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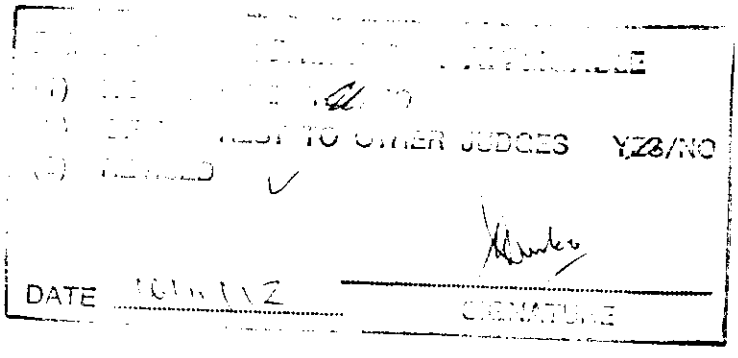
IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: 22354/12

DATE: 2012-10-26



In the matter between:

THEODOR WILHELM VAN DEN HEEVER Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND 11 OTHERS Respondents

J U D G M E N T

PRINSLOO, J: Before me this afternoon in the third court are two applications which in my opinion require urgent attention and I will give judgment right away.

It is already approximately 16:20 on a Friday afternoon and I do not propose giving a lengthy judgment.

The first application before me is the application by the National Director of Public Prosecutions for confirmation of a provisional restraint order granted on 4 May 2012 in terms of the provisions of section 26 of the Prevention of Organised Crime Act 121 of 1998 also described as "POCA" and to which I will refer as "the Act".

The return date following the granting of the provisional order has been extended on a number of occasions and on the last occasion it was extended until today, 26 October 2012. The order was granted against 11 so-called defendants whose names appear from the heading of the documentation and which names I will not repeat.

The first defendant, however, is Mr Dawid Jacobus Groenewald, who, on his own version, was the driving force behind the farming business which, according to the National Director of Public Prosecutions or "NDPP" conducted unlawful activities, including the unlawful dehorning of rhinoceroses or "rhinos", the unlawful sale of the rhino horns and other unlawful conduct in contravention *inter alia* of the relevant Nature Conservation Legislation, not only applicable Nationally, but also in the Limpopo Province. This legislation includes the National Environmental Management: Biodiversity Act 10 of 2004 or "NEMBA" and the Limpopo Environmental Management: Biodiversity Act 17 of 2003 ("LEMA").

Before me in this application for confirmation of the provisional restraint order which was granted in terms of the provisions, as I have

said, of section 25 of the Act, Mr Lebala SC, assisted by Mr Mashalane, appeared for the applicant, which is the NDPP and Mr Cilliers SC appeared for the 11 defendants and also the eight respondents cited in this restraint order application. The 11 defendants, as I have said, are accused in the criminal trial, which has already been instituted following a lengthy investigation conducted by the police into these alleged unlawful activities and the eight respondents are cited on what appears to be a somewhat tenuous basis, namely that some of them are businesses in which some of the accused, or defendants have an interest – which is unspecified in the papers, and some of them are simply the wives of some of the accused or defendants. Mr Cilliers SC appears for all these parties.

The other application features as applicant the curator, Mr Theodore Wilhelm van den Heever, who was appointed by the court granting the provisional order in terms of the relevant provisions in the Act, to take charge of the assets of the defendants and the respondents aforementioned, in order to preserve those assets with a view to recouping allegedly ill begotten gains derived from criminal activities perpetrated by these defendants and respondents in the course of their unlawful activities. The purpose of such a restraint order, broadly speaking, is to preserve those assets against dissipation by the accused persons pending a conviction in the criminal trial and the subsequent granting of a confiscation order in terms of the provisions of section 18 of the Act which will allow for some of those assets to be forfeited and presumably liquidated in order to have the monies paid into the fiscus

within the meaning of the provisions of the Act.

The application by the curator is aimed at firstly joining a close corporation called Henque 3900 CC as 11th respondent in that application which I will refer to as "the curator application" on the basis that the first respondent who is also the first defendant, Groenewald, in the restraint application, is the sole member of Henque and became the sole member after his arrest in September 2010 and started conducting business though Henque *inter alia* with an aspiring intervening party, Mr John Frederick Hume ("Hume") who is an arch conservationist, evidently well to do financially, who owns a number of valuable farm properties and *inter alia* owns some 800 rhinos.

It seems that Groenewald started conducting relatively expansive business deals with Hume after he was arrested and these included the purchase of some 42 buffalo and other game and the entering into of some elaborate written contracts with Hume, *inter alia* specifying that Hume was reserving the ownership in these buffalo pending full payment of the purchase price, alternatively delivery of a certain consignment of rhino in a barter arrangement to Hume, because Hume's declared ultimate aim is to preserve as many rhino as he can and to prevent Groenewald and company from *inter alia* killing or dehorning the rhino as is alleged by the police. On the subject I add that part of the founding papers in the restraint application is a lengthy affidavit by Colonel Jooste, an experienced police officer, containing serious allegations and details of literally hundreds of charges against Groenewald and the other defendants in the restraint application, whose

involvement, judging by the number of charges, was a great deal more modest than those of Groenewald who is the admitted leader of the group of defendants.

I have already stressed this today during the proceedings before me that I consider the charges against Groenewald in particular, to be extremely serious and unfortunate, particularly given the times in which we live where rhino are being slaughtered by criminals on a daily basis all over our country. I am alive to this while giving this judgment leading up to the order which I am going to make, and I am distressed about it.

In this curator application, Ms Dippenaar SC appears for the curator and again Mr Cilliers SC appears for all the respondents. This time the respondents are not the same as those cited with the defendants in the restraint application, although the curator application was launched under the same case number. There are familiar faces in the curator application to be found amongst the 12 respondents, including Groenewald, his spouse Sariette Groenewald and a company Catfish Investments which owns the farm Prachtig, in the Musina district, where most of these unlawful activities allegedly were perpetrated under the auspices of Groenewald and his employees.

I add that the owner of a neighbouring farm, which is in fact an adjoining farm, Krige, is also listed as a respondent in the curator application and other respondents listed are two American shareholders in Catfish which owns Prachtig and for good measure a Cuban and a Spanish respondent who are shareholders with Mrs Groenewald in the

company owning the farm Krige. Another close corporation, Valinor Trading 142 CC, of which Mrs Groenewald is the sole member, also features as a respondent in both the applications.

The mortgagee of the two farms, ABSA Bank, is the tenth respondent in the curator application and is not opposing the curator application, neither is Mr Cilliers representing that bank. Henque, cited as the 11th respondent, is yet to be joined as such as part of the curator application launched by the curator and one of the prayers is for the joinder of Henque which application is strenuously opposed by the other respondents, and also by Hume.

The position from a procedural point of view I will refer to shortly after making the remark that one of the prayers, and perhaps the main prayer in the curator application, is for leave to the curator to sell the whole farming business as a going concern, that would include Prachtig and Krige and the animals, some specified and identified, others not, roaming on those farms, as well as, if I understand it correctly, animals presently roaming on a third farm in which Groenewald has an interest, called the farm Steyn, in the Malelane district.

Broadly speaking the curator alleges, in the curator application, that he is unable, through no fault of his own I may be add, because he clearly put in a great deal of diligent effort to execute his task as curator, to continue successfully conducting the farming business. The monthly expenses to run the farming business come to some R1.3 million. Details are specified in schedules diligently prepared by the curator.

The curator says that Groenewald and Company would initially

support him in the running of this highly specialised business which involves not only trading in animals such as rhinos and buffalo, but also hosting hunting parties, mainly from overseas. These are specialist activities and when Groenewald evidently disassociated himself from the activities and his efforts to assist the curator, the farming business drastically deteriorated. There are clear signs that hundreds of these very valuable animals are in dire straits and distress because of prevailing drought conditions.

Submissions were made to me informally during the hearing today that some of these animals have died in the meantime, because of malnutrition. To his credit, the curator has been obtaining funding very diligently in an effort to feed the animals and to maintain them as best he could. It seems, on a general reading of the papers, that his efforts in this regard cannot be maintained and my clear impression is that even if he were to be given leave to sell the business, which would also lead, I assume, to his discharge as curator, there are clear indications that the animals may suffer, are suffering already, and may even die in the process. That in itself will amount to a dissipation of the assets of these alleged criminals which is after all the purpose of the preservation order.

I have consequently taken it upon myself in full debate with all counsel, to attempt to make some order, although not directly linked to the main business before me, which will secure the proper treatment and maintenance of these suffering animals without Groenewald losing ownership, at least until proper advance warning has been given to the

NDPP. So much for the broad outline of the applications before me.

The first item for me to consider is the application for confirmation of the rule. If I discharge the rule then the curator application will come to naught. The same applies, inasmuch as I may not yet have mentioned it fully, to an application by Hume to intervene as a respondent in the curator application in order to protect his alleged interests in what he sold to Groenewald who owes him, admittedly, something in the order of R43 million.

I turn briefly to the restraint application and the application to confirm the rule *nisi*. In his diligent address, Mr Lebala pointed out, correctly, that the NDPP, as applicant, has complied with the requirements for the granting of a restraint order as set out in section 25 of the Act. This reads as follows:

"25 Cases in which restraint orders may be made –

(1) a High Court may exercise the powers conferred on it by section 26(1) –

(a) when –

(i) a prosecution for an offence has been instituted against the defendant concerned;

(ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that the confiscation order may be made

against that defendant; and

(iii) the proceedings against the defendant have not been concluded; or

(b) ..."

It is clear that the prosecution has been instituted. In my view it is quite clear that there are reasonable grounds, judging by the affidavit of Colonel Jooste, amongst others, to believe that a confiscation order may well be made against the defendants and, thirdly, the proceedings against the defendants have not been concluded as intended by this provision and other provisions in the Act.

Under these circumstances, and given the gravity of the charges, one would be inclined to confirm the rule. However, the defendants and the respondents raised a defence amounting to this: the attorney for the defendants and particularly the attorney of Groenewald, shortly after the arrest of the defendants, entered into negotiations with the prosecutor and the NDPP, urging them, if they were so inclined, not to go ahead with obtaining a restraint order, advising them of the complexity and the special nature of the business and the anticipated difficulties that the curator would encounter if he were to attempt to run the business, pending the outcome of a lengthy criminal trial, and making certain settlement offers, including an offer for all the rhino on the farms to be sold and the proceeds invested in interest bearing accounts to be available to defray any amounts which the defendants may be ordered to forfeit to the state following their conviction and the granting of a confiscation order.

These offers were rejected, and despite the clear request of the attorney on behalf of Groenewald and some of the other accused, to be notified in advance, so that they can be heard in the event of a restraint order application being launched, the NDPP went ahead nevertheless to move the application in May of this year on an *ex parte* basis. Of course section 26 of the Act contains clear provision that the NDPP may, by way of an *ex parte* application, apply to a competent court for a restraining order. It is not couched in peremptory language and it is clear that the NDPP has an option or a discretion whether to move the application *ex parte* or in the normal course by notifying the affected parties.

In this case of course large amounts are at stake. The defendants dispute their liability, alleging, broadly, that they did have the necessary permits in terms of the conservation legislation to dehorn the rhinos and to kill some of them and to conduct some of the alleged activities, and extremely valuable properties are at stake. In addition to that a very specialised business, which, as I have illustrated, has to some extent gone to rack and ruin, which offers the sole livelihood to Groenewald, his wife and some of the other accused, is also at stake.

The argument offered by the defendants is that under these circumstances the NDPP, when moving the application *ex parte*, offended the trite principles applicable when an applicant moves a court on an *ex parte* basis. In that sense, so the argument goes, where the interest of the defendants and their appeal to be forewarned and to be allowed to be heard in the event of such an application being launched

was not disclosed to the court resulting in the requirements which I will briefly refer to, not being complied with, that the rule falls to be discharged.

In this regard it is necessary to briefly refer to some authorities and some documentation. Already on 14 October 2010, shortly after the arrest of Groenewald and the other defendants, in September 2010, Groenewald's attorney, also acting for some of the other defendants, wrote the following letter to one Advocate Spies, who was one of the prosecutors involved in the case. I add that this letter was posted on 12 October and also on 14 October, so that it bears both those dates. I will simply refer to it as the letter of 12 or 14 October, which reads:

"Geagte Adv Spies,

Insake die staat teen ons kliënte: Mnr D. Groenewald en Andere.

Verskeie telefoniese gesprekke met u het betrekking.

Ons wens te bevestig na aanleiding van die verskeie telefoniese gesprekke met u dat ons die volgende op rekord plaas naamlik:

1. U het aan skrywer meegedeel dat die bate beslagleggingseenheid waarskynlik 'n aansoek sal bring ingevolge die POCA wet vir die beslaglegging op sekere van ons bovermelde kliënte se bates.

2. Ons het aan u verduidelik dat daar sekere implikasies sal wees indien daar beslaglegging op van ons kliënte se bates gedoen word, meer spesifiek ten aansien van die voer van die diere indien daar op onder andere die diere beslag geïe word.

3. Skrywer het aan u voorgestel dat indien daar inderdaad op ons kliënte se bates beslag gelê wil word die voorstel gemaak word dat daar eerder met u en die bate beslagleggingseenheid ooreengekom word dat die renosters wat tans op die plaas is verkoop word waarna die opbrengs van die voormelde verkoop belê sal word by 'n finansiële instansie waarna ons kliënt sal toesien dat die nodige waarborg aan die bate beslagleggingseenheid uitgereik word waarna die aangeleentheid ten aansien van moontlike bate beslaglegging oorgehou sal word tot na die finalisering van die strafsaak van ons bovermelde kliënte.

4. Ten einde bovermelde waarborg te bewerkstellig sal dit onnodige regskostes voorkom en sal daar voldoende sekuriteit aan die bate beslagleggingseenheid gestel word uit die opbrengs van die verkoop van die renosters op die plaas. Gevolglik sal dit sinvol wees om hierdie aangeleentheid agterweë te hou tot die finalisering van die strafsaak.

5. Daar is verder aan u verduidelik dat ons oorweeg dit om 'n aansoek by die hof te bring ter wysiging van die bedrag van die borg wat vasgestel is ...

6. Skrywer het u meegedeel dat ons kliënt, mnr Groenewald, nie in hierdie stadium seker is wie belang sal stel in die aankoop van die bovermelde renosters nie, maar het skrywer agterna gedink dat dit gewens sal wees indien die

renosters op 'n openbare veiling verkoop word, waarna die opbrengs belê sal word ten einde die nodige waarborg soos hierbo na verwys uit te reik.

7. Dit is verder bespreek dat u skrywer so spoedig moontlik sal voorsien van 'n afskrif van die dossier inhoud.

8. U word verder versoek om ons te voorsien van 'n beëdigde verklaring, welke gebruik was ter ondersteuning van die uitreiking van die visenteringsbriewe ...

9. U het onderneem om nie die skrywer onkant te vang met enige dringende uitreikings van bate beslagleggingsbevele nie en sal u die aangeleentheid eers met die skrywer bespreek waartydens u skrywer sal verwittig indien daar van voorneme is om 'n beslagleggingsbevel te bekom.

Gevolglik ontvang ons graag op 'n dringende basis bovermelde gevraagde inligting. Ons wens te bevestig dat ons begerig is om ons kliënt behoorlik by te staan met die verdediging van hierdie aangeleentheid en word voormelde inligting so spoedig moontlik verlang ten einde ons in staat te stel om voorlopig ons kliënt te adviseer rondom hierdie aangeleentheid.

U vriendelike dog dringende samewerking word waardeer.

Die uwe."

It is common cause that this letter reached not only the prosecutor, but also the NDPP to whom she passed it on.

In response to this letter the NDPP wrote a lengthy letter dated 15 October 2010 to the attorney Mr Grobler of Polokwane, acknowledging

receipt of the letter of 12 October, also dated 14 October, in which the following is said with regard to the subject at hand, namely the possible impending attachment order or application for a restraint order:

"2.1 Bate beslaglegging:

2.1.1 Dit is voor die hand liggend dat die regspan van die bate beslagleggingseenheid 'n ondersoek sal loots in 'n saak soos die onderhawige.

2.1.2 Tydens die telefoniese gesprek met u op 8 Oktober 2010 is aan u meegedeel dat tot op daardie datum slegs een gesprek rondom die saak met die gemelde eenheid deur myself gevoer was. Aangesien u besorgd was ten aansien van enige moontlike bevele wat teen u kliënte (mnr en mev Groenewald) mag uitgereik word, is die enigste onderneming wat aan u gegee was om u in kennis te stel wanneer die gemelde eenheid met 'n formele ondersoek ten einde voor te berei vir moontlike hofverrigtinge begin.

2.1.3 U word hiermee ingelig dat sodanige ondersoek nou van stapel gestuur is. Ek is nie in 'n posisie om u verder behulpsaam te wees met wat die omvang of inhoud van die ondersoek is nie of wat die aard van enige moontlike hofverrigtinge sal wees nie, indien enige.

2.1.4 U skrywe gedateer 14 Oktober 2010 is reeds aangestuur na die gemelde eenheid vir kennisname

met spesifieke verwysing na paragraaf 3, 4 en 6 van u skrywe. Geen onderneming kan deur myself aan u gegee word ten aansien van die oorhou van enige bevele deur die bate beslagleggingseenheid nie."

Mr Cilliers, in his address to me, and as an experienced counsel in these matters, informed me that it is common place in matters of this nature, for settlements to be reached in the form of some form of security being furnished to the NDPP in order to avoid restraint in respect of properties belonging to the accused, because such restraint orders have drastic effects on the constitutional rights and the freedom of trade and other freedoms of the affected person.

The offer made, which I have quoted, involving the furnishing of security following the disposal of the rhinos is an example of the type of settlement which I understand is regularly entered into in matters of this nature. The offer is also aimed at ensuring a proper compensation to the state in the event of a confiscation order being granted at the end of the criminal trial following conviction of one or more of the defendants.

Attached to the opposing affidavit to the application to confirm the rule one finds another letter written to Advocate De Villiers of the NDPP on 22 October, containing the same type of representations to which I have referred when quoting the first letter of 12 or 14 October. In a replying affidavit the state denied that this letter was ever received by Advocate De Villiers. Given the fact that it is common cause that the first letter was received and passed on and responded to, not much turns on the dispute relating to the receipt of the second letter of the

22nd of October.

I add that there is undisputed evidence in the opposing affidavit to the confirmation of the rule that the attorney in the number of telephonic discussions with the NDPP authorities, which is common cause, impressed upon those authorities the specialist nature of the business conducted by Groenewald and his team. The following is stated in this regard in paragraph 13 of the opposing affidavit:

"13. I deem it very important to enter into negotiation with the applicant in order to prevent a restraint order, alternatively to negotiate the terms of such restraint order, alternatively to present our case to the court hearing the application in order to explain to the court the uniqueness of the farming operations and the material problems that a curator will face in this matter if a restraint order is granted without having regard to the uniqueness of the situation. We wish to *inter alia* to the following:

13.1 Farming with and dealing in exotic wild animals is a very specialised business to conduct. A curator with no or very little specialised knowledge and/or experience in this business would find it impossible to maintain assets under these circumstances.

13.2 Negotiating and accommodating foreign hunters is also difficult and impossible for a person without experience to conduct.

13.3 The feeding habits of the different animals must also

be understood in order to ensure that they are properly fed. The various parasites and illnesses that we have to deal with on such a farm is also something that an inexperienced person in this field will find impossible to properly handle.

14. Our attorney discussed the issue on a number of occasions telephonically with advocate Spies, the state advocate responsible for the prosecution, during the beginning of October 2010."

These allegations are not disputed in the replying affidavit.

Other submissions in this regard made in the opposing affidavit to the curator application, which is not strictly now before me, is that if the business were to be sold at an auction as the curator applies for, as a going concern, it stands to reason that the prices fetched will probably be below the market value and redound to the detriment of the state and its interests in the assets to be preserved.

Mr Cilliers referred me to the following authorities on the subject of the need to make full disclosure to a court when moving an *ex parte* application. I add that it is common cause that these representations made by Groenewald's attorney, details of which I have quoted, were not disclosed to the court when the restraint order was applied for *ex parte*. There was no mention whatsoever made of the settlement offer and the urgent request to be notified in advance so that the defendants could be heard during the hearing and the application for the restraint order.

The authorities referred to by Mr Cilliers are these: In an unreported case in this division namely that of *National Director of Public Prosecutions v W. Basson*, case number 22424/99, under very similar circumstances the learned judge, Roux, J, said the following:

> "Finally I must mention conduct which both saddens me and causes concern ... They told Messrs Ackermann and Pretorius that Basson was quite prepared to cede any rights to property other than his home and personal effects to the applicant. Basson made this offer despite the fact that he lays no claim to any property, save his home and personal effects. It is obvious that Ackerman and Pretorius knew that Basson wanted to oppose any application and make his tender known. The following day, 3 August 1999 Ackerman deposed to the affidavit which I have mentioned earlier in support of the application. No mention is made of the important conversation of the previous day. I now mention the duty of utmost good faith which applies to all *ex parte* applications. *Herbstein and Van Winsen,* with reference to ample authorities, spells out this duty:
>
> > 'the utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order have been made upon and *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the decision of the court, whether to make an order or not, the court has a

discretion to set the order aside with costs on the ground of non-disclosure.

There can be no doubt that if Cassim AJ had been made aware that:

1. Basson was anxious to dispute the matter.
2. That he had made a serious and legally sound offer, she would or could have come to a different conclusion."

According to Mr Cilliers' submission, which is obviously undisputed, the court under these circumstances, and for this reason, set aside the interim order and ordered the applicant to pay the costs on an attorney and own client scale, because of the non-disclosure referred to.

The matter went on appeal to the SCA where it is reported as *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) where the appeal was unsuccessful, evidently for other reasons as well. I have not studied the whole judgment, but in paragraph [21] at 428 H the learned judge of appeal says the following:

"Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision and the withholding and suppression of material facts by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide*. *(Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348 E to 349 B).

The fact that the respondent had volunteered to place all the

affected property under the control of the state was clearly material. Why it was not disclosed to Mr D'Oliviera, and then suppressed in the affidavit deposed to by Mr Ackermann in support of the application, has not been explained. It was submitted on behalf of the appellant that Mr Ackermann might have considered that the offer was made without prejudice. There is no suggestion of that in the evidence. In my view the affidavit deposed to by Mr Ackermann was materially misleading. Although the appellant himself cannot be said to have been at fault, he must per force bear the consequence of the conduct of the officials who are entrusted to litigate on his behalf."

The appeal was dismissed and the special punitive cost order was also not interfered with.

Mr Cilliers also referred me to an unreported case of *National Director of Public Prosecutions v J. H. Pretorius and Another* case number 46474/09 in this division, where the court also referred to the obligation to make disclosure in *ex parte* applications. The interim order, where material facts of settlement proposals had also not been disclosed in that case, was set aside and a punitive cost order was made.

In this case Mr Lebala argued, if I understood him correctly, that these principles are not to supersede or water down the requirements in the Act, firstly that the NDPP is at liberty to approach the court on an *ex parte* basis, and secondly, if the requirements in section 25 are met, which I have quoted, the NDPP qualifies for the granting of a restraint

order. I cannot agree with that submission. It seems to me that the two issues are entirely separate and the provisions of the Act cannot water down the well-known common law principles to which I have referred when quoting these authorities.

Mr Lebala also argued that the present case is distinguishable from the one in Basson because the settlement offer made is "free floating" and not a clear unequivocal offer. I cannot agree with that argument. It seems to me quite clear that there can be no misunderstanding about the nature of the offer, involving disposal of the rhino and depositing the proceeds in order to offer the necessary security to the state.

In my opinion it is quite clear from the 12 or 14 October letter addressed to the prosecutor and passed on to the NDPP, that the defendants wanted to be heard when the application is moved. They clearly state that they do not want to be caught by surprise. They confirm that an undertaking had been obtained to that effect from the NDPP and they also make an unequivocal offer. In my opinion these circumstances are on all fours with the *Basson* and the *Pretorius* cases and fall exactly inside the ambit of the remarks made by Roux J, which I have quoted and where it is stated that if the learned judge granting the provisional order had known about the settlement offer and also that the accused was anxious to dispute the matter, which clearly appears from the letters which I have quoted, the learned judge may well have come to a different conclusion. It is not necessary for an aggrieved party faced with the result of an adverse *ex parte* order granted against him or

her to show that the judge granting the provisional order would have come to a different conclusion.

It is also not necessary, as I have quoted from what the Appellate Division with reference to *Schlesinger* had to say, to show that the non disclosure was wilful or *mala fide*. In my opinion I am bound by the judgments of Roux, J and the one in the *Pretorius* matter. I can only deviate from that approach if I am satisfied that it is clearly wrong. I am not so satisfied. Consequently I consider myself bound to that approach and the result is that the provisional order and the *rule nisi* falls to be discharged.

There are other issues which now come into play and which I have already briefly alluded to. The one is the question of costs. It seems to me that where the rule falls to be discharged the costs should follow the result and the applicant, which is the NDPP, in the restraint order is to pay the costs.

As to the appointment of Mr Van den Heever as curator it appears to me that where the rule has been discharged the substratum of his appointment is to fall away, in which event, if I correctly understand the provisions of section 28(2) and (3) of the Act, the *curator bonis* is to be discharged and provision must be made for the state to pay the costs of the curator if no confiscation order has been made as is the case at present. The appropriate provisions are section 28(3)(a) and (b) and also 28(3)(c)(ii) dealing with the order directing the state to pay the costs of the curator. These provisions I will have to built into the order which I am about to make.

Furthermore, the curator application will come to naught because of the discharge of the rule, and although I do not intend making a specific order dismissing that application, I am duty bound, I consider, to make an order dealing with the costs of that application. It seems to me that the curator's costs flowing from his application, should also be paid by the state in terms of the provisions of section 28(3)(c)(ii) and the costs of the respondents, including the costs of Hume, involving the application to intervene, stand to be paid by the NDPP who is the first respondent in the curator application and who supported that application, although not formally so, by filing an affidavit.

Furthermore I was informed by Ms Dippenaar, and I am indebted to her for doing so, that there are certain trading costs still due to the curator which have to be paid, and details of that issue will also be built into the order which I am about to make.

Moreover, I have been referred to an undertaking given, or at least the proposal made by Mr Cilliers, on behalf of Groenewald, supported by Mr Botes who appears for Hume, that upon discharge of the order all rhino in the control of Groenewald on the farms Prachtig, Krige and Steyn will, without delay, be transferred to the conservationist Hume at his farm Elandslaagte in the Klerksdorp district. The transfer will take place at the cost and for the account of Groenewald, but the feeding of the rhino will be done by Hume. To that extent I consider that at least some relief will be obtained for these suffering animals, although their destiny is not formally before me for decision.

I add, with the permission of Mr Cilliers, although I will not build it

into the order, that he gave an undertaking, on behalf of Groenewald, that the latter will agree to caveats being registered against Groenewald's farms to ensure that they are not alienated pending the outcome of the criminal proceedings. Furthermore Mr Cilliers indicated, and I record this, although it will not be part of the order, that his client Groenewald is prepared to embark upon further discussions to offer security to cover any losses to the state in the event of a conviction and a confiscation order being granted, similar to what was offered in the first place, but rejected. I trust that the parties will seriously consider following up these suggestions and putting them into operation in order to protect the fiscus and the animals in this very serious and very sad case.

I make the following order at 17:35 in the afternoon, and I invite counsel to listen attentively and to remind me immediately after giving the order, if they feel that I left out something or should have qualified the order in a particular fashion:

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ORDER

1. The provisional order, including the *rule nisi*, is discharged.

2. The NDPP is ordered to pay the costs of the defendants and the respondents flowing from the restraint application. (**The costs will include the cost of two counsel, where applicable, and the costs of senior counsel where applicable, and this will also apply to the costs payable by the NDPP in respect of the curator application**). (***The costs will also include the costs of***

senior counsel in respect of those costs payable in respect of the curator application with reference to the counsel acting for the curator.)

3. The *curator bonis* is discharged in terms of the provisions of section 28(3) of POCA.

4. In terms of the provisions of section 28(3)(c)(ii) of POCA the state is ordered to pay the costs of the *curator bonis* which will include his costs flowing from his launching of the curator application. (**these costs will include the disbursements and the fees, in as much as it may be necessary, of the *curator bonis***.)

5. The NDPP, as first respondent in the curator application, is ordered to pay the costs of the respondents in the curator application, including the costs of Hume as intervening party and the costs of the application to intervene.

6. 6.1 All trading costs will be paid by Groenewald. The purchase price of game sold to Mr Du Plessis and/or his legal entities shall be paid to the *curator bonis* and the balance is to be paid within seven days from the date of the handover.

6.2 A formal handover is to be done on or before 30 October 2012, which shall be attended by representatives of both the *curator bonis* and the first respondent.

6.3 Copies of all documents for the trading period are to be made available to the first respondent within 15

days of the handover.

7. Groenewald, in cooperation with Hume, will forthwith relocate all rhino on the farms Prachtig, Krige and Steyn and other rhino under his control to the property of Hume known as Elandslaagte, district Klerksdorp, subject to the following further conditions:

7.1 Groenewald, in cooperation with Hume, will reserve ownership in the rhino, and if he is not the owner, but if the rhino are owned by companies or close corporations managed by Groenewald or his wife, ownership will be reserved by those entities.

7.2 If the need arises to alienate any of these rhino the NDPP will be given timeous advance warning of not less than 30 days, in writing, of this possible alienation, to allow the NDPP to properly protect his or her interests.

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DATE OF JUDGMENT/ORDER: 2012-10-26

ON BEHALF OF CURATOR: ADV DIPPENAAR SC

ON BEHALF OF THE NDPP: ADV LEBALA SC WITH ADV MASHALANE

ON BEHALF OF RESPONDENTS: ADV CILLIERS SC

ON BEHALF OF INTERVENING PARTY: ADV BOTES

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