THE DUTY OF UTMOST GOOD FAITH IN ASSET-FORFEITURE JURISPRUDENCE – SOME LESSONS TO LEARN

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SUMMARY

The Constitutional Court has held that the provisions of the Prevention of Organised Crime Act 121 of 1998 that empower the State to apply *ex parte* for restraint and preservation orders regarding property involved in criminal activities do not *per se* violate the requirements of the *audi alteram partem* rule. However, the State still has to adhere to the normal procedural and other obligations imposed on applicants approaching courts for orders on an *ex parte* basis; one of these obligations is the duty of utmost good faith or *uberrima fides*. This article examines the application of this rule by SA courts. As respondents are diligent in seeking instances of non-disclosure of relevant information to warrant the application of the *uberrima fides* rule to their advantage, a high degree of openness and good faith is required from the State in order to avoid these ex parte orders being rescinded or discharged

"We are dealing here with a procedural remedy which gives recognition to the importance of the *audi* principle"[1]

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* The views expressed in this paper are those of the authors alone, and do not represent the views of the SA National Prosecution Authority or Nelson Mandela Metropolitan University. I am grateful for the assistance of my colleagues in the AFU as well as my wife, Lolla, in this research.

1 Per Traverso DJP in *NDPP v Braun*, unreported judgment of the CPD, Case no 220/2206 delivered on 20 September 2006.

1 INTRODUCTION

Sections 26(1)[2] and 38(1)[3] of the Prevention of Organised Crime Act[4] authorize the State[5] to apply *ex parte*[6] for restraint and preservation orders respectively. The Constitutional Court[7] has validated the *ex parte* procedure, confirming that its application does not have the effect of tempering the *audi alteram partem* rule and that the State is thus entitled to use it where appropriate and subject to certain caveats. The Constitutional Court has reaffirmed that a High Court has the power to grant a rule *nisi* – together with interim relief where circumstances render it necessary – in the interest of the right to a fair hearing. The State has to place before the court facts that justify the granting of the order.[8] Given the list of offences in Schedule I of POCA – most of which[9] entail some element of dishonesty – one would expect to find maximum utilization of this procedural measure in practice during the implementation of POCA's asset-forfeiture provisions to assist in swiftly curtailing the evasive actions of the criminal.

A word of caution has, however, been issued: The *ex parte* provision:[10]

- Is an empowering tool to be used only if circumstances dictate;
- is not one that will, in all cases or invariably, be invoked;

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2 Which is part of Ch 5 (Criminal Forfeiture) which targets only the recovery of proceeds of unlawful activities and is invoked by way of motion proceedings when a suspect is to be charged or has been charged or prosecuted, there are reasonable grounds to believe that a conviction may follow and that a confiscation order may be made. It is thus conviction and *in personam*-based forfeiture. It is not substantially different from the UK asset-forfeiture law as set out in the Proceeds of Crime Act 2002; and see also *NDPP v Basson* 2002 All SA 255 (A) par 5.

3 Which is part of Ch 6 (Civil Forfeiture) targeting both the recovery of proceeds of unlawful activities and removal from public circulation of facilitating property or instruments or assets used in the commission of crime where the guilt of the wrongdoer is not relevant. This follows the so-called *in rem* proceedings wherein the asset is preserved and thereafter forfeited to the State and is similar to US forfeiture legislation.

4 121 of 1998 (hereinafter "POCA"), which plays a legitimate and important role in combating crime. It could, however, also have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in the Constitution of the Republic of South Africa, 1996.

5 The Asset Forfeiture Unit (AFU) in South Africa was established in 1999, within the National Prosecution Authority, to implement the asset-forfeiture provisions in POCA. It comprises of lawyers, financial investigators and administrative support staff.

6 That is, no notice of the application is given to the other or opposite party even though his or her rights or interests may be severely affected thereby; in *NDPP v Rautenbach* 2005 1 SACR par 12 this was explained as follows: an interim order that is made *ex parte* is by its nature provisional – it is "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side" (per Harms JA in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) 746 (SCA) par 6), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) par 45).

7 In *NDPP v Mohamed NO* 2003 4 SA 1 CC par 33.

8 *NDPP v Singh,* unreported judgment of the DCLD, Case no. 4463/2003 delivered on 10 December 2003 8 to 18.

9 Eg, kidnapping, robbery, gambling, extortion, breaking or entering premises, theft, drug trafficking, dealing in armaments, dealing in an endangered species, illicit dealing in precious metals or stones, money laundering, racketeering and terrorism.

10 *NDPP v Braun supra* par 20–22.

- is invoked only where:
  - There is good cause or reason for the procedure, such as genuine urgency; or
  - where giving notice to the other party will defeat the very objective for which the order is sought, and
- does not relieve the State of the normal procedural and other obligations imposed on any applicant who approaches a court for an order on an *ex parte* basis.

One of these obligations is the duty of utmost good faith or *uberrima fides*. In this article, which does not attempt to be a comparative study, an attempt will be made to assess critically and in an illustrative way, through an examination of asset-forfeiture case law, how our courts have applied this rule and extract such lessons as may be learnt in the process. Where an order is sought *ex parte* it is well established that the utmost good faith must be observed, that is, all material facts must be disclosed which can influence a court in coming to its decision, and the withholding, suppression or falsification of such facts, by itself, entitles a court to set aside an order, even if the non-disclosure, suppression or falsification was not wilful or *mala fide*.[11] What *is* material will depend on the facts of each case, but, in essence, facts that *could* be crucial to the outcome of the case are deemed material.

The main purpose of asset forfeiture in terms of POCA is to restrain, preserve, confiscate, realize and forfeit to the State assets received, derived or retained from unlawful activities or those chosen and used to perpetrate or facilitate the commission of crime. The rationale behind *ex parte* proceedings is to grant the State access to a party's assets (by freezing same) without the latter knowing about it and before any possible dissipation of said assets can be brought about.[12] The requirement of a conviction in instances of criminal forfeiture is linked to the assumption that the court is dealing with a criminal who will, consistent with his or her propensities, not only hide or make away with his or her ill-gotten gains – once he or she becomes aware that the finger of the law is pointed at him or her – and furthermore may already have taken steps to that end.[13]

The clear intention of the legislature that applications of this nature may be brought *ex parte* is unavoidable; presumably the legislature regarded such proceedings as inherently urgent or for some valid reason warranting a procedure containing some element of surprise.[14] This then results in the court initially hearing one party's version of events which may in turn cause some degree of injustice by offending against the principle of *audi alteram*

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[11] *NDPP v Basson supra* 261; *Schlesinger v Schlesinger* 1979 (4) SA (W) 342 348E–349B; *NDPP v Van Zyl*, unreported judgment of the TPD, Case no 39358/2007 delivered on 3 June 2008 16–17; and *NDPP v Braun supra* par 22.

[12] *NDPP v Rautenbach supra* par 13.

[13] *NDPP v Rautenbach*, unreported judgment of the TPD, Case no. 21642/2000 delivered on 29 May 2001 4.

[14] *David G Alexander and 4 others*, unreported judgment of the TPD, Case no. 5792/2000 delivered on 22 May 2000 21–22.

parte. The terms of the order attempts to limit this by putting certain safeguards in place.

2 BACKGROUND TO THE *UBERRIMA FIDES* RULE IN *EX PARTE* APPLICATIONS

The leading authority on the *uberrima fides* rule is the case of *Schlesinger*.[15] Mrs Schlesinger obtained an order on an *ex parte* basis to sue her husband by way of edictal citation for a decree of divorce and other relief. She did not disclose to the court the existence of patrimonial proceedings in Switzerland that had been pending since December 1976 and that her husband was disputing his South African domicile. Mrs Schlesinger's attorneys had also undertaken to give notice of the application to the husband's lawyers, but this was not done. In an application to set aside the order and for leave to intervene, her husband argued that he was entitled to have been given notice, that his wife had not been frank and that certain material facts had not been disclosed which might have influenced the court in arriving at a decision to grant her the relief sought. The court held that on the strength of the undertaking – amounting to an agreement – to give notice, her husband should have been notified and that since there had been serious non-disclosure or misstatement of material facts the order had to be set aside with costs as between attorney and client.

Examining the origins of the principle of full disclosure, Le Roux J[16] quoted the following passage from Herbstein and Van Winsen:[17]

> "Although, on one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts, which might affect the granting or otherwise of an *ex parte* order. The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court; so much more so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the decision of the court whether to make an order or not, the Court has a discretion to set aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."

Relying on the authorities the learned Judge then crisply formulated the rule as follows:

- In *ex parte* applications all material facts must be disclosed which *might* influence a court in coming to a decision;

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15 *Supra.*

16 348F–H.

17 *The Civil Practice of the Superior Courts in South Africa* 2ed (1966) 94; see also *In re The Leydsdorp and Pietersburg (Transvaal) Estates Ltd (in liquidation)* 1903 TS 254 257-258; *Phillips v May* 136 1 PH C16 (W); *Estate Logie v Priest* 1926 AD 312 323; *De Jager v Heilbron* 1947 (2) SA 415 (W) 419–420; *Barclays Bank v Giles* 1931 TPD 9 11; and *Spilg v Walker* 1947 (3) SA 495 (E). For the English Law in this regard see *Republic of Peru v Dreyfus Brothers & Co* (1886) 15 LTR 802 803; *Becker v Noel* (1971) 1 WLR 803; and *Bloomfield v Serenyi* (1945) 2 All ER 646 (CA) 648D.

- the non-disclosure or suppression of facts need not be wilful or *mala fide* in order to incur the penalty of rescission; and
- the court, apprised of the true facts, has the discretion to set aside the former order or to preserve it.

Le Roux J then proceeded to set out the examples of material non-disclosure in the authorities relied upon in the judgment. In *Leydsdorp*[18] a final liquidation order was granted *ex parte*. To the knowledge of the applicant the company lying at the centre of the dispute had also been registered in England and was in the process of being wound up there when the application was lodged. This fact was, however, not disclosed to the court. In *De Jager*[19] there was a failure to disclose that other proceedings were pending between the same parties in connection with a portion of the larger transaction which formed the subject matter of the current application, the application was set aside. What is clear is that, unless there are very cogent practical reasons why an order should not be rescinded, courts will always frown on an order obtained *ex parte* on incomplete information[20] and will set it aside even if relief could be obtained on a subsequent application by the same applicant.[21] This precept will be applied with particular stringency if such material information was known and available to the applicant.

The existence of and adherence to the rule in our courts is well understood and is uncontested.[22] Litigation by its very nature demands high levels of diligence, ethics, frankness, honesty and openness, firstly, to the opposing party and, secondly, to the court. In addition, the rule legitimizes the legal process in settling disputes and reminds litigants that courts as arbiters of disputes ought to be furnished with all material information, exemplifying good faith, in order to deliver justice to the parties.

In *Trakman NO v Livshitz*[23] an application was brought to review and set aside the Registrar's decision relating to the amount of security for costs the applicant was obliged to furnish and the manner and time within which he was required to do so. The respondents took a point *in limine* that the applicant had no *locus standi* to bring the application which point Roux J upheld on the basis that the applicant had ceded his rights of action against the respondents to one Alenson – a fact which the Judge found the applicant had deliberately failed to disclose. The court expressed its displeasure with the non-disclosure:

> "Since May 1986 the applicant and his attorney Kruger have had intimate and, as far as the other litigants are concerned, exclusive knowledge of the cession. On his own or on Kruger's advice the applicant has misled this Court by his silence. This silence becomes all the more sinister when delaying tactics of the applicant, as plaintiff, are taken into account ... The failure to

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18 *In re The Leydsdorp and Pietersburg (Transvaal) Estates Ltd (in liquidation)* (*supra*).

19 *De Jager v Heilbron* (*supra*).

20 Especially when this tends to cast grave suspicion on the *bona fides* of the party bringing the application *ex parte*.

21 *Schlesinger v Schlesinger supra* 350B.

22 *NDPP v Mamade,* unreported judgment of the WLD, Case no. 18360/2008 delivered on 2 December 2008.

23 1995 (1) SA 282 AD.

> disclose the cession for six years is inexcusable. This failure is only consistent with dishonesty. When dishonesty is harnessed to mislead the Court, to harass the other litigants and to obtain undue advantage it will be met with sternest disapproval."

On appeal – which was upheld – the correct position in relation to the cession was set out and it was held[24] that it appeared that there had not necessarily been a sinister reason for the non-disclosure. While the applicant might possibly have been lacking in candour in not referring to the cession, his failure to do so was not necessarily indicative of deliberate dishonesty on his part. Smalberger JA[25] reaffirmed the rule that it was trite law that in an *ex parte* application the utmost good faith had to be observed by an applicant. A failure to disclose fully and fairly all material facts known to him or her might lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone. Although the appeal was upheld (as mentioned), Roux J's sentiments revealed the serious light in which courts viewed the duty to disclose; non-compliance had a tendency to give an unfair advantage to the applicant.

The Judge of Appeal indicated that he knew of no authority which extended that principle to motion proceedings justifying the dismissal of an opposed application (irrespective of the merits thereof). He expressed the view that material non-disclosure, *mala fides*, dishonesty and the like in relation to motion proceedings might – and in most instances should – be dealt with by making an adverse or punitive order as to costs but could not serve to deny a litigant substantive relief to which such party would otherwise have been entitled.

It must thus be remembered that the court exercises its discretion when it decides to dismiss or preserve the order obtained *ex parte*. In some cases it may, notwithstanding the material non-disclosure, be sympathetic to the applicant by allowing the order to stand, but indicate its disapproval of the applicant's actions by way of an adverse costs order due to the non-disclosure.

In *Powell NO v van der Merwe NO*[26] which dealt with a search and seizure warrant, Southwood AJA appeared to have expanded[27] the ambit of the *dictum* in *Schlesinger* as follows:

> "In my view, the approach (of a duty to disclose material facts)[28] should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for an order (compare *Hall v Heyns* 1991 (1) SA 381 (C) 397B–C) or, as is the case, because they have not been sufficiently investigated. ...
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> The purpose of rigorously applying the rule and setting aside the decision to authorise the warrant is not to punish the director as was stated by the Court below. It is to maintain the legality of the process. Infringement of the right to privacy by a search and seizure warrant is justifiable only if the correct facts have been placed before the judicial officer in an objective manner so that he

[24] 288B–C.
[25] 288E–F.
[26] 2005 (5) SA 62 (SCA) par 74–75.
[27] See also *NDPP v Braun supra* par 25.
[28] Authors' insertion.

> can properly apply his mind. The process will be fatally flawed if incorrect facts are placed before him."

3 THE *UBERRIMA FIDES* RULE IN CRIMINAL FORFEITURE CASE LAW

Bearing in mind the earlier clear elaboration of the rule in *Schlesinger* – and the other cases that followed – it could have been expected that the AFU would have trodden carefully in respect of the principle of non-disclosure when POCA introduced the empowering provision to institute motion proceedings *ex parte* in 1999. In *Basson*[29] the State applied *ex parte* for and obtained a restraint order against assets of Dr Basson on the basis that while he was a member of a top-secret military project of the former South African Defence Force and prior to the coming into effect of POCA, he had misappropriated for personal gain R45 million of the funds that the State had placed at his disposal for the project by diverting the funds to private companies and accounts that he controlled.

On the return date Basson opposed the order and the rule *nisi* was set aside with costs on an attorney and client scale on the basis that section 18 of POCA did not, at the time,[30] have a retrospective application and that there was a failure to disclose certain facts to the court. Said facts were that on the day before the application was brought Basson's lawyers, aware that a restraint order might be in the offing, telephoned a Mr Ackerman, the Deputy Director of Public Prosecutions heading up the prosecution of Basson, and told him that the order would be pointless because Basson laid no claim to any of the property concerned (except for his house, two cars and certain personal belongings) and that he raised no objection to its being put under State control. Ackerman was informed that the house was already under State control because it was serving as security for Basson's bail.

Ackerman advised Basson's lawyers to contact Mr d'Oliviera, the Deputy National Director of Public Prosecutions who was dealing with the matter. The next day the legal advisers tried unsuccessfully to telephone d'Oliviera on his cellphone but the 'phone had been switched off and remained thus for the following two days. On 3 August, before the application was brought, Ackerman spoke to d'Oliviera and told him that he had been informed that Basson's lawyers knew about the pending application. Apparently he did not convey the fact that the offer had been made, because that was not disclosed to the court when d'Oliveira made the application – d'Oliviera stated that he was not aware of the offer. Ackerman also made no mention of the offer in an affidavit in which he said that the interests of justice required that a restraint order be made.

On appeal Nugent AJA confirmed the adverse costs order, restated the rule and held:

> "The fact that the respondent had volunteered to place all the affected property under the control of the State was clearly material. Why it was not disclosed to Mr d'Oliveira, and then suppressed in the affidavit deposed to by

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29 See *supra* in a judgment delivered on 28 September 2001.

30 Prior to the amendment.

> Mr Ackerman in support of the application, has not been explained. It was submitted on behalf of the appellant that Mr Ackerman might have considered that the offer was made without prejudice. There is no suggestion of that in the evidence. In my view the affidavit deposed to by Mr Ackerman was materially misleading. Although the appellant[31] himself cannot be said to have been at fault, he must perforce bear the consequence of the conduct of the officials who are entrusted to litigate on his behalf."

Phillips v National Director of Public Prosecutions[32] arose from the following circumstances: Phillips was facing, *inter alia*, charges of running a brothel and living off the earnings of prostitution. The State applied *ex parte* for and obtained a provisional restraint order. Phillips opposed the application, but the rule *nisi* was confirmed. He was, however, granted leave to appeal.

In his appeal he averred that the State, as *ex parte* applicant, had failed to make disclosure of nine matters in the court papers and was thus in violation of its duty of utmost good faith. Eight of the alleged instances of non-disclosure – the details of which are not relevant here – were dismissed. On appeal said dismissal was upheld. Only the ninth allegation of non-disclosure warrants consideration for the purposes of this discussion. It was argued that there had been bad faith on the part of a senior member of the State's staff, Mr Hofmeyr. Phillips had been a state witness in an earlier prosecution against three men charged with extorting him (Phillips) to organize what were referred to as "sex holidays" in foreign countries. While giving evidence he admitted that his establishment was a brothel. This admission was quoted in the founding papers of the State's application as evidence establishing reasonable grounds for the belief that Phillips might be convicted on charges under the Sexual Offences Act.[33]

Phillips stated that he had not been warned of his right against self-incrimination or offered an indemnity against prosecution under the Sexual Offences Act before testifying. The evidence supported him in this regard. He went on to add that Hofmeyr had been present at court when he (Phillips) gave the evidence in question and that this was by no means coincidental, but an indication that Hofmeyr was conducting a vendetta against him. He argued on appeal that it was the State's duty to disclose in the *ex parte* application that his admission was inadmissible and the presence of Hofmeyr at the extortion trial warranted the conclusion that he had effectively been steered into incriminating himself so that his evidence could be used against him in the restraint proceedings. It was submitted by Phillips's lawyers that this conduct indicated *mala fides* on the State's part. This argument was also rejected on appeal. The Court[34] reiterated the rule as follows:

> "It is trite that an *ex parte* applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that

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31 The NDPP.
32 2003 (6) SA 447 (SCA).
33 23 of 1957.
34 Par 29.

> discretion the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside."

It is submitted that the latter two aspects, namely the reasons for non-disclosure and the consequences of setting aside the provisional order are a slight development of the original rule as formulated in *Schlesinger*. They are additional aspects to consider in exercising the discretion. When the State complained about Phillips's imputations of deliberate non-disclosures in the founding papers and the insinuation of *mala fides* on the part of Hofmeyr, the Court[35] expressed the following sentiments:

> "Why should respondent and his staff have to bear the sting of such excesses if they are only trying, in the public interest, to combat organised crime? On the other hand, respondent operates in a tough environment especially in so far as the areas in which asset forfeiture and related matters are concerned. If those he accuses are indeed criminals they will be in the game to obtain rich rewards. They will not use kid gloves. They might well resort to exaggerated vehemence to add weight to their protestations of innocence."

In *NDPP v Rudman*[36] two accused were to be charged with 27 charges of fraud, alternatively theft, and a provisional restraint was obtained on an *ex parte* basis. One of the accused, Botha, opposed but did not dispute his involvement in what was without doubt an illegal money-making venture, but stated that he did so without any guilty knowledge relying on what he had been told by Rudman, the co-accused. He accordingly denied that he had any intent to defraud the complainants or to steal money from them although it was clear that the fact that the victims knew him very well explained why they listened to him and invested in the scam.

He also complained that the State had failed to disclose that he had, on 18 April 2002, made a detailed statement to one Townsend, a captain in the Commercial Branch of the South African Police Services in which Botha set out fully his version of the relationship between Rudman and him. Furthermore, he stated that he had drawn up two affidavits in opposition to summary judgment applications; in these affidavits his defence was again set out, the contention being that the investigating officer must have been aware, prior to the restraint application being launched, of the fact that civil proceedings had been instituted against Botha and that he had made these affidavits. It was submitted further that Botha's version was such an integral part of the case against him that the State should have disclosed it.

In reply the State attached a copy of the docket stating that this amounted to an overburdening of court papers both in terms of the nature and sheer volume of the contents thereof. The court held that there was no merit in these non-disclosure arguments; instead, it was of the opinion that the disclosure of such facts by the State would have merely indicated that Botha had consistently denied having been involved in any criminal activity and would have provided details of his defence, which could have led to a dispute of fact in the papers. Put differently, the non-disclosure was

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35 Par 45.

36 Unreported judgment of the ECD, Case no 15/2004 delivered on 24 July 2004 (ECJ 2004/034) [2004] ZAECHC 20 (22 July 2004).

immaterial and therefore would not have influenced the judge who granted the provisional restraint order.

In *NDPP v Van Zyl SJ*[37] a dentist was charged with fraud for having submitted fictitious medical aid claims. The State obtained *ex parte* a provisional restraint order. On the return date one of the objections was that the State had, *inter alia*, failed to disclose that the 1 947 counts involved only R387 650 (and not R2 404 609 as stated originally) and that the misleading manner in which the founding affidavit dealt with these facts might have influenced the court. It was held that there was merit to this argument in that what was set out in the affidavit was not an accurate or proper reflection of the facts and was thus misleading. A costs order on the scale as between attorney and client was deemed to be justified in the circumstances. The rule as set out in *Schlesinger* and adopted in *Basson* was confirmed.[38] Of significance, it appears that the expanded ambit of the dictum in *Powell* was applied in this instance.

4 THE *UBERRIMA FIDES* RULE IN CIVIL FORFEITURE CASE LAW

The rule was used in eight civil forfeiture cases, seven judgments of which were handed down in 2008. The State was fortunate that adverse orders as to costs were not granted against it. In *Braun*[39] the State obtained on an *ex parte* basis a provisional preservation order against certain immovable property and a BMW X5 on the basis that both, as instrumentalities of offences, had been used to facilitate the commission of criminal carnal intercourse, twenty-three lewd acts and various contraventions of the Sexual Offences Act[40] involving children. Braun applied for the reconsideration of the order contending that there had been material non-disclosures that may have influenced the court.

In the papers it was alleged that Braun was a director and sole shareholder of Villabraun (Pty) Ltd and beneficial owner of the immovable property which was his residence when in truth he was not a director and had never at any time held the entire issued share capital of the company. In fact, Braun and his wife had each transferred 50% of the issued share capital in the company to the Braun Family Trust, the beneficiaries of which were their children. It is submitted that these are matters which clearly fall squarely within the *Powell* extended ambit of the doctrine.

In addition, it transpired that the State and the legal representatives of Braun had been communicating for some months before the application was launched and such communication was not mentioned in the court papers. In the result the court held that had the judicial officer who initially granted the order been aware of these material facts the matter would not have been allowed to be brought *ex parte* and on an urgent basis.

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37 Unreported judgment of the TPD, Case no. 39358/2007 delivered on 3 June 2008.
38 Par 20.
39 See fn 1 above.
40 *Supra*.

In *NDPP v Klem*[41] a sum of R100 000, received from the sale of jewellery obtained by robbery, had been provisionally preserved as an instrumentality of theft or proceeds of stolen items, and the complaint was that the State indicated in the court papers that the money had been found in a safe and that the respondent's tax affairs were still outstanding; in truth, the money was in a sling bag carried by the respondent and his tax affairs were up to date. However, the grounds the court relied on for setting aside the order was that no link to any offence could be proved.

In *Africa Leven Indigo v NDPP*[42] two material facts were not disclosed: The first one was that, before the application was lodged, a meeting took place between the applicant and officials of ABSA Bank in which the applicant made a certain undertakings pertaining to the flow of funds in the applicant's account. The second one was that the applicant was a subsidiary of a listed company. The court held that, if this fact had been disclosed, the judicial officer would have had a proper appreciation of the size of the applicant's business and its capacity to repay the amount, in the event it became necessary to do so; therefore, the judicial officer would have been reluctant to grant the order.

In *NDPP v Starplex*[43] certain cash amounts used in a money-exchange business were preserved. It was argued that, even though the State had declined to give an assurance that notice would be given to the other side, which fact was disclosed, the State should not have obtained the order *ex parte* because the money was at all material times held by the police pending prosecution. The court rejected this argument since it could not be said that there was non-disclosure in the circumstances of the case. It found that the State was justified in adopting a prudent approach in bringing the application *ex parte* to secure the money.[44]

In *NDPP v Bantjies*[45] the order preserved assets to the value of R1 944 840. The State had relied on two spread-sheets setting out the amount of income allegedly obtained through tainted emoluments attachment orders. The first spread-sheet was, however, withdrawn and this, as well as the reasons for the withdrawal, was not disclosed to the Court. Hartzenberg J had this to say:[46]

> "There is authority, with which I agree, when the State applies for an order in terms of the Act it has to put all relevant information before the court that could possibly influence it not to grant the order. In this particular case the quantification of the amount is the essential element of the evidence on which the court is to decide whether an order is to be made or not. If the court had been apprised that the evidence is totally speculative and that a previous attempt to quantify had to be withdrawn I do not for a moment belief (*sic*) that Van der Merwe, J would have made that order. In my view it has to be set aside."

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41 Unreported judgment of the WLD, Case no 3696/2006 delivered on 28 January 2008.

42 Unreported judgment of the WLD, Case no 20111/2007 delivered on 1 February 2008.

43 Unreported judgment of the CPD, Case no 12099/2007 delivered on 20 March 2008.

44 11.

45 Unreported judgment of the TPD, Case no. 34767/2008 delivered on 26 August 2008.

46 Par 7.

In *NDPP v Mamade*[47] the order related to foreign and local currency and travel cheques which had earlier on been a subject of release litigation between Mamade and the Minister of Safety and Security. It was argued that the facts that were withheld concerned dealings between the State and an attorney acting for Mamade regarding the handing over of the seized items pursuant to the initial release order against the Minister. An SMS had been sent on behalf of the State to the attorney suggesting that a meeting ought to be held for the purpose of handing over the items; said meeting was held in abeyance. According to Mamade this arrangement, which was not disclosed by the State, amounted to an implied undertaking that the State would not bring any further court applications preventing the release of the property. Had the court been apprised of these facts, so went the argument, the application would have been postponed or the court would have declined to hear the matter *ex parte*. Franklyn AJ rejected this argument in the following terms:[48]

> "The facts in *Schlesinger* and *Braun* cases are therefore distinguishable from the facts in the present case. In particular, the court hearing the preservation application was fully aware that the SAPS and Erwee were obliged under the Rule 49(11) order to release the seized goods to Ismael. The court was also fully aware of the fact that there was an arrangement between Erwee and Ismael's attorneys for a meeting to effect release of the goods. I find that there has not been a non-disclosure of facts which necessitates a reconsideration of the order."

5 CONCLUDING REMARKS

The *uberrima fides* rule, as formulated in *Schlesinge*r, extended in *Powell* and confirmed in subsequent case law serves to uphold the legality of the motion-court process which includes the asset-forfeiture procedure. If the AFU had regard to it some of the adverse judgments set out herein, plus considerable wasted litigation in this regard, could have been avoided. It is obvious that respondents will be extremely diligent in seeking to identify instances of non-disclosure of relevant information warranting the application of the *uberrima fides* rule to their advantage. Accuracy, honesty, openness, ethics and utmost good faith in any litigation serve as a buffer in averting the situation where an order obtained *ex parte* will be rescinded or discharged. Adherence to the values stated at the beginning of the previous sentence will go a long way in assisting judicial officers when applying their minds to the facts, if such are correctly and comprehensively stated. A failure to disclose adequately is usually followed by an adverse costs order which should serve as a potent deterrent.

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47 Unreported judgment of the WLD, Case no 18360/2008 delivered on 2 December 2008.

48 Par 23.