



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Reportable

Case no: D10619/2021

In the matter between:

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

APPLICANT

and

**WESTERN BREEZE TRADING 434 (PTY) LTD
YUNUS ESSOP**

1ST RESPONDENT

2ND RESPONDENT

In re: an application in terms of Section 48 of the Prevention of Organised Crime Act, No. 121 of 1998 concerning immovable property listed in Annexure "A".

Coram: M E Nkosi J

Heard: 18 August 2023

Delivered: 06 September 2023

ORDER

1. An order is granted in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') declaring forfeit to the State immovable property described as Section No. 7 as shown and more fully described on Sectional Plan No. SS 475/2008 in the scheme known as EBUHLENI in respect of the land and building or buildings situated at PORT ZIMBALI, in the KwaDukuza municipal area, of which section the floor area, according to the said sectional plan is 392 (three hundred and ninety two) square metres in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under Deed of Transfer ST39616/2018 ('the Ebuhleni property'), preserved in terms of a Prevention of Property Order granted by this Court on 19 November 2021 (under the above case number).
2. In terms of s 50(6) of POCA, this forfeiture order shall not take effect before the period allowed for an application under s 54 of POCA or an appeal under s 55 of POCA has expired or before such application is disposed of.
3. Hendrik Vorster Hattingh, who was appointed as *curator bonis* in terms of the preservation order, is authorised to continue to act as such.
4. That after this forfeiture order takes effect the *curator bonis* is directed to sell the property by way of public auction and after deducting his fees and expenditure

to deposit the balance into the Criminal Assets Recovery Account established in terms of s 63 of POCA.

5. The respondents must pay an amount of R16 163 500.14 to the State within a period of six months from the date of this order into the Criminal Assets Recovery Account referred to in paragraph 4 above.

6. Proof of payment must be furnished in writing to the *curator bonis* referred to in paragraph 3 above or his successor/s.

7. Failing payment, the appointed *curator bonis* is authorised to sell the property described as Portion 157 (of 148) of Erf 325 PORT ZIMBALI, Registration Division FU, Province of KwaZulu-Natal, in extent 1140 (one thousand one hundred and forty) square metres, held under Deed of Transfer T000017266/2014, also known as 9 Mahogany Drive, Zimbali ('the 9 Mahogany Drive property'), by public auction or private treaty, at a reasonable price to the highest bidder and, subject to the rights of secured creditors, to pay the sum of R16 163 500.14 into the account mentioned in paragraph 4 above and to disburse the net proceeds, after incidental expenses, into the banking account provided by the respondents.

8. Pending payment of the amount stipulated in paragraph 5 above to the State, the *curator bonis* is authorised to take such steps as he may consider necessary to secure the State's rights in the 9 Mahogany Drive property, such as endorsing the title deed of that property to record the State's rights therein.

9. That, in terms of s 50(5) of POCA, the Registrar of this court, or the State Attorney (KwaZulu-Natal) on the request of the Registrar, is to publish a notice of

the making of this Order in the form set out in Annexure 'A' hereto in the Government Gazette as soon as practicable after this Order has been made.

10. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

JUDGMENT

M E Nkosi J

Introduction

[1] The applicant applies in terms of s 48(1) of the Prevention of Organised Crime Act 121 of 1998 ('POCA') for an order forfeiting to the State two immovable properties belonging to the first respondent described as:

- (a) Portion 157 (of 148) of Erf 325 Port Zimbali, Registration Division FU, Province of KwaZulu-Natal, in extent 1140 (one thousand one hundred and forty) square metres, held under Deed of Transfer T000017266/2014 ('the 9 Mahogany Drive property'); and
- (b) Section No. 7 on Sectional Plan No. SS 475/2008 in the scheme known as Ebuhleni in respect of the land and building or buildings situated at Port Zimbali, in the KwaDukuza Municipality area, of which section the floor area, according to the said sectional plan is 392 (three hundred and ninety two)

square metres in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under Deed of Transfer ST39616/2018 ('the Ebuhleni property').

The Preservation of Property Order

[2] The two properties, which are collectively referred to in this judgment as 'the properties', are subject to the preservation of property order that was granted by this court on 19 November 2021 pursuant to an application that was brought by the applicant in terms of s 50(1) of POCA. The basis of the application was that the properties were acquired and/or developed with the proceeds of unlawful activities following an investigation into the Durban Solid Waste ('DSW') contracts, which resulted in the criminal prosecution of certain persons for crimes involving, *inter alia*, fraud, theft, racketeering, money laundering and corruption.

The Applicant's Case

[3] The applicant's case, briefly stated, is that during or about November 2018, the Ethekewini Municipality ('the Municipality') caused a forensic audit investigation to be conducted into the circumstances surrounding the award of contracts by the DSW for the interim provision of refuse collection, street cleaning and illegal dumping management in and around the various suburbs and townships of the Municipality. The investigation revealed that certain officials and councillors of the Municipality conspired to flout the tender legislation and the procurement policies of the Municipality and awarded the relevant contracts to four companies, one of which was an entity called El Shaddai Holdings Group CC ('El Shaddai'). El

Shaddah was represented in all its business dealings by Craig Ponnann ('Craig'), who was also the signatory to its bank account.

[4] The total amount paid by the Municipality to the four companies concerned for the period January 2018 to July 2019 was approximately R320 955 973.33. This was 300% more than the sum of R248 386 053.88 that was paid by the Municipality to 27 service providers for the same service from 2013 to 2017 (four years). Of that amount, a total sum of R52 487 890.61 was paid by the Municipality to El Shaddai. Upon analysis of El Shaddai's bank statements, the investigation revealed that of the R52 487 890.61 that was received by El Shaddai from the Municipality, an amount of R48 795 054.30 was paid by El Shaddai to an entity named uMvuyo Holdings CC ('uMvuyo').

[5] Upon analysis of the bank statements of uMvuyo, the investigation revealed that uMvuyo made payments to the extent of R6 073 707.55 to attorneys Garlicke & Bousfield, and that a sum of R600 000 was paid by El Shaddai to the same firm of attorneys for the purchase of the Ebuhleni property, together with the furniture contained therein. The purchaser of the property was reflected as Thiloshnie Subbah ('Subbah'), who turned out to be the wife of the second respondent. Upon further investigation, it was found that Subbah and Craig are both employed by the same company, Amakhaza Cold Storage, which conducts its business from the premises at 38 Kobe Road, Durban. The Ebuhleni property was ultimately transferred to the first respondent on 4 December 2018. The sole director of the first respondent is the second respondent.

[6] Further analysis of the bank statements and source documents of uMvuyo revealed that the architectural services, construction of a house and design services

rendered at 9 Mahogany Drive, were paid for by uMvuyo with the proceeds of the unlawfully awarded DSW contract for the benefit of the first and second respondents. The total amount of such payments was R16 163 500.14, which was made up of payments to Metropole Architects (R240 000); John Goss Projects (R8 352 250.14), and; Olala Interiors (R7 571 250). In conclusion, it was submitted by Ms *Mothilall*, who appeared for the applicant, that the balance of probabilities favour the applicant based on the evidence before this court. She argued that the properties are the proceeds of unlawful activities, to wit, fraud, corruption, racketeering and money laundering and, therefore, fall to be forfeited to the State.

The Respondents' Case

[7] The respondents' case, on the other hand, is fully set out in their answering affidavit dated 27 May 2022, which is deposed to by the second respondent. In essence, the basis of the respondents' opposition of the relief sought by the applicant in these proceedings is that the properties were obtained by the first respondent legally and for value, and that neither the first nor the second respondent knew nor had reasonable grounds to suspect that the properties constituted proceeds of crime or had been acquired with the proceeds of crime.

[8] In substantiation of the respondents' opposition, the second respondent states in his affidavit that during the periods preceding the payments which the applicant avers had been made from uMvuyo to Metropole Architects, Garlicke and Bousfield Attorneys, Olala Interiors and John Goss Projects, he had had business dealings with Craig, who was acting on behalf of certain entities. He, on the other hand, represented three companies, namely, the first respondent, Thunderstruck 132 (Pty) Ltd ('Thunderstruck'), of which he currently holds active Directorship, and Travel

Meister (Pty) Ltd t/a Meister Cold Storage ('Travel Meister'), the affairs of which he is currently managing as a manager. The details of their alleged dealings are fully set out in the paragraphs below. The respondents have also put up copies of the invoices which are said to have been issued by the first respondent and its sister companies to uMvuyo. I propose to deal with the invoices separately later in this judgment for a proper analysis of the contents thereof.

Thunderstruck

[9] Thunderstruck supplied frozen food products to the retail industry and, as such, entered into agreement with uMvuyo to supply frozen potato chips to it. During the period 9 March 2019 to 3 June 2019, Thunderstruck supplied to uMvuyo at its special instance and request frozen products, in the form of potato chips, and issued invoices to uMvuyo indicating its indebtedness to Thunderstruck. The total sum of such invoices was R6 462 000.

Travel Meister

[10] Travel Meister operates a cold storage warehouse for the specific purpose of cold storage of perishable goods. uMvuyo engaged the services of Travel Meister on a regular basis and Travel Meister would issue uMvuyo with invoices for such services. The total sum of invoices which were issued by Travel Meister to uMvuyo in respect of the period March 2018 to April 2019 was R10 236 662. The second respondent's contention is that the said invoices are for services of back to back storage provided by Travel Meister to uMvuyo at its special instance and request.

The First Respondent (Western Breeze)

[11] The first respondent acquired four plant hire equipment described as the Tractor Loader Backhoes ('TLB's'), and was approached by uMvuyo for the purpose of hiring the said TLB's. The first respondent supplied the four TLB's to uMvuyo, for which it charged a hire fee. uMvuyo extended the rental period from month to month for the period 10 January 2018 to 30 June 2019, for which the first respondent issued invoices for the hire of the said equipment. In addition, during this period uMvuyo purchased specialised shelving / racking / conveyor panels / blowers and compressor, as well as specialised racking pallets. uMvuyo owed Western Breeze the total sum of R17 266 400.

The Invoices

[12] According to the first batch of invoices annexed to the respondents' answering affidavit, Travel Meister provided cold storage to uMvuyo of between five to 12 pallets of potato chips almost daily from 2nd to 30th January 2019 for the total sum of R828 552; between five to 13 pallets of potato chips almost daily from 1st to 28th February 2019 for the total sum of R777 676, and; between five and 12 pallets of potato chips almost daily from 1st to 30th March 2019 for the total sum of R791 106. After the last batch of invoices for the period 1st to 30th March 2019, a pile of illegible pages are annexed to the respondents' answering affidavit as further invoices. In my view, these give credence to the applicant's suspicions that the purported invoices were fabricated to give legitimacy to the respondents' version of events.

[13] The second batch of invoices are those which were supposedly issued by Thunderstruck for the supply of frozen potato chips over the period 9th March 2019

to 3rd June 2019 for the total sum of R6 462 000. The delivery address of the frozen potato chips to uMvuyo is reflected on the Thunderstruck invoices as 38 Rodgeton Towers, 14 Aurora Drive, Umhlanga Ridge, which is the residential flat of Craig and his mother, Sinthamone Ponnann ('Sinthamone'). Each invoice is for the sale of 24 tons of frozen potato at R17.95 per ton. What I find even more bizarre about the Thunderstruck invoices is that four of them are dated 2nd April 2019, which suggests that on that date Thunderstruck delivered 24 tons x 4 of frozen potato chips at 14 Aurora Drive, Umhlanga, which cannot under any circumstances accommodate that amount of frozen potato chips.

[14] The third and last batch of invoices are those issued by the first respondent to uMvuyo for the hire of the four TLB's over the period 10th January 2018 to 30th June 2019 for the total sum of R17 266 400.00, as well as the sale of specialised shelving, racking, conveyor panels, blowers, compressor and racking panels for the total sum of R8 900 000. No written agreement was provided by the respondents to indicate uMvuyo's purpose of hiring the four TLB's for approximately six months, or the physical address at which the four TLB's were delivered by the first respondent to uMvuyo. The information contained in each invoice is the bare minimum and vague, and does not provide the details and/or specifications of any one of the four TLB's. The same applies to the invoice purportedly for the sale of specialising shelving, racking and panels.

[15] The companies the second respondent represented issued invoices to the entities represented by Ponnann for, *inter alia*, plant hire and the sale of specialised racking and contracts relating to cold storage. The debt which had been owed by the entities represented by Ponnann to the companies of which he (the second respondent) is the Director exceeded an amount of R23 837 207.69. During this period, and even

prior to the period in which payments were made by uMvuyo to other parties on behalf of the first respondent, the first respondent had contractual agreements with the parties concerned relating to the properties. This culminated in an agreement being concluded between the first respondent and the third parties concerned in terms of which uMvuyo would make payments directly to them on behalf of the first respondent.

[16] Consequently, any payments made by El Shaddai and/or uMvuyo during the periods averred by the applicant, the respondents would be able to justify such payments on the basis that they were made to discharge legitimate debts which were due and payable by uMvuyo to the first respondent. The first respondent, in turn, was discharging the debts owed by it to the third parties concerned. It was contended by the second respondent that at no stage had he, or the first respondent, been aware of any irregularities or fraudulent actions by any company which made payments on behalf of the first respondent, thereby discharging a legitimate debt on behalf of the first respondent.

Payment of the First Respondent's Creditors by uMvuyo

[17] According to the second respondent's calculations, the total amount of uMvuyo's indebtedness to all three companies represented by him was R33 956 062. At the time when the (oral) agreements were concluded between the second respondent (representing the first respondent and its sister companies) and Craig (representing uMvuyo), the first respondent did not have a bank account. Consequently, payments due to it could not be paid into its bank account. In the circumstances, it was decided between the second respondent and Craig that the first respondent's debts to various entities for the purchase of the Ebuhleni property and

for the building of a home / dwelling on the 9 Mahogany Drive Zimbali property would be paid directly by uMvuyo. This was intended to extinguish uMvuyo's indebtedness to the first respondent. The total sum paid by uMvuyo to the service providers of the first respondent amounted to R24 437 207.69.

The Applicant's Reply to the Respondents' Case

[18] The applicant replied in some detail to the issues raised by the respondents in their answering affidavit. It essentially denied that: (a) the three companies which the second respondent claims to have represented in his alleged dealings with Craig were in active business pre-dating the date upon which uMvuyo made payments to the first respondent's creditors on its behalf, and; (b) the alleged dealings between the second respondent (representing the three companies) and Craig (representing uMvuyo) had actually occurred or, if they did, were legitimate business transactions. It also challenged the authenticity of the invoices annexed to the respondents' answering affidavit, contending that they were fabricated to give legitimacy to the respondents' version of events.

Determination of the Issues

[19] In my view, the evidence adduced by the applicant was sufficient to prove on a balance of probabilities that the properties were acquired with the proceeds of unlawful activities. Such evidence was not refuted by the respondents or by Craig, which left it unchallenged. Therefore, the remaining issue for determination by this court is whether the respondents did not know, nor had reasonable grounds to suspect, that the funds from which uMvuyo had made the aforesaid payments constituted the proceeds of crime. This was strongly denied by the second

respondent in his answering affidavit, and this court will not grant the forfeiture order sought by the applicant if it finds on a balance of probabilities that the respondents' version of events is true.¹ See *National Director of Public Prosecutions v Botha N.O. and Another*.²

[20] At this stage, I digress momentarily to deal with the contention made by Mr *Collins* SC, who appeared with Mr *Lombard* on behalf of the respondents, that the motion proceedings are not suited for this case because the applicant is seeking final relief, while motion proceedings are not designed to determine the probabilities where disputes of fact arise in the affidavits. See *National Director of Public Prosecutions v Zuma*³ and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁴ In my view, it is apparent from the provisions of s 48(1) of POCA that it was the intention of the legislature to utilise motion proceedings where the National Director of Public Prosecutions (NDPP) seeks an order for forfeiture of property to the State. The use of motion proceedings does not preclude any person who entered an appearance to oppose the granting of a forfeiture order to appear and adduce evidence at the hearing of the application.⁵ Upon hearing the application, the court may make an order on a balance of probabilities in relation to the forfeiture of the proceeds of unlawful activities.⁶

[21] Starting with the Ebuhleni property, it was not disputed by the respondents that the purchase price of that property in the total sum of R6 673 707.55 was paid

¹ Section 52 (2)(b) of POCA.

² *National Director of Public Prosecutions v Botha N.O. and Another* [2020] ZACC 6; 2020 (1) SACR 599; 2020 (6) BCLR 693 (CC) at 37 para 109.

³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 227 (SCA).

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁵ Section 48(4)(a) and (b) of POCA.

⁶ Section 52(1) and (2) of POCA.

by uMvuyo for the benefit of the first respondent. That fact, in itself, raises serious doubt about the legitimacy and/or lawfulness of the transaction. It has all the qualities of tax evasion and money laundering, which strongly suggests that the respondents were fully aware that the funds used to purchase the Ebuhleni property were the proceeds of an unlawful activity. The direct payment of the purchase price by uMvuyo for the benefit of the first respondent was, in my view, intended to disguise the money as legitimate payment without disclosing its actual source.

[22] Regarding the 9 Mahogany Drive property, the evidence adduced by the second respondent was that the property was acquired by the first respondent during or about May 2014 as vacant land for the sum of R2 400 000. It was admitted by the respondents that the property was subsequently developed to the tune of R17 763 500.10 using the funds provided by uMvuyo. Just like the payment of the purchase price for the Ebuhleni property, the direct payment of the first respondent's creditors by uMvuyo towards the development of the 9 Mahogany Drive property has all the qualities of tax evasion and money laundering, and would not have occurred without the full knowledge and cooperation of the first and second respondent.

[23] It was submitted by the second respondent in his answering affidavit that uMvuyo could not make payment to the first respondent because it did not have a bank account at the relevant time. Even if one was to accept that explanation for argument's sake, the respondents' claim of lack of knowledge of uMvuyo's source of funds would have been more plausible if payment was made into the bank account of either one of the other two companies which the first respondent claims to have represented in his dealings with Craig, being Thunderstruck or Meister Cold Storage. The second respondent's explanation also raises the question as to how the first

respondent was able to pay its creditors and receive payments from its debtors, other than uMvuyo, over the period when it had no bank account.

[24] The situation gets even worse for the respondents when one changes focus to view the matter from uMvuyo's perspective. According to the evidence adduced by the applicant, which is not disputed by the respondents, Sinthamone is the sole director of uMvuyo. The delivery address of uMvuyo is 38 Ridgeton Towers, 14 Aurora Drive, Umhlanga, which is a residential flat measuring 119 square metres in size. Craig lives in the flat with his mother, Sinthamone. Craig and Subbah, the second respondent's wife, are both employed by Amakhaza. Against the background of those matrix, I find it highly unlikely that the tons of frozen potato chips which were allegedly delivered by Thunderstruck at that address would have been fitted in a residential flat measuring 119 square metres in size.

[25] Apart from the concerns raised in the preceding paragraphs, the respondents expect this court to believe that the three companies represented by the second respondent, two of which he represented as their sole director, provided goods and services to uMvuyo for over a year without any written contract or any form of security to protect their interests in the event of uMvuyo's default. When uMvuyo defaulted in its payments, the second respondent claims that he had a discussion with Craig about uMvuyo bringing its payments up to date. He made no mention of any written demand for payment, which is what any company which engages in legitimate business transactions would normally do.

[26] Besides, if the first respondent and its sister companies were actively trading as alleged by the second respondent, one would expect each one of the three companies to have audited financial statement covering the periods which form the

subject of this application. No such statement were put up by the first respondent as annexures to his answering affidavit, nor did he file any confirmatory affidavit/s by the three companies' auditor/s in support of his answering affidavit. Regarding the first respondent's failure to pay tax on the payments made by uMvuyo to the first respondent's creditors, the second respondent stated in his answering affidavit that this *'had been weighing on my mind and as early as 2019 I had instructed the first respondent's Accountant to initiate the process by which SARS / Tax compliance would be achieved.'*

[27] It was further alleged by the second respondent in his answering affidavit that the first respondent had been assessed on the income, which included the payments made by uMvuyo for its benefit, and that arrangements were in place for the payment of income tax thereon. No confirmatory affidavit to that effect was filed by the first respondent's auditors, nor was any indication given by the second respondent of the arrangements allegedly made with SARS for the payment of the outstanding income tax on the aforesaid payments. The second respondent annexed to his affidavit copies of the ITA34C assessments in respect of the first respondent, However, these do not appear to include the payments made by uMvuyo to the first respondent's creditors. Furthermore, the first respondent does not appear to have declared any expenses other than depreciation in 2018 and 2020, which is not normal for any legitimate business.

[28] In conclusion, all the factors listed in the preceding paragraphs considered cumulatively lead me to the inescapable conclusion that the respondents were fully aware that the payments received from uMvuyo came from an unlawful activity, and they tried to launder the money by paying it to third parties. The apparent attempts to regularize the first respondent's tax affairs with SARS were probably in reaction

to the investigation that was initiated by the Municipality into the contracts awarded by the DSW. The same applies to all the transactions alleged by the second respondent to justify the payments made by uMvuyo to Garlicke & Bousfield and the first respondent's creditors. In my view, they were all a sham.

[29] Therefore, based on the evidence before me, I am satisfied that the applicant has established on a balance of probabilities that: firstly, the Ebuhleni property was acquired with the proceeds of unlawful activities, and; secondly, the 9 Mahogany Drive property was developed by the respondents using the proceeds of unlawful activities. I am not persuaded to make a finding on a balance of probabilities that the respondents had acquired the interests in either the Ebuhleni property or the 9 Mahogany property legally and for consideration, or that they neither knew nor had reasonable grounds to suspect that the money used in the acquisition of the Ebuhleni property and the development of the 9 Mahogany property was the proceeds of unlawful activities.

Should the Properties be Forfeited to the State?

[30] In the light of the finding of this court that the respondents must have known or had reasonable grounds to suspect that the money received from uMvuyo constituted proceeds from unlawful activities, the question is whether this warrants the forfeiture of the properties to the State. The term 'property' is defined in s 1 of POCA as meaning 'money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'. The money paid by uMvuyo for the purchase of the Ebuhleni property and for the development of the 9 Mahogany Drive

property must ordinarily fall within this definition. See *National Director of Public Prosecutions v Botha N.O and Another*.⁷

The Ebuhleni Property

[31] Insofar as the Ebuhleni property is concerned, it is common cause that that property was acquired by the respondents solely with money provided by uMvuyo, which was shown by the applicant, on a balance of probabilities, to be the proceeds of unlawful activities. Admittedly, neither one of the respondents has been charged with any offence or has been implicated in any wrongdoing. However, it must be borne in mind that the validity of a forfeiture order is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute criminal proceedings.⁸ See *National Director of Public Prosecutions and Another v Mohammed NO and Others*⁹, which states: ‘Chapter 6 provides for forfeiture in circumstances where it is established on a balance of probabilities that property has been used to commit an offence or constitutes the proceeds of unlawful activities even where no criminal proceedings in respect of the relevant crimes have been instituted. Chapter 6 is therefore focussed not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.’ See also *National Director of Public Prosecutions v Botha N.O and Another*¹⁰.

⁷ *National Director of Public Prosecutions v Botha N.O and Another* [2020] ZACC 6; 2020 (1) SACR 599; 2020 (6) BCLR 693 (CC) at 35 para 106.

⁸ Section 50(4) of POCA.

⁹ 2002 (4) SA 843 (CC) para 17

¹⁰ (Supra) at page 12 par 29

[32] Therefore, in the case of the Ebuhleni property, I find that an order forfeiting the entire property to the State is warranted and justified, particularly, as that property was purchased wholly with the proceeds of unlawful activities. The respondents have no legitimate right to that property, and cannot argue that the forfeiture of the property to the State constitutes an arbitrary deprivation of property as envisaged in s 25(1) of the Constitution.

The 9 Mahogany Drive Property

[33] Regarding the 9 Mahogany Drive property, on the other hand, it is common cause that that property was purchased by the first respondent during or about 2014 for the price of R2 400 000. This means that the respondents enjoy protection in terms of s 25(1) of the Constitution from an arbitrary deprivation of that property. However, that right does not extend to the money which was provided by uMvuyo for the development of that property, the source of which was shown by the applicant, on a balance of probabilities, to be the unlawful activities of uMvuyo. In the circumstances, some form of proportionality assessment is necessary to determine what right or interest in the 9 Mahogany Drive property should be forfeited to the State as proceeds of the unlawful activities. In my view, the most practical and equitable method would be to order an equivalent of the total amount expended by uMvuyo towards the development of the property to be forfeited to the State on the basis that the respondents have no legal right of entitlement to that money.

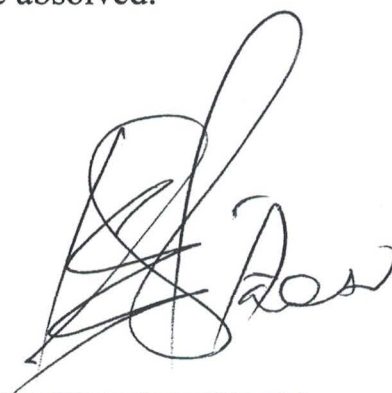
Order

[34] In the circumstances, the following order is made:

1. An order is granted in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') declaring forfeit to the State immovable property described as Section No. 7 as shown and more fully described on Sectional Plan No. SS 475/2008 in the scheme known as EBUHLENI in respect of the land and building or buildings situated at PORT ZIMBALI, in the KwaDukuza municipal area, of which section the floor area, according to the said sectional plan is 392 (three hundred and ninety two) square metres in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under Deed of Transfer ST39616/2018 ('the property'), preserved in terms of a Prevention of Property Order granted by this Court on 19 November 2021 (under the above case number). The respondents are placed under a final winding-up order in the hands of the Master of the High Court, Pietermaritzburg.
2. In terms of s 50(6) of POCA, this forfeiture order shall not take effect before the period allowed for an application under s 54 of POCA or an appeal under Section 55 of the Act has expired or before such application is disposed of.
3. Hendrik Vorster Hattingh, who was appointed as *curator bonis* in terms of the preservation order, is authorised to continue to act as such.
4. That after this forfeiture order takes effect the *curator bonis* is directed to sell the property by way of public auction and after deducting his fees and expenditure to deposit the balance into the Criminal Assets Recovery Account established in terms of Section 63 of the Act.

5. The respondents must pay an amount of R16 163 500.14 to the State within a period of six months from the date of this order into the Criminal Assets Recovery Account referred to in paragraph [4] above.
6. Proof of payment must be furnished in writing to the *curator bonis* referred to in paragraph [3] above or his successor/s.
7. Failing payment, the appointed *curator bonis* is authorised to sell the property described as Portion 157 (of 148) of Erf 325 PORT ZIMBALI, Registration Division FU, Province of KwaZulu-Natal, in extent 1140 (one thousand one hundred and forty) square metres, held under Deed of Transfer T000017266/2014, also known as 9 Mahogany Drive, Zimbali ('the 9 Mahogany Drive property'), by public auction or private treaty, at a reasonable price to the highest bidder and, subject to the rights of secured creditors, to pay the sum of R16 163 500.14 into the account mentioned in paragraph 4 above and to disburse the net proceeds, after incidental expenses, into the banking account provided by the respondents.
8. Pending payment of the amount stipulated in paragraph 5 above to the State, the *curator bonis* is authorised to take such steps as he may consider necessary to secure the State's rights in the 9 Mahogany Drive property, such as endorsing the title deed of that property to record the State's rights therein.
9. That, in terms of Section 50(5) of the Act, the Registrar of this court, or the State Attorney (KwaZulu-Natal) on the request of the Registrar, is to publish a notice of the making of this Order in the form set out in Annexure 'A' hereto in the Government Gazette as soon as practicable after this Order has been made.

10. The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'Me Nkosi', written over a horizontal line.

ME NKOSI

JUDGE

Appearances

For the applicant: Ms B Mothilall
Instructed by: The Director of Public Prosecutions, Durban, KZN.

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For the respondents: Mr M Collins SC and Mr W Lombard
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Date of Hearing: 18 August 2023

Date of Judgment: 06 September 2023

**ANNEXURE 'A'**

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Reportable
Case no: D10619/2021

In the matter between:

**THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

APPLICANT

and

**WESTERN BREEZE TRADING 434 (PTY) LTD
YUNUS ESSOP**

1ST RESPONDENT

2ND RESPONDENT

In re: an application in terms of Section 48 of the Prevention of Organised Crime Act, No. 121 of 1998 concerning immovable property listed in Annexure "A".

PROPERTY TO BE FORFEITED

IMMOVABLE PROPERTY DESCRIBED AS:

Section No. 7 as shown and more fully described on Sectional Plan No SS 475/2008 in the scheme known as EBUHLENI in respect of the land and building or buildings situated at PORT ZIMBALI, in the KWADUKUZA MUNICIPALITY AREA, of which section the floor area, according to the said

sectional plan is 392 (three hundred and ninety two) square metres in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under **Deed of Transfer ST39616/2018**.

ANNEXURE 'B'

**NOTICE IN TERMS OF SECTION 50(5) OF THE PREVENTION OF
ORGANISED CRIME ACT, 121 OF 1998 (POCA)**

The National Director of Public Prosecutions applied for and was granted a forfeiture order in terms of Section 50 of the Prevention of Organised Crime Act, 1221 of 1998 (POCA) in the High Court of South Africa, KwaZulu-Natal Local Division, Durban on 06 September 2023 in case number D10619/2021 in relation to immovable property described as Section No. 7 as shown and more fully described on Sectional Plan No. SS475/2008 in the scheme known as EBUHLENI in respect of the land and building or buildings situated at PORT ZIMBALI, in the KWADUKUZA MUNICIPALITY AREA, of which section the floor area, according to the said sectional plan is 392 (three hundred and ninety two) square metres in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under Deed of Transfer ST39616/2018. (a copy of the application and order can be obtained from the person mentioned in paragraph 5 hereunder).

This notice is addressed to all persons who are described in paragraph 3 below.

Take notice that:

- 1 The property mentioned above which was subject to a preservation of property order was forfeited to the state.

- 2 After this forfeiture order takes effect, Hendrik Vorster Hattingh is directed to sell the property by way of public auction and after deducting his fees and expenditure deposit the balance into the Criminal Assets Recovery Account, established in terms of Section 63 of the Act, under Account No. 80303056 and held at the South African Reserve Bank, Vermuelen Street, Pretoria;
- 3 Any person affected by the forfeiture order, and who was entitled to receive notice of the application under Section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture 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 the order in respect of the property.
- 4 If you are a person referred to in paragraph 3, you are advised to obtain legal advice on whether your interest can be protected and, if so, on how to protect it.
- 5 Whether it is necessary to deliver or serve any notice, affidavit or other process document on the Applicant, you must deliver or serve them on the Applicant at the following address: The State Attorney: MS Pete, 8th Floor, Metropolitan Life Building, 391 Anton Lembede Street, Durban c/o H Smal, State Attorney KZN, 2nd floor, Cnr Otto & Church Street, Pietermaritzburg. Contact details: Tel: (031) 365 2500, Fax: (031) 306 2448 and Ref: 119/0011842/21/B/P37.