



HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

Case No.: 3783/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
18 June 2025	
DATE	SIGNATURE

In the matter between:

DERRICK THABO MODJELA N.O.

First Applicant

PERTUNIA PHEEHA N.O.

Second Applicant

and

JOHAN FRANCOIS ENGELBRECHT N.O.

First Respondent

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS

Second Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 June 2025 at 10:00.

JUDGMENT

Bhengu AJ

Introduction

- [1] This is an opposed urgent application brought by the applicants in their capacity as the trustees of Morneo Family Trust and in their individual capacity. The applicants are married in community of property to each other. They fall within the class of accused persons and affected persons whose assets are subject to a restraint order in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). They are seeking an interdictory relief to stop the first respondent ("the Curator") from proceeding with the sale of the immovable property described as Portion 121 of the Farm 64 White River, Mpumalanga Province "the Property".

Brief background facts

- [2] On 23 September 2022 the National Director of Public Prosecutions ("NDPP") sought and obtained a provisional restraint order in terms of section 26 of POCA against the applicants. In terms of the restraint order the applicants' joint estate, including the immovable property which is the subject matter of this application form part of the assets under restraint order, pending the criminal proceedings. The said property at the time was used as a wedding venue and a conference centre.

- [3] The applicants were called upon to show cause on 18 November 2022 why the provisional order should not be made final. The applicants did not oppose the provisional order, and a final order was granted on 05 December 2022.
- [4] The first respondent, was appointed as a *curator bonis* in terms of section 28(1)(a) of POCA and subject to the applicable provisions of the Administration of Estates Act 66 of 1965. He has since taken the restrained property under his control.
- [5] The matter was enrolled on extreme urgency basis. The urgent application was served via email on 19 May 2025 at 16h24, setting the matter for hearing on 27 May 2025. The respondents were required to file their notice to oppose by 20 May 2025 and an answering affidavit by 21 May 2025. The respondents indeed filed their intention to oppose and answering affidavits within the truncated time limits.
- [6] On 27 May 2025, the date of hearing, the applicants sought condonation for the late filing of their replying affidavit. The application was opposed by the respondents on the basis that the replying affidavit was only served on the first respondent on the eve of the hearing and that the replying affidavit was not accompanied by a formal application for condonation. The second respondent objected on the basis that they were never served with the replying affidavit. The applicants' counsel requested permission to file the replying affidavit during the hearing and for the matter to be heard later in the day to allow the parties and the court to have regard to the replying affidavit. I refused the application on the basis that the applicants failed to comply with the basic rule for service of documents on all parties to the proceedings and to apply for condonation for noncompliance with the practice directives for management of urgent matters.

Respondents' points in *limine*

- [7] The respondents raised four points in *limine*. First point in *limine* for lack of urgency, second point in *limine* for non-compliance with the disclosure obligations in terms of section 26(7) of POCA, third point in *limine* for absence of a confirmatory affidavit by the second applicant, and fourth point in *limine* for failure to satisfy the requirements for interim interdict. I will first deal with urgency.

Urgency

- [8] It is trite that an applicant in an urgent application must set out in their founding affidavit the circumstances which render the matter urgent and must also satisfy the court why the applicant claim that she/he will not obtain substantive redress at a hearing in due course that warrants departure from the times frames prescribed in Rule 6(5)(b).¹
- [9] According to applicants the urgency was precipitated by the information that the applicants received on 16 May 2025 from an acquaintance who was passing by the property and saw an advertisement for sale by public tender which was posted outside the property. The deadline for submitting tenders being 30 May 2025.
- [10] The first applicant averred that he was taken aback by the move of the Curator considering that his attorneys of record had been engaging with the Curator regarding the Curator's notice to sell the immovable property. The chronology of events leading up to this urgent application according to the applicants are as follows:

¹Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para 6.

[11] On 19 April 2024 the Curator sent the Applicants a Notice to Sell the Property. In this notice the Curator informed the applicants that the value of the property continued to decline every month as a result of escalating municipal arrears, security, and insurance costs.

[12] The notice further informed the applicants that there were no liquid assets to pay off the expenses and requested the applicants to furnish him with sufficient security and or acceptable (lawful) means to pay the outstanding debt owed to the municipality and to preserve the value of the movable and immovable property and to reduce the costs. He invited the applicants to consult with him within 14 days from the date of the letter *“in order to prevent the immovable and movable property from being sold on auction or tender in order to properly administer the estate”* under his control.

[13] On 09 May 2024 the applicants’ attorneys sent a letter to the Curator. In summary, the said letter raised the following issues:

13.1 That the Trust deny that the property was owing arrear rates and taxes to the Municipality, that the applicants had not received any statement or letter of demand from the municipality regarding the outstanding debt, that the property was using borehole water and solar pump. They denied that there was an account for solar water.

13.2 Regarding the unavailability of any liquid assets to satisfy the expenses, the applicants stated that the Curator had failed to consult them or their accountants after obtaining the order as required by paragraph 12.7 to establish whether there are any realisable assets or not.

13.3 They recorded that the properties were losing value as a result of the failure on the part of the curator to preserve the properties and to explain why the property was not generating income. The applicants indicated their willingness to meet with the Curator to discuss the matter further.

[14] On 15 May 2024 the Curator sent a letter to the applicants' attorneys. In this letter the Curator requested amongst other things: details about the legal mandate of the applicants' attorney, the applicants' financial affairs and how they were funding the legal services in compliance with the restraint order.

[15] On 17 July 2024, the applicants' attorneys responded to the Curator, and they objected to furnishing the requested financial information related to the agreements between the applicants and their attorneys on the basis of legal privilege. The Curator was asked to follow Uniform Rule 7 route if he is questioning their mandate. The letter further stated the following:

"...Lastly, kindly indicate if you are persistent on auctioning the property despite the issues, we have raised of which you have not responded to."

[16] According to the applicants until the date when they launched the urgent application, the Curator never responded to the letter of 07 July 2024. They then sent a follow up email dated 26 July 2024 to which there was again no response. The applicants averred that they were compelled to approach this Court on an urgent basis to interdict the sale pending the finalization of the criminal trial as the "Curator's conduct in seeking to sell the property behind the back of the Trustees constitute an ambush and is not justified." The applicants averred that the matter is extremely urgent as the tenders close on the 30th of May 2025, whereafter the successful bidder will take full ownership of the property.

[17] The applicants averred that the property was purchased to sustain future generations of their family. Should the property be sold, the Trust will not be afforded sufficient redress in due course in that if the court does not come to their assistance and in the event that they are acquitted in the pending criminal trial, the property would never be recovered. According to the applicants the damages claim will not be possible to quantify as the property is currently in a dilapidated state. Further, the applicants averred that there is sufficient movable property that the Curator can sell to cover the expenses. The property was functioning as a conference area and could be leased out at an amount of

R500,000.00. They alleged that the Curator has allowed the property to deteriorate into a “white elephant”.

Respondents’ Point in *limine* on Urgency

[18] The point in limine was raised by the first respondent. He contended that the application lacked urgency and/or alternatively the urgency as pleaded by the applicants was self-created. They averred that the applicants were made aware of the curator’s intention to sell the property as early as 19 April 2024. He contended that the application was designed to obstruct the lawful execution of his duties as the Curator rather than to advance any meritorious legal claim. He averred that there was an inordinate delay in bringing the application, that the founding affidavit of the applicants is replete with material misrepresentations and omissions.

[19] The first respondent averred that the applicants’ assertion that he failed to respond to their correspondence dated 17 and 26 July 2024 is patently false. He averred that the applicants deliberately misled the Court in their chronology leading up to the urgent application by excluding material facts which goes to the heart of the applicants’ case. In this regard, the first respondent contended that there were repeated and documented efforts by the Curator to engage the applicants for purpose of consultation since 2023 and more specifically on 19 April 2024, 15 May 2024, 09 October 2024 and on 06 November 2024.

[20] He referred to correspondence addressed to the applicants’ attorneys dated 09 October 2024, whereby the first respondent recorded the following:

“Kindly advise regarding a suitable date and time to meet with you and your client’s to discuss the Property... we are amenable to a virtual meeting.”

[21] The respondent further referred to a follow up letter dated 06 November 2024 which recorded the following:

"We refer to the above matter as well as our mail of 9 October 2024, to which we do not seem to have received a response from you.

We invited you to meet to discuss the sale of Portion 64... as well as the movable assets of your clients held at the property....

Please be advised that the first respondent is now compelled by the prevailing circumstances to proceed with the sale of the property and assets without further delay to ultimately preserve value."

[22] On 09 November 2024, the applicants' attorneys responded as follows:

"Kindly be advised that we do not have instructions from our client to discuss the property you are referring to. We further ask for your indulgence while we wait for instructions from our client on how to proceed with the property described below."

[23] The first respondent contended that the failure by the applicants to attach or even acknowledge this correspondence misrepresent the true factual context of the application which must be viewed in the most serious light as it undermines the integrity of the proceedings.

[24] The respondents further contended that the absence of an explanation for the delay since the initial notice was given on 19 April 2024 combined with the Applicants' failure to engage with or challenge the first respondent's powers, the failure to apply for relief under Section 26(6) and their failure to comply with section 26(7) of POCA renders the application fatally deficient.

[25] The preliminary issue for determination by this Court is whether the applicants have made out a case for urgency. If so, whether the applicants have satisfied the requirements for an interim interdict.

Discussion

[26] It is common cause that the court granted a restraint order in terms of section 26(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA). The applicants however, throughout the founding affidavit referred to a “preservation order”. While the applicants’ counsel attributed the reference to the preservation order instead of a restraint order as an honest oversight on the part of counsel when preparing the papers, it is however not clear on the papers whether the applicants understood the difference between the two orders and the legal consequences that flow from a restraint order. This will be discussed later in the judgment.

[27] Chapter 5 of POCA, Section 26(1) provides as follows:

“(1) 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.”

(2) A restraint order may be made -

- (a) in respect of such realizable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;*
- (b) in respect of all realizable property held by such person, whether it is specified in the restraint order or not; in respect of all property which if it is transferred to such person after the making of the restraint order would be realizable property”.*

[28] In the applicants’ case, the restraint order states that the realisable property included assets listed in Annexure A attached to the order and “*all other property held by the defendants and respondents 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 behalf of the Defendants and Respondents and any other people.*” The

effect of the order is to preserve realisable property pending the outcome of the criminal proceedings.

[29] A Curator *bonis* appointed in terms of section 28(1)(a) of POCA is granted wide powers subject to the directions of that court, to do any one or more of the following on behalf of the person against whom the restraint order has been made, namely

- i) *“to perform any particular act in respect of any or all the property to which the restraint order relates;*
- ii) *to take care of the said property;*
- iii) *to administer the said property; and*
- iv) *where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;*

(b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a curator bonis has been appointed under paragraph (a), into the custody of that curator bonis.”

[30] I will refer to the three paragraphs in the restraint order that are relevant for the determination of this application.

[31] Paragraph 12.2 of the restraint order require any person obliged to make disclosure in terms of the Order to provide such further and specific information as the Curator considers relevant to any fact which has been so disclosed.

[32] Paragraph 12.5 of the restraint order provided that the Curator had power and authority *“to pay expenses related to the realisable property, which expense would ordinarily be carried by the estate out of the realisable property. If no liquid assets are available to the Curator to pay these expenses, the Curator will have the power to sell assets under restraint, in consultation with the respective owner of the realisable property under his control.” (my emphasis).*

[33] Paragraph 12.7 empowered and authorised the Curator to make enquiries from the applicants' as well as their respective accountants or auditors or attorneys and pursuant to any such enquiries, inspect copy and analyse all relevant documentation relating to the affairs of the applicants and any other entities in which the applicants have an interest with a view of tracing such further realisable property.

[34] In *Mngomezulu and Another v National Director of Public Prosecutions and Another*² the appellants challenged the authority of a curator *bonis* appointed in terms of section 28(1)(a) of POCA to alienate immovable property. The SCA held that “*I am of the view that a High Court may in terms of s 28(1)(a) authorize a curator bonis appointed in terms of that section to alienate property under restraint in order to properly administer the assets under his control.*”

[35] The applicants' counsel accepted that the correspondence referred to by the respondent was omitted from the chronology of events leading up to the urgent application. She submitted that the omission was not deliberate and that her instructions were that the counsel who prepared the papers did so based on the information that was provided to him at the time. She submitted that even if the applicants' papers are not perfect, that the court can still come to the assistance of the applicants if the court reasoned that an injustice would occur by not granting the interim interdict. She submitted that the Curator was not justified in trying to sell the “*crown jewel*” of the family when the applicants' indebtedness to the municipality was disputed. She further submitted that the criminal trial is setdown in the next two months and there is a possibility that the applicants may not be convicted in which instance they would have already lost the property. She argued that the Curator had already waited for over two years already, since his appointment. She reasoned that waiting for two more months for the criminal trial to commence will not make any difference.

² *Mngomezulu v National Director of Public Prosecutions* [2007] SCA 11 (RSA) at page 19.

[36] While I note the assertions about the importance of the property to the family, what remains unexplained is the failure of the applicants to meet with the Curator to discuss the available means to save the property. It is also not explained why the applicants had failed to furnish their attorneys with instructions regarding the sale of the immovable property.

[37] I am of the view that the applicants' contention that the Curator had done nothing in the past two years since the restraint order was granted is misplaced. The Curator's report dated 11 July 2023 referred to by the respondents recorded that the disclosure from the applicants was still outstanding. That there was no power at the premises as power had been disconnected by the municipality due to nonpayment. The Curator also reported that he had not found any liquid assets in the estate to cover the mounting expenses. I'm of the view that the Curator discharged his duty to consult the owners of the property.

Second point in *limine* – failure to comply with the provisions Section 26(7) of POCA.

[38] This point was argued at length by the second respondent in amplification of the submissions already made by the first respondent. The second respondent averred that the applicants failed to comply with section 27(1)(a) of POCA which requires them to disclose under oath and in writing "a full description and location of all the property, including the nature and source of any income or assets, whether within or outside the Republic". That their non-disclosure and their failure to bring an application for living expenses in terms of section 26(6) of POCA, compels the conclusion that the applicants have access to undisclosed financial means which they have deliberately withheld from the first respondent.

[39] The respondents averred that the applicants are in contempt of the restraint order by failing to comply with their disclosure obligations. They submitted that a party who defies the remedial mechanism in the restraint order, is precluded from seeking to interdict the Curator *bonis* from selling a restrained property while continuing to withhold a true account of their financial affairs. Had they made the disclosures, the Curator would have been in a position to assess whether there

existed disposable income sufficient to sustain the ongoing costs associated with the upkeep of the immovable property, and whether the alleged business operations were viable. According to the second respondent this conduct was a deliberate strategy to frustrate the administration of the restraint and hinder the Curator from executing his statutory fiduciary duties.

[40] The applicants' counsel submitted that she did not have instructions as to whether the applicants complied with the restraint order or not. She however submitted that the Curator has powers and civil remedies of contempt should he feel the applicants have failed to comply with the court order. She submitted that none of the remedies had been utilized to date.

[41] Even though I agree with the applicants' counsel that the legal remedy of contempt of court order is available to the respondents, I am however of the view that regardless of whether the Curator had instituted contempt proceedings against the applicants, the applicants as the trustees of the Family Trust have a fiduciary duty to act with honesty and good faith in dealing with the assets of the Trust. The applicants' failure to make full disclosure of their financial interests and their omission and/or the misrepresentation of material facts leading to this urgent application should be taken into account in determining whether they are entitled to an urgent relief.

Sufficient redress in due course

[42] The Court held in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*³ that:

“The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and

³ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para 6 - 8

heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

...Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

- [43] The applicants claim that they will not be afforded sufficient redress at a hearing in due course is premised on their belief that at the close of the tender on 30 May 2025 the successful bidder will take full ownership of the property. This is however a mistaken belief as it is clearly stated in the advertisement and conditions of sale that the acceptance of any offer remains subject to a further 21-day period within which the seller is entitled to accept or reject the offers. The applicants have not even approached the Curator to discuss the viability of selling the movable assets as per their contention in their papers that there are sufficient movable properties that could be sold in order to preserve the immovable property. I am of the view that the claim that they will not be afforded sufficient redress cannot succeed when the applicants refuse to take the first step which could lead to the resolution of the matter.

Conclusion

[44] It is clear from the facts of the matter that applicants did not comply with rule 6(12)(b) which requires an applicant to set out the circumstances rendering the matter urgent. The applicants were unable to explain the delay in instituting these proceedings as early as April 2024 or alternatively from 09 October 2024 when the Curator unequivocally informed them of his intention to proceed with the sale. The applicants ignored the notice and brought the urgent application less than two weeks before the close of public tender. The applicants failed to satisfy the court that they will not get substantial redress at a hearing in due course. Their failure to co-operate with the Curator and their failure to comply with their disclosure obligations in terms of section 26(7)(a) bar them from approaching urgent court for assistance while they have failed to comply with their obligations under a lawful restraint order and frustrated the administration process. I therefore find that the urgency relied upon by the applicants was self-created and that the claim for urgency should fail.

Costs

[45] The respondents sought a punitive cost order on the scale between attorney and client against the applicants as well as their attorney of record, jointly and severally based on the following grounds:

45.1 That the applicants made false and misleading representations to the Court and omitted material correspondence which constitutes a deliberate abuse of court process.

45.2 That the applicants' attorney actively participated in an obstructive strategy to conceal possible assets that are subject to a restraint order under POCA by refusing to comply with a reasonable request for information made under a valid court order thereby obstructing the administration of justice under the guise of legal privilege.

[46] Punitive costs orders against legal representative are awarded in exceptional circumstances where it is clear from the papers that the legal representative conducted himself in a manner which grossly deviate from the standard expected of a legal practitioner. In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Another*⁴ the Court held the following:

“Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.”

[47] What is clear from the facts of this case is that the Curator requested information relating to the financial affairs of the applicants, the mandate agreement for legal services rendered and whether there were any funds held in trust by the attorneys on behalf of the applicants. In response to the Curator, the attorney stated that the restraint order did not authorise the curator to investigate the attorney and client documents. It does not appear from the papers whether there were any further engagements with the Curator on this issue. The attorney stated that if the Curator wants to challenge the mandate of the attorney, he must follow Uniform rule 7 route.

[48] The question is whether this information is enough for such an adverse order against the legal representative, I do not agree. I am of the view that more information is required including submissions from the legal practitioner concerned for such a finding to be made. Certainly, that exercise is beyond the issues before me for adjudication. It is important to note that these are not contempt of court proceeding against the applicants for their failure to comply with their disclosure obligations. The non-disclosure is only relevant as far as to the determination of whether the applicants have made a case for urgent relief or not. The full merits of the case will be determined at the hearing in due course

⁴ *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Another* [2013] 4 All SA 346 (GNP) para [34 - 35]

after the applicants have filed their replying affidavit. I am therefore not satisfied that a case is made for a cost order against the attorneys.

[49] With regard to the applicants, I am satisfied that a punitive cost order is justified. This is not because they are unsuccessful on urgency but because of the misleading statements made under oath and unexplained omission of material facts which I agree with the respondents that they go to the heart of this urgent application. The integrity of the court process needs to be respected. Misrepresentation of facts to induce a certain outcome in a matter should be frowned upon as it constitutes an abuse of the court process which the applicants cannot be excused from.

[50] In the result, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. The applicants are ordered to pay the respondents' costs on an attorney and client scale.

JL Bhengu
Acting judge of the High Court
Mbombela Main Seat

Appearances

For the Applicants: Adv Z Gumede

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Date of hearing: 27 May 2025

Date of Judgment: 18 June 2025