



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case no: 1174/2021

In the matter between:

**LAND AND AGRICULTURAL BANK OF
SOUTH AFRICA**

APPELLANT

and

**THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

FIRST RESPONDENT

MOOVILLE (PTY) LTD

SECOND RESPONDENT

WILLEM JANSEN VAN VUUREN

THIRD RESPONDENT

CPAD FARM HOLDINGS

FOURTH RESPONDENT

MONGESI ALFRED MDE

FIFTH RESPONDENT

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

SIXTH RESPONDENT

MIKE TIMKOE TRUSTEES CC

SEVENTH RESPONDENT

DONALD GEORGE DUKE JACKSON

EIGHTH RESPONDENT

THE MASTER OF THE HIGH COURT

NINTH RESPONDENT

REGISTRAR OF DEEDS, CAPE TOWN TENTH RESPONDENT

Neutral citation: *Land and Agricultural Bank of South Africa v The Minister of Rural Development and Land Reform and Others* (1174/2021) [2022] ZASCA 133 (13 October 2022)

Coram: PONNAN, VAN DER MERWE and MABINDLA-BOQWANA JJA and MOLEFE and SIWENDU AJJA

Heard: 7 September 2022

Delivered: 13 October 2022

Summary: Prevention of Organised Crime Act 121 of 1998 – civil recovery of property under chapter 6 – exclusion of ‘interest’ in property from operation of forfeiture order – ‘interest’ means any right – ranking of competing claims for exclusion from forfeiture – to be determined in terms of common law principles particularly precedence of real and prior rights.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown, (Rugunanan J, Beshe J and Krüger AJ concurring), sitting as court of appeal:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the full court is set aside and replaced with the following:
 - (a) The appeal is dismissed with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) Paragraphs 1, 2, 3 and 4 of the order of Goosen J are set aside and replaced with the following:
 - “1. The interest of the first applicant, the Land and Agricultural Development Bank of South Africa, consisting of the debt secured by its mortgage bond over the property concerned, is excluded from the operation of the forfeiture order.
 2. The fourth respondent, the Minister of Rural Development and Land Reform, is directed to pay the costs of the first applicant.”

JUDGMENT

Van der Merwe JA (Ponnan and Mabindla-Boqwana JJA and Molefe and Siwendu AJJA concurring)

[1] The parties that participated in the appeal are the appellant, the Land and Agricultural Development Bank of South Africa (the Land Bank), and the first respondent, the Minister of Rural Development and Land Reform (the Minister). The Land Bank owes its continued existence to the provisions of s 2 of the Land and Agricultural Development Bank Act 15 of 2002 (Act 15 of 2002). In terms of those

provisions it is a corporate legal person of which the State is the sole shareholder. The listed objects of the Land Bank include the promotion, facilitation and support of equitable ownership of agricultural land, in particular the increase of ownership of agricultural land by historically disadvantaged persons (s 3(1)(a) of Act 15 of 2002). An important part of the mandate of the Minister is to do the same. The Minister executes this mandate by, inter alia, making grants to previously disadvantaged individuals to enable them to acquire agricultural land.

[2] Both the Land Bank and the Minister thus made funds available for the purchase of portion 1 and the remainder of the farm Poplar Grove No 303, as well as the farm Honeyville No 302 (collectively referred to as the property). It is 1218,9797 hectares in extent and situated in the Kouga Municipality in the Eastern Cape. The property was to be registered in the name of a trust of which 39 identified previously disadvantaged individuals would be the beneficiaries. Because of corruption and fraud that sadly are not uncommon in South Africa, the property was registered in the name of CPAD Farm Holdings (Pty) Ltd (CPAD). In the main, the appeal concerns the extent, if any, to which the Land Bank and the Minister respectively are entitled to the exclusion of an interest from the forfeiture of the property under the Prevention of Organised Crime Act 121 of 1998 (POCA). I shall revert to the facts after setting out the relevant provisions of POCA.

Civil recovery of property under POCA

[3] Chapter 6 of POCA (ss 37-62) deals with civil recovery of property. In terms of s 1 of POCA 'property' is defined in wide terms as 'money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'. This section also states that 'interest' includes any right. Section 37 makes clear that proceedings under this Chapter are civil proceedings, to which the rules of evidence applicable to civil proceedings apply. In terms of s 38(1), the National Director of Public Prosecutions (NDPP) may by way of an *ex parte* application apply to the High Court (as defined) for a preservation order. Section 38(2) provides that the High Court shall

make a preservation order if there are reasonable grounds to believe, inter alia, that the property concerned is the proceeds of unlawful activities. Section 42 makes provision for the appointment of a curator bonis, to assume control and care of the property under preservation.

[4] In terms of s 39(1), the NDPP must give notice of a preservation order to, inter alia, all persons known to have an interest in the property which is subject to the order. Such a person may, in terms of s 39(3), enter an appearance to oppose the making of a forfeiture order or to apply for the exclusion of his or her interest in the property concerned from the operation thereof. Section 39(5) sets out what an appearance shall contain, including an affidavit stating, where applicable, the nature and extent of the interest relied upon and the basis upon which the exclusion of the interest from the forfeiture order is claimed.

[5] If a preservation order is in force, the NDPP may in terms of s 48(1) apply to the High Court for an order forfeiting to the State all or any of the property that is subject to the preservation order. In terms of s 48(2), the NDPP must give notice of the application to every person who entered an appearance in terms of s 39(3). Section 48(4) provides that such a person may appear at the hearing of the application and may adduce evidence to oppose the application or to apply for the exclusion of his or her interest in the property concerned from the operation of the order. These procedural rights are also available to a person who was permitted under s 49 to enter a late appearance.

[6] Section 50(1) reads as follows:

'(1) The High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned –

- (a) is an instrumentality of an offence referred to in Schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.'

Each of the categories listed in subsections (a), (b) and (c), are defined in s 1 of POCA. On the facts of this matter it is only necessary to refer to the definition of 'unlawful activity'. It 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'.

[7] Section 52 deals with the exclusion of an interest in property from the operation of a forfeiture order. In terms of s 52(1), the High Court may make such an order on the application of a person who entered an appearance under s 39(3) or s 49. Section 52(2) provides:

'(2) The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order –

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.'

[8] Section 52(2A) proceeds to deal with the exclusion of interests from the forfeiture of an instrumentality of an offence or property associated with terrorist or related activities. In terms thereof, such an order must also in the first place be based on a finding on a balance of probabilities 'that the applicant for the order had acquired the interest concerned legally. . . '.

[9] Section 54 allows any person affected by a forfeiture order who was entitled to notice of the application for the forfeiture order, but did not receive such notice, to apply for an order excluding his or her interest in the forfeited property from the operation of the order or varying the operation of the order. The procedural aspects of such an application and the hearing thereof are regulated by ss 54(2)-(7). In terms of s 54(4), the High Court may consolidate the hearing of applications filed under the

section. Section 54(8) echoes the provisions of s 52(2) and s 54(8A) those of s 52(2A).

[10] Section 56(1) provides that if a curator bonis has not yet been appointed in respect of the property concerned, one may be appointed pursuant to a forfeiture order. The consequences of a forfeiture order are described in s 56(2) and (3), as well as s 57(1). Sections 56(2) and (3) read:

- '(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the curator bonis on behalf of the State.
- (3) Upon a forfeiture order taking effect the curator bonis may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property.'

[11] Section 57(1) reads:

- '(1) The curator bonis must, subject to any order for the exclusion of interests in forfeited property under section 52 (2)(a) or 54(8) and in accordance with the directions of the Committee—
 - (a) deposit any moneys forfeited under section 56(2) into the Account;
 - (b) deliver property forfeited under section 56(2) to the Account; or
 - (c) dispose of property forfeited under section 56(2) by sale or any other means and deposit the proceeds of the sale or disposition into the Account.'

The 'Committee' means the Criminal Assets Recovery Committee established under s 65 and the 'Account' means the Criminal Assets Recovery Account established under s 63.

Relevant facts

[12] On 2 August 2006, the Minister paid out an amount in excess of R2.6 million for the purpose of acquiring the property for the trust. The Land Bank advanced a further sum of approximately R5 million to facilitate the transaction. The advance was secured by a first mortgage bond over the property in favour of the Land Bank (the bond). The bond was registered in the Deeds Office on 13 April 2007 and provided

security for the capital sum of R5 082 900, an additional sum of R1 016 580 in respect of legal and other costs under the bond and interest.

[13] CPAD defaulted in respect of payment to the Land Bank and the latter issued summons against CPAD in the Eastern Cape Local Division of the High Court, Port Elizabeth (the local division). On 3 September 2008, the Land Bank obtained default judgment against CPAD for the payment of the capital advanced, accrued interest and costs. The property was declared executable and on 14 October 2008 the Sheriff attached it in the execution of the default judgment.

[14] In the meantime, the NDPP instituted a criminal prosecution relating to the property against a director of CPAD and a former employee of the Minister. On 28 October 2014, the NDPP ex parte obtained a preservation order in respect of the property in the local division. The order placed the property under the control, custody and care of a curator bonis. It provided for notice of the order to interested parties, including the Land Bank. It further informed interested parties who intended to oppose the application for a forfeiture order or to apply for an order excluding an interest from it, to enter an appearance in terms of s 39(3) of POCA.

[15] When the preservation order came to the knowledge of the Land Bank, it immediately instructed its attorney to protect its interest in the property. The attorney engaged officials of the NDPP, who assured him: that the NDPP acknowledged the Land Bank's security consisting of the bond; that its interest in the property would be excluded from the forfeiture order; and that it was not necessary for the Land Bank to enter an appearance or become involved in the application for a forfeiture order. It is common cause that this application was not served on the Land Bank. The local division (Majiki J) by default made an order declaring the property forfeit to the State on 13 January 2015.

[16] For reasons that are not apparent from the papers, the forfeiture order not only made no mention of the interest of the Land Bank, but provided that the property 'be handed back' to the Minister. The relevant part of the order read:

1. An Order be and is hereby granted in terms of section 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA), declaring forfeit to the State the Honeyville Farm measuring 1 218 9797 hectares in the district of Humansdorp (the property).
2. In terms of section 50(6) of POCA paragraph 5 below shall take effect 45 days after publication of a notice thereof in the Government Gazette unless an Appeal is instituted before this time in which case this Order will take effect on the finalisation of such Appeal.
3. Michael Timkoe (Timkoe) who was appointed as curator in the Preservation Order, be and is hereby directed to continue acting as such for the purpose of this Order.
4. Pending the taking effect of this Order the property shall remain under the control of Timkoe.
5. On the date on which this Order takes effect, to wit 45 week days after publication in the Government Gazette, Timkoe shall cause the property to be handed back to the Department of Rural Development and Land Reform for re-allocation in terms of all applicable procedures, and as such to sign all necessary documents in regard thereto. This will be regarded as payment to the State.'

[17] After the forfeiture order had been made, the officials of the NDPP continued to maintain that the Land Bank would be entitled to the settlement of the debt secured by the bond from the proceeds of the sale of the property. They were not, however, authorised to represent or bind the Minister. Meanwhile, the curator bonis took steps to sell the property. The Land Bank had the property valued and informed the curator bonis that it would agree to the sale of the property for R8 million. Accordingly, on 25 May 2015, the curator bonis entered into a deed of sale in terms of which the property was sold to a third party for the sum of R8 million. By then the debt secured by the bond had already exceeded R8 million.

[18] In these circumstances, the execution of the deed of sale would result in the Land Bank receiving the full proceeds of the sale and the Minister receiving nothing. The Minister found this result unpalatable. The relevant parties entered into a series of negotiations, but could not reach agreement. Eventually the Land Bank approached the local division essentially for an order amending the forfeiture order to subject it to the full extent of its rights in terms of the bond.

[19] The Land Bank cited various parties that could have been affected by the order claimed, but only the Minister (the fourth respondent) opposed the application. In the answering affidavit, the Minister alleged that the grant constituted an 'interest' in the property as defined in POCA. The Minister expressly acknowledged the rights of the Land Bank under the bond and in principle had no objection to a variation of the forfeiture order to provide for the rights of the Land Bank. However, the Minister disputed that the Land Bank enjoyed 'a prior or stronger right'. As both the Minister and the Land Bank had been the victims of unlawful activities under POCA, so the Minister contended, they should share in the proceeds of the sale of the property in proportion to the capital loss sustained by each. That would result in a proportion of the proceeds of two thirds to the Land Bank and one third to the Minister. The practical effect would be that the Land Bank would receive about half of what was owed to it under the bond, whereas the Minister would obtain full recovery of the grant.

[20] The matter came before Goosen J. As I have said, it was not in dispute that the Land Bank had an 'interest' in the property as defined in POCA. Goosen J held that there was no conceivable reason why the Land Bank's interest should be limited to the capital sum advanced. He held that the Minister also had such an interest in the property. He placed a value of R2.68 million on the Minister's interest. With the apparent consent of the parties, he determined the matter on the basis that both the Land Bank and the Minister effectively sought the exclusion of their respective interests from the operation of the forfeiture order. This was a sensible approach. It was clear that, but for the assurances of the officials of the NDPP, the Land Bank

would have entered an appearance in terms of s 39. Presumably the Minister did not do so, because it was expected that the forfeiture order would contain paragraph 5 quoted above.

[21] The court proceeded to conclude as follows:

'Notwithstanding these procedural issues, the forfeiture order in its present form must be varied not only to properly give effect to the provisions of POCA but also to facilitate the final resolution of the matter. That can be achieved, it seems to me, by rendering forfeiture subject to the rights of the bondholder as was sought. It can further be achieved by giving effect to s 57(1)(c), ie by authorising disposal of the forfeited property by sale or other means. To the extent that this conflicts with paragraph 5 of the existing order I have already stated that that order is in conflict with paragraph 1 and cannot, in the light thereof stand. Since both the Land Bank and the Department have established defined interests in the property such interests ought to be excluded from the forfeited property.'

[22] The relevant part of the order issued by Goosen J, as amended by agreement, provided:

1. Paragraph 1 of the order of Majiki J dated 13 January 2015 is amended by the insertion at the end thereof the phrase "*subject to the rights of bondholders*".

2. Paragraph 5 of the order is hereby deleted and replaced with the following:

"5. *In terms of s 57 of POCA the curator bonus [sic] is authorized [sic] as of the date on which the forfeiture order takes effect, to perform all the powers and functions specified in the Act including the following:*

5.1 *To dispose of the property by sale, public auction or other means after due notice of the proposed disposal and the terms thereof having been given to the first applicant, and fourth and fifth respondents' attorneys and further subject to the conditions set out in paragraph 5A below.*

5.2 *After deduction of the curator bonis' fees and expenditure and further after deduction of all related and incidental costs and charges in respect of or relating to the sale and transfer of the property and in terms of the provisions of s 52(2) of the Act, to pay from the balance of the proceeds of the sale, if any, the following amounts:*

5.2.1 to the first applicant and amount equal to the value of the first applicant's judgment as at the date of disposal of the property;

5.2.2 to the fourth respondent an amount equal to the value of the grant funds paid to facilitate acquisition of the property;

and thereafter to deposit the remaining balance of the proceeds, if any, into the Criminal Assets Recovery Account established in terms of s 63 of POCA.

5.3 To perform any ancillary acts which in the opinion of the curator bonis are necessary but subject to any directives of the Criminal Assets Recovery Committee, established under s 65 of the Act."

3. Paragraph 5A is hereby inserted in the order:

"5A In the event that the disposal of the property is for a purchase price in an amount less than the aggregate of the sums referred to in 5.2.1 and 5.2.2 above then in that event the sums paid to the first applicant and fourth respondents shall be in proportion to the sums set out in 5.2.1 and 5.2.2 above."

4. The first applicant and fourth respondent shall each pay their own costs.'

[23] With the leave of Goosen J, the Minister appealed and the Land Bank cross-appealed to the full court of the Eastern Cape Division of the High Court, Grahamstown (the full court). On appeal the parties sought the orders that they respectively had pursued in the local division. The full court (Rugunanan J, Beshe J and Krüger AJ concurring) rejected the argument that the Land Bank's rights took precedence and came to the conclusion 'that the interest in the property of both the Minister and the Bank should be limited to the equivalent of their capital loss without ranking in status or prior position'. It accordingly upheld the appeal with costs and dismissed the cross-appeal with costs. It confirmed para 2 of the order of Goosen J, but substituted para 1 thereof with the following:

'The proceeds of the sale of the relevant immovable property be apportioned between the Fourth Respondent and the First Applicant on the basis of the capital loss sustained by the Fourth Respondent and First Applicant pursuant to the unlawful activity referred to in the founding papers.'

The present appeal is with the special leave of this court.

Analysis

[24] Against this background, the appeal raises two issues:

- (a) Whether the Minister has an interest in the property as defined in POCA; and
- (b) If so, how the competing claims of the parties for the exclusion of interests from the operation of the forfeiture order should be determined.

As to (a)

[25] The courts below based the finding that the Minister had an 'interest' in the property on the judgment in *National Director of Public Prosecutions v Levy and Others* [2004] 4 All SA 103 (W) (*Levy*). There one of the issues was whether the second and third respondents had an 'interest' in residential property registered in the name of the first respondent. The second and third respondents made 'investments' in a pyramid scheme by making cash and cheque payments into an attorney's trust account. The particulars of the trust account had been furnished to them by another 'investor'. The 'investments' were made on the back of promises of exorbitant short-term cash returns. It appears that the court accepted that the 'investments' had fraudulently been utilised to purchase the immovable property owned by the first respondent. It concluded in paras 21-22:

' . . . *In casu* the monies of the second and third respondent were used to pay the purchase price of the property. Their interest in the property accordingly is the equivalent of those amounts . . . I conclude, therefore, that the second and third respondents have shown an interest in the property to the extent that they are entitled to be compensated for their losses, to be paid to them from the proceeds of the sale of the property in terms of the forfeiture order.'

For the reasons that follow, *Levy* was wrongly decided.

[26] As I have said, s 1 of POCA provides that 'interest' includes any right. This brings the meaning of the word 'includes' to the fore. When used in a definition, 'includes' generally denotes a term of extension. That would be the case where the primary meaning of the term that is defined is well-known and the word 'includes' introduces a meaning or meanings that go beyond that primary meaning. In such a

case, the definition would encompass the primary well-known meaning as well as that which the definition declares that it shall include. The context may, however, indicate that 'includes' signifies that what follows thereafter constitutes a complete or exhaustive definition of the relevant term. In this sense 'includes' is equivalent to 'means'. See *Union Government v Rosenberg Ltd* 1946 AD 120 at 127; *R v Debele* 1956 (4) SA 570 (A) at 572H-573A and 575A-576A; *Stauffer Chemical Co & Another v Safsan Marketing and Distribution Co (Pty) Ltd & Others* 1987 (2) SA 331 (A) at 350H-351E and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others* [2003] ZACC 19; 2004 (1) SA 406 (CC) paras 17-19. The judgment of Langa DCJ in the latter matter is particularly instructive.

[27] The word 'interest' has no such well-known primary meaning. It is a word of wide and vague import. Therefore it is unlikely that 'includes' was intended to add a wider meaning to a primary meaning that itself was in no need of definition. It rather seems that the purpose of the expression 'includes any right' was to define 'interest' more precisely. This is strongly supported by the context of POCA. It will be recalled that s 52(2) and s 54(8) provide that the first requirement for an order excluding an interest in property that is the proceeds of unlawful activities from the operation of a forfeiture order is a finding, on a balance of probabilities, that the applicant 'had acquired the interest concerned legally and for a consideration'. In applications for exclusion under s 52(2A) and s 54(8A), the applicant must also show on a balance of probabilities that the interest concerned had been acquired legally. This is the language of acquisition of rights to property.

[28] This also accords with the purpose of Chapter 6 of POCA. Its purpose is to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the State. That purpose would be undermined if the forfeiture is subjected to vague and flimsy interests as opposed to legal rights.

[29] Although ambiguity may have been avoided by the employment of the word 'means', I conclude that this is the meaning that, in the context, must be ascribed to 'includes'. In sum, 'interest' means any right. And any right to property (as defined) is an expression of wide import, which may include a contingent right to property. See *Mazibuko & Another v National Director of Public Prosecutions* [2009] ZASCA 52; 2009 (6) SA 479 (SCA) (*Mazibuko*) para 54.

[30] On the facts, the Minister has no right to the property. For the sake of illustration, I am prepared to disregard the legal concepts of *commixtio* of money and that money in a bank account is the property of the bank. On this basis, I am prepared to accept that the purchase price of the property was partly paid by the grant. But even if a thief purchases property with stolen cash, the owner of the cash does not legally acquire a right to that property, much less for a consideration. In the result, I hold that the Minister has no 'interest' in the property.

As to (b)

[31] However, even if the Minister did indeed have an interest in the property in the sum of R2.68 million, that of the Land Bank had to prevail. As I have demonstrated, the order of the full court was founded on three main propositions. These are that: (a) the Land Bank does not have a stronger right than the Minister; (b) under POCA the interest of the Land Bank is limited to its 'capital loss'; and (c) the Land Bank and the Minister have to share in the proceeds of the property in proportion to their respective capital losses. I am unable to agree with any of these propositions.

[32] In the first place, the full court placed reliance on the provisions of s 57(2) of POCA. It provides:

'Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.'

The full court said that this section 'plainly offsets the Bank's secured entitlement to the property . . .'. Section 57(2) does not say that. It deals with the effect of a

forfeiture order and is clearly not applicable to interests that were excluded from the operation thereof.

[33] The argument of the Minister that found favour with the courts below, was that in terms of Chapter 6, victims of crime have to be treated equally. This was largely based on the statement in *Levy* para 21 that:

'It was clearly the intention of the Legislature to protect the interests of innocent third parties who have become the victims of a fraudulent activity.'

[34] This is not correct. The purpose of Chapter 6 of POCA is not to protect the interests of victims of crime by compensation of their losses. That is, inter alia, provided for in s 300 of the Criminal Procedure Act 51 of 1977. As I have said, the purpose of Chapter 6 is to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the State. To save it from unconstitutionality under s 25(1) of the Constitution, the Chapter had to provide for the protection of the pre-existing interests of innocent citizens in property subject to forfeiture. See *Mazibuko* para 43. Whether such a person was (also) a victim of crime, is irrelevant.

[35] Moreover, there is no indication in Chapter 6 of POCA of an intention to render common law principles inapplicable or to vary them. Such an intention would have required clear articulation. On the contrary, whether an interest in property was legally acquired clearly has to be determined under existing law, including the common law. It follows that there is no legal basis for depriving the Land Bank of the preference provided by its real right or of its secured claims for interest and costs.

[36] The Legislature must have contemplated that competing applications could be made for the exclusion of interests in property from a forfeiture order. As I have said, s 54(4) provides that the High Court may consolidate the hearing of such applications. Yet, it did not prescribe principles for the ranking of such competing claims. It follows that this must be determined according to principles of common law. Two main

principles are relevant. The first is that a real right generally prevails over a personal right. The second is that the maxim *qui prior est tempore potior est iure* applies to the ranking of rights that are equal in hierarchy. On the application of these principles, therefore, the interest of the Land Bank had to be afforded precedence over that of the Minister.

Conclusion

[37] Before concluding, there is an aspect that I am constrained to mention. Paragraph 2 of the order of Goosen J (which replaced para 5 of the forfeiture order and was confirmed in para 2 of the order of the full court) gave extensive directions to the curator bonis. They, inter alia, related to the manner of disposal of the property, the deduction of fees and costs from the proceeds of the disposal and the deposit of the remaining balance in the 'Account'. All of these matters are regulated by s 57 of POCA. Section 57(5) in particular provides:

'The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose.'

In the result, these directions were either unnecessary or incompetent. See *Mazibuko* para 57.

[38] For the reasons stated, the rights of the Land Bank under the bond, judgment and attachment of the property should to their full extent have been excluded from the operation of the forfeiture order as the first charge against the proceeds of the property. The Minister's claim for the exclusion of an interest should have been disallowed on the basis that the Minister has no such interest in law or at least, assuming that the Minister has such an interest, on the ground that the exclusion of such interest from the forfeiture order would not constitute an efficacious remedy.

[39] Thus, the appeal must be upheld with costs. It was rightly not disputed that the employment of two counsel by the Land Bank on appeal was justified.

[40] The following order is issued:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the full court is set aside and replaced with the following:
 - (a) The appeal is dismissed with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) Paragraphs 1, 2, 3 and 4 of the order of Goosen J are set aside and replaced with the following:
 - “1. The interest of the first applicant, the Land and Agricultural Development Bank of South Africa, consisting of the debt secured by its mortgage bond over the property concerned, is excluded from the operation of the forfeiture order.
 2. The fourth respondent, the Minister of Rural Development and Land Reform, is directed to pay the costs of the first applicant.”

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances:

For appellant: A Beyleveld SC and T Rossi
Instructed by: Greyvensteins Inc, Port Elizabeth
Muller Gonsior Attorneys, Bloemfontein.

For first respondent: R G Buchanan SC
Instructed by: State Attorney, Port Elizabeth
State Attorney, Bloemfontein.