REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2024/089403

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES

3.REVISED: NO

27 JANUARY 2025

[redacted]
Judge Dippenaar

In the matter between:

RICHARD MASOANGANYE NO	**APPLICANT**
and	
NEDBANK LIMITED	**FIRST RESPONDENT**
THE SHERIFF, SANDTON SOUTH	**SECOND RESPONDENT**
THITUKA LUBILANJI PAUL	**THIRD RESPONDENT**
TIMOTHY MAKWAMBA NGOY	**FOURTH RESPONDENT**
MILENO TIMOTHEE NGOY	**FIFTH RESPONDENT**

NGOIE GLOGLO GLORIA	**SIXTH RESPONDENT**
CLAUDE BOKOMO BOKONDO	**SEVENTH RESPONDENT**
MONGA EUSTACHE NUMBI	**EIGHTH RESPONDENT**
NKULI JULIE KILUMBA	**NINTH RESPONDENT**
FRANS EDWARD PRINS ROOTMAN	**TENTH RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**ELEVENTH RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 27th of JANUARY 2025.

DIPPENAAR J:

[1] This application concerns interim interdictory relief and a writ of execution under r 45. The genesis of the application lies in a preservation order granted on 11 March 2024 under s 38 of the Prevention of Organised Crime Act (POCA).[1] In terms of the order, the applicant was appointed as *curator bonis* ('curator') and was authorised to assume control of the assets which formed the subject matter of the preservation order and to ensure their preservation. The present application concerns the interest on an amount of R35 million held at the first respondent (Nedbank) in an account in the name of the Defence Office Democratic Republic of Congo (DRC) Embassy. In due course a forfeiture order was granted on 21 June 2024 in terms of s 53 as read with s 48 of POCA. The order forfeited the R35 million to the State and it was declared that its ownership vested in the

[1] Act 121 of 1998.

State as from the effective date of the forfeiture order. The forfeiture order did not expressly include the interest derived from the capital amount.

[2] After the tenth respondent, Mr Rootman, became aware of the forfeiture order, the second respondent, (the Sheriff) at his behest served a warrant of execution and notice of attachment in terms of r 45(8)(c) and 45(12) on Nedbank in terms whereof the movable goods of the DRC were attached on 25 June 2024 (the first warrant). The warrant was based on a judgment obtained by the tenth respondent against the Government of the DRC on 2 September 2003 for payment of some US$ 11 224 744 million and R122 569.89, together with interest and costs (the judgment). Pursuant to a sale in execution, the tenth respondent had only recovered an amount of R10 462 024.88.

[3] Pursuant to the granting of the forfeiture order, the capital amount of R35 million was transferred to the curator by Nedbank. It refused to transfer the interest component as the forfeiture order did not expressly provide for it. On 15 July 2024, Nedbank paid the interest component of R1 019 431.97 to the Sheriff in terms of the first warrant, without informing the curator.

[4] Shortly thereafter, and on 16 July 2024, the tenth respondent served a further warrant of execution and warrant of attachment under r 45(12) on the applicant in his capacity as curator, which sought to attach and take into execution the property relating to the preservation and forfeiture orders under his control (the second warrant). The warrant was similarly based on the judgment. On 1 August 2024, the tenth respondent demanded payment of the interest held by the Sheriff, triggering the launching of the interdict application by the applicant.

[5] The applicant, in his capacity as curator, sought interim interdictory relief prohibiting the Sheriff from making payment of the monies held in custody, pending the outcome of an application to be launched by the eleventh respondent (the NDPP), to vary the existing forfeiture order to include the interest accrued on the capital amount of R35 million, representing a forfeited cash component. The application was originally

launched as an urgent application, but was postponed on 3 September 2024 by agreement between the parties in terms of an order of Van Der Westhuizen J. In terms of that order, the Sheriff was interdicted to make payment to the tenth respondent or any other party pending the final determination of the matter. Costs were reserved.

[6] The NDPP delivered an affidavit in support of the application, setting out various facts. It contended that the accrued interest constituted the proceeds of unlawful activities as defined in s 1(1) of POCA. It adopted the stance that the accumulated interest must of necessity form part of the proceeds of unlawful activities and that the interdictory relief sought by the applicants was just and equitable and in the interests of justice. It further contended that the curator had *locus standi* to launch the interdict application as it was intended to preserve the forfeited property.

[7] Only the tenth respondent actively opposed the application. The other respondents did not actively participate in the proceedings. The first respondent and the third to eleventh respondents were cited as interested parties in the application and no relief was sought against them, save in the event of opposition.

[8] On 23 August 2024, Mr Rootman launched a counter application for an order to compel compliance with the second warrant and the garnishee notice under r 45(12). In relevant part, he sought an order that:

> *'The Respondent in his capacity as curator bonis appointed in terms of the forfeiture order granted by this court on 21 June 2024 is ordered to give effect to the Applicant's writ of execution issued on 9 July 2024*'.

[9] Prior to the hearing of the application and on 31 October 2024, a supplementary affidavit was delivered by the curator setting out certain recent developments. The forfeiture order had been published in Government Gazette no 51173 on 19 July 2024. On 18 October 2024, the NDPP's variation application of the forfeiture order was granted, rendering the interest component part of the property forfeited to the State. In relevant

part, the variation order, granted under r42(1)(b), inserted the words ‘plus, interest accrued thereon’ after the capital amounts referred to in subparagraphs 1.1 and 1.2 of the forfeiture order. The latter pertained to the R35 million in the Nedbank account.

[10] Pursuant thereto, the applicant on 23 October 2024, proposed to the tenth respondent that the matter be removed from the opposed roll, with each party to pay its own costs. The tenth respondent’s legal representatives in relevant part, replied the following day:

> *‘Save for the question of costs, we agree with you that the main application …has become moot, following the variation order. Our client’s counter application is a live dispute. Our client will ask the Court on 11th November 2024 to determine whether the Forfeiture Order, can validly defeat a judgment already issued by the court in favour of our client, and can the Curator refuse to comply with the term of the warrant that has been served on him, in terms of Uniform Rule 45(12)(b).’*

[11] That elicited a long response from the applicant’s attorneys setting out the reasons why their view of the remaining disputes differed from that of the tenth respondent and why, in their view, the counter application could not succeed. The applicant defined the relevant issue as *“not whether the forfeiture order can defeat a judgment but rather, what the legal effect of the preservation and forfeiture procedure under POCA has on the attachment in execution by a judgment creditor’.*

[12] The tenth respondent elected not to deliver any supplementary affidavit in response. Prior to the hearing, the parties were directed to deliver supplementary heads of argument pursuant to the developments of 18 October 2024. Both parties did so.

[13] At the hearing, the tenth respondent persisted with the contention raised in the main application that the applicant lacked *locus standi* to have sought the interim relief pending the application by the NDPP. That argument was persisted with in order to justify an adverse costs order sought against the curator in his personal capacity. This resulted

in both parties making submissions on the merits of the main application, despite the only outstanding issue in the main application being that of costs.

[14] A determination of the issue of *locus standi* would have no precedential value in circumstances where the substantive relief has become academic.[2] Moreover, by the time the application was heard, the forfeiture order had been varied and the interest placed under the control of the curator. Any debate about his *locus standi* also became moot at that stage as the forfeiture order[3] authorised the curator to take the necessary steps to preserve the forfeited property under his control.

[15] Notwithstanding the variation order, the tenth respondent persisted in his challenge, despite the entire basis for the argument having fallen away. In those circumstances, the tenth respondent should be liable for the costs of the main application.

[16] I turn to the tenth respondent's counter application. He argued that it was to be resolved on the basis of fact, not law. He submitted that the forfeiture order in paragraph 6.4 thereof, placed an obligation on the curator to deposit the cash and the balance of sale proceeds of the fixed property into the nominated account of the Embassy of the DRC. It was submitted that there was no basis for the contention that the cash amounts have been forfeited to the State as the forfeited property vests with it only until the finalisation of the curatorship property and although DRC cannot enforce claim until conclusion forfeiture process, the property has accrued to DRC. It was submitted that consequently, the DRC's entire right title and interests were executable and was payable to the tenth respondent once the curatorship process was finalised as the property and proceeds have been forfeited to the DRC and not the State.

[17] The curator on the other hand submitted that such position was ill conceived and has no basis in law as POCA does not provide for a forfeiture to any party other than the

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[2] MEC for Health, Gauteng v Dr Regan Solomons (1089/2023) [2024] 184 (30 December 2024) paras 30 to 33.
[3] Paras 3 to 6.

State. He submitted that there was no claimable entitlement under r 45(12)(a) from the curator as there was no debt as envisaged by the rule which was owed to the DRC which was capable of attachment. He submitted that the DRC has no claim against the curator and would not be able to execute payment pursuant to the forfeiture order.

[18] The counter application is squarely based on r 45(12)(b) as read with r 45(12)(a). The tenth respondent sought a mandamus directing the curator to comply with the second warrant of attachment. The applicable principles are trite. A judgment creditor may in terms of r 45(8) as read with r 45(12) attach an accruing debt. Debts owing to a judgment debtor are executable and capable of being attached and sold. The right must have vested in the judgment debtor although the time for enforcement may not have arrived. [4]

[19] The central issues are whether there is a debt and whether it has accrued to the DRC.

[20] The aim of POCA is to recover assets that have been used to commit offences or assets that are the proceeds of unlawful activity, for which purpose the Criminal Assets Recovery Account (CARA) in the National Revenue Fund was established under s 63 of POCA. S 48 of POCA provides for a forfeiture of assets to the State. It does not provide for a forfeiture of assets to a victim. Section 57 obliges the curator to deposit any monies forfeited into that account, subject to any order for the exclusion of interest in forfeited property under s 52(2)(a) or 54(8). The tenth respondent did not rely on any application by him or the DRC or on order pertaining to the exclusion of any interest in the forfeited property under s 52 or 52 of POCA.

[21] The forfeiture order in relevant part provides:

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[4] Ormerod v Deputy Sheriff Durban 1965 (4) SA 670(D).

2 In terms of Section 56(2) of the Act, ownership of the property shall vest in the State as from the effective date of this order…

6 The curator bonis is authorised to:

6.3. Subject to any order of this Court for the exclusion of any interest in the property under section 52(2) of the Act, to deduct his fees and expenditure which were approved by the Master of the High Court;

6.4 Deposit the cash amounts referred to in paragraphs 1.1 and 1.2 above as well as the balance of the proceeds of the sale of the fixed property, after his approved fees has been deducted, into the nominated bank account of the Embassy of the Democratic Republic of Congo.

8 Any person, whose interest in the property concerned is affected by the forfeiture order, may, within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the court.

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

[22] On a purposive, contextual and linguistic interpretation of the forfeiture order,[5] paragraph 6.4 does no more than authorise the curator to pay the cash amounts after deduction of the fees into the nominated account of the Embassy of the DRC. It does not impose an obligation, without more, on him to do so and the terms of paragraph 6.4 are not peremptory. Nor does it of itself vest ownership of such funds in the DRC.

[23] Paragraph 6.4 cannot be viewed in isolation. It must be read together with paragraph 2 of the order, which in express terms provides that ownership of the forfeited

[5] HLB International (South Africa) (Pty) Ltd v Mwrk Accountants and Consultants (Pty) Ltd 2022 (5) SA 373 (SCA) paras 25 to 28.

property vests in the State. The tenth respondent's contention that the funds accrued to the DRC, lack merit. The forfeiture order does not vest rights to the funds in the DRC.

[24] In terms of the forfeiture order, ownership of the capital funds vested in the State with effect from 21 June 2024. Thus, by the time the second warrant of attachment was served on 16 July 2024, ownership of the funds already vested in the State. The variation order including the reference to the interest in the forfeiture order was not granted with prospective effect only. It amended the existing forfeiture order. By the time the application was heard, ownership of all the funds, including the interest thus vested in the curator on behalf of the State under s 56(2). Dominium of the monies had passed to the State which now owned the assets exclusively and by operation of law.

[25] In terms of s 57(2) of POCA: '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'. Insofar as the second warrant was served prior to the varied forfeiture order taking effect, it thus does not avail the tenth respondent.

[26] There was no evidence presented that either the DRC or the tenth respondent availed themselves of the remedies provided in the order or under s 54 of POCA to seek the exclusion of such funds form the operation of the forfeiture order. I am further not persuaded that the provisions of s 30 avails the tenth respondent as there is no order in existence granted under the section.

[27] For r 45 to apply, there must be a relationship of debtor and creditor between a third party (the State represented by the curator) and the judgment debtor (the DRC). That is a prerequisite for attachment under the subrule. An accruing debt is a debt not yet payable but a debt represented by an existing obligation. [6]

[6] Honey and Blankenberg v Law 1966 (2) SA 43 (SR) at 48A

[28] The opening words of r 45(12)(a) provide: 'Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor…'. Those words define its parameters and form the basis for the succeeding provisions.[7] For the provisions of the rule to apply, there must be a relationship of debtor and creditor in existence between a third party and the judgment debtor and a debt must be in existence.

[29] I agree with the curator that there is no existing obligation or debtor-creditor relationship between him (as representative of the State) and the DRC. The assets cannot be the subject matter of a debtor creditor relationship as between any parties. The assets were no longer owned by the DRC, as judgment debtor, but by the State, There is thus no debt payable or accruing from the curator to the DRC susceptible to attachment under r45(12)(a). The forfeiture order does not give rise to a debt capable of such attachment. The DRC has no claim against the curator and would not be able to execute payment pursuant to the forfeiture order. The assets are not those of the curator nor can the curator be said to be a debtor of the DRC. The property forfeited subject to the forfeiture order cannot be said to be a debt owed by the State to the DRC.

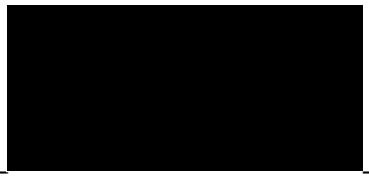
[30] The provisions of r 45(12) thus do not avail the tenth respondent and he has not established that he falls within the parameters of the rule. It follows that the tenth respondent's counter application must fail. There is no basis to deviate from the normal principle that costs follow the result. Considering the complexities of the matter, costs on Scale B would be appropriate.

[31] In the result, the following order is granted:

[1] The tenth respondent is directed to pay the costs of the main application on Scale B;

[7] Identiguard International (Pty) Ltd v Standard Bank of South Africa 2008 JDR 1519 (T) at 8H-9A.

[2] The tenth respondent's counter application is dismissed with costs on Scale B.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING	: 11 NOVEMBER 2024
DATE OF JUDGMENT	: 27 JANUARY 2025

APPEARANCES

APPLICANT'S COUNSEL	: Adv. J.G. Smit
APPLICANT'S ATTORNEYS	: C J Brand Attorneys Inc.
TENTH RESPONDENT'S COUNSEL	: Adv N Cassim SC Adv TV Mabuda
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