Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 6171/2021

Before: The Hon. Mr Justice Binns-Ward
Hearing: 9 June 2021
Judgment: 17 June 2021

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

JEROME BOOYSEN First Defendant

AND FIVE OTHERS Second to Sixth Defendants

TINA ADELE BOOYSEN First Respondent

AND THREE OTHERS Second to Fourth Respondents

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 17 June 2021.)

BINNS-WARD J:

[1] On 3 May 2021, the National Director of Public Prosecutions ('the NDPP') obtained a restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') against a number of persons, including the first defendant,[1] Mr Jerome Booysen. The order was granted provisionally by Steyn J, before whom an application for the order had been brought *ex parte*, as contemplated in s 26(1). It was a so-called 'uncapped order' because it prohibited the defendants from dealing with any of their property, as distinct from one relating only to specified items of property.[2] It bears mention that the first defendant is married in community of property to the first respondent, and that consequently the order affects their common property. It is of course open to the first respondent, independently of her husband, to apply for the amelioration of the effect of the order if it bears unduly harshly on her.

[2] This judgment concerns Mr Booysen's application, brought as a matter of urgency in terms of s 26(3)(c) of POCA,[3] for the discharge or variation of the order insofar as it affects him. The application in essence requires the court to reconsider the order granted provisionally in the first defendant's absence. The NDPP is no better positioned when the order is reconsidered on the return day than she was when the application for a restraint order was moved initially (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para 45-46 and *National Director of Public Prosecutions v Rautenbach and Another* [2004] ZASCA 102 (22 November 2004); [2005] 1 All SA 412 (SCA) at para 12-13). That is what distinguishes the current proceedings from an application for rescission or variation brought in terms of s 26(10).[4] I accordingly invited counsel for the NDPP to address the court first in support of the confirmation of the provisionally made order.

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[1] The term '*defendant*' is used in the sense defined in s 12(1) of POCA.

[2] Provision is expressly made for such orders in s 26(2)(b) and (c) of POCA.

[3] Section 26(3)(c) provides that '*Upon application by the defendant, the court may anticipate the return day [of a rule nisi issued when a provisional restraint order is made] for the purpose of discharging the provisional restraint order if 24 hours' notice of such application has been given to the applicant …*'.

[4] Section 26(10) provides: '*A High Court which made a restraint order –*

(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied –

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, last, damaged, concealed or transferred; and

(b) *show rescind the restraint order when the proceedings against the defendant all concluded.*'

[3] POCA is directed at combatting organised crime, money laundering and criminal gang activity. The preamble to the Act records that '*it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves*'. The objects of the legislation therefore include the criminalisation of '*the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity*'. '*Enterprise*' is very widely defined, and includes '*any individual*' and any '*group of individuals associated in fact*'.[5] '*Pattern of racketeering activity*' is defined to mean '*the planned, ongoing, continuous or repeated participation in or involvement in any offence referred to in Schedule 1 ...*'.[6] The offences referred to in s 13 of Drugs and Drug Trafficking Act are included in the types of offences listed in Schedule 1 to POCA. The restraint and confiscation order provisions in POCA are there in recognition of the need '*to provide for a civil remedy of preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence*'.[7]

[4] The court may grant a restraint order when it is satisfied that the person who is to be subject to it is to be charged with an offence and there are reasonable grounds for believing that a confiscation order may be made against such person (s 25 of POCA). A confiscation order may be made only after a person has been convicted of having committed a criminal offence. It follows that a court that is asked to make a restraint order must also be persuaded that there is a realistic prospect of the defendant being convicted on the charge(s) he faces or is to face.

[5] In terms of s 18 of POCA, a court convicting a person of an offence may, on the application of the prosecutor, enquire into any benefit the defendant may have derived from that offence, any other offence of which the defendant has been convicted at the same trial and any criminal activity which the court finds to be sufficiently related to those offences. The purpose of the confiscation would be to deprive the defendant of any benefits which may have been derived by him or her from the offences upon which he or she might be convicted or any other criminal activity which the trial court might find to be sufficiently related to those offences.[8] The statute casts the confiscation net widely.

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[5] Section 1 of POCA.

[6] Id.

[7] Id.

[8] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at para 10.

[6] The purpose of a restraint order is to preserve property pending the completion of the contemplated criminal proceedings against a defendant so that it will be available to be realised in satisfaction of any confiscation order that might be made.[9] Section 18(2)(a) provides that the amount which a court may order the defendant to pay in terms of a confiscation order shall not exceed the value of the defendant's proceeds of the offences or related criminal activities as determined by the court.

[7] The proceedings are civil proceedings, and any question of fact in the application proceedings falls to be decided on a balance of probabilities (s 13 of POCA).

[8] In *Rautenbach* supra, Nugent JA summarised the approach to be adopted in the adjudication of applications for restraint orders under Chapter 5 of POCA as follows: '*It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 19) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the court is properly seized of its discretion, it is not open to the court to then frustrate those criteria when it purports to exercise its discretion (cf Kyriacou,*[10] *footnote 1, paras 9 and 10).*'

[9] In their joint concurring judgment in *Rautenbach*, Navsa JA and Ponnan AJA emphasised that, whilst - differently from the position with a confiscation order - there is no express limitation on the ambit or extent of a restraint order, '*it would be offensive to justice*

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[9] *NDPP v Rautenbach* supra, in para 24.

[10] *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA).

if the effect of a restraint order was disproportionate to the contemplated future conviction and confiscation order'.[11] It follows that a court exercising its discretion to make a restraint order must have regard to the proportionality between the extent of the restraint and that of the possible confiscation order the satisfaction of which the restraint order is directed at securing. It is accepted, however, that an empirical correspondence in values is not required, nor, indeed, practically achievable in most cases.

[10] The concurring judgment in *Rautenbach* acknowledged, with reference to the observations of Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 78, that, realistically, it will often not be possible at the restraint stage for the NDPP to predict or place before the court more than a limited portion of the material that is likely to influence the court faced with the confiscation application. It might also be difficult at the restraint stage for the NDPP to be able to identify the '*related criminal activities*' referred to in s 18(1)(c) of POCA, which can have a bearing on the determination of the extent of a confiscation order. The appeal court has indicated that a court seized of an application for a restraint order should take these difficulties into account in making its decision. The objects of the legislation, and the place of restraint and confiscation orders in the statutory scheme, must be kept in mind. A court should not approach an application for a restraint order in a way that thwarts or undermines those objects.

[11] I refer to these considerations in some detail because it seems to me that the criticism levelled by the first defendant's counsel at the nature and quality of the evidence adduced by the NDPP in support of the prospects of a conviction the first defendant on the charges faced by him set the bar too high. An application for a restraint order is not a preview of or dress rehearsal for the criminal trial. This court does not have to be satisfied that the first defendant will probably be convicted, only that there is apparently cogent evidence upon which he might be convicted. The place for testing such evidence will be in the criminal trial, not in these proceedings. At this stage, it is only the alleged existence of the evidence and its apparent cogency that has to be evaluated.

[12] The learned judges nevertheless took care in the concurring judgment in *Rautenbach* to stress that their acknowledgement of the inherent difficulties confronting the NDPP in the formulation of applications for restraint orders '*should not be construed as an invitation to laxity in the presentation of an application for a provisional restraint order in terms of s 26*

[11] In para 85-87.

of the Act'. They proceeded '*Every effort should be made to place sufficient information before the court to enable it to properly engage in the judicial function envisaged in that section. Courts should be vigilant to ensure that the statutory provisions in question are not used in terrorem. On the other hand to insist at the provisional stage on a precise correlation between the value of property restrained and the value of the alleged proceeds of criminal activity would be to render a vital part of the scheme of the Act unworkable*'.[12]

[13] Mr Booysen has been or is to be indicted on numerous charges including managing an enterprise conducted through a pattern of racketeering activity in contravention of s 2(1)(f) of POCA, manufacturing scheduled substances in contravention of the Drugs and Drug Trafficking Act 140 of 1992, dealing in such substances, and conspiracy to possess and deal in prohibited undesirable dependence-producing substances. A copy of the indictment was annexed to the principal founding affidavit.

[14] It appears from the information set out in the supporting affidavits that Mr Booysen is the owner of numerous immovable properties. Eighteen properties are individually identified in the papers as registered in his name. A senior police officer, Lieutenant-Colonel Barkhuizen, testified that, consequent upon a report received from an informant that Mr Booysen was engaged in drug dealing from a property in the northern suburbs, surveillance was maintained over certain properties registered in his name. Subsequent police raids found considerable quantities of drug manufacturing material at three properties owned by Mr Booysen. The nature of the material that was found at these addresses was indicative of the use of the properties for the manufacture and distribution of illegal narcotics on a commercial scale. The first defendant claims that he had no knowledge of the use of his properties for unlawful purposes. His evidence was that he had engaged the second defendant, one Kenneth Hansen, to manage the properties, which were used to generate a rental income.

[15] The NDPP has indicated that use will also be made in support of the prosecution of Mr Booysen of transcripts of numerous authorised telephone intercepts. An annexure to the supporting affidavit of Captain Rossouw of the Directorate of Priority Crimes purports to provide a short precis of the content of each of more than 400 intercepted telephone conversations that took place between various persons, including some of the defendants, over a period of more than two years between September 2015 and November 2017. For the purposes of the current application the NDPP focussed attention on the incriminatory nature

[12] Id, in para 87.

of the content of the telephone conversations bearing on an alleged transaction involving the sale of illicit drugs that allegedly took place at the Zevenwacht Mall in Kuils River on 3 November 2016. The evidence suggests that the second defendant sold illicit drugs in the transaction at a consideration of R95 000 in cash.

[16] The transaction was effected at a time when the defendants' activities were under close police surveillance. The second defendant was arrested whilst driving away from the Zevenwacht Mall, and the R95 000 in cash was found on his person. The first defendant's counsel pointed out that the telephone intercept summaries relied on by the NDPP in the founding affidavit to inculpate the first defendant did not bear out the averments made in the affidavit concerning them. I agree. It was clear, however, that the NDPP relied on the entire summary, and not just the items in the summary of intercepts specifically referred to.

[17] It is evident, if one has broader regard to the relevant summaries, that there were apparently communications between the first and second defendants concerning what the second defendant should give as his explanation for having such a large sum in cash on his person. The second defendant telephoned the first defendant after his arrest to inform the latter that he had been taken into custody and apparently to arrange for the first defendant to take pre-emptive measures to prevent incriminating material being discovered in any search by the police while the second defendant was in custody. Furthermore, the summary suggests that the intercepted conversations indicated that the first defendant was aware ahead of the time that the second defendant was to be at the Mall at the appointed time and had an interest in what the latter was to be doing there. Captain Rossouw's summary indicates that in a telephone discussion with an unidentified third person on 9 November 2016 concerning how the police could have obtained the information to effect his arrest in connection with the Zevenwacht Mall transaction, the second defendant stated that it was only he and the first defendant (apparently referred to as 'Jonas') '*who knew'*.

[18] It also appears from the summary of telephone intercepts that the first defendant showed an interest in obtaining the release of the money impounded by the police. Item 230 in the summary relates to a conversation between the first and second defendants on the morning of 9 November 2016. It reads as follows: '*Kenneth Hansen phoned Jerome Booysen. Jerome tells Kenneth to try and get that money back (seized R95 000). Kenneth say* (sic) *Jerome must make statement that he borrowed the money. Jerome says he will state he borrowed Kenneth 70 000. Jerome then says Kenneth can say the rest is money he saved.*' (The context suggests that the word 'borrow' should be construed as 'lend' or 'lent'.)

[19] The first defendant's counsel complained about the hearsay nature of the evidence concerning the telephone intercepts, whilst acknowledging that regard might validly be had to such evidence in applications in terms of s 26. The defendant claimed that the evidence was '*difficult to deal with*' because it amounted '*to opinion evidence, founded on edited and translated versions of hearsay evidence. In particular it is apparent that the evidence of telephone recordings are not transcripts, but translated, and edited versions of telephone calls*'.

[20] In my view, there was nothing objectionable about the NDPP's use of hearsay evidence. The evidence falls to be evaluated in the context of the case assessed as a whole, and the weight to be attached to it determined accordingly. The passages in *Rautenbach* to which reference was made earlier in this judgment confirm that it was not incumbent on the NDPP in the current proceedings to adduce the evidence that will be led at the criminal trial or to try to prove the charges. It is sufficient for her to indicate what evidence is available for that purpose and to give this court sufficient insight into its nature to be able to evaluate whether there is a reasonable possibility that the defendant might be convicted at trial.

[21] There was in any event nothing to prevent the first defendant, if he wished, obtaining the transcripts or recordings referred to by Captain Rossouw and placing them before the court if he believed that they would show up a fatal weakness in the state's case against him or indicate that the prospect of the prosecution succeeding was illusory. These being civil proceedings, the mechanism afforded by Uniform Rule 35(12) was available to him.

[22] In my judgment, the evidence identified by the NDPP in her supporting papers is of a nature that might support the first defendant's conviction on at least some of the charges that he faces in the criminal proceedings. The circumstances also support the likelihood that if he is convicted, a confiscation order may be granted after due enquiry in terms of s 18 of POCA.

[23] The question then is whether the uncapped order provisionally granted by Steyn J should be confirmed, or varied so as make it relate only to specified property. The first defendant sought a variation in the event of my concluding, as I have done, that a case for some form of restraint order has been made out. He made a contingent tender to submit an immovable property in Wellington that is owned by a company that he controls (Albatross Isle Trade (Pty) Ltd, cited as the second respondent in these proceedings) to a restraint order and put in from the bar (without objection) an appraised valuation of the property at R8,6 million, although it is evident from the appraisal that the building on the property,

which is currently in disuse, would require significant conversion work in order to be realised at the appraisal price. (The municipal valuation of the property is R2,915 million.) It seems to me that the tender should more appropriately have been formulated as one of the first defendant's shares in the company and the registration of a caveat against its immovable property, but in view of the conclusion I have reached on the outcome of the application that is by the by.

[24] The evidence suggests that the first defendant might be shown at the criminal trial to have participated or been involved in dealings involving narcotics with an estimated value of between about R7,8 million and R10 million. It is evident that the tender was formulated with the estimated value of the identified drug transactions in mind on a basis that the first defendant believes would afford an appropriately proportionate relationship between the value of property restrained and the likely amount of any confiscation order that might be made.

[25] In my judgment the first defendant's tender is based on too narrow a view of the effect of the evidence. The fact that three of his properties were found to be places at which illicit drugs were manufactured on a commercial scale gives an indication that the dealings in which the first defendant may have been involved, and from which he might have benefitted, very conceivably extended well beyond the transactions identified by the applicant. Whether this was in fact the case, and if so, the extent of the benefit he may have derived would be established in the enquiry that the court seized of an enquiry in terms of s 18 of POCA will undertake if the first defendant is convicted and the applicant then applies for a confiscation order.

[26] The defendant may in such enquiry, which can potentially be far-ranging, be directed to submit a written statement as provided for in s 21(3) of the Act, wherein he could be required to set forth with substantiating particularity how he acquired the numerous immovable properties registered in his name or those of any corporate entity controlled by him. It is significant to bear in mind that the evidential presumptions in s 22 of POCA apply against a defendant at an enquiry in terms of s 18.[13]

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[13] Section 22(3) provides: '*For the purposes of determining the value of a defendant's proceeds of unlawful activities in an enquiry under section 18 (1) –*

(a) if the court finds that he or she has benefited (sic) from an offence and that –

(i) he or she held property at any time at, or since, his or her conviction; or

(ii) property was transferred to him or her at any time since the beginning of a period of seven years before the fixed date,

[27] In the current matter, the first defendant has testified that his property holdings were initially amassed from his earnings as a municipal building inspector for 21 years and from the investment of his wife's pension pay-out of R400 000 after a period more than 20 years' employment by Yellow Pages. The first defendant said that he retired in 2006 and had commenced buying and selling immovable properties from around 2003 '*borrowing against* [his] (undisclosed) *pension interest*'. I think that the court is entitled to take judicial notice that the income of a building inspector is relatively modest. The first defendant said that his experience empowered him to acquire properties on auction and renovate them for the purpose of profitable resale or generating a rental income. He implied (without providing any particularity) that these sources of capital growth and supplemental income had funded further acquisitions. It appears from the Deeds Registry information attached to the first defendant's answering affidavit[14] that in the period since the beginning of 2015 he has acquired immovable property that is still registered in his name for a total purchase consideration of more than R5,5 million. The first defendant has also accumulated a collection of nine motor vehicles of assorted vintage and value estimated to be worth nearly R1,7 million.

[28] The first defendant has also pointed out that he has been subjected to a tax audit by the South African Revenue Service (SARS) that covered the period between the 2003 and 2018 tax years (both included). He complains that the curator appointed to the property restrained in terms of the order made by Steyn J is an employee of PriceWaterhouseCoopers, whom he says was involved under the auspices of SARS in the investigations associated with the tax audit. He claims that this gives rise to a conflict of interest and asserts that the failure by the applicant or the curator to disclose it amounted to a breach of the duty of utmost good faith owed by anybody seeking relief against a respondent in an *ex parte* application. He also claimed that it was inconceivable that the deponents to the supporting affidavits in the current proceedings could have been unaware of his previous employment or the tax audit and

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the court shall accept these facts as prima facie evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 18(1);

(b) *if the court finds that he or she has benefited (sic) from an offence and that expenditure had been incurred by him or her since the beginning of the period contemplated in paragraph (a), the court shall accept these facts as prima facie evidence that any such expenditure was met out of the advantages, payments, services or rewards, including any property received by him or her in connection with the offences or related criminal activities referred to in section 18(1) committed by him or her.*'

[14] Annexure AA2 to the answering affidavit. Properties 2, 3, 4, 5, 6, 9, 10, 11, 12 and 15. The immovable properties identified in the answering affidavit do not correspond in certain respects with those identified in the supporting affidavit of Detective Warrant Officer Pieter Louw.

concluded '(t)*heir failure to disclose the fact of the audit, and the obviously legitimate origins of my assets is indicative of their coyness in making full disclosure*'.

[29] The local head of the Asset Forfeiture Unit testified in reply that the applicant had been unaware of PWC's involvement in a tax audit of the first defendant's income. I have no reason to doubt that. The first defendant moreover did not disclose any particulars of the tax audit. The mere fact that a person has been subject to a tax audit does not tell one anything, not even that the person has been found to have been tax compliant. It also does not warrant that any income of the taxpayer identified or verified in the course of the audit had been legitimately generated. The extent to which SARS is permitted to divulge taxpayer information is strictly limited in terms of Chapter 6 of the Tax Administration Act 28 of 2011. It does not appear from the indictment that Mr Booysen faces any tax-related charges, and it seems to me that it would only be in relation to such charges, if they were preferred, that SARS would be permitted to disclose the first defendant's taxpayer information to the NDPP.

[30] By contrast, it is open to a taxpayer to obtain from SARS information relating to the taxpayer's tax affairs or information submitted to SARS by the taxpayer or by a person on the taxpayer's behalf.[15] Accordingly, if the first defendant sought, as he appears to have done by his opaque reference to the tax audit, to establish that his tax records bore out his claim that his property acquisitions were accumulated using legitimately derived income and borrowings, he could have done so by producing the records. It is significant that he failed to do so. I say that because it is obvious in the context of the allegations in the supporting papers that the funding of the first defendant's accumulation of assets called out for more detailed explanation if he were to persuade this court that it was legitimate, and thereby show that the NDPP's prospect of obtaining a confiscation order was doubtful.

[31] There may not have been an onus on the first defendant, but in undertaking the required exercise of postulating, as best it is able, the likely extent of a possible confiscation order, this court cannot overlook the effect of the presumptions in s 22 of POCA mentioned above. Whilst those presumptions are not applicable in the current proceedings, the predictive character of the enquiry entailed in the restraint order proceedings means that their likely effect cannot be ignored, for it bears on the extent of the security to be provided in terms of the restraint order if the object of s 26 is to be adequately sustained. The scantier the

[15] Section 73 of the Tax Administration Act 28 of 2011.

information provided by a defendant opposing a restraint order, the more probable it is, absent an acceptable explanation for its meagreness, that the presumptions will operate against that defendant at any eventual enquiry in terms of s 18.

[32] Nothing that the first defendant has said about the involvement of PWC in his tax audit persuades me that the appointed curator has a conflict of interest. I am able to take judicial notice that PWC is one of the world's most prominent firms of accountants and auditors. It is a large organisation. It is not clear from the answering affidavit that the appointed curator was personally involved in the first defendant's tax audit or even that he would have known about it. If he was involved, he would be subject to the same confidentiality obligations that SARS is. The terms of the restraint order require the first defendant to make disclosure of his assets to the curator. He claims to have been complying with the order in this respect. I fail to see the alleged conflict of interest.

[33] As far as I can discern from the papers, the curator has not yet reported on the market valuation of the first defendant's immovable properties. The terms of the provisional order required him to have done so by 3 June 2021. The NDPP has, however, listed in the supporting papers (in the affidavit of Detective Warrant Officer Pieter Louw) the values of 18 immovable properties registered in the first defendant's name and that registered in the name of Albatross Isle Trade (Pty) Ltd. As mentioned above,[16] the first defendant has listed other properties that belong to him. He contends that the information provided by DW/O Louw understates the market value of the properties concerned, but points out that the provided information demonstrates that the value of his equity in the properties amounts to over R21,35 million.

[34] Having had careful regard to the evidence, assessed in accordance with the approach endorsed by the appeal court in *Rautenbach* supra, I have concluded, notwithstanding the diffidence I exhibited during the argument of the case about the proportionality of the order, that the balance of considerations weighs in favour of confirming the provisional order.

[35] The following order is made:

1. The provisional order incorporated in paragraph 1 of the order made by the Honourable Mrs Justice Steyn in this matter on 3 May 2021 is hereby confirmed pending the outcome of the trial of the first defendant on the relevant charges and further pending the outcome of any proceedings that may follow upon his conviction

[16] In note 14.

for a confiscation order in terms of s 18 of the Prevention of Organised Crime Act 121 of 1998.

2. The first defendant shall pay the applicant's costs of suit occasioned by his opposition to the application.

3. The rule *nisi* issued in terms of paragraph 2 of the forementioned order of 3 May 2021 remains returnable on 3 August 2021 in respect of the second to sixth defendants.

A.G. BINNS-WARD
Judge of the High Court