THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **1820/2023**
Reportable: YES / **NO**
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

SIBISI, CHRISTOPHER SOMANDLA First Respondent

MACRONYM 37 (PTY) LTD Second Respondent

APHIWOKUHLE HOLDINGS (PTY) LTD Third Respondent

In re:

1. ERF 1[...], also known as 9[...] T[...] Street, Royldene, Kimberley.

2. ERF 1[...], also known as The Lyve Café, corner Chapel and Du Toitspan Street, Kimberley.

3. White Audi A1, with registration number K[...].

4. Kitchen Equipment, delivered and installed at The Lyve Café, corner of Chapel and Du Toitspan Streets, Kimberley, as per annexure JS 41 (i.e. Schedule of Equipment).

Neutral citation: *NDPP v Sibisi and Others* (1820/2023)
Coram: Nxumalo J
Heard: 13 June 2025
Date of Order: 06 March 2026

ORDER

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1. An order is granted in terms of the provisions of Section 50 of the **PREVENTION OF ORGANISED CRIME ACT** 121 of 1998 ("*POCA*"), declaring forfeit to the State certain property ("the property"), which is presently subject to a preservation of property order granted by this Honourable Court under the abovementioned case number 29 September 2023 and subsequently confirmed on 08 December 2023; to *wit*:

    1.1. Erf 1[...], also known as 9[...] T[...] Street, Royldene, Kimberley.

    1.2. Erf 1[...], also known as The Lyve Café, corner Chapel and Du Toitspan Street, Kimberley.

    1.3. One White Audi A1, with registration number K[...]; and

    1.4. Certain Kitchen Equipment, delivered and installed at The Lyve Café, corner of Chapel and Du Toitspan Streets, Kimberley, as per annexure JS 41.[1]

2. A further order be and is hereby granted in terms of Section 52(2)(a) of POCA, excluding the interest of Standard Bank, in respect of the abovementioned property referred to in paragraph 1.2, from the operation of the forfeiture order.

3. The *curator bonis*, Mr Yousuf Hassen, appointed by this Court, in terms of the order granted on 29 September 2023, is directed to continue to act as such with authority to perform all the functions specified in the POCA, subject to the provisions of the **ADMINISTRATION OF ESTATES ACT** 66 of 1965 and the supervision of the Master of the High Court.

4. The *curator bonis* shall have all such powers, duties and authority as provided for in POCA and this Order; including such powers, duties and authority reasonably incidental thereto and shall, in addition, be subject to the applicable provision of the **ADMINISTRATION OF ESTATES ACT** 66 of 1965. The fees and expenditure of such *curator bonis* reasonably incurred in the execution of his duties shall be paid from the proceeds of the forfeit property.

5. In terms of Section 56(2) of POCA, the property shall vest with the *curator bonis* on behalf of the State, on the date on which this forfeiture Order takes effect.

6. The *curator bonis* is authorised as of the date on which this forfeiture Order takes effect to:

6.1. Assume control of the property and take it into custody.

[1] i.e. "the *Schedule of Equipment*"

6.2. Dispose of the property with public sale.

6.3. Deal with the excluded interest in terms of Section 52(2) of POCA, granted in favour of Standard Bank.

6.4. Deduct his fees and expenditure that were approved by the Master of the High Court, subject to the exclusion of interest in the property under Section 52(2) of the POCA, granted in favour of Standard Bank.

6.5. Deposit the balance of the proceeds into the Criminal Assets Recovery Account number 8[...], established under Section 63 of the POCA, held at the South African Reserve Bank, Vermeulen Street, Pretoria.

6.6. Perform any ancillary acts which, in the opinion of *curator bonis*, but subject to any directions of the Criminal Assets Recovery Committee, established under Section 65 of the POCA, are necessary.

7. The *curator bonis* shall as soon as possible, but not later than within a period of 90 days of this Order coming into effect, file A Report with the applicant and the Master of the High Court, indicating the manner in which he:

7.1. Completed the administration of the property mentioned above; and

7.2. Complied with the terms of this Order.

8. Any person affected by this Order and who was entitled to receive notice of the application under Section 48(2) of the POCA, but who did not receive such notice, may within 45 days, after the publication of the notice of this Order in the Gazette, apply for an order under Section 54 of the POCA, excluding his or her interest in the property; or varying the operation of this Order, in respect of the property.

9. All the paragraphs of this Order shall operate with immediate effect, except paragraphs 4,5 and 6; which will only take effect on the day that a possible appeal is disposed of in terms of Section 55 of the Act; or after the day that an application for execution of interest in the forfeited property in terms of Section 54 of the POCA, is disposed of; or after expiry of the period in which an appeal may be lodged or application be made in terms of Section 54 of the POCA, whose interest in the property concerned is affected by this Order, may within 20 days after he or she has acquired knowledge of this Order, set the matter down; after giving notice thereof to the applicant, for variation or rescission by this Court; and

10. The costs of this application are awarded to the applicant.

JUDGMENT

Nxumalo J

<u>INTRODUCTION</u>:

[1] This motion implicates Sections 50 of the **PREVENTION OF**

ORGANISED CRIMES ACT 121 of 1998 ("***POCA***")[2] seeking to declare forfeit to the State, certain property, which is presently subject to a preservation of property order granted by this Court under the abovementioned case number on 29 September 2023 and confirmed on 08 December 2023; to *wit*: (a) Erf 1[...], also known as 9[...] T[...] Street, Royldene, Kimberley; (b) Erf 1[...], also known as The Lyve Café, corner Chapel and Du Toitspan Street, Kimberley; (c) one White Audi A1, with registration number K[...]; and (d) certain Kitchen Equipment, delivered and installed at The Lyve Café, corner of Chapel and Du Toitspan Streets, Kimberley, as per annexure JS 41.[3] The applicant also seeks costs of this motion to be awarded to it.

[2] The applicant is the **National Director of Public Prosecution** within the contemplation of Section 179(1)(a) of the Constitution. The offices of the applicant are situate at 123 Westlake Avenue, 2nd Floor, VGM Building, Weavind Park, Silverton, Pretoria.

[3] The first respondent is one **Christopher Somandla Sibisi**, an adult male residing at 489 Cedar Creek Boulevard, Fourways, Johannesburg. The first respondent is the sole director of the second and second respondents, respectively. He is cited herein as a person who might have an interest in the impugned property.

[4] The second respondent is one **Macronym 37 (Pty) Ltd**, a property limited company, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with its registered address and principal place of business situate at 67 De Beers Road, Kimberley. The second respondent is cited herein as a party that might have an interest in the impugned property.

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[2] Or "*the Act*"

[3] i.e. "*the impugned property*" as itemised in "*the Schedule of Equipment*"

[5] The third respondent is one **Aphiwokuhle Holdings (Pty) Ltd**, a property limited company, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registered address and principal place of business situate at 6[...] D[...] T[...] Road, Kimberly. The third respondent is also cited herein as a party that might have an interest in the impugned property.

[6] The application which is lodged *vide* Section 48 of POCA, in the main is predicated against the contention that the impugned property is the proceeds of unlawful activities of fraud and money laundering within the contemplation of Schedule 1 of the POCA. Section 48 (1) of POCA, expressly permits the applicant, if a preservation of property order is in force, to apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

[7] For its own part, Section 50(1) of POCA impels this Court, subject to Section 52, to make an order applied for under Section 48(1) of POCA, if this Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 of POCA; or is the proceeds of unlawful activities. Section 50(2) of the POCA, on the other hand empowers this Court, when it makes a forfeiture order or at any time thereafter, to make any ancillary orders that it considers appropriate.

[8] The respondents are opposed to the order sought being granted. They have delivered an answering affidavit to that extent. The deponent thereto is the first respondent. It is in the main contended for the respondents that on a balance of probabilities, the impugned property is not the proceeds of unlawful activities. The nub of the respondents' disputation resides in paragraphs 4.3-4.7 of the said answering affidavit;

to *wit*:

"4.3 It is common cause that in June 2020, the Department awarded a contract to the second respondent to procure Covid-19 PPE i.e. coveralls, surgical masks and N95/FF2 masks, in the amount of R26 960 025.00.

4.4 … the second respondent sold and delivered the goods to the Northern Cape Department of Health in 2020, at the Department's special instance and request and that the respondents did so lawfully.

4.5 … that the Department deviated from the normal supply chain management process when it commenced procuring PPE, for the Covid-19 pandemic in March 2020, it cannot be said that the respondents should be held liable for such deviations.

4.6 The respondents had absolutely no power to influence the granting of the tender in question. It is not for the respondents to champion the internal operational requirements of the Department, nor to be the custodians of same.

4.7 The applicant want to create the impression that the respondents somehow played a role in the awarding of the contract, but this is completely unsubstantiated. The second respondent was not a party to the decision-making process. The decision to award the contract must be placed solely at the feet of the officials of the Department."

[9] The parties are *ad idem* as to what falls for determination in these proceedings; to *wit*: whether on a balance of probabilities, the impugned property is the proceeds of unlawful activity and/or the instrumentality of an offence.

CONDONATION:

[10] Having delivered their answering affidavit 33 days out of time, the respondents sought condonation for same. The respondents, in this regard, in the main contented that granting them condonation would be in the interest justice and that their failure to deliver the said affidavit was not due to their negligence and/or willful default. In this regard it is alluded that the respondents' legal representative stated that at all material times hereto, she was under the misapprehension that there was still sufficient to file, as advised by the respondents' previous counsel. That this was an honest mistake which this Court should not draw a negative inference from. To the extent that the relief sought involves public funds, it followed that its full ventilation was of public importance. Regard being had to the drastic nature of the relief sought and the absence of prejudice on the part of the applicant, it was in the interests of justice for condonation to be granted. The foregoing is in sum what was contended for the respondents.

[11] The applicant for its own part, in the main contended that the failure of the respondents to deliver their answering affidavit timely was solely due to their negligence and/or willful default. It was also contended for the applicant that condoning the late delivery of the said affidavit was pointless since opposition of the application had no prospects of success. That to the extent that the respondents sought to place the blame for the delay on their previous counsel. The question was, having instructed attorneys, why did it remain their responsibility to seek counsel by themselves. That the respondents did not show good cause for condonation to be granted because the explanation given was not reasonable. The prejudice suffered by the applicant is the delay in the finalisation of the matter. That in sum was the contention of the applicant in this regard.

[12] It is trite that the factors which are generically taken into consideration by our Courts in determining an application for condonation *inter alia* include the degree of lateness; the explanation therefore; the prospects of success; and the importance of the case. It also is so that, our Courts will also consider the absence of prejudice to the other party. Further, it is so that whilst the standard for considering an application for condonation is the interests of justice, same depends upon the facts and circumstances of each case.[4]

[13] In ***Rabie v De Wit***, it was held as follows:[5]

> *"Thus, in **Trans-African Insurance Co Ltd**,[6] the requirement of prejudice was reaffirmed by Schreiner JA, who quoted with approval what was held by a Full Bench in **Foster** **v** **Carlis and Houthakker** [7] in a similar context:*
>
> *'It seems to me impossible to construe the rule otherwise than as conferring upon the Court the power to condone any such irregularity or impropriety, because the contrary view would convert the latter part of the rule into an instruction to the Court to set aside the irregular or improper proceeding… **It seems to me, therefore, that the Court is entitled to overlook in proper cases any irregularity in procedure which does not work any*** **substantial prejudice** ***to the other party.'"***[8]

[14] It can be deduced from the foregoing that this Court has a discretion to overlook any procedural irregularity which does not cause prejudice to the other party. The applicant was able to deliver its replying affidavit on 31 May 2024. Both parties delivered the prerequisite practice notes and

[4] ***Van Wyk V Unitas Hospital (Open Democratic Advice Centre as Amicus Curae*** 2008(2) SA 472 at 477A-B
[5] 2013(5) SA 219 (WCC) at para 17
6 1956 (2) SA 273 (A) at 276G-H
7 1924 TPD247 at 251-252
[8] Emphasis added

heads of argument to conduce the expeditious adjudication of this matter. None of the parties have been prejudiced, nor was this Court inconvenienced. In the premise, regard being had to the drastic relief sought; the extent and cause of delay; the effect of the delay on the administration of justice and the applicant; the reasonableness of the of the explanation for the delay; the importance of the issue at stake and the prospects of success- this Court was therefore constrained to condone the late delivery of the answering affidavit.

THE PARTIES' MAIN CONTENTION, IN SUM:

Applicant's:

[15] The applicant in the main contended as follows: It is trite that the committed unlawful activity need not be committed by the holder of the property. There must be a consequential link between the unlawful activity and the impugned property. The second respondent (i.e. Macronym) at all material times hereto was not a transversal contractor as defined in the National Treasury Notes.[9] Notwithstanding that the Northern Cape Provincial Department of Health,[10] which was bound by the Treasury Notes, with the intention to defraud and prejudice the Department, the respondents' misrepresentation led to the appointment of the second respondent. At all material times hereto, the first respondent had a corrupt relationship with the Department's Chief Financial Officer, one Gaborone. The second respondent procured the impugned property with the proceeds of a contract it received as a result of its fraudulent misrepresentation during the impugned procurement process. On the conspectus of all the available evidence, the applicant has evinced, on a balance of probability that the impugned property was procured through the proceeds of unlawful activities.

[9] Hereinafter referred to as "*the Treasury Notes*"
[10] Hereinafter referred to as "*the Department*"

<u>Respondents'</u>:

[16] The respondents', for their own part, in sum contended as follows: The impugned property is not an instrumentality of an offence and/or purchased with proceeds of an offence or unlawful activities within the contemplation of schedule 1 of POCA. Consequently, same should not be forfeited to the State; and alternatively, in the event that this Court finds that the impugned property is liable to be forfeited to the State, this Court has to assess whether the proposed forfeiture is proportional.[11]

[17] It is common cause that in June 2020, the Department awarded a contract to the second respondent to procure Covid-19 Personal Protective Equipment ("*PPE*") i.e. coveralls, surgical masks and N95/FFP2 masks[12] in the amount of R26 960 025.00. The second respondent sold and delivered the impugned goods to the Department in 2020, at the Department's special instance and request and that the respondents did so lawfully. The Department deviated from the normal supply chain management process when it commenced procuring PPE for the Covid-19 Pandemic in March 2020. The respondents should not be held liable for such.

[18] The respondents had absolutely no power to influence the granting of the tender in question. It is not for the respondents to champion the internal operational requirements of the Department, nor to be the custodian of same. The applicant wants to create the impression that the respondents somehow played a role in the awarding of the contract, which is completely unsubstantiated. The second respondent was not a party to the decision-making process regarding the said contract. The award of

[11] Hereinafter referred to as "*the proportionality assessment*"
[12] Hereinafter referred to as "*the impugned goods*"

same was the sole decision of the Department.

<u>ISSUES FOR DETERMINATION</u>:

[19] The crux of this application was whether the impugned property fell to be forfeited to the State because same constitutes proceeds of unlawful activities and/or is an instrumentality of an offence. Tangentially, it also fell to be determined, in the event that this Court found that the impugned property is liable for forfeiture, whether the relief sought was proportional; regard being had to the facts and circumstances of this case.

[20] The phrase "*proceeds of unlawful activities*" connotes "*any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived*". The phrase "*instrumentality of an offence*" in turn denotes "*any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere*".

[21] The phrase "*unlawful activity*" means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.[13]

<u>BRIEF OVERVIEW</u>:

[22] On 15 March 2020, the President of the Republic, declared a National

[13] Section 1 of the Act.

State of Disaster, following the outbreak of the Covid-19 Pandemic. In turn, National Treasury ("*NT*") issued Instruction Notes to all National and Provincial departments, to assist in dealing with the procurement of PPEs, during the said pandemic.

[23] On 17 March 2020, one Ms Nomhle Orienda Gumbo ("*Gumbo*"), a Manager in the Department's Health and Non-Communicable Deceases Unit, Kimberley, compiled a memorandum for the procurement of cleaning and disinfectant material, as a matter of urgency. Gumbo estimated the quantities on her own initiative and the amounts for the items were supplied by one Mr Montgomery Faas, a Manager Supply Chain Management in the Department ("Faas").

[24] On 23 March 2020, Gumbo signed the memorandum and it was recommended by one Mr Riaan Strydom ("*Strydom*"), the Acting Chief Director and one Mr Daniel Gaborone, the Chief Financial Officer of the Department ("*Gaborone*") and approved by one Mr Deon Theys ("*Theys*"), the Acting Head of Department ("*the HOD*"). Significantly, the Gumbo memorandum did not include coveralls or body bags.

[25] On 09 June 2020 the second respondent submitted documentation, which one Ms Cleopatra Norman ("*Norman*") signed on its behalf. The second respondent submitted a quotation to the Department, reflecting the supply of 50 000 coveralls; 250 000 surgical masks and 250 000 FFP2 masks - totaling the sum of R26 960 025.00. On 17 June 2020 Gaborone signed a letter addressed to the second respondent titled "*Acceptance of Offer: Supply of Personal Protective Equipment*" wherein he stated that the Department accepts his offer to supply. A Delivery Note dated 22 June 2020 for 250 000 disposable face masks was subsequently signed by one Ms Elizabeth Dibueng Manyetsa ("*Manyetsa*") on behalf of the Department, whilst one Mr Macdonald Kgololo Mampe ("*Mampe*") signed

on behalf of the second respondent.

[26] A Delivery Note dated 07 July 2020 for 250 000 N95/FFP2 masks was signed by one Mr Goitsemodimo Piet Moseki ("*Moseki*") on behalf of the Department and Mampe, on behalf of the second respondent. A Delivery Note, dated 20 July 2020 for 69 984 coveralls was signed by Moseki, on behalf of the Department and Mampe, on behalf of the second respondent. On 27 July 2020 a Purchase Order evenly dated with a delivery date of 26 August 2020 was signed by one Dr Theys, with a description reference: "*Clothing Outfit Protective*". The second respondent issued an invoice on 29 July 2020. On 06 August 2020 an amount of R26 960 025.00 was deposited into the second respondent's Standard Bank account.

<u>Second Respondent's Submission of its First Quotation and WhatsApp Communications between Gaborone and the First Respondent</u>:

[27] In this regard, the applicant alleged as follows: On 14 April 2020 one Mr Siyabulela Booi, an Assistant Manager in Supply Chain Management ("*Booi*"), transmitted an RFQ to the second respondent and other suppliers, for the supply of certain PPE items. The second respondent and other suppliers responded to the said RFQ. The second respondent's quote was R316 992 607.00. On 23 April 2020 a regret letter was sent to the second respondent and other suppliers, advising that their quotations were unsuccessful due to overpricing. Thereafter, Booi in writing invited all prospective suppliers to a consultative process regarding pricing, attaching Treasury Instruction Note number 09 of 2019/2020. The said Instruction Note peremptorily prescribed the list of items, suppliers and prices to be used by all Government Departments.

[28] The foregoing notwithstanding, paragraph 3.7.6 of the Instruction Note, granted the following dispensation:

> *"3.7.6. Institutions may approach any other supplier to obtain quotes and may procure from such suppliers on condition that:*
>
> *i. The items are to the specifications as determined by the National Department of Health;*
>
> *ii. The prices are equal or lower than the prices in Annexure A;*
>
> *iii. The supplier is registered in the Central Supplier Database."*

[29] It is significant to point out that paragraph 2.5 of the Instruction Note, for its own part, expressly and unambiguously stipulated that the nature of the goods that are required should not be goods ordinarily procured and the high demand of these items by both the private and public sector may lead to uncompetitive and inflated prices.

[30] On various dates, the first respondent sent Gaborone the following texts: "*Somandla*" (01 June 2020); "*Sharp Budakes, I need to give feedback and I don't know what to say"* (10 June 2020). Gaborone in turn responded as follows: *"I'll call you soon*" (10 June 2020). On 11 and 12 June, respectively the second respondent further texted Gaborone as follows: *"Sure Budakes, are we still meeting as I had to postpone to tomorrow"* and asked *"Are you still sending?"* On 15 June 2020, Gaborone texted the first respondent as follows: "*I'll call you back."*

[31] Shortly after the said written communication, Gaborone (the CFO) and the first respondent communicated *via* WhatsApp on various occasions

from 01 June 2020. This communication seems to have been initiated by the latter. On 09 June 2020, Booi once again transmitted the said RFQ to the second respondent. The WhatsApp communication between Gaborone and the first respondent thereafter resumed during the period between 10 to 12 June 2020. On 12 June 2020, Faas advised Gaborone that the second respondent was not compliant with the specifications of the goods required.

[32] The respondents, for their own part averred as follows, with regard to the foregoing: With respect to the extent of Booi's involvement in the procurement process, the applicant deliberately ignored the delegated authority of Booi, in the chain of the decision making in the Department. It is common cause that Booi is not a Deputy Director or Chief Director; nor a Head of Department. Booi therefore at all material times hereto had no power or influence to award contracts to anyone. The so-called WhatsApp communication referred to in paragraph 42.5 of the founding affidavit, is merely one message where the first respondent wrote- "*Somandla*." It is inconceivable that the applicant is now attempting to attribute guilt to that one message.

[33] In reply, the applicant denied the foregoing and averred as follows: It is unclear as to why the respondent is making the foregoing averments as the applicant never inferred or indicated that Booi influenced the awarding of the impugned contract. That it is worth noting though that Booi is an Assistant Manager in SCM, which means his input in awarding contracts is valuable or should be valuable. The second respondent does not make out a case as to why it should not be inferred that the communication with the CFO of the Department (Gaborone), during procurement process is untoward. The second respondent ignored the fact that this is not the only communication that was noted between itself and the CFO. Further communication was observed on 10-12 June 2020,

as well as 15 June 2020. The second respondent as a businessman should know this kind of communication could cast a bad light on the procurement process as it would be viewed as the CFO being favourable to it.

[34] It is clear from the foregoing that the respondents' attempt to confess and avoid the allegations contained in the applicant's affidavit only amounts to indignant argument and expostulation, which should be eschewed in answering affidavits.[14] Affidavits are not pleadings. The respondents can thus not content themselves with bare unsubstantiated denials,[15] unless of course there is no other way open to them and nothing can be expected of them.[16]

<u>First Respondent's submission of Quotations on 13 and 15 June 2020</u>:

[35] As alluded above on 09 June 2020, Booi once again transmitted an RFQ to the second respondent. Thereafter, also as alluded above, Gaborone and the first respondent resumed their communication *via* WhatsApp during the period of 10 to 12 June 2020. On 12 June 2020, Faas advised Gaborone that the second respondent was still not compliant with the specifications of the goods required. On Saturday 13 June 2020 the first respondent submitted another quotation directly to Gaborone, queerly backdated 10 June 2020. Thereafter, on 15 June, the WhatsApp communication between Gaborone and the first respondent, resumed. Following the said communication, a revised quotation was once more submitted by the first respondent *via* electronic mail to Booi. Gaborone was contemporaneously copied in same.

<u>Inflation of quantities and inclusion of items not requested in the first</u>

[14] ***Reynolds NO v Mecklenberg (Pty) Ltd*** 1996 (1) SA 75 (W) at 79A-F
[15] ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** 1949 (3) SA 1155 (T) at 1163 and 1165
[16] ***Wightman v Headfour (Pty) Ltd*** 2008 (3) SA 371 (SCA) at 375G

respondent's quotation:

[36] Significantly, the applicant avers that the Draft Report by Morar ("*the Draft Report*") *inter alia*, found as follows; that: The quantities in the said quotation were inflated and included items that were not requested. The unrequested items gave rise to the inflated quotation value. The second respondent inflated its prices, which resulted in an overpayment of an amount of R862 500.00.

Second respondent's tax non-compliance and being unregistered as a PPE or medical equipment supplier:

[37] The applicant alleged that at all material times hereto, the second respondent was not, not only unregistered to supply PPE or medical supplies to the applicant, but also not tax compliant according to the applicant's CSD.[17] This is not disputed, anywhere.

The Department's overpayment to the second respondent:

[38] On 17 June 2020 Gaborone informed the second respondent that its quotation was accepted and that a formal letter to that effect will be transmitted by 18 June 2020. In terms of the Draft Report, the second respondent also inflated its prices when it invoiced the Department. This inflation resulted in the Department overpaying the second respondent in the amount of R862 500.00.

Large cash withdrawals by the second respondent and cash deposits by Gaborone:

[39] This Court found that the second respondent did not frankly disclose the

[17] Paragraphs 42.15 -42.16, p450, Founding Affidavit

detail of the foregoing conversation with Gaborone, at all material times hereto. This Court found that whilst the said WhatsApp communication continued between Gaborone and the first respondent after the impugned transaction was completed, particularly on the dates, the second respondent was making large cash withdrawals from its bank account. Troublingly, the Morar Report observed through the perusal of FIC Report of Theys and Gaborone, that the latter made certain cash deposits into his bank account in the approximate amount of R378 000.00.

<u>Shortage of 69 984 coveralls, despite the respondents' alleged delivery of 69 984 of same on 20 July 2020 and stocktaking recordal of nil on 09 September 2020</u>:

[40] The applicant also alleged, that at all material times hereto, one Ms Heliza Mentoor ("*Mentoor*") was responsible for the weekly reporting of stock levels to Treasury, whilst Manyetsa was in charge of receival and distribution of PPEs. That on 24 July 2020 the latter's records evinced a shortage of 69 984 coveralls, despite the respondents' alleged delivery of 69 984 of same on 20 July 2020. Of significance, in this regard is the fact that the former's stocktaking of coveralls recorded nil on 09 September 2020.

<u>Payments by the Second Respondent to one Masedi Star (Pty), which is not Registered or Licensed to Manufacture or Sell PPEs</u>:

[41] It is common cause that the second respondent made certain payments to Masedi Star for PPEs, notwithstanding the fact that according to the South African Health Products Regulatory Authority ("*SAHPRA*") was at all material times hereto, not registered or licensed to manufacture or sell PPEs. The applicant also alleged that Masedi Star, provided contradictory information to the Asset Forfeiture Unit ("*AFU*") and the Special Investigating Unit ("*SIU*"), with regard to payments received from

the second respondent.

[42] The respondents, for their own part in this regard, contended as follows, with regard to the foregoing: It is important to note that the first Request for Quotation (RFQ) sent by Booi to the first respondent, was for twenty different items which ultimately amounted to R316 992 607.00. Whereas the second RFQ, was only for only three different items amounting to R26 960 025.00. Therefore, the impression that the applicant is trying to create that the first respondent’s first quotation to the first RFQ, was grossly inflated is misleading. The request the first respondent received from Booi was a separate and different quotation for the first wave of the Covid pandemic. Accordingly, Booi initially gave his standard pricing, but as things progressed, the second respondent was never appointed for that first quotation and never provided Booi with any invoice.

[43] The second RFQ came from Gaborone for different quantities and stock and the first respondent ensured that his pricing was as per the circular of National Treasury, which dictated the pricing. The allegations that the prices were grossly inflated are categorically denied and without merit.

[44] Significantly, the first respondent contended that to the extent that he is a businessman, it is “*acceptable business practice to communicate with a Department he intends providing services*”. That the WhatsApp communications between himself and Gaborone are not strange or incriminating at all. That he kept communicating with Gaborone purely for business purposes devoid of any underhandedness or any illegality. That the allegations are baseless and without merit. Booi sent the first respondent the first RFQ and the first quotation submitted was rejected. So, it was only natural for the first respondent to go to Gaborone to enquire what he did wrong in the first quotation to enable him to correct his subsequent quote.

[45] The second respondent confirmed making payment to one Masedi Star, who allegedly procured K95 masks, 3-ply surgical masks and coveralls and selling same to the second respondent. He referred this Court to annexure A, allegedly being the quotation Masedi Star, provided to the second respondent. That the second respondent executed and discharged its obligations, including helping the Department by providing transportation services for the goods procured through other companies. That all the items were delivered to the Department in terms of the impugned tender. Respondents attached copies of delivery notes which allegedly prove delivery.[18]

[46] In reply, the applicant denied the foregoing and contemporaneously contended as follows: It is unclear as to why the respondents are making the said averments as the applicant never inferred or indicated that Booi influenced the awarding of the impugned tender, in anyway. That the foregoing notwithstanding, to the extent that Booi is an Assistant Manager in the Supply Chain Management section of the Department, means his input in awarding tenders is valuable as it should. That the respondents did not make out a case as to why it should not be inferred that the impugned communication with Gaborone during the procurement process was untoward.

[47] That the respondents ignored the fact that the impugned text is not the only communication that was transmitted between the respondents and Gaborone. That to this extent, further communication was transmitted on 10 to 12 June 2020, as well as 15 June 2020. That the first respondent, as reasonable businessman, should have known that the impugned communication could place a bad light on the process since same would be viewed as Gaborone being favourable to the respondents.

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[18] Annexure B

[48] The applicant placed no contention on the first quotation. The quotation that the applicant found to have been inflated is the one on the basis of which the second respondent was awarded the impugned tender. The respondents' assertion that the second respondent was indeed requested to quote three items which description and quantity was specified is not true. That it is so since the quantity as directed in the RFQ, is not the same quoted by the second respondent as there is one additional item which did not form part of the RFQ. The said RFQ issued by Booi did not include coveralls. This notwithstanding, the second respondent unilaterally included same at an inflated price and quantity *contra* the RFQ.

[49] Whilst it is the respondents' case that the second RFQ was issued by Gaborone, they do not furnish any proof of same or any unit price quotation to that effect. If regard is being had to the impugned WhatsApp texts, especially; to *wit: "Sharp Budakes, I need to give feedback and I don't know what to say"* it can be inferred that the second respondent requested Gaborone to tell him what to say.

[50] The impugned communication was between the second respondent and Gaborone and not Booi. The latter who had been sending the RFQs to the second respondent. That it is unacceptable business practice for communication to ensue between Gaborone and any service provider during the process adjudicating any tender as same can be viewed as the latter to be soliciting advice as to how to go about the process. It follows that the said communication is underhanded as same relates to the procurement at hand, at all material times hereto. Further, where there was communication, it follows that there would have been an amendment to the impugned quotation. That it so since same seems to solicit advice and "*stuff*" to be sent to the respondents by Gaborone. The first

respondent therefore had a corrupt relationship with Gaborone as he was communicating with him directly during the procurement process, whilst Gaborone was the one who gave the go ahead despite various non-compliances by the second respondent.

[51] That it is significant to point out that the second respondent's first quote was declined due to pricing and the second quote non-compliant with the goods specifications. The second respondent has inflated and caused financial prejudice to the Department because service was not rendered effectively. It is evinced that there was a shortage of coveralls, at all material times hereto, despite the second respondent's alleged delivery of same. The second respondent misrepresented the type of masks quoted versus delivery.

[52] Significantly, the second respondent has not provided a reasonable explanation how he could afford to purchase the impugned property if it was not for the funds from the Department. Buying the said property had the effect of concealing and/or disguising the nature and source of the impugned funds.

DETERMINATION:

The respondents' bare and unsubstantiated denials:

[53] Without clearly or concisely stating all the material facts upon which they rely and without giving any fair or clear answer to every point of substance raised by the applicant in its founding affidavit, or advancing evidence of the relevant facts, it was generically averred as follows, in the remainder of the answering affidavit: (a) The funds received from the Department were not derived in the course of lawful business activities; (b) the first respondent denied that the funds he received were derived through fraudulent or corrupt conduct; (c) there is no evidence that he

committed any offence; (c) any irregularities in the procurement process did not render the impugned property proceeds of unlawful activities; (d) he obtained the impugned properties legally and for value and at the time he acquired same he had no reasonable grounds to suspect that the properties constituted proceeds of crime or had been acquired with the proceeds of crime; (e) he developed the property situate at 9[...] T[...] Street, Minerva Gardens, with funds from his other business interests and not with the funds he acquired from the impugned tender; (f) granting of a forfeiture order against him would amount to an arbitrary deprivation of property in contravention of Section 25(1) of the Constitution. This Court found the foregoing to be wholly bare and unsubstantiated.

<u>Averments Accepted as Correct by this Court</u>:

[54] The following allegations relied upon by the applicant are for the purposes of this application accepted by this Court as correct. It is so since the respondents in their answer to the applicant's founding affidavit did not admit or deny; or confess and avoid same.[19]

[55] The documents and annexure filed in support of the preservation application preceding the instant which were incorporated into the founding affidavit as if expressly traversed therein. The affidavit of one Mr Jacobus Smith ("*Smith*") and the relevant annexure filed in support of the preservation application. Smith is a Financial and Asset Investigator under the auspices of the of the Asset Forfeiture Unit ("*AFU*") based in Kimberley.

[56] This Court, for the purposes of this application also accepted the following allegations as correct since they were also not admitted or denied; or confessed and avoided by the respondents: With the advent of

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[19] ***Soffiantini v Mould*** 1956 (4) SA 150 (E0 at 154F

the Pandemic, Instruction Notes were sent out by Nation Treasury to all departments as guidelines on how to go about procuring goods and services during the Pandemic. In the Notes, transversal contractors were set up to provide the departments with the said goods and services. Treasury was to be informed of any noncompliance with the said notes by any department.

[57] The second respondent did not qualify to receive the impugned tender as it was part of the transversal contractors. The foregoing notwithstanding, the Department appointed second respondent *contra* the said notes, without informing Treasury. At all material times hereto, the second respondent was not registered in the Central Data Base as a service provider of PPEs or an entity that provides supplies in the medical sector, nor was it tax compliant.

[58] The second respondent misrepresented itself to the Department by quoting and receiving payment for N95 masks, whilst knowing that in actual fact, it delivered surgical masks. There was also a misrepresentation on the part of the second respondent, by delivery of a different quantity of masks than the ones reflected in its quote and the RFQ. The Department's stock reconciliation and distribution list noted numbers that do not reconcile with the alleged delivery of same. Huge shortage was noted despite the alleged delivery by the second respondent. Regard being had to the foregoing, it was reasonable to infer that the second respondent did not deliver effectively, if at all.

[59] Significantly, the forensic investigation revealed that after the second respondent communicated with Gaborone, it revised its quotation. A reasonable inference can therefore be drawn that the said communication related to the said quotation and/or procurement process. When the second respondent was invited to give information on how and where it

procured the PPEs, it gave conflicting information to the different law enforcement agencies. For example, the invoice given the SIU was an amount of R13 248 000.00, whilst it furnished the AFU, an invoice in the amount of R2 008 500.00. The AFU Investigator was unable to trace any transaction pertaining to the former amount, in any of the second respondent's bank accounts.

[60] The Department's officials acted in concert with the second respondent, in causing prejudice to the Department, for *inter alia*; the following reasons: (a) the prices quoted were inflated; (b) the first delivery by the impugned goods was made 3 months later, despite the fact that the deviation request was on an urgent basis;(c) the Department transmitted a Purchase Order to the second respondent dated 27 July 2020, with a delivery date of 26 August 2020, after it had already delivered the impugned goods;(d) the second respondent was paid before the purchase order date; (e) the said purchase order simply stated "*Clothing Outfit Protective*" without any specificity, which is misleading, regard being had to the fact that at the time the purchase order was transmitted, the Department would have been aware of what had been delivered by the second respondent; (f) the preliminary finding that some of the impugned communication between the first respondent and Gaborone took place during the period the former withdrawal of large sums of money from his bank account lends credence to the irresistible inference that a corrupt relationship existed between the former and the latter; and (g) the transactions conducted by the respondents in utilizing the money received from the Department fall within the ambit money laundering as same was transferred to the bank account of the third respondent, where the impugned property transactions took place, thus having the effect of disguising or concealing the nature or source of the impugned funds.

[61] Significantly, it appears from the papers that the quote Gaborone

accepted is not the quote that was invoiced. It is so since the accepted quotation dated 10 June and submitted on 13 June 2020, contained seven items in circumstances where the RFQ, and the second quotation was only for three items; to *wit*: 5000 non-sterile gloves; 5000 surgical gloves and 30 000 N95 masks. The forgoing notwithstanding, it is evident from the papers that the second respondent delivered normal masks instead of N95 masks, the latter for which he quoted for and was paid therefor. Nowhere is this discrepancy explained by the respondents.

[62] The inclusion of the coveralls, for which not only no purchase order was transmitted before delivery, but which was questioned by Mentoor, remains unexplained. The second respondent also could not explain why more than 50 000, coveralls were purportedly delivered in circumstances where only 50 000, was quoted. Nor is there any explanation as to why 250 000 surgical masks that were not requested; or why 250 000 N95/FFP2 masks were quoted, were paid for and not delivered; whilst only 30 000 were requested by the Department. There is also no explanation on the papers, as to why normal masks were delivered, instead of the foregoing. On this score alone, it follows that had the second respondent adhered to the RFQ transmitted by the Department, payment due would have been drastically less than what was received.

[63] The following can also be deduced, regard being had to the facts as stated by the respondent, together with the facts alleged by the applicant, that are admitted by the respondent. First and significantly, the respondents admit the finding that at all material times hereto, the second respondent was not tax compliant or registered on the applicant's CSD or registered on same as a medical equipment supplier. Second, the respondents admit that the quantities in the 15 June 2020 quotation were inflated and included items that were not requested. Third, they admit that according to SAHPRA, Masedi Star is not registered or licensed to

manufacture or sell PPEs. They also admit that the said company gave contradictory information to AFU and SIU, regarding payment received from the second respondent.

[64] The foregoing is so since the respondents' affidavit, in response to the said allegations has failed to admit or deny; or confess and avoid. It is trite in our law that, in the circumstances, this Court had, for the purposes of the application, accept the applicant's allegations as correct.

[65] Fourth, regarding the alleged inflated quotation value and the resultant overpayment of an amount of R862 500.00, by the Department to the second respondent. The respondents merely "*categorically*" denied and maintained that same is "*without merit*" and no more. Tritely, whilst it is permissible for a respondent, without advancing evidence of facts under oath, to seek to impugn the veracity of the applicant's allegations by examining their inherent validity or probity in all the proved circumstances. The respondents can however not content themselves with bare unsubstantiated denials, unless of course, there is no other way open to the respondents and nothing more can be expected of them. It is not so in this case.

[66] Fifth, the first respondent's contention that it is "*acceptable business practice to communicate with the Department*" he intends providing services to or that nothing was underhanded or illegal about same, cannot be more legally flawed. Whilst private parties are generically free to conduct themselves with regard to contracts to be entered into between them. It is not so with organs of State. There are some restrictions that apply to them by virtue of the principle of legality, which may render wholly or partially, ineffective contracts involving the contravention of specific rules of law or which are contrary to public policy. In its modern guise, public policy is rooted in the Constitution and

the fundamental values enshrined therein. To this extent, Section 217 of the Constitution, expressly and unambiguously impels all organs of State or any other institution identified in national legislation to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Needless to state that, these concepts are interconnected and interrelated.

[67] It was also submitted for the respondents that they have taken this Court into their confidence and indicated that the purpose of the communication was to merely seek clarity regarding what exactly the Department was looking for from their service providers so that they could correct their quotations. This is not only patently irregular, but is also tellingly evincing how much the respondents were out of their depth in the sector provision of medical supplies. The required items were quantified, qualified and priced.

[68] It should be borne in mind that Gaborone, at all material times hereto was exercising a public power. It is a fundamental principle of the rule law that the exercise of public power is only legitimate where lawful. The impugned communication between the first respondent and Gaborone on the face of it seem not only unlawful but was also unfair, opaque, uncompetitive to the other service providers. It is so since it does not stand up to scrutiny by interested parties. Sixth, a bare denial that the first respondent ever paid any money to Gaborone or merely that the allegation is baseless and with merit, without more, is not good enough; regard being had to the probity in all the facts proved and circumstances of this case.

[69] The respondents also caviled with the following: That the Department was not called upon to show cause why the decision to procure on the strength of emergency procurement was taken. That this failure

substantially weakened the applicant's case because the allegations are that the tender was awarded unlawfully, yet the decision-maker's version implicating the respondents in any wrong doing was not before this Court. That the applicant also failed to attach the relevant bid evaluation and adjudication documents which led to the appointment of the second respondent. That consequently, this Court had no sight regarding how and why the tender was awarded to the respondents. Without the said documents, the respondents are placed in the unfair and impossible position of having to explain how they were selected and appointed, which they have no knowledge, which is unfair to the respondents.

[70] It is evident that the respondents did not know, nor had any reasonable grounds to suspect that the funds they received from the impugned tender constituted the proceeds of crime. That there is no evidence which suggests that the respondents were involved in the impugned deviation. This decision must therefore be placed at the feet of Theys and Gaborone. This argument is not only misconceived, but is also unsound in law.

[71] It should be borne in mind that in *casu*, guilt or wrong doing of the owner or possessor is of no relevance. The unlawful activity need not have been committed by the holder or owner of the property. It is sufficient if the impugned proceeds are, in some way consequences of unlawful activities[20] Conterminously, the phrase requires the impugned property to have been derived, received and retained in connection with or as a result of unlawful activities.[21] It is so since it has been correctly held that the phrase "*unlawful activity*" first, it should be approached on the basis that, subject to the necessary attenuation of the linguistic scope of "*in connection with*" it should be given its full ambit. Second, it should also

[20] ***NDPP v Seervarayan*** 2004 (2) All SA 491 SCA
[21] ***NDPP v Cook Properties*** 2004 (2) SACR 208 SCA

be borne in mind that the objectives of the Act, is to render forfeit, the returns that might accrue from unlawful activity.

[72] It follows from the foregoing that whilst, the applicant bears the onus to evince on a balance of probabilities that the impugned property constitutes the proceeds of unlawful activities and/or is an instrumentality of an offence. It is so that in circumstances where the respondents were faced with a *prima facie* case that the property is the proceeds of unlawful activity, it does not avail the respondent to ask the applicants to investigate the monies and properties, to establish that they are actual fact the proceeds of unlawful activities. Matters peculiarly within the knowledge of the respondents require them to place all the information before the Court.[22] This is because the respondents, for their own part bear the onus of proving that their innocent recipients of the impugned proceeds. This the respondents failed to do.

CONCLUSION:

[73] The prejudice suffered by the Department and the public purse is by no means insignificant. The jurisprudential basis of the Act, is to *inter alia*, provide for the recovery of proceeds of unlawful activity and for the civil forfeiture of property that has been utilized to commit an offence and/or property that amount to the proceeds of unlawful activity. This is to ensure that criminals do not enjoy the fruits of their crimes. It follows that the Act requires the impugned proceeds to be followed, the profits to be seized and the spoils of criminality to be targeted, which serves the secondary objects of deterrence and crime prevention.[23] Needless to state, the Act is a law of general application within the contemplation of Section 25(1) of the Constitution. Bringing its full might to bear, regard

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[22] ***NDPP v Samuel and Others*** 9863/2016 KZN, Unreported Judgment
[23] ***NDPP v Wood and Others*** 2022 (2) SACR 245 (GJ).

being had to the facts and circumstances of this case can therefore not amount to an arbitrary deprivation of property, as suggested for the respondents.

[74] Regard being had to the foregoing, this Court concluded that forfeiture was commensurate. In the premise, the impugned property fell to be forfeited to the State because on a balance of probabilities same constitutes proceeds of unlawful activities and/or is an instrumentality of an offence.

ORDER:

[75] It is against this backdrop that the following Order issued:

1. An order is granted in terms of the provisions of Section 50 of the **PREVENTION OF ORGANISED CRIME ACT** 121 of 1998 ("*POCA*"), declaring forfeit to the State certain property ("the property"), which is presently subject to a preservation of property order granted by this Honourable Court under the abovementioned case number 29 September 2023 and subsequently confirmed on 08 December 2023; to *wit*:

10.1. Erf 1[...], also known as 9[...] T[...] Street, Royldene, Kimberley.

10.2. Erf 1[...], also known as The Lyve Café, corner Chapel and Du Toitspan Street, Kimberley.

10.3. One White Audi A1, with registration number K[...]; and

10.4. Certain Kitchen Equipment, delivered and installed at The Lyve Café, corner of Chapel and Du Toitspan Streets, Kimberley, as per annexure JS 41.[24]

11. A further order be and is hereby granted in terms of Section 52(2)(a) of POCA, excluding the interest of Standard Bank, in respect of the abovementioned property referred to in paragraph 1.2, from the operation of the forfeiture order.

12. The *curator bonis*, Mr Yousuf Hassen, appointed by this Court, in terms of the order granted on 29 September 2023, is directed to continue to act as such with authority to perform all the functions specified in the POCA, subject to the provisions of the **ADMINISTRATION OF ESTATES ACT** 66 of 1965 and the supervision of the Master of the High Court.

13. The *curator bonis* shall have all such powers, duties and authority as provided for in POCA and this Order; including such powers, duties and authority reasonably incidental thereto and shall, in addition, be subject to the applicable provision of the **ADMINISTRATION OF ESTATES** Act 66 of 1965. The fees and expenditure of such *curator bonis* reasonably incurred in the execution of his duties shall be paid from the proceeds of the forfeit property.

14. In terms of Section 56(2) of POCA, the property shall vest with the *curator bonis* on behalf of the State, on the date on which this forfeiture Order takes effect.

15. The *curator bonis* is authorised as of the date on which this forfeiture Order takes effect to:

    15.1. Assume control of the property and take it into custody.

[24] i.e. "the *Schedule of Equipment*"

15.2. Dispose of the property with public sale.

15.3. Deal with the excluded interest in terms of Section 52(2) of POCA, granted in favour of Standard Bank.

15.4. Deduct his fees and expenditure that were approved by the Master of the High Court, subject to the exclusion of interest in the property under Section 52(2) of the POCA, granted in favour of Standard Bank.

15.5. Deposit the balance of the proceeds into the Criminal Assets Recovery Account number 8[...], established under Section 63 of the POCA, held at the South African Reserve Bank, Vermeulen Street, Pretoria.

15.6. Perform any ancillary acts which, in the opinion of *curator bonis*, but subject to any directions of the Criminal Assets Recovery Committee, established under Section 65 of the POCA, are necessary.

16. The *curator bonis* shall as soon as possible, but not later than within a period of 90 days of this Order coming into effect, file A Report with the applicant and the Master of the High Court, indicating the manner in which he:

16.1. Completed the administration of the property mentioned above; and

16.2. Complied with the terms of this Order.

17. Any person affected by this Order and who was entitled to receive notice of the application under Section 48(2) of the POCA, but who did not receive such notice, may within 45 days, after the publication of the notice of this Order in the Gazette, apply for an order under Section 54 of the POCA, excluding his or her interest in the property; or varying the operation of this Order, in respect of the property.

18. All the paragraphs of this Order shall operate with immediate effect, except paragraphs 4,5 and 6; which will only take effect on the day that a possible appeal is disposed of in terms of Section 55 of the Act; or after the day that an application for execution of interest in the forfeited property in terms of Section 54 of the POCA, is disposed of; or after expiry of the period in which an appeal may be lodged or application be made in terms of Section 54 of the POCA, whose interest in the property concerned is affected by this Order, may within 20 days after he or she has acquired knowledge of this Order, set the matter down; after giving notice thereof to the applicant, for variation or rescission by this Court; and

19. The costs of this application are awarded to the applicant.

APS NXUMALO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

Appearances:

For Applicant:	**MS MTOBI**
Instructed by:	**Office of the State Attorney**
	Kimberley
For Respondents:	**ADV GEDEDGER**
Instructed by:	**Shaheem Samsodien Attorneys**
	c/o **Lulama Lobi Inc.**