IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED.

23/3/22 J Jawie
DATE SIGNATURE

CASE NO: 62604/2021

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
KURT ROBERT KNOOP N.O.	1st Respondent
JOHAN LOUIS KLOPPER N.O.	2nd Respondent
KGASHANE CHRISTOPHER MONYELA N.O.	3rd Respondent
JUANITO MARTIN DAMONS N.O.	4th Respondent
SUJAY ABBAI NAIDOO N.O.	5th Respondent
OPTIMUM COAL MINE (PTY) LTD	6th Respondent
KURT ROBERT KNOOP N.O.	7th Respondent
JOHAN LOUIS KLOPPER N.O.	8th Respondent
TEGETA EXPLORATION & RESOURCES (PTY) LTD	9th Respondent
KURT ROBERT KNOOP N.O.	10th Respondent
JUANITO MARTIN DAMONS N.O.	11th Respondent
OPTIMUM COAL TERMINAL (PTY) LTD	12th Respondent
THE REGISTRAR OF THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	13th Respondent
THE REGISTRAR OF DEEDS N.O.	14th Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	15th Respondent
THE COMMISSIONER OF THE SA REVENUE SERVICE	16th Respondent
NATIONAL UNION OF MINE WORKERS	1st Intervening Respondent

PANKY TRADING CC & 133 OTHERS 2nd Intervening Respondent(s)

An Application in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 for a preservation of property order

In re: All the shares held by Tegeta Exploration & Resources (Pty) Ltd ("Tegeta") in Optimum Coal Mine (Pty) Ltd

In re: All the shares held by Tegeta in Optimum Coal Terminal (Pty) Ltd

In re: The Business of OCM

CASE NO: 62601/2021

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

TEMPLAR CAPITAL LIMITED Respondent

MPUMALANGA ACTION MOVEMENT 1st Intervening Respondent

NATIONAL UNION OF MINEWORKERS 2nd Intervening Respondent

In re: Application in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 for a preservation of property order in respect of the claims of Templar Capital Limited against Optimum Coal Mine (Pty) Ltd

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JUDGMENT

THE COURT (FOURIE J and MBONGWE J):

[1] This matter concerns two urgent applications and four intervention applications. The two main applications are substantially the same and, as there is a considerable overlap between them, it was decided by the Acting Judge President of this Division that both applications should be heard together by the same Court.

[2] The National Director of Public Prosecutions ("NDPP") is the applicant in both the main applications. The relief sought in both these applications is for an order in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") to preserve certain assets. In the first application (Case No: 62604/2021) the NDPP applies for an order to preserve the following property:

(a) all shares held in the Optimum Coal Mine (Pty) Ltd ("OCM");

(b) the business of OCM;

(c) all shares held in the Optimum Coal Terminal (Pty) Ltd ("OCT").

[3] Both the OCM and OCT have been in business rescue since 2018. The first application is opposed by the first to fourth and sixth to twelfth respondents ("the business rescue practitioners") as well as the National Union of Mineworkers ("NUM") as the first intervening respondent. A group of creditors in the business rescue process who are the second intervening respondents, has later decided to abide the decision of the Court.

[4] The relief sought in the second application (Case No: 62601/2021) is also for an order in terms of section 38 of POCA to preserve the claims held by Templar Capital Limited (Templar) against OCM. Templar is not in business rescue. This application was initially opposed by Templar (the respondent in that application) as well as the Mpumalanga Action Movement and NUM as the first and second intervening respondents. Templar as well as the Mpumalanga Action Movement and NUM have since indicated that they will all abide by the

decision of the Court in this application. This means that the second application is now unopposed.

[5] To complicate matters, there are also two interlocutory applications which are both opposed. These applications relate to the first main application. The first is an application by the business rescue practitioners to strike out and the second is an application to admit a further affidavit by the NDPP. The papers are voluminous. There is a core bundle comprising of about 2 500 pages. The heads of argument are extensive. Argument lasted for three full days. Fortunately, the intervention applications are no longer opposed.

[6] On the second-last day of argument another role-player, Mr Koko, attempted to enter the fray. He filed an application to be heard on the last day of argument in terms whereof he applied for leave that his affidavit deposed to on 3 March 2022, and a bundle of documents accompanying it, *"be admitted as part of the papers in the proceedings under Case No: 62604/2021"* (the first main application). This application was dismissed with no order as to costs. Reasons for this order will be given in due course.

BACKGROUND

[7] The NDPP explains in the founding affidavit that the assets targeted in these applications are the very assets that gave rise to the Public Protector's findings in her October 2016 *"State of Capture"* report, that State Capture existed and had far-reaching effects. According to that report the Public Protector found evidence of irregular conduct by senior Eskom executives and senior state officials. This conduct allegedly facilitated the acquisition by certain members of

the Gupta family of the business of the Optimum Coal Mine through a transaction in terms of which a company known as Tegeta Exploration and Resources (Pty) Ltd ("Tegeta") acquired all of the shares and claims of Optimum Coal Holdings (Pty) Ltd in Optimum Coal Mine (Pty) Ltd (OCM) and Optimum Coal Terminal (Pty) Ltd (OCT).

[8] It is then explained in the founding affidavit that, flowing from the Public Protector's report, the Commission of Inquiry into allegations of State Capture, corruption and fraud in the public sector, including organs of state, promulgated under Presidential Proclamation No. 3 of 2018 was established, and through its processes, South Africans came to learn about the alleged widespread criminality that was linked to Tegeta's acquisition of the Optimum Coal Mine.

[9] As a result of evidence pointing to the commission of multiple offences, the NDPP's case is that there are reasonable grounds to believe that the property involved comprises the proceeds of crime or is the instrumentality of an offence and is thus liable to be preserved in terms of section 38(2) of POCA. The property targeted in the first main application is the shares of Tegeta in OCM and OCT as well as the business of OCM. The case for preservation of the property flows from a sale agreement entered into between Tegeta, Optimum Coal Holdings (Pty) Ltd, Glencor International AG and Oakbay Investments (Pty) Ltd during or about 2015 and 2016 (the Optimum transaction).

[10] The full purchase price payable by Tegeta under the Optimum transaction was an amount of R2,084,210,206.10 which was to be paid into an Escrow account held on behalf of the banks who had been financing OCM. The

NDPP seeks to preserve the Optimum property because it is alleged that it is the proceeds of unlawful activity. According to the NDPP Tegeta obtained the funds to acquire the Optimum property through fraud, money-laundering, corruption and theft.

[11] In the second main application (where Templar is the respondent) the NDPP contends that a company known as Centaur Ventures Ltd ("CVL") is a Bermuda-based entity that, at the relevant time, was 50% owned, and almost entirely financed, by the Gupta family whose representative on CVL was the bridegroom at the notorious Sun City Gupta wedding. The other 50% partner in the CVL was Centaur Holdings Ltd, a company controlled by a certain McGowan.

[12] The CVL claims are claims against OCM. They arise out of prepayments made by CVL to OCM for coal which OCM failed to deliver. The CVL claims aggregate to more than R1.3 billion and have been recognised by the OCM business rescue practitioners. The case of the NDPP is therefore that the CVL claims are themselves proceeds of crime and were an important element of a Gupta family money-laundering scheme designed to launder kickbacks on State Capture contracts paid offshore to the Gupta's and South African proceeds of State Capture crimes. As already indicated above, this application is now entirely unopposed.

[13] Tegeta, OCM and OCT are now all in business rescue. The business rescue practitioners of OCM have put together a business rescue plan that has been approved by the creditors of OCM. This plan contemplates the disposal of

the business of OCM to Liberty Coal (Pty) Ltd ("Liberty Coal"). Liberty Coal is a subsidiary of Templar and both these companies are controlled by McGowan.

[14] OCM and OCT are linked companies. OCT owns a shareholding in Richards Bay Coal Terminal (Pty) Ltd which entitles it to export coal for OCM at Richards Bay Coal Terminal. Because of the interlinked nature of OCM and OCT, a suspensive condition for the implementation of the OCM business rescue plan is the adoption by the OCT creditors of a business rescue plan approving the indirect acquisition by Templar of the OCT shareholding in Richards Bay Coal Terminal (Pty) Ltd. The business rescue practitioners of OCT have also put together a business rescue plan for OCT that seeks to satisfy the suspension condition (in clause 15.4) of the OCM business rescue plan.

[15] The business rescue practitioners of the OCM have recognised Templar as the single largest creditor of OCM in its capacity as cessionary of the claims of Centaur Ventures Ltd (CVL) against OCM (the CVL claims). In terms of the adopted business rescue plan, the CVL claims will be converted into equity in Liberty Coal. The deadline for implementation of the OCM business rescue plan is 25 March 2022. It is explained in the founding affidavit that if these proceedings are not finalised prior to the implementation of the OCM business rescue plan, the relief claimed by the NDPP will be rendered nugatory because the business of OCM will be disposed of to Liberty Coal for a nominal amount of R1,00 (one rand) in circumstances where the OCM and OCT shares are then rendered valueless.

[16] In their answering affidavit the business rescue practitioners (who are opposing the first main application) contend, amongst others, that the NDPP:

(a) failed to indicate that this application is urgent;

(b) failed to join numerous parties despite their direct and substantial interest in this application;

(c) failed to make out a case for leave in terms of section 133(1)(b) of the Companies Act, 71 of 2008;

(d) failed to disclose a cause of action and is therefore not entitled to the relief sought.

[17] In addition thereto, the business rescue practitioners as well as NUM contend that the NDPP has not made out a case for the preservation of the OCM business and has not established, even on a *prima facie* basis, that the business was acquired from the proceeds of unlawful activities. It is further submitted that the relief sought by the NDPP will deprive the employees of their vested rights. They finally argue that the relief sought by the NDPP is *ultra vires* POCA and in conflict with Chapter 6 of the Companies Act.

THE INTERLOCUTORY APPLICATIONS

[18] As indicated above, there are two interlocutory applications which are both opposed. They both relate to the first main application. The first is an application by the business rescue practitioners to strike out and the second is an application by the NDPP to admit a further affidavit.

The application to strike out

[19] The business rescue practitioners apply for an order for the striking out of some 20 (twenty) annexures to the affidavit of Tshikovhi (a Chief Financial Investigator who filed a supporting affidavit to the founding affidavit of the NDPP) and for an order to strike out certain paragraphs in the replying affidavit of the NDPP.

[20] The first part of this application relates to certain documents which were illegible. The NDPP states that the annexures concerned had been extracted from the State Capture Commission's website. The documents bear a watermark of the Commission. When uploaded onto Caselines the watermark becomes opaque and obscures the content of the documents. To read the document, one has to download or print the document. In an attempt to address the problem these annexures had then been reintroduced and uploaded onto Caselines to enable a proper reading thereof. The substance of the complaint is that this should not have been done.

[21] A striking out application should not be intended to raise technical objections. The striking out procedure is not intended for a party to gain an advantage based on technicalities (*Anderson and Another v Port Elizabeth Municipality* 1954 (2) SA 299 (E)). This is exactly the approach now followed by the business rescue practitioners. No prejudice will result if these documents are allowed to be reintroduced onto Caselines. In the result we are of the view that there is no merit in this objection.

[22] The second part of the objection relates to certain paragraphs contained in the replying affidavit of the NDPP. No specific reason is given why these individual paragraphs are sought to be struck out, save for the blanket statement in the notice that the paragraphs contain inadmissible hearsay evidence and/or raise new matter in reply and/or are scandalous, vexatious, argumentative, speculative and/or irrelevant. It seems that the main objection is that the replying affidavit contains new matter which should be struck out.

[23] While it is the general rule that an applicant has to make out its case in the founding papers in motion proceedings, the introduction of new material in the replying affidavit is not necessarily barred, unless the admission thereof will prejudice the other party (*Beack & Co SA (Pty) Ltd v Van Zummerman and Another* 1982 (2) SA 112 (W)). In short, if the business rescue practitioners thought that they were prejudiced by new material introduced in the replying affidavit, they could have applied for leave to file a further affidavit to deal with those allegations. They opted not to do so. In the result we are of the view that there is no merit in the application to strike out. An order in this regard will be made in due course.

The application to admit a further affidavit

[24] The business rescue practitioners filed an affidavit on 8 March 2022 setting out facts they believe reveal that the NDPP has no intention to also apply for a forfeiture order if a preservation order would be granted. It is contended that these facts emanate from a letter dated 3 March 2022 addressed by the State Attorney to the legal representatives of NUM.

[25] In an attempt to answer these allegations the NDPP applied for leave to file a supplementary affidavit. The application is opposed. Both the business rescue practitioners and NUM claim that the NDPP is using the POCA processes to secure an ulterior purpose. These are serious allegations. It would therefore be necessary for the NDPP to be given an opportunity to answer these allegations.

[26] The Court may in its discretion permit the filing of further affidavits. In the exercise of this discretion, we take into account that there will be no prejudice to the business rescue practitioners or NUM if the NDPP is granted leave to file a further affidavit. Furthermore, such an affidavit should be seen as an answer to the allegations already made against the NDPP. We are therefore of the view that it will be in the interests of justice to allow such an affidavit. An order in this regard will be made in due course.

THE STATUTORY FRAMEWORK

[27] We shall now first consider the relevant provisions of POCA and then the relevant sections of the Companies Act. According to its preamble POCA seeks to combat organised crime, money-laundering and criminal gang activities. It does so by providing the National Prosecuting Authority with two civil remedies which target the spoils of criminality (*NDPP v Elran* 2013 (1) SACR 429 (CC) at paras [67] to [68]). Chapter 6 establishes a bifurcated procedure, which ultimately balances the right to property on the one hand with the vindication of criminally tainted property on the other (*National Director of Public Prosecutions*

v Botha N.O. and Another 2020 (6) BCLR 693 (CC) at paras [114] - [129]). The first is the preservation stage and the second is the forfeiture stage.

[28] Section 38(1) of POCA provides that:

> *"The National Director may by way of ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any matter with any property."*

[29] A preservation order is a necessary pre-condition to a forfeiture order. Section 48(1) of POCA only permits the NDPP to apply for a forfeiture order (i) if a preservation order is in place, and (ii) over property that is subject to the preservation order. Both the main applications are concerned with an application for a preservation order.

[30] Section 38(2) establishes a relatively low threshold to grant the preservation order. It reads:

> *"(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned –*
>
> *(a) is an instrumentality of an offence referred to in the Schedule 1;*
>
> *(b) is the proceeds of unlawful activities; or*
> *(c) is property associated with terrorist and related activities."*

[31] At the preservation stage, therefore, the NDPP is required to establish no more than a *prima facie* case that there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in

Schedule 1, or is the proceeds of unlawful activities. It is only at the forfeiture stage under section 48 that proof on a balance of probabilities is specified by the Legislature (*NDPP v Van Heerden* 2004 (2) SACR 26 (C) at paras [33] - [34]). The Court also has no discretion to refuse the preservation order where a *prima facie* case is made out. Section 38(2) provides that the Court *"shall"* grant the order if the threshold test is met (*NDPP v Van Staden* 2007 (1) SACR 338 (SCA) at par 3).

[32] The second stage is the forfeiture stage. Within 90 (ninety) days of the preservation order, the NDPP is required to bring an application for forfeiture of the preserved property, failing which the preservation order lapses (section 40(a)). In the intervening period the Court may order that the preserved property be placed under the care of a curator *bonis* with permissions made for, amongst others, control over the property, continued administration of the property and where the property is a business or undertaking, to carry on the business or undertaking, with due regard to any law which may be applicable (section 42(1)).

[33] Before granting a preservation order the Court must be satisfied that there are reasonable grounds to believe that the property concerned is either an instrumentality of an offence or proceeds of unlawful activities (section 38(2)). POCA defines *"instrumentality of an offence"* as:

> *"... any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere."*

[34] The same Act defines the *"proceeds of unlawful activities"* as follows:

> *"Any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes property representing property so derived."*

[35] *"Unlawful activity"* means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of POCA. The definition of *"property"* reads as follows:

> *"... 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."*

[36] Section 38(3) is also important. It provides that a High Court making a preservation of property order *"shall at the same time make an order authorising the seizure of the property concerned"* by a police official, and any *"other ancillary orders that the Court considers appropriate for the proper, fair and effective execution of the orders"*.

[37] Finally, section 61 of POCA deals with *"expedition of applications"*. The procedure provided for *"in any application"* is to authorise the National Director to file with the Registrar of the High Court a certificate stating that in his or her opinion the case is of general public importance. Upon receipt of such certificate the Judge President, or Deputy Judge President, *"shall designate immediately"* a Judge of that High Court to hear and determine the application.

[38] We now turn to consider the applicable provisions of the Companies Act. It is common cause that OCM, OCT and Tegeta are all in business rescue. The first to fifth respondents have been joined in their capacities as the business rescue practitioners of OCM, whereas the seventh and eighth respondents have been joined in their capacities as the business rescue practitioners of Tegeta. The tenth and eleventh respondents are the business rescue practitioners of OCT.

[39] Section 133 of the Companies Act places a general moratorium on legal proceedings that are brought against a company in business rescue, or that are brought in relation to any property of a company in business rescue. The relevant part of section 133 provides as follows:

> *"(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –*
>
> *(a) with the written consent of the practitioner;*
>
> *(b) with the leave of the Court and in accordance with any terms the Court considers suitable;".*

[40] Section 140 deals with the general powers and duties of business rescue practitioners. It provides in subsection (1), amongst others, that during a company's business rescue proceedings, the practitioner has full management control of the company in substitution for its board and pre-existing management. The practitioner is also responsible to develop a business rescue plan to be considered by affected persons and to implement any business rescue plan that has been adopted in accordance with the provisions of the Act.

[41] Section 144 regulates the rights of employees. It provides in subsection (1), amongst others, that during a company's business rescue proceedings employees of the company may exercise any rights set out in Chapter 6 of the Act, whereas section 145 makes provision for the participation by creditors. In subsection (1) it provides, *inter alia*, that each creditor is entitled to notice of each Court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings.

[42] Insofar as the interpretation of the Act is concerned, section 5(4) prescribes the procedure to be followed if there is an inconsistency between any provision of the Companies Act and a provision of any other National legislation. It provides as follows:

> *"(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation –*
>
> *(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and*
>
> *(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second –*
>
> *(i) any applicable provisions of the –*
>
> *(aa) Auditing Profession Act;*
>
> *(bb) Labour Relations Act 1995 (Act No. 66 of 1995);*
>
> *(cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);*
>
> *(dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);*

(ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);

(ff) Securities Services Act, 2004 (Act No. 36 of 2004); or

(gg) Banks Act,

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4); or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4)."

THE EVIDENCE

[43] We shall now consider the evidence applicable to both the main applications as well as the defences raised by the business rescue practitioners and NUM.

[44] The evidence relied on in these proceedings by the NDPP are outlined in the supporting affidavit of Sibusiso Tshikovhi. He is a Chief Financial Investigator employed by the National Prosecuting Authority and is attached to the Investigating Directorate, Pretoria. He has a Bachelor of Accounting Science (B.Compt) degree and is a member of the South African Chapter of the Association of Certified Fraud Examiners.

[45] Tshikovhi explains in his affidavit that the facts provided therein are either within his personal knowledge, or are based on documentation that he has read or had access to, unless the contrary is indicated. He says the following with regard to the flow of money which he investigated:

> *"Where I describe money flows in this affidavit, I do so on the basis of analysis of money flow that I have performed or independently confirmed by myself on the basis of my experience and expertise and having had sight of the relevant underlying banking transaction records."*

[46] Tshikovhi states that his affidavit is in support of the main application in respect of all the shares held by Tegeta in OCM; the business of OCM, all the shares held by Tegeta in OCT; and all the claims held by Templar pursuant to a cession of claims from Centaur. When reference is made to the founding affidavit, it includes the affidavit of Tshikovhi.

The first main application (Case No: 62604/2021)

[47] The property targeted in this application is the shares of Tegeta in OCM and OCT as well as the business of OCM. The case for preservation of this property flows from the Tegeta-Glencor transaction during 2015 and 2016. It is alleged that in April 2016, for payment of R2,084,210,206.10, Tegeta acquired all of the targeted property referred to above.

[48] The NDPP seeks to preserve the Optimum property because it is alleged to be the proceeds of unlawful activity. According to the founding affidavit Tegeta obtained the funds to acquire the Optimum property through fraud, money-laundering, corruption and theft. It is alleged that Tegeta obtained the funds to purchase the property from eight sources in several transactions.

[49] The first transaction of R659,558,079.38 was a pre-payment from Eskom to Tegeta for coal to be supplied from OCM. It is alleged that senior executives within Eskom procured that Eskom made this pre-payment to Tegeta through a

series of fraudulent misrepresentations made to Eskom. These fraudulent misrepresentations were designed to put Tegeta in funds to acquire the targeted property before the payment deadline of 14 April 2016. Tegeta ultimately delivered the coal for which the pre-payment had been made.

[50] The second transaction relates to the so-called Albatime loan. Albatime (Pty) Ltd is an entity which is allegedly used by the Gupta Family to launder proceeds of crime. A loan of R104,500,000.00 from Albatime to Tegeta was funded from two criminal sources, both of which arose on 4 December 2015. Albatime provided a fixed deposit of R110 million as security for the Bank of Beroda to advance R104,500,000.00 to Tegeta on loan. It is explained that the R110 million fixed deposit provided as security by Albatime derived from R56 million stolen from the Transnet Second Defined Benefit Fund by Regiments Fund Managers of which R42 million was laundered onto Albatime, and R74,784,800.00 flowing from a fee of R93,480,000.00 procured by Trillian Asset Management (Pty) Ltd from Transnet through fraud and corruption, before being laundered onto Albatime.

[51] The third transaction concerns an amount of R152,000,000.00. It is alleged that this amount was laundered through Trillian Management Consulting. This company provided a fixed deposit of R160 million as security for the Bank of Beroda to advance the amount of R152,000,000.00 to Tegeta on loan. It is explained that the R160 million fixed deposit provided as security by Trillian Management Consulting derived from amounts stolen from the Transnet Second Defined Benefit Fund by Regiments Fund Managers and then laundered on through the Trillian Group of Companies.

[52] The fourth transaction of R842,231,000.00 was allegedly laundered through Centaur Mining (Pty) Ltd. Centaur provided a fixed deposit of R886,559,781.00 as security for the Bank of Beroda to advance R842,231,000.00 to Tegeta on loan. Centaur is a wholly-owned subsidiary of Centaur Ventures Limited (CVL), a Bermuda-based company. It has been pointed out in the founding affidavit that Mr McGowan (who represented CVL in its dealings with Griffin Line Trading, a Gupta family company) repeatedly stated under oath that the funds advanced from Griffin Line to CVL are likely the proceeds of crimes against the South African State and that the flow of these funds from Griffin Line to CVL was part of a money-laundering scheme.

[53] According to Tshikovhi Tegeta effectively acquired the business of OCM through the shares sale agreement. According to him the OCT and OCM shares as well as the business of OCM together with the CVL claims are all closely interlinked. The CVL claims against OCM relate to payments made by CVL to OCM *"allegedly on coal contracts in respect of which OCM still had outstanding coal delivery obligations to CVL"*. Having regard to the extraordinary anomalies in these contracts between *"parties operating not at arm's length"*, the NDPP has reason to believe that the contracts were not genuine coal contracts but rather money-laundering devices designed *"to paper"* transactions, the primary purpose of which was to introduce Gupta family proceeds of crime back into South Africa.

[54] It is then concluded by the NDPP that, on the unanswered evidence, R916 million of the R2,084,210,206.10 purchase price was clearly the proceeds of unlawful activities and that there are reasonable grounds to conclude that

another R842 million of the purchase price was also the proceeds of unlawful activities.

Defences against the first main application

[55] The business rescue practitioners contend that the application is not urgent. It is pointed out that the NDPP approaches the Court on an urgent basis and seeks an order for urgency. No case for urgency in the founding affidavit has been made out and according to this submission, section 61 of POCA finds no application in this matter.

[56] We do not agree with these submissions. This application was issued by the Registrar of this Court on 8 December 2021. Although the NDPP approaches the Court on an urgent basis, the applicant has in any event issued a certificate in terms of section 61(a) of POCA in respect of these proceedings. It is dated 8 December 2021 and has been attached to a letter dated 10 December 2021 which was addressed to the Judge President of this Division. In this letter the NDPP has pertinently referred to the certificate indicating *"that the matters are of general public importance and thus the applications should be expedited"*.

[57] Section 61 of POCA provides the NDPP with a fast-track to a hearing. The purpose of the certificate is to engage the Court's urgent attention so that the Judge President can *"immediately designate a Judge"* to hear and determine the application. The Deputy Judge President has thereafter constituted a special Court, consisting of two Judges, to hear this matter. Therefore, in our view, this

application, as well as applications in general under section 38(1), are to be regarded as inherently urgent.

[58] Furthermore, the matter is self-evidently urgent. The business rescue practitioners intent to implement the business rescue plan on 25 March 2022 at which point the business of OCM will transfer to Liberty Coal and the shares in OCM and OCT will be left with no value at all. Having regard to all these considerations, we are satisfied that the matter is urgent.

[59] The next defence relates to non-joinder. According to the business rescue practitioners, the NDPP failed to join numerous known and identified parties, despite their direct and substantial interest in the proceedings. It was submitted that all affected persons have vested personal rights in the OCM and OCT business rescue plans. According to this defence the NDPP cannot elect to join certain interested parties to deal with the application on notice and still maintain that she did not need to join other interested parties. Reference was made, amongst others, to *ABSA Bank Limited v Naude N.O.* 2016 (6) SA 540 (SCA) paras 7-11, where it was held that upon the adoption of a plan, all affected persons must be joined and mere notice is insufficient. These affected persons include employees as well as creditors. It was also argued that *Economic Freedom Fighters v Speaker of the National Assembly* [2016] 1 All SA 520 (WCC) par 53 *"is the most important case"* in this regard. It was pointed out that in that case the Court made it clear that:

> *"The joinder of the members of Parliament is required because the orders in rem that are being sought may affect their personal interests in a sufficiently direct and material way."*

[60] The argument of the NDPP is that the joinder complaint is based on a failure to appreciate the nature of a preservation order as an order *in rem* and the implications that this has for principles of joinder. Principles of joinder are designed with regard to the doctrine of *res judicata*. A preservation order is an order *in rem* which is binding against the world and it is not open to a party faced by a claim of *res judicata* in relation to an order *in rem* to complain that he or she was not cited as a party in the proceedings where the order *in rem* was handed down. According to this argument the order is binding against such a person, even if he or she was not cited in the original proceedings.

[61] Section 37 of POCA makes it clear that proceedings under Chapter 6 are civil proceedings in every sense. These are *in rem* proceedings. It is the property which is proceeded against. The focus is not on the wrongdoer but on the property used to commit an offence (*Brooks and Another v National Director of Public Prosecutions* 2021 (2) SACR 53 (SCA) at par [16]). In *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (TPD) at 368H the Court described a judgment *in rem* as one:

> *"... which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and, therefore is conclusive for, or against, everybody, as distinct from those decisions which only purport to determine the jural relation of the parties to one another, and their personal rights and equities inter se, and which therefore, are commonly termed, decision in personam."*

[62] Generally speaking, unlike an order *in personam*, the binding nature of an order *in rem* is not confined to parties who have been cited as respondents in the proceedings giving rise to the order *in rem*. An order *in rem*, i.e. affecting

either the status of a person or his property, is conclusive against all the world and it is not open to a party faced by a claim of *res judicata* in relation to an order *in rem* to complain that he or she was not cited as a party in the proceedings where the order *in rem* was handed down (*Liley and Another v Johannesburg Turf Club and Another* 1983 (4) SA 548 (W) at 550 and Erasmus, Superior Court Practice, 2nd Ed, D1-284).

[63] It is also not necessary for the joinder of parties at the preservation stage of the proceedings of this nature to comply with the requirement of *audi alteram partem*. The Constitutional Court and the Supreme Court of Appeal have repeatedly held that the NPA may seek a Chapter 6 preservation order *ex parte* (*NDPP v Mohamed N.O.* 2003 (1) SACR 561 (CC) at par 33 and *National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 (SCA) at par 3). In *Ex Parte National Director of Public Prosecutions* 2018 (2) SACR 176 (SCA) the Supreme Court of Appeal has held that the requirements of *audi alteram partem* are satisfied by the provisions of Chapter 6 which will require notice of a preservation order to be given to any interested parties who may then intervene to protect their interests (paragraphs 25 and 26 of the judgment).

[64] This also highlights the distinction between the present case and *ABSA Bank Ltd v Naude*, *supra* and *Economic Freedom Fighters v Speaker of the National Assembly*, *supra* on which the business rescue practitioners rely. Unlike the present case, those cases did not arise in a regime that provides for *ex parte* initial hearings and then *audi alteram partem* at a second stage of the process as provided for in POCA. Those cases dealt with joinder in general and are therefore distinguishable from the present one. The mere fact that the NDPP

has chosen to bring the application on notice to the business rescue practitioners (as a sign of courtesy) does not mean that the nature of these proceedings, as envisaged in Chapter 6 of POCA, has now changed. It remains, in our view, substantially the same.

[65] Furthermore, if the argument about joinder was correct, it would have to apply not just to rare cases where the NDPP had cited respondents, like the present case, but it would also have to apply to all cases, including the vast majority of cases where the NDPP proceeds *ex parte*. Does that mean that a Judge hearing the *ex parte* application cannot grant the preservation order if it will impact on the personal rights of any other party who has not been joined as a party to such proceedings? If that would be the legal position, it will be at odds with the judgment of the Supreme Court of Appeal in *Ex parte NDPP* 2018 (2) SACR 176 (SCA) at paras 20 to 26 and, for that matter also *NDPP v Van Staden* 2007 (1) SA 338 (SCA) at par 3. In those two judgments the Supreme Court of Appeal has now twice made it clear that POCA gives the NDPP a right to proceed *ex parte* and that it was not for the Courts to read into POCA limitations of that right to proceed *ex parte* which are not contained in the Act.

[66] For the reasons set out above, we agree with the submissions put forward by counsel for the NDPP. In our view there is no merit in this defence of non-joinder.

[67] The third defence is that the NDPP had to obtain leave of the Court to institute these proceedings in terms of section 133(1)(b) of the Companies Act, but that she failed to make out a case for such leave. The argument is that the

NDPP should have sought leave by way of a prior substantive application and that an applicant for leave must show that the proceedings are *"necessary and appropriate"*. According to the business rescue practitioners the NDPP failed to comply with these requirements.

[68] According to the NDPP these proceedings are necessary and appropriate for at least two reasons: the first is that leave is being sought by the NDPP in the exercise of her statutory and constitutional obligations to discourage and combat crime. The second is that there is no real dispute between the parties that at least some of the property is the proceeds of unlawful activity. Therefore, so the argument goes, it is in the interests of justice that leave should be granted.

[69] Section 133(1) of the Companies Act places a general moratorium on legal proceedings against a company under business rescue, except, amongst others, *"with the leave of the Court and in accordance with any terms the Court considers suitable"*. In the application now before us there is no specific prayer in the notice of motion for such leave to be granted. However, in the founding affidavit, under the heading *"Section 133 of the Companies Act"*, this issue has been pertinently dealt with. In par 89 of the founding affidavit the NDPP submits *"that there is an overwhelming case for consent for these proceedings to be granted under section 133(1)(b)"*. It is further explained that the implementation of the OCM business rescue plan will amount to the commission of a money-laundering offence and *"to allow business rescue practitioners to veto POCA proceedings will result in an absurdity"*. This issue has also been ventilated at length during argument.

[70] Taking into account all these circumstances, we are satisfied that the NDPP has requested, at least by necessary implication, that leave should be granted in terms of section 133(1)(b) of the Companies Act. This kind of relief can be considered in terms of the prayer for further and/or alternative relief. Such a prayer can be invoked to justify or entitle a party to an order in addition to that set out in the notice of motion where that order is clearly indicated in the founding affidavit and is established by satisfactory evidence (*Port Nolloth v Xhalisa* 1991 (3) SA 98 (C) at 112). This, in our view, has been done.

[71] We do not agree with the submission that the NDPP should have sought leave by way of a prior substantive application. Our Courts have recognised that the request for leave may be made together with the main application. Prospects of an application for leave would generally be reliant on the prospects of success in the main relief to be sought (*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd* 2017 (4) SA 592 (GJ) at paras 27 and 28).

[72] When considering whether to grant leave or not, one has to take into account, *inter alia*, the purpose why leave is sought as well as the prospects of success in the main application. In the matter before us leave is being sought by the NDPP in the exercise of her statutory and constitutional obligations to combat crime. In this regard we agree with the view that the law should not allow a potential perpetrator of an offence to hide behind a statutory provision, such as section 133 of the Companies Act (this is not a reference to any of the parties in this matter) to prevent law enforcing authorities to combat crime. To do so would, to say the least, not be in the interests of justice. Taking into account all these considerations, as well as our conclusion on the merits of this

application as referred to in paragraph 86 hereunder, it would be nonsensical to refuse the application for leave as envisaged by section 133(1)(b) of the Companies Act.

[73] The business rescue practitioners have also raised the defence that the NDPP failed to disclose a cause of action with regard to the sale of shares, or to make out a case in her founding affidavit for the relief sought with regard to the sale of shares, and is therefore not entitled to preserve the property. This defence, as we understand it, stands on two legs.

[74] First, it is contended with regard to the purchase of the shares that the Albatime, Trillian and Centaur streams of the Optimum purchase price cannot be characterised as proceeds of crime because the funds actually advanced to Tegeta were advanced on loan by the Bank of Beroda against certain fixed deposits. According to this argument *"there is a break between the deposit of a criminal's money and the bank's money"*. This, the business rescue practitioners contend, breaks the chain linking the proceeds of crime to the purchase price.

[75] In answer thereto, the NDPP has pointed out that, according to the evidence, the loan facilities were advanced against the security of fixed deposits which were funded with proceeds of crime. Therefore, so the argument goes, the proceeds of crime in the fixed deposits *"were a necessary element of the funding scheme"*. We agree with this submission. The Optimum property acquired with loan funding provided by the Bank of Beroda was, at the very least, *"property ... which was derived, received ... indirectly ... as a result of any*

unlawful activity" within the meaning of the POCA definition. Therefore, in our view, there is no merit in this part of the defence.

[76] The second part of this defence is that the NDPP failed to establish a fraud on Eskom in her founding affidavit, as it is common cause that Tegeta ultimately delivered all the coal to Eskom in terms of the pre-payment agreement. Therefore, so it has been contended, Eskom suffered no harm in making the pre-payment.

[77] The short answer given by the NDPP to this argument is the following. The fact that Tegeta ultimately delivered the coal for which pre-payment was made is irrelevant because there was *"clear potential prejudice in making a pre-payment"* to a company whose future as a going concern was known to be in doubt. We agree with this submission. Furthermore, the potential prejudice is also illustrated by asking the question *"what if the coal would not be delivered"* after a pre-payment had already been made? It is only now, with the benefit of hindsight, that one can conclude and point out that all the coal had been delivered. Put differently, one should assess the potential prejudice at the time when the pre-payment was made, i.e. before the coal had been delivered. For these reasons we conclude that there is also no merit in this part of the defence.

[78] Finally, both the business rescue practitioners as well as NUM maintain that the NDPP has not made out a case for the preservation of the OCM business. The first argument is that the NDPP has not defined what is the business of the mine. According to the NDPP it is clear on the papers that the business of OCM is the business that is about to be transferred to Liberty Coal

as defined in the business rescue plan. That business is defined as follows in clause 2.1.7 of the plan:

> *"The whole of the coal mining business conducted by the company pursuant to the Sale Assets, comprising the operation of the Optimum Mine and the supply and export of coal to various local and international markets, and all matters ancillary or incidental thereto."*

[79] The NDPP points that this definition of business must be read with the definition of the Sale Assets in clause 2.1.56 of the business rescue plan. The Sale Assets:

> *"means all the assets owned by the company in relation to the business which include (without limitation) the Related Party Claims, the Mineral Rights, the Mining Assets and the immovable properties, together with all available books, documents, deeds and records (historic or otherwise) pertaining thereto."*

[80] According to the NDPP that is the business that she seeks to preserve and the business rescue practitioners have always understood that to be the business of the OCM. We agree with this submission. The claim that nobody knows what the business is, is untenable.

[81] The second argument with regard to the business is that the NDPP has failed to make out a case for the acquisition of the business by proceeds of crime. Both the business rescue practitioners as well as NUM argued that the sale agreement only refers to the shares and does not indicate that what was going to be acquired was also a business.

[82] The NDPP disputed the correctness of these submissions. Tshikovhi clearly indicates in his affidavit (par 4) that his evidence relates to not only the shares, but also the business of OCM. He also explains (in par 5.3) that through the sale agreement Tegeta *inter alia* effectively acquired the business of OCM. According to him the shares, the business and the CVL claims are all addressed by him *"because they are closely interlinked"* (par 11).

[83] Clause 14 of the sales of shares and claim agreement deals with *"TRANSITION"*. Clause 14.1 gives the impression that the sale of shares would also include the sale of a business. It provides as follows:

> *"It is recorded that the seller and the target companies form part of the integrated Glencor group coal business in South Africa and shall after the closing date need to be extracted from such business and become stand-alone businesses."*

[84] Also the affidavit of Mr Marsden (who represented the seller) makes it clear that the sale of shares was in effect a sale of the business of the mine. He explains (par 18) that he and Mr Van der Steen *"required Eskom's consent for the sale of the mine"*.

[85] Taking into account all the above considerations, we are of the view that the sale of shares was a deal with the object of acquiring a business (*cf.* Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others 2017 (4) SA 610 (SCA) at par 27 and 28). The business of OCM was therefore also acquired through the Optimum transaction. Put differently, the business of OCM was acquired by using the sale of shares. This conclusion is also supported by the

evidence of Tshikovhi where he states that through the sale agreement, Tegeta *inter alia* effectively acquired the business of OCM.

Conclusion

[86] We therefore conclude as follows. The property concerned in this application includes all of Tegeta's shares in OCM and OCT as well as the business of OCM. There is sufficient evidence indicating that Tegeta obtained the funds to acquire these properties from several sources which were channelled through various transactions. Taking into account the evidence in this regard, as well as the undisputed objective facts, the NDPP has demonstrated that Tegeta obtained the funds to acquire the Optimum property through fraud, money-laundering, corruption and theft. In our view, the NDPP has established a *prima facie* case that there are reasonable grounds to believe that the properties concerned are the proceeds of unlawful activities.

The relief sought

[87] The preservation order proposed by the NDPP makes provision, *inter alia*, for a preservation order in terms of section 38(2) of POCA in respect of all the shares held in OCM and OCT as well as the business of OCM. It also provides for the appointment of a curator *bonis* with certain powers, duties and authority subject to the business rescue practitioners of OCM retaining control of the business of OCM and to exercise all powers in respect of that business that they are lawfully vested with. It also makes provision for the right of any interested party to apply to this Court for a variation or the setting aside of this order in terms of section 47 of POCA. Finally, it provides for notice to be given in

terms of section 39 of POCA, the right of any respondent or any other person to oppose the application for an order forfeiting the property to the State or to apply for an order excluding his or her interest from a forfeiture order in respect of the property.

[88] Both the business rescue practitioners and NUM contend that the relief sought is legally incompetent as the appointment of a curator would result in an irreconcilable conflict with Chapter 6 of the Companies Act. They also contend that the effect of the relief sought will deprive the employees of their vested rights and will infringe upon their rights to fair labour practices as enshrined in section 23(1) of the Constitution.

[89] The essence of the business rescue practitioners' argument is that business rescue is an important part of the machinery of the Companies Act and this preservation application should not be permitted to interfere with the business rescue regime. They seek support for this proposition in section 5(4) of the Companies Act as that section provides that if there is an inconsistency between the Companies Act and a provision of another national law, then the Companies Act will prevail.

[90] The argument of the NDPP is that a proper consideration of section 5(4) indicates that where there is an inconsistency between the Companies Act and another Act, the first step is to try to apply the two provisions concurrently. Thereafter, it is stipulated that *"to the extent that it is impossible"* to apply or comply with one of the provisions, the Companies Act will prevail (except in certain defined cases which are not relevant now).

[91] Having considered the proposed draft order by the NDPP, we are of the view that it endeavours to harmonise any potential conflict between the two Statutes. It is not disproportionate or arbitrary as submitted by the business rescue practitioners and Num. The opposite is true. It has carefully structured the preservation order around the business rescue process. The preservation order will involve the appointment of a curator who will carry on the business together with the business rescue practitioners in the period between the granting of the order and the forfeiture stage. It also provides that the business rescue practitioners of OCM, subject to certain qualifications, will retain control of the business of OCM and will be entitled to exercise all powers in respect of that business that they are lawfully vested with as business rescue practitioners.

[92] The need to harmonise any potential conflict between provisions of POCA and that of the Companies Act, is also illustrated by comparing companies not in business rescue with companies which are in business rescue. It can hardly be suggested that POCA should apply to companies not in business rescue, but it is not applicable to companies which are in business rescue. The reason is obvious. Such a differentiation will allow perpetrators of crime, hiding behind business rescue, to run away with the spoils. It is necessary to follow a practical and robust approach, to allow the law to take its course and to prevent an injustice to be done. A sensible approach is therefore necessary.

[93] The second part of this argument put forward by NUM, is that the relief sought by the NDPP will deprive the employees of their vested rights and will stand in conflict with the provisions of the Companies Act regarding these rights.

In answer thereto the NDPP submitted that Chapter 6 of the Companies Act does not protect or exclude the assets or business of a company from being subject to a preservation order under POCA. We agree with this submission. There is nothing in the relief claimed that is inconsistent with the Companies Act or POCA. On the contrary, section 42(1)(a) of POCA expressly provides for a curator, where the property is a business or undertaking, to carry on such business or undertaking with due regard to any law which may be applicable. This means that the curator's power to carry on the business of OCM would be a power to be exercised with due regard to Chapter 6 of the Companies Act. Furthermore, we have already considered and pointed out the *in rem* nature of the POCA proceedings as well as the fact that all interested parties will have the right to be heard as provided for in POCA. Put differently, a preservation order is not a final order that will deprive the employees of their rights.

[94] It was also contended by the business rescue practitioners as well as NUM that the NDPP has no intention of proceeding with a forfeiture application and the NDPP is using the POCA processes to secure an ulterior purpose. This submission is made with regard to a letter dated 3 March 2022, addressed to the legal representatives of NUM, in which certain settlement proposals were made by the legal representatives of the NDPP.

[95] There is, in our view, no merit in this argument. In a supplementary affidavit deposed to by a Deputy National Director of Public Prosecutions it is confirmed that the NDPP *"has always been, and remains, intent on bringing forfeiture proceedings following any preservation order"* that may be granted in this application. Furthermore, if it was indeed the intention of the NDPP not to

proceed with forfeiture proceedings, then one would have expected the proposed draft order not to refer to that procedure at all. This is not the case. It specifically makes provision for any respondent or any other person to oppose the application for an order forfeiting the property. We have no reason to doubt the evidence or the intention of the NDPP in this regard.

[96] Taking into account all the above considerations, we are satisfied that the draft order proposed by the NDPP, as amended by us after having considered also the submissions made by the other parties, provides for a harmonious reading and implementation of POCA and the Companies Act. This is in accordance with the requirements of section 5(4) of the Companies Act. On that harmonious approach, the business rescue process can continue with the oversight of the POCA appointed curator *bonis*. We therefore conclude that there is no merit in the objections raised by the business rescue practitioners or NUM against the proposed draft order as amended.

The second main application (Case No: 62601/2021)

[97] The relief sought in the second application (where Templar is the respondent) is also for an order in terms of section 38 of POCA to preserve the claims held by Templar against OCM. The evidence relied on by the NDPP in this application are also outlined in the supporting affidavit of Tshikovhi. When reference is made to the founding affidavit, it includes the affidavit of Tshikovhi. As already pointed out above, this application is now unopposed.

[98] According to the founding affidavit McGowan is the controlling mind of Templar. He was previously the partner of the Gupta family in CVL (Centaur

Ventures Limited). Before Templar withdrew its opposition to this preservation application, McGowan made it clear that the Templar claims were based on prepayments made by CVL on four coal *"contracts"* between CVL and OCM. The four *"contracts"* identified by McGowan as the source of the CVL claims are contracts CVL6, CVL8, CVL9 and CVL12. These were all contracts between CVL and OCM, which at that stage was a Gupta family-owned coal mine.

[99] The CVL claims amount to over R1.3 billion of which R768,000,000.00 represents the payments made by CVL in respect of which CVL did not receive coal. The balance comprises damages claims based on the non-delivery of the relevant coal. The case of the NDPP for preservation of the Templar claims has been brought on three different and independently bases.

[100] It is alleged that the CVL claims were themselves the proceeds of crime. The NDPP adduced evidence to show that the CVL claims in respect of the abovementioned contracts were funded to an extent far in excess of R768,000,000.00 by advances to CVL on a loan from the Gupta family Dubai-based company, Griffin Line Trading LLC. In this regard McGowan himself has stated under oath that the funds provided by Griffin Line were likely the proceeds of crimes against the South African State and that the flow of these funds from Griffin Line to CVL was part of a money-laundering scheme of the Gupta family.

[101] There is evidence to indicate that recycled proceeds of a Centaur Mining (Pty) Ltd fixed deposit was funded by criminally tainted Griffin Line advances to CVL. It is also explained that recycled proceeds of crime in a Trillion fixed

deposit was funded by R160 million stolen from the Transnet Second Defined Benefit Fund.

[102] On 15 June 2020 McGowan ceded the CVL claims to Templar in a transaction where he represented both parties. It is alleged that when McGowan ceded the CVL claims to Templar, he not only had reasonable grounds to believe, but subjectively did believe, that the Griffin Line loan funds underlying the CVL claims were proceeds of crime.

[103] The evidence adduced by the NDPP therefore indicates that the CVL claims in respect of the abovementioned contracts were funded by advances to CVL on the Griffin Line loan, recycled proceeds of the Centaur mining fixed deposit and recycled proceeds of the Trillian fixed deposit. This evidence stands completely uncontradicted.

[104] It is contended by the NDPP that the CVL claims in the hands of Templar are therefore the proceeds and instrumentality of the money-laundering offences created by sections 5 and 6 of POCA as well as the proceeds of these crimes.

[105] Taking into account the evidence as well as the undisputed objective facts, we are satisfied that the NDPP has made out a *prima facie* case that there are reasonable grounds to believe that these claims are the proceeds of the crime of money-laundering.

THE APPLICATION BY KOKO

[106] As already indicated above, on the second last day of argument, Mr Koko filed an application in terms whereof he applied for leave that his affidavit deposed to on 3 March 2022, and a bundle of documents accompanying it, should be admitted as part of the papers in the proceedings under case number 26604/2021 (the first main application). This application was dismissed with no order as to costs. The reasons are the following:

(a) No relief is sought against Mr Koko in any of the two main applications referred to above;

(b) Mr Koko is not a party to these proceedings and he also did not apply to intervene as a respondent;

(c) Although reference was made to Mr Koko in the founding affidavit under case number 62604/2021, this Court cannot allow another affidavit by a person who is not a party to these proceedings in an attempt to answer certain allegations made against him, certainly not at such a late stage.

CONCLUSION

[107] Having considered all the evidence, the arguments put forward by the business rescue practitioners as well as the arguments of NUM, we are of the view that both the main applications should succeed with costs to be paid by the business rescue practitioners in their official capacity and NUM, jointly and severally, in case number 62604/2021, including the costs of two counsel where so employed.

ORDER

The following orders are accordingly made:

(A) CASE NO: 62604/2021

The draft order attached hereto and marked "X1" is made an order of Court.

(B) CASE NO: 62601/2021

The draft order attached hereto and marked "X2" is made an order of Court.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 23/3/22

M MBONGWE
JUDGE OF THE HIGH COURT
PRETORIA

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Applications heard on 8 – 11 March 2022.

Judgment delivered on 23 March 2022.