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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

 **Case number: 2023-028928**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

[…] 12 June 2024

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SIGNATURE DATE

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| In the matter between: |  |
| **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | Applicant |
| And |  |
| **LORETTE JOUBERT** | 1st Defendant |
| **KISHENE CHETTY** | 2nd Defendant |
| **KRISHNA CHETTY** | 3rd Defendant |
| **MARICHA JOUBERT** | 4th Defendant |
| **KUMARASEN PRITHIVIRAJ** | 5th Defendant |
| **VOLAN PRITHIVIRAJ** | 6th Defendant |
| **RAMAHLAPI JOHANNES MOKWENA** | 7th Defendant |
| **JAMES RAMANJALUM** | 8th Defendant |
| **JABEZ NAIDOO** | 9th Defendant |
| **LESETJA DAVID MOGOTLANE** | 10th Defendant |
| **THOMAS DUMASI MARIMA** | 11th Defendant |
| **VEERAN NAIPAL** | 12th Defendant |
| **ALPHEUS NKOSIBAKHE MAKHETHA**  | 13th Defendant |
| **MARCEL DUAN PATRICK MARNEY** | 14th Defendant |
| **JACOBA MAGDELENA HAVENGA** | 15th Defendant |
| **KYSAMULA MORRIS MABASA**  | 16th Defendant |
| **WILLEM JOHANNES JANSEN** | 17th Defendant |
| **HARRY MKHULU MILANZI** | 18th Defendant |
| **RUDOLPH JOHANNES JACOBUS SMIT** | 19th Defendant |
| **MARNA LEANA BORNMAN** | 20th Defendant |
| **MODIKWA BRENDA TSEBENHLANE** | 21st Defendant |
| **PRINESH NAIDOO** | 22nd Defendant |
| **ANDRÉ SIMPSON** | 23rd Defendant |
| **ZUZETTE MAGRIETA SPANG** | 24th Defendant |
| **MALUMISIS ABEL MAFHOHO** | 25th Defendant |
| **RUMILA VADIVALOO NAIDOO (PILLAY)** | 26th Defendant |
| **ROSINA MILANZI** | 27th Defendant |
| **ABIGAYLE ABNER ESAU** | 28th Defendant |
| **SALAMINA KHOZA** | 29th Defendant |
| **LETHABO MABORE MAMABOLO** | 30th Defendant |
| **SCHALK WILLEM COETZEE** | 31st Defendant |
| **LINDA LUBANYANA** | 32nd Defendant |
| **ZELDA FUHRI BOTHA** | 33rd Defendant |
| **PIETER JOHANNES JACOBS** | 34th Defendant |
| **MAMOHUBA HELEN MODIBA** | 35th Defendant |
| **TSHEPO EDWIN MODIKWE** | 36th Defendant |
| **FAMANDA SAMSON MASHELE** | 37th Defendant |
| **JOSEPH MONYOKO** | 38th Defendant |
| **LAWRENCE PHEELO THAHANE** | 39th Defendant |
| **ANNA CATHARINA ELIZABETH DU PREEZ** | 40th Defendant |
| **PRAGALATHAN GOUNDEN** | 41st Defendant |
| **TSHEPHO ANDREW MASHEGO** | 42nd Defendant |
| **RAVIN RAMLALL** | 43rd Defendant |
| **HANISHA CHETTY**  | 44th Defendant |
| **JANE MTHEMBU** | 45th Defendant |
| **SERANG TRADING (PTY) LTD (2016/504428/07)** **(AS REPRESENTED BY THE 2ND DEFENDANT)** | 46th Defendant |
| **ARGAN AUTOMOTIVE MECHANICAL INNOVATION AND TOWING SOLUTIONS (PTY) LTD (2016/504428/07)** **(AS REPRESENTED BY THE 6TH DEFENDANT)** | 47th Defendant |
| **BLUE VOICE CONSULTING AND PROJECTS CC** **(2011/018413/23)** **(AS REPRESENTED BY THE 27TH DEFENDANT)** | 48th Defendant |
| **BAMBANANI MARKETING AND PROJECTS** **(2009/206512/23)** **(AS REPRESENTED BY THE 2ND DEFENDANT)** | 49th Defendant |
| **BAROMA CONSTRUCTION AND OFFICE** **CONSUMABLES (PTY) LTD (2012/059965/07)****(AS REPRESENTED BY THE 18TH DEFENDANT)** | 50th Defendant |
| **BAJATWALA DISTRIBUTORS (PTY) LTD (2017/359724/07)****(AS REPRESENTED BY THE 43RD DEFENDANT)** | 51st Defendant |
| **CICADA AUTO ENGINEERING AND MECHANICAL****SOLUTIONS (PTY) LTD (2016/504477/07)****(AS REPRESENTED BY THE 32ND DEFENDANT)** | 52nd Defendant |
| **COUNTERPOINT TRADING CC (2002/049187/23)** **(AS REPRESENTED BY THE 3RD DEFENDANT)** | 53rd Defendant |
| **DITORO TRADING CC (2004/033581/23)** **(AS REPRESENTED BY THE 22ND DEFENDANT)**  | 54th Defendant |
| **EMETHONJENI FURNITURE AND PROJECTS (PTY) LTD (2012/059956/07)** **(AS REPRESENTED BY THE 18TH DEFENDANT)** | 55th Defendant |
| **GAUTOOLS (PTY) LTD (2012/177517/07)****(AS REPRESENTED BY THE 1ST DEFENDANT)** | 56th Defendant |
| **IMPOKANE GENERAL TRADE AND DISTRIBUTION****(PTY) LTD (2017/249446/07)** **(AS REPRESENTED BY THE 1ST DEFENDANT)** | 57th Defendant |
| **IMBOBEZI ENTERPRISES (PTY) LTD (2017/356800/07)****(AS REPRESENTED BY THE 22ND DEFENDANT)** | 58th Defendant |
| **ISASALETHU CONSTRUCTION AND OFFICE** **CONSUMABLES (PTY) LTD (2012/060132/07)** **(AS REPRESENTED BY THE 29TH DEFENDANT)** | 59th Defendant |
| **ISIMBALI TRADING AND PROJECTS (PTY) LTD** **(2012/061888/07)** **(AS REPRESENTED BY THE 18TH DEFENDANT)** | 60th Defendant |
| **KLIPFONTEIN LEDWABAS GENERAL DEALERS CC** **(2003/013811/23)** **(AS REPRESENTED BY THE 26TH DEFENDANT)** | 61st Defendant |
| **KGOTHO TRADING ENTERPRISE (PTY) LTD** **(2011/004261/07)** **(AS REPRESENTED BY THE 5TH DEFENDANT)** | 62nd Defendant |
| **MAFUTA MARKETING SOLUTIONS CC****(2005/0550065/23)** **(AS REPRESENTED BY THE 44TH DEFENDANT)** | 63rd Defendant |
| **MPAPADI TRADING CC (2006/073470/23)** **(AS REPRESENTED BY THE 3RD DEFENDANT)** | 64th Defendant |
| **SEMI BUILD 303 CC (2002/068769/23)** **(AS REPRESENTED BY THE 2ND DEFENDANT)** | 65th Defendant |
| **SIFIKILE FURNITURE AND PROJECTS (PTY) LTD** **(2012/059968/07)** **(AS REPRESENTED BY THE 29TH DEFENDANT)** | 66th Defendant |
| **SIYANGOBA TRADING AND PROJECTS (PTY) LTD** **(2012/061892/07)** **(AS REPRESENTED BY THE 3RD DEFENDANT)** | 67th Defendant |
| **SUPER STATIONERY DISTRIBUTORS CC** **(2005/014625/23)** **(AS REPRESENTED BY THE 5TH DEFENDANT)** | 68th Defendant |
| **THANDEKA RMT MARKETING SOLUTIONS CC** **(2007/221864/23)** **(AS REPRESENTED BY THE 27TH DEFENDANT)** | 69th Defendant |
| **UMBANATIE TRADING AND PROJECTS (PTY) LTD** **(2009/153030/07)****(AS REPRESENTED BY THE 5TH DEFENDANT)** | 70th Defendant |
| **VATIKA TRADING AND PROJECTS (PTY) LTD** **(2014/052777/07)****(AS REPRESENTED BY THE 1ST DEFENDANT)**  | 71st Defendant |
|  |  |
| **KISHENE CHETY N.O. (IN HIS CAPACITY AS JOINT** **TRUSTEE OF THE CHETTY FAMILYTRUST)** **IT 000066/2016(G)** | 1st Respondent |
| **HANISHA CHETTY N.O. (IN HER CAPACITY AS JOINT TRUSTEE OF THE CHETTY FAMILYTRUST)** **IT 000066/2016(G)** | 2nd Respondent |
| **LAHITA CHETTY** | 3rd Respondent |
| **VASANTHI PRITHVIRAJ** | 4th Respondent |
| **SIBONGILE NOSIPHO MOGOTLANE** | 5th Respondent |
| **SUSARA NAIPAL** | 6th Respondent |
| **MARGARET FULUFHELO MAFHOHO** | 7th Respondent |
| **THABISO SETSEAKOBO WALTER MPHAHLELE** | 8th Respondent |
| **RIAAN BOTHA** | 9th Respondent |
| **ALETTA ELIZABETH JACOBS** | 10th Respondent |
| **SEJABATI CYNTHIA MODIKWE** | 11th Respondent |
| **O’ NIEL PERUMAL** | 12th Respondent |

**REASONS FOR JUDGMENT**

**LESO, AJ:**

[1] This matter was heard in the urgent court wherein the 3rd, 53rd and 64th Defendants filed an urgent anticipatory application to anticipate the return date for the purpose of discharging or varying the provisional order granted in favour of the NDPP on 28 May 2023.

[2] The respondents brought an urgent application after the NDPP obtained an order in an *ex parte* application for a provisional restraint against dealing with the assets of the defendants and the respondents and the order to disclose and surrender such property pending further order of this court and in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 as amended.

[3] In the circumstances the court made the following order:

1. That the *rule nisi* with return date 11 July 2023 be anticipated on 19 June 2023.

2. That the provisional order granted by this Honourable Court on 28 April 2023 made against the Third, Fifty Third and Sixty Fourth Defendants be discharged and set aside.

3. That the applicant be ordered to pay the costs of this application on a scale as between attorney and client.

**Order on urgency**

[4] The provisional court order in terms of POCA was granted on 28 April 2023 with the return date of 11 July 2023. The defendant and the respondents were allowed to oppose the confirmation of the provisional order on the return date. The defendants were allowed to make an application to anticipate the return date for the purpose of discharging or varying the provisional order on less than 24 hours' notice of such application to the applicant.

[5] The applicant opposes the anticipation of the return date on the basis that no urgency has been shown to exist and has filed and served a Replying Affidavit/Answering Affidavit for the matter to be struck off the roll and be dealt with on 11 July 2023. The NDPP conceded to having become aware of the defendant's intention to file an application to anticipate the return date on 1 June 2023. The main opposition on urgency lies in the NDPP’s complaint relating to the fact that the defendants failed to file their opposition on 19 May 2023 and the prejudice it suffered by not being able to prepare the replying affidavit.

[6] I was persuaded by the applicant's submission that the applicant cannot be afforded substantial redress at a hearing in due course because they are not parties to the proceedings on 11 July 2023 which the NDPP did not dispute. Having considered the reasons for non-compliance given by the defendants, the grounds for opposition by the NDPP and the nature of the application, the court was inclined to hear the application.

**Merits**

[7] The court exercised its discretion and permitted the filing of the answering affidavit by the NDPP which was filed in the course of the hearing of the application. The merit of this matter was mainly based on the provisions of Rule 6(8) of the Uniform Rules of the High Court and the non-disclosure or failure to put all facts before the court in the *ex parte* application for POCA which I will deal with later. Rule 6 of the Uniform Rules provides as follows:

Rule 6

“(8) Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours’ notice.”

[8] The submission made by Counsel for the defendants after the NDPP filed the answering affidavit changed the complexion of the defendants’ case. The non-disclosure or failure to put all facts before the court in the *ex parte* application in the POCA application was the highlight of the case. The NDPP’s response was that the *ex parte* provisions were carefully invoked because adequate good cause or reason has been shown for such an adopted procedure. I considered all the affidavits filed by the NDPP and the oral submissions by the counsel representing the NDPP that the restrained papers constitute the evidence in the applicant's case in which it is expected to make out a proper case that there are reasonable grounds to believe that the defendants face prosecution, may be convicted and a confiscation order may be granted. That applicant is not expected to prove the actual guilt of the 3rd, 53rd and 64th defendants beyond reasonable doubt. Most of the NDPP’s argument was centered around the allegations of unlawful activities and the pending criminal cases(s) faced by the 3rd, 53rd, and 64th defendants. There was no explanation tendered as to why certain information or facts were not disclosed in the *ex parte* application.

[9] The proposition by the NDPP that the history of the arrest and the striking off of the criminal case from the roll did not entitle the applicant to issue a Provisional Restraint Order because such history is irrelevant and misplaced. It is not for the NDPP to decide which information is good for the ears of the court if the information is readily available at the time of the *ex parte* application. The nature of the proceeding compels the applicants to disclose fully and honestly to the court, particularly because the order was granted in the absence of the other parties and considering the principle of the *audi alteram partem* rule which is embedded in our legal system. The principle on ex parte applications was set out in *Pretoria Portland Cement Co Ltd v Competition Commission*[[1]](#footnote-1), where the court held that “*an ex parte application by its very nature places only one side of a case before the court and requires the utmost good faith on the part of the applicant”*.

[10] The legal principle in *ex parte* applications is that applicants in *ex parte* applications have a duty to be completely transparent and honest with the court. Any breach of this duty could lead to the dismissal of the application or adverse cost orders, emphasising the importance of maintaining utmost good faith throughout the process. Similarly in *Estate Logie v Priest*[[2]](#footnote-2), the court held that “*failure to make full disclosure of all known material facts (that is, facts that might reasonably influence a court to come to a decision) may lead the court to refuse the application or to set aside the ruling easily on that ground alone, quite apart from considerations of wilfulness or mala fides”*.

[11] I found that the non-disclosure of the outcome of the criminal proceedings against the defendant is material facts that should have been placed before the court so that the court can be able exercise discretion on whether or not to grant the restrained order. There is no good reason why the NDPP failed to disclose such information.

[12] The Order discharging the Provisional Restrained Order granted by this Court on 28 April 2023 made against the 3rd, 53rd and 64th defendants was granted based on the NDPP’s failure to disclose other facts during *ex parte* application.

[13] The Order for extension of rule nisi was granted on the basis that there was an agreement on the extension of the return date by the parties during the urgent application.

**Cost Order**

[14] The court awarded a costs order having exercised its discretion and the general rule that the successful party is entitled to costs of costs follows suit.

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**JT LESO**

**ACTING JUDGE OF THE HIGH COURT**

**Delivered: the reasons for the judgment were prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives, by email and by uploading it to the electronic file of this matter on Caselines.**

DATE OF HEARING: 19 June 2023

DATE OF JUDGMENT: 19 June 2023

APPEARANCES

Counsel for the Applicant: Adv J Wilson

Instructing Attorney: Mr Kgaphola, State Attorney Pretoria

 316 Thabo Sehume Street

 PRETORIA

 Tel: (012) 309 1677

 Email: Kkgaphola@justice.gov.za

 or CISibiya@npa.gov.za

 Ref Mr Kgaphola/2023/AFU/PTA

Counsel for the 3rd, 53rd

And 64th defendants: Adv NGD Maritz SC and Adv WJ Botha

Instructing Attorneys: Heckroodt and Associates Attorneys

 369 Polaris Avenue

 Waterkloof

 PRETORIA

 Tel: (012) 940 3555

 Email: hannah@heckroodtlegal.com

 Ref: P HECKROODT/CHETTY003

Counsel for the Curator: Adv D Marais

Instructing Attorneys: Kern & Partners

 Tel: (011) 643 4020

 Email: clive@kernlaw.co.za

 Ref: Mr C Kern

1. See *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) para 45; Trakman v Livishirtz 1995 (1) SA 282 (A) 288. [↑](#footnote-ref-1)
2. See *Estate Logie v Priest* 1926 AD 312 at 323; National Bank of SA Ltd 2001 (3) SA 705 (SCA) at 717 and Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC). [↑](#footnote-ref-2)