

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**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
.....
SIGNATURE		DATE

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	8 th Defendant
JABEZ NAIDOO	9 th Defendant
LESETJA DAVID MOGOTLANE	10 th Defendant
THOMAS DUMASI MARIMA	11 th Defendant
VEERAN NAIPAL	12 th Defendant
ALPHEUS NKOSIBAKHE MAKHETHA	13 th Defendant
MARCEL DUAN PATRICK MARNEY	14 th Defendant
JACOBA MAGDELENA HAVENGA	15 th Defendant
KYSAMULA MORRIS MABASA	16 th Defendant
WILLEM JOHANNES JANSEN	17 th Defendant
HARRY MKHULU MILANZI	18 th Defendant
RUDOLPH JOHANNES JACOBUS SMIT	19 th Defendant
MARNA LEANA BORNMAN	20 th Defendant
MODIKWA BRENDA TSEBENHLANE	21 st Defendant
PRINESH NAIDOO	22 nd Defendant
ANDRÉ SIMPSON	23 rd Defendant
ZUZETTE MAGRIETA SPANG	24 th Defendant
MALUMISIS ABEL MAFHOHO	25 th Defendant
RUMILA VADIVALOO NAIDOO (PILLAY)	26 th Defendant
ROSINA MILANZI	27 th Defendant
ABIGAYLE ABNER ESAU	28 th Defendant
SALAMINA KHOZA	29 th Defendant
LETHABO MABORE MAMABOLO	30 th Defendant
SCHALK WILLEM COETZEE	31 st Defendant
LINDA LUBANYANA	32 nd Defendant

ZELDA FUHRI BOTHA	33 rd Defendant
PIETER JOHANNES JACOBS	34 th Defendant
MAMOHUBA HELEN MODIBA	35 th Defendant
TSHEPO EDWIN MODIKWE	36 th Defendant
FAMANDA SAMSON MASHELE	37 th Defendant
JOSEPH MONYOKO	38 th Defendant
LAWRENCE PHEELO THAHANE	39 th Defendant
ANNA CATHARINA ELIZABETH DU PREEZ	40 th Defendant
PRAGALATHAN GOUNDEN	41 st Defendant
TSHEPHO ANDREW MASHEGO	42 nd Defendant
RAVIN RAMLALL	43 rd Defendant
HANISHA CHETTY	44 th Defendant
JANE MTHEMBU	45 th Defendant
SERANG TRADING (PTY) LTD (2016/504428/07) (AS REPRESENTED BY THE 2ND DEFENDANT)	46 th Defendant
ARGAN AUTOMOTIVE MECHANICAL INNOVATION AND TOWING SOLUTIONS (PTY) LTD (2016/504428/07) (AS REPRESENTED BY THE 6TH DEFENDANT)	47 th Defendant
BLUE VOICE CONSULTING AND PROJECTS CC (2011/018413/23) (AS REPRESENTED BY THE 27TH DEFENDANT)	48 th Defendant
BAMBANANI MARKETING AND PROJECTS (2009/206512/23) (AS REPRESENTED BY THE 2ND DEFENDANT)	49 th Defendant
BAROMA CONSTRUCTION AND OFFICE CONSUMABLES (PTY) LTD (2012/059965/07) (AS REPRESENTED BY THE 18TH DEFENDANT)	50 th Defendant
BAJATWALA DISTRIBUTORS (PTY) LTD (2017/359724/07) (AS REPRESENTED BY THE 43RD DEFENDANT)	51 st Defendant 52 nd Defendant

CICADA AUTO ENGINEERING AND MECHANICAL SOLUTIONS (PTY) LTD (2016/504477/07) (AS REPRESENTED BY THE 32ND DEFENDANT)	
COUNTERPOINT TRADING CC (2002/049187/23) (AS REPRESENTED BY THE 3RD DEFENDANT)	53 rd Defendant
DITORO TRADING CC (2004/033581/23) (AS REPRESENTED BY THE 22ND DEFENDANT)	54 th Defendant
EMETHONJENI FURNITURE AND PROJECTS (PTY) LTD (2012/059956/07) (AS REPRESENTED BY THE 18TH DEFENDANT)	55 th Defendant
GAUTOOLS (PTY) LTD (2012/177517/07) (AS REPRESENTED BY THE 1ST DEFENDANT)	56 th Defendant
IMPOKANE GENERAL TRADE AND DISTRIBUTION (PTY) LTD (2017/249446/07) (AS REPRESENTED BY THE 1ST DEFENDANT)	57 th Defendant
IMBOBEZI ENTERPRISES (PTY) LTD (2017/356800/07) (AS REPRESENTED BY THE 22ND DEFENDANT)	58 th Defendant
ISASALETHU CONSTRUCTION AND OFFICE CONSUMABLES (PTY) LTD (2012/060132/07) (AS REPRESENTED BY THE 29TH DEFENDANT)	59 th Defendant
ISIMBALI TRADING AND PROJECTS (PTY) LTD (2012/061888/07) (AS REPRESENTED BY THE 18TH DEFENDANT)	60 th Defendant
KLIPFONTEIN LEDWABAS GENERAL DEALERS CC (2003/013811/23) (AS REPRESENTED BY THE 26TH DEFENDANT)	61 st Defendant
KGOTHO TRADING ENTERPRISE (PTY) LTD (2011/004261/07) (AS REPRESENTED BY THE 5TH DEFENDANT)	62 nd Defendant
MAFUTA MARKETING SOLUTIONS CC (2005/0550065/23) (AS REPRESENTED BY THE 44TH DEFENDANT)	63 rd Defendant
MPAPADI TRADING CC (2006/073470/23) (AS REPRESENTED BY THE 3RD DEFENDANT)	64 th Defendant
SEMI BUILD 303 CC (2002/068769/23) (AS REPRESENTED BY THE 2ND DEFENDANT)	65 th Defendant

SIFIKILE FURNITURE AND PROJECTS (PTY) LTD (2012/059968/07) (AS REPRESENTED BY THE 29TH DEFENDANT)	66 th Defendant
SIYANGOBA TRADING AND PROJECTS (PTY) LTD (2012/061892/07) (AS REPRESENTED BY THE 3RD DEFENDANT)	67 th Defendant
SUPER STATIONERY DISTRIBUTORS CC (2005/014625/23) (AS REPRESENTED BY THE 5TH DEFENDANT)	68 th Defendant
THANDEKA RMT MARKETING SOLUTIONS CC (2007/221864/23) (AS REPRESENTED BY THE 27TH DEFENDANT)	69 th Defendant
UMBANATIE TRADING AND PROJECTS (PTY) LTD (2009/153030/07) (AS REPRESENTED BY THE 5TH DEFENDANT)	70 th Defendant
VATIKA TRADING AND PROJECTS (PTY) LTD (2014/052777/07) (AS REPRESENTED BY THE 1ST DEFENDANT)	71 st Defendant
KISHENE CHETY N.O. (IN HIS CAPACITY AS JOINT TRUSTEE OF THE CHETTY FAMILYTRUST) IT 000066/2016(G)	1 st Respondent
HANISHA CHETTY N.O. (IN HER CAPACITY AS JOINT TRUSTEE OF THE CHETTY FAMILYTRUST) IT 000066/2016(G)	2 nd Respondent
LAHITA CHETTY	3 rd Respondent
VASANTHI PRITHVIRAJ	4 th Respondent
SIBONGILE NOSIPHO MOGOTLANE	5 th Respondent
SUSARA NAIPAL	6 th Respondent
MARGARET FULUFHELO MAFHOHO	7 th Respondent
THABISO SETSEAKOBO WALTER MPAHLELE	8 th Respondent
RIAAN BOTHA	9 th Respondent
ALETTA ELIZABETH JACOBS	10 th 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, 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, 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

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.

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).

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.

[...]

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

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