both in South Africa and Namibia. The general rule is that orders of court must be obeyed. Were this not so, the protection of the rights of persons and the resolution of disputes by recourse to the Court, which is

[7] *Regiments Fund Managers (Pty) Ltd v and Others v Nel NO and Another* [2024] ZAGPJHC 1559.

established for that purpose, would be of little, if any, effect and the community would be deprived of the proper administration of justice.[8]

Inability to meet expenses out of unrestrained property

[44] In their initial urgent application on 22 May 2024, the applicants sought the release of R3 000 000 for all their historical and future legal expenses; R293 349.81 per month for their living expenses; and an amount of R614 585.78 from one of their bank accounts. In these proceedings, the amount for legal expenses has doubled to R6 200 000.00 without any information that would assist the court in determining how it was arrived at, especially to justify the fact that it has doubled. In respect of the living expenses, the amount has been mysteriously reduced by approximately R144 582.76 in a period of about 12 months.

[45] The applicants stated that when a preservation order was granted on 30 December 2023 in terms of the Namibian POCA legislation, it effectively restrained all funds in entities and trusts in Namibia, which therefore left them with no assets to rely on. Further, at that stage, they had no property that was unrestrained, either in South Africa, Namibia or anywhere else. This cannot be correct due to the fact that, prior to 6 March 2024 when the Namibian restraint order was granted, they were able to pay their reasonable expenses from the Namibian funds. What the applicants fail to mention is that they had failed to disclose all their interests in the Namibian property, under oath and to submit a sworn and full statement of all their assets and liabilities.

[46] The applicants had also failed to disclose their interests in the following:

46.1 Welgevonde Farm, which is a farming enterprise in the extent of 3755 hectares situated in the Aranos District, Namibia, with a total value of approximately N$11 265 000.00; and

46.2 Game, that is, approximately 100 Oryx Antelope, 50 Kudus, 100 Wildebeest, 20 Eland Antelope, 50 Impala, 500 Springbuck, 5 Zebras, 20 Red hartebeest, 6 Sable Antelope, 4 Giraffes, and 4 horses.

[8] *Di Bona v Di Bona* [1993] 3 All SA 624 (C) at 628.

[47] It has not been indicated whether Welgevonde Farm is generating any income and or profit; if any, what the turnover is, if any, what are the running expenses, save for the stipend that was said to have been paid to the two employees.

[48] The order granted by the Namibian High Court on 6 March 2024 was a provisional restraint order, with a *rule nisi*, in terms of which the applicants' Namibian property was restrained. This *rule nisi* was discharged on 22 November 2024. This property therefore became available to the applicants until the Namibian Financial Intelligence Centre placed a hold on all of their FNB bank accounts on 30 December 2024. It is important to note that this provisional preservation order preserves positive balances of the specific FNB accounts and no other assets or property. From the information before court, it cannot be found that there are no other available assets to meet their expenses.

[49] Once again, it would have been expected of the applicants to address the court concerning these assets. In an attempt to explain their failure to disclose the assets in Namibia, the applicants' Counsel submitted that the approach the applicants had adopted was that the South African orders did not apply to the assets in Namibia. They submitted further that they were therefore under no obligation to disclose the Namibian assets.

[50] The applicants do seem to comprehend the problem in their non-disclosure of their Namibian assets. They continued to use the funds from the Namibian assets to pay for all their expenses. This explains why their first urgent application was brought in May 2024. This was after their assets in Namibia had been discovered and a provisional restraint order was granted. The urgent application was not pursued and was ultimately withdrawn on 7 June 2024 and costs tendered. For the period from May 2024 to the current application, the applicants did not deem it necessary to bring the application for living and legal expenses. There is no reason why this was not given priority.

[51] There was an amount of R5 million which was obtained by the applicants. There is no explanation as to how much of the said amount had been drawn or expended and why provision was not made therefrom to pay for legal expenses. Without this

information, it may very well be that there are funds available which the applicants can use for all expenses.

[52] This Court cannot accept the applicants' submission that they had no obligation to disclose the Namibian assets. These assets are their source of living which they have failed to disclose. As stated, they have not necessarily explained how they derive their income, excluding the amounts already declared. It is therefore compelling to conclude that the Namibian assets are an instrumentality of crime and that could be the reason they did not disclose them.

[53] I am also persuaded to conclude that the FNB accounts are not the only assets that they have. This conclusion would lead to the result that the applicants have failed to satisfy the court that they cannot meet their living and legal expenses from their unrestrained and unpreserved property as prescribed by sections 26 and 44(2)(a) of POCA.

[54] I agree with the contention that mere assertion by the applicants that they are unable to fund their living and legal expenses is plainly insufficient to meet the requirements.

[55] An applicant who seeks to have restrained assets released for them to meet their living and legal expenses must place facts before the court that would establish that they are unable to meet their reasonable expenses from the unrestrained assets or income. Such information would have placed the court in a position to exercise its discretion on whether to release such funds. The applicants have failed to satisfy this requirement, as there is no information as to their income. In the absence of such information, it may very well be that there are funds to meet their expenses.

[56] In the circumstances, the application must fail.

Costs

[57] The respondents argued that a punitive cost order be made against the applicants. It was also argued that the court should take into consideration the

numerous occasions the applicants have brought applications to court on an urgent basis, thus leading to the delay in the hearing of the main application.

[58] I am unable to find that the applicants were motivated by ulterior motives in bringing all the applications they did. There is, therefore, no basis for an adverse finding against them. There is no basis to deviate from the ordinary principle applicable to costs.

Order

[59] Consequently, the following order is made:

1 The application is dismissed.

2 The applicants are ordered to pay the costs of the application.

[redacted]

M.R MOLELEKI AJ

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

The judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 11 June 2025

Appearances

For the Applicants:	Mr MMW Van Zyl SC with Mr JJ Venter
Instructed by:	Tim Du Toit & Co. Inc Pretoria C/O Combrink Greyling Attorneys Mbombela
For the First Respondent:	Mr K Van Der Walt The State Attorney Mbombela
For the Second Respondent:	Mr J Hershensen SC
Instructed by:	Van Der Merwe & Associates Pretoria C/O Gerrie Groenewald Attorneys Mbombela
Heard on:	8 May 2025
Judgment delivered on:	11 June 2025