

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape High Court, Kimberley)**

**Case No: 2027/2012  
Heard: 25/10/2013  
Delivered: 13/12/2013**

In the matter between:

**The National Director of Public Prosecutions**

**APPLICANT**

**and**

**Alfeus Christo Scholtz**

**1<sup>st</sup> RESPONDENT**

**Alfeus Christo Scholtz N.O  
(In his capacity as joint trustee  
of the Casee Trust)**

**2<sup>nd</sup> RESPONDENT**

**Esmarie Scholtz**

**3<sup>rd</sup> RESPONDENT**

**Esmarie Scholtz N.O**

**4<sup>th</sup> RESPONDENT**

**(In her capacity as joint trustee  
Of the Casee Trust)**

**Trifecta Investment Holdings (Pty) Ltd  
(Registration No. 2006/011099/07)**

**5<sup>th</sup> RESPONDENT**

<b>Trifecta Holdings (Pty) Ltd (Registration No. 2003/018438/07)</b>	<b>6<sup>th</sup> RESPONDENT</b>
<b>Trifecta Trading 434 Property 5 (Pty) Ltd (Registration No. 2005/035873/07)</b>	<b>7<sup>th</sup> RESPONDENT</b>
<b>Trifecta Trading 434 Property 5 (Pty) Ltd (Registration No. 2006/004455/07)</b>	<b>8<sup>th</sup> RESPONDENT</b>
<b>Trifecta Trading 434 Property 7 (Pty) Ltd (Registration No. 2006/004635/07)</b>	<b>9<sup>th</sup> RESPONDENT</b>
<b>Trifecta Prop 11 (Pty) Ltd (Registration No. 2006/007170/07)</b>	<b>10<sup>th</sup> RESPONDENT</b>
<b>Lanel Breda N.O ((In her capacity as joint trustee of the Shosholoza Trust)</b>	<b>11<sup>th</sup> RESPONDENT</b>
<b>Hermanus Petrus Steyn N.O (In his capacity as joint trustee of the Shosholoza Trust)</b>	<b>12<sup>th</sup> RESPONDENT</b>
<b>Richard Scheffer N.O (In his capacity as joint trustee of the Shosholoza Trust)</b>	<b>13<sup>th</sup> RESPONDENT</b>
<b>Yolanda Rachel Botha</b>	<b>14<sup>th</sup> RESPONDENT</b>
<b>John Fikile Block</b>	<b>15<sup>th</sup> RESPONDENT</b>
<b>Noluthando Silungile Block</b>	<b>16<sup>th</sup> RESPONDENT</b>
<b>Chisane Investments (Pty) Ltd (Registration No. 2004/004027/07)</b>	<b>17<sup>th</sup> RESPONDENT</b>
<b>Nicolaas Natwala</b>	<b>18<sup>th</sup> RESPONDENT</b>
<b><u>Khara Hais Municipality</u></b>	<b>19<sup>th</sup> RESPONDENT</b>

<b>Alvin Botes</b>	<b>20<sup>th</sup> RESPONDENT</b>
<b>Itile Supply Services (Pty) Ltd ((Registration No. 2005/010820/07))</b>	<b>21<sup>st</sup> RESPONDENT</b>
<b>Rodney Martin Saal</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>Kelvin Cecil Ryland</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>Palesa Ruth Lebona</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>Trifecta Resources and Exploration (Pty) Ltd (Registration No. 2006/015442/07)</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>Alvin Botes (In his capacity as trustee of the Poliyane Leisure Trust)</b>	<b>26<sup>TH</sup> RESPONDENT</b>
<b>Green Marble Investments 3 (Pty) Ltd (Registration No. 2006/028085/07)</b>	<b>27<sup>TH</sup> RESPONDENT</b>
<b>Ngwedi Investments (Pty) Ltd (Registration No. 2001/017372/07)</b>	<b>29<sup>th</sup> RESPONDENT</b>
<b>Quantum Leap Investments 657 (Pty) Ltd (Registration No. 2002/028568/07)</b>	<b>30<sup>th</sup> RESPONDENT</b>
<b>Catwalk Investments 582 Pty Ltd (Registration No. 2000/023642/07)</b>	<b>31<sup>ST</sup> RESPONDENT</b>
<b>Sovereign Seeker Investments 98 Pty Ltd (Registration No. 2005/027824/07)</b>	<b>32<sup>ND</sup> RESPONDENT</b>
<b>Trifecta Trading 434 Property 10 Pty Ltd (Registration No. 2006/004307/07)</b>	<b>33<sup>RD</sup> RESPONDENT</b>
<b>Green Marble Investments 2 Pty Ltd</b>	<b>34<sup>th</sup> RESPONDENT</b>

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**(Registration No. 2006/028262/07)**

**Steelpoort Inv Pty Ltd  
(Registration No. 2006/033775/07)**

**35<sup>TH</sup> RESPONDENT**

**Upington Super SaltPty Ltd  
(Registration No. 1968/013439/07)**

**36<sup>TH</sup> RESPONDENT**

**Rochelle Sandra Botes**

**37<sup>TH</sup> RESPONDENT**

## **JUDGMENT**

***MAMOSEBO AJ***

### **INTRODUCTION**

- [1] On 30 November 2012 I issued a provisional restraining order *ex parte* against the 37 respondents cited in this matter. The order restrained them, inter alia, from dealing in any manner with any property to which the restraining order relates. Simultaneously with this order, a *rule nisi* was issued calling upon the respondents to show cause on 22 March 2013 why the provisional order should not be made final. The rule and the interim order were extended on 10 May 2013 and subsequently to 31 May 2013. On 31 May 2013, the matter was postponed to the opposed roll for hearing on 25 October 2013. A *Curator Bonis*, Mr Shawn Williams of KPMG, a firm of Chartered Accountants, was appointed in terms of s28 (1) (a) of the Prevention of Organized Crime Act, 121 of 1998 (POCA). The applicant, the National Director of Public Prosecutions (NDPP), now applies for the confirmation of the provisional restraint order.

[2] Respondents 2-10; 25; 27 and 30-33 filed notices of intention to oppose the application but have not deposed to affidavits in opposition thereto. The NDPP placed in issue the first respondent's, (Alfeus Christo Scholtz's) authority to act on their behalf in opposing this application. Respondents 11 to 13 have filed notices to oppose but did not file answering affidavits. It was common cause that Mr Alvin Botes has been erroneously cited twice; the 28<sup>th</sup> respondent is therefore deleted. A breakdown reflects that respondents no's 1 and 5-10 have been charged criminally and are opposing this application. Respondents 2-4; 11-13; 25; 27 and 30-33 have not been criminally charged and are also opposing the application. Respondents 14; 15; 17 and 20-24 have been criminally charged and do not oppose the application. Lastly, respondents 16; 18-19; 26; 29 and 34-37 have not been criminally charged and do not oppose this application.

[3] On 10 May 2013 I granted the following order:

*“In respect of the first to tenth, eleventh, twelfth, thirteenth, twenty fourth, twenty fifth, twenty seventh, thirty first and thirty sixth respondents this matter is postponed to Friday 31 May 2013 (as a provisional date) and the rule nisi is extended accordingly; In respect of the remaining respondents the provisional order that was issued on 30 November 2012 is confirmed.”*

Mr Cilliers SC, representing 16 respondents, has in his introduction included among the respondents he is representing in this application twenty ninth, thirtieth, thirty second, thirty third, thirty fourth and thirty fifth. The provisional restraint order has already been confirmed against

them on 10 May 2013.

### **THE PARTIES**

- [4] The applicant is the NDPP duly appointed in terms of s10 and s5(2) (a) of the National Prosecuting Act, No 32 of 1998, read with s179(1) of the Constitution of the Republic of South Africa Act, No 108 of 1996. The respondents comprise the Trifecta Group of companies, persons and or entities alleged to have been involved or may have had an interest in the realisable property.

### **THE FACTUAL BACKGROUND**

- [5] The NDPP relies on the affidavit of Mr Nkululeko Christopher Ndzengu, a Senior Deputy Director of Public Prosecutions. It is common cause that the Trifecta Group of companies acquired office space in the Northern Cape and leased it to government departments. It is further not in dispute that Mr Breda, a former Director in the fifth respondent, Trifecta Investment Holdings (Pty) Ltd, who died in a plane crash on 03 March 2009, negotiated and entered into all lease agreements with government departments. In the quest to identify a broader BEE involvement, Breda nominated the Shosholoza Trust (eleventh to thirteenth respondents) to hold his 10% allocated shareholding. Mr Alfeus Christo Scholtz (first respondent and joint trustee of Casee Trust) held his shareholding in Casee Trust (fourth and fifth respondents).
- [6] Breda at a later stage informed Scholtz that he has identified the fourteenth respondent, Yolanda Rachel Botha, Head of Department,

Northern Cape Department of Social Development, as a BEE participant. Botha in turn established JYBA Trust for that purpose. The

Trifecta Group, through Breda, was awarded seven lease agreements which, as deposed to by the NDPP, were secured fraudulently and corruptly. The averments are supported by the audit report compiled by Trevor Sean White, a Chartered Accountant and Forensic Auditor of PricewaterhouseCoopers. White conducted an investigation into the lease agreements entered into between the Northern Cape Department of Social Development, the South African Social Security Agency (SASSA) and the fifth respondent, Trifecta Investment Holdings (Pty) Ltd, and the subsidiary companies. The NDPP intimates that the respondents circumvented the legitimate supply chain management processes in order to secure the lease agreements and in doing so charged the department grossly inflated amounts for the office space supplied and/or for services purportedly rendered.

- [7] The NDPP maintain further that the respondents made corrupt payments to and for the benefit of amongst others Yolanda Rachel Botha, John Fikile Block and Alvin Botes.
- [8] During this period Mr Block held the following positions:
  - (a) The Provincial Chairmanship of the African National Congress (ANC), in the Northern Cape;
  - (b) He was a Member of the Northern Cape Provincial Legislature (NC/MPL); and
  - (c) He was a Member of the Executive Council (MEC), in charge

of the Department of Education, and presently MEC for the Department of Finance.

[9] At the relevant time Mr Alvin Botes was:

- (a) A Member and Deputy Secretary of the ANC (NC);
- (b) MPL, the Northern Cape Legislature;
- (c) MEC, Department of Social Development, (NC).

[10] The others held the following positions:

- (a) Rodney Martin Saal, Deputy Director: Physical Planning, Northern Cape Department of Social Development;
- (b) Kevin Cecil Ryland, Physical Planning; and
- (c) Palesa Ruth Lebona, administrative clerk in the Physical Planning Division.

[11] Mr Van der Linde SC, for the NDPP, submitted that he is not seeking relief from the eleventh to thirteenth respondents (the trustees of the Shosholoza Trust). In response Mr South, representing eleventh to thirteenth respondents, argued that the NDPP obtained the provisional restraint order through the abuse of the process of Court. He argued that the founding affidavit never alleged that anything was transferred to the Shosholoza Trust. Mr South accordingly applies for the restraint order against eleventh to thirteenth respondents to be discharged and that all restrained or seized assets be returned to his clients. A concession erroneously made does not bind a Court. I will show why I reject the concession. See *Phillipus Johannes Botha v Minister of Constitutional Development and Another*, Case No 849/2013



delivered 29/11/2013 in this division in which Kgomo JP et Lever AJ remarked as follows at Para 7:

*“[7] The application to strike out was brought informally, but nevertheless we entertained it. Advocate Barnard for the NDPP conceded that paragraphs 4 to 8 and 10 to 13 should be struck out and resisted the application to strike out only in respect of paragraph 14 of Ms Byleveld’s affidavit. In our view Advocate Barnard was wrong to make such concession and in any event a court is not bound by a concession erroneously made. In **Matatiele Municipality and others v President of the Republic of South Africa and Others** 2006 (5) SA 47 (CC) at 67 the Court held:*

*“[67] Here, we are concerned with a legal concession. **It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law.** Indeed, in *Azanian’s Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, ‘if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it.’ Were it to be otherwise, this could lead to intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, is inconsistent with the Constitution. This would be contrary to the provisions of s2 of the Constitution which provides that the ‘constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.’”*

See also *Government of the Republic of South Africa and Others v Von Abo 2011 (5) SA 262 (SCA)* paras 18 and 19; and *Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)* at 23F.”

- [12] In an affidavit submitted by Scholtz, appearing as the second respondent to the North Gauteng High Court in Case Number 3753/11 the following extract appears under cited paragraphs:

*“18. The deceased passed away on 03 March 2009. Although the Shosholoza Trust was the registered holder of 55% of the shareholding in the first respondent (being Trifecta Investment Holdings (Pty) Ltd), 10% of these shares were being held as nominee on behalf of a principal, which means that Shosholoza Trust and the Casee Trust each effectively held 45% shareholding in the first respondent.”*

*“31.5 Although the Shosholoza Trust was registered as a shareholder of 55% of the shares in the first respondent, the Shosholoza Trust represented by the deceased [Breda] had, to my personal knowledge, in 2005 undertaken to transfer a 10% shareholding in the first respondent to the nominee of Yolanda Botha, who was a close friend of the deceased and influential in political circles. She had not yet nominated the entity to which shares should be transferred at the time of the deceased’s death, and hence the reference to the YB Trust in the spreadsheet. That 10% shareholding is also reflected in the organogram, annexure “CS3” which I had handed to and discussed with the first applicant at our meeting in March 2009, and was at no time queried or disputed by any of the applicants.”*

*“67.1 I refer to what I have stated above in regard to the undertaking given by the deceased on behalf of the Shosholoza Trust, and accepted by Yolanda Botha, to transfer 10% of the shares held by the Shosholoza Trust in the first respondent to the nominee of Yolanda Botha. This agreement was confirmed by both of them to me in 2007, and on numerous subsequent occasions. It was expressly confirmed to me that until such time as she has decided upon and nominated the entity which was to hold the 10% shareholding, the Shosholoza Trust would continue to hold 10% of the shares in the first respondent for and on behalf of the entity nominated by Yolanda Botha.*

*67.2 On 19 January 2009 the deceased and I at a meeting held at Pretoria agreed to give effect to the transfer of the 10% shareholding in the first respondent to a BEE company or trust which would be controlled by Yolanda Botha. We formally agreed that 10% of the shares in the first respondent, and which formed part of the shares held by and registered in the name of Shosholoza Trust, would be sold at par to a BEE company or BEE trust to be formed, and that Van Deventer Smith Attorneys would be instructed to establish the entity and effect the transfer.*

*67.3 The JYBA Belleggingstrust was subsequently formed with Angelique Botha, (the niece of Yolanda Botha) and Naude as trustees, and the shares were transferred to the Trust.”*

The names of the parties identified above by numbers only are the

following: 11<sup>th</sup> to 13<sup>th</sup>; 5<sup>th</sup>; 2<sup>nd</sup>; 4<sup>th</sup> and 14<sup>th</sup> respondents.

## **THE LEGAL ISSUES**

- [13] It is necessary to refer to the provisions of s25 and 26 of the Prevention of Organized Crime Act, 121 of 1998 as a point of departure.

### **25 Cases in which restraint orders may be made**

*“(1) A High Court may exercise the powers conferred on it by section 26(1)-*

*(a) When-*

- (i) A prosecution for an offence has been instituted against the defendant concerned;*
- (ii) Either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and*
- (iii) The proceedings against that defendant have not been concluded; or*

*(b) When-*

- (i) That court is satisfied that a person is to be charged with an offence; and*
- (ii) It appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.*

*(2) Where the High Court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person*

*is not charged within such period as the court may consider reasonable.*

## **26 Restraint orders**

*(1) The National Director may by way of an ex parte application apply to a competent 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 manner with any property to which the order relates.*

*(2) A restraint order may be made-*

*(a) In respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;*

*(b) In respect of all realisable property held by such person, whether it is specified in the restraint order or not;*

*(c) In respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.*

*(3)(a) A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.*

*(b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;*

*(c) Upon application by the defendant, the court may anticipate the return day for the purpose of discharging the provisional restraint order if 24 hours' notice of such application has been given to the*

*applicant contemplated in subsection (1).*

*(4)(a) A restraint order shall provide for notice to be given to persons affected by the order.”*

- [14] Mr Cilliers, has argued two issues *in limine* pertaining to the *ex parte* application. First, whether the NDPP was entitled to approach the Court on an *ex parte* basis in the light of the preceding requests on behalf of the respondents and the relevant facts; and secondly, whether the NDPP disclosed all material facts in the founding affidavit as they were obliged to do having regard to an applicant’s obligations when approaching a Court on an *ex parte* basis.

### **APPROACHING THE COURT ON AN EX PARTE BASIS**

- [15] As quoted above s26(1) permits the NDPP to approach the Court on an *ex parte* basis. The term ‘may’ makes it discretionary to the NDPP to follow the *ex parte* route but nowhere does it expressly or by implication prevent the NDPP from pursuing that option; the exigency of the situation may dictate the choice to be made. The Act makes provision for a rule *nisi* to be granted in order to afford a respondent an opportunity to show cause why the provisional order should not be confirmed on the return date. A respondent is even expressly authorized to anticipate the return date and have the rule nisi discharged, if so advised.
- [16] Mr Cilliers has further argued this aspect based mainly on a North Gauteng unreported judgment of Prinsloo J in *Theodore Wilhem Van den Heever versus National Director of Public Prosecutions and 11*

*Others*, Case No 22354/12 delivered 26 October 2012. In that case two urgent applications were considered simultaneously. In the one application, the *curator bonis*, Mr Van den Heever, brought the application. The circumstances there are distinguishable from the facts in the present application. The second application in the same matter referred to as the Groenewalt matter involved inter alia conducting the farming business which included trading in animals, including rhino and buffalo as well as hosting hunting parties from overseas. The responsibility was cumbersome to Van den Heever who had to take responsibility for these animals which were in dire straits and in distress due to the drought. It was a matter of life and death for the animals. Undue delay or inappropriate steps taken may have precipitated irreparable harm or loss.

- [17] The case before me involves commercial buildings which have been leased out. An order by my sister Williams J issued on 07 March 2013 reads:

*“1. The first to fourteenth applicants (**the applicants**) will fully comply with paragraph 18 of the order dated 30 November 2012 (**the November order**) by 13 March 2013.*

*2. Subject to compliance by the applicants with paragraph 1 above, the second respondent (**curator**) is authorised to provide written authorization for the sale of the immovable properties referred to in paragraphs 2.1, 2.2, 2.3 and 2.4 of the Notice of Motion dated 27 February 2013 to the third respondent in terms of the following sale of rental enterprise agreements:*

*2.1 The sale of enterprise agreements between the third respondent [Delta Property Fund Limited] (**purchaser**) and the third applicant [Esmarie Scholtz] (**seller**) dated 20 February 2013 which includes Erf 7365, Kimberley;*

*2.2 The sale of enterprise agreements between Delta Property Fund Limited (purchaser) and the Esmarie Scholtz (seller) dated 20 February 2013 which includes Erf 29879, Kimberley;*

*2.3 The sale of enterprise agreements between Delta Property Fund Limited (purchaser) and Trifecta Trading 434 Property 4 (Pty) Ltd (seller) dated 20 February 2013 which includes Erf 10405, Kimberley;*

*2.4 The sale of enterprise agreements between Delta Property Fund Limited (purchaser) and the Trifecta Trading 434 Property 4 (Pty) Ltd (seller) dated 19 February 2013 which includes Erf 12180, Kimberley.*

- 3. The full purchase price payable in terms of each of the sale agreements referred to in paragraphs 2.1 to 2.4 above, will be paid directly to the second respondent [The Curator S Williams N.O.) save for any amount payable to mortgagees under any mortgage bond(s) presently registered over any of the properties referred to in paragraphs 2.1 to 2.4 above payable to such mortgagees to procure cancellation of such mortgage*



*bond(s).*

4. *The curator will deal with the purchase price received in terms of paragraph 3 above in accordance with the powers provided for in the November order.*
5. *The legal costs and disbursements of the curator will be paid on the following basis unless otherwise agreed:*
  - 5.1 *In respect of council fees in the amount assessed as reasonable by the relevant Bar Council.*
  - 5.2 *In respect of attorney's fees in the amount assessed as reasonable by the relevant Law Society.*
  - 5.3 *In respect of disbursements the assessment of the reasonableness thereof by the relevant Law Society.*
6. *Payment of the curator's disbursements in terms of paragraph 5 above will be paid in terms of section 28 (3)(c) of POCA.*
7. *Save as aforesaid the November order remains of full force and effect.*
8. *Applicants do not proceed with the order sought in terms of paragraph 3 of the Notice of Motion.*
9. *Costs of applicants and the NDPP is reserved for argument at the hearing in the main application."*

It seems to me that pursuant to this order, relief was granted to the applicants, the Trifecta Group of companies, removing any other form of pressure, mainly financial, which they may have had prior to the sale of these immovable properties.

[18] Mr Cilliers has referred to a letter addressed to the NDPP dated 07 June 2011 written by Mr Naude of Etienne Naude Attorneys, on behalf of Trifecta Investment Holdings and all the companies in the group including Mr Christo Scholtz and the Casee Trust. He argued that based on undertakings by the respondents to safeguard the NDPP's position in that letter pending the finalization of the criminal trial, it was unwarranted for the NDPP to have approached the Court *ex parte*. He argued further that s26(1) does not confer on the NDPP an additional or stronger right but simply restates the ordinary common law principle.

[19] I did not find anything in the papers or during argument that substantiated the argument that the applicant could not have approached the court *ex parte*. See ***Development Bank of Southern Africa Ltd v Van Rensburg and others NNO 2002 (5) SA 425 (SCA)*** at 443F-444F where Nienaber JA stated:

*“The interim order, according to the above dicta, therefore had no more than a mere holding effect in respect of the attachment that took place in terms thereof. It did not have the additional effect of converting the possession resulting from the attachment into a real right that, per se, would enjoy*

*preference over the claims of other creditors. That this is what the Court had in mind appears further from what was stated at 86H:*

*'I have pointed out that an order in favour of the applicant would not merely be the enforcement of an existing right, but would amount in effect to the grant of rights which the applicant would otherwise not have had. More particularly, it would bestow upon the applicant a right of security which would disturb the distribution of Affinity's assets if Affinity were finally liquidated.'*

*[39] This conclusion, that the rule nisi did not have finite and definitive effect, is patently correct. An interim order is by its very nature both temporary and provisional; its purpose is to preserve the status quo pending the return day. Thus it was said by Corbett CJ in Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 18J - 19B:*

*'The term "rule nisi" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyls's Judicial Practice 3rd ed 450 et seq; Tollman v Tolmann 1963 (4) SA 44 (C) at 46H). Walker's Oxford Companion to Law sv "nisi", states that a decree, rule or order is made nisi when it is*

*not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a "curious mixture of our practice with the practice of England" took place and the practice arose of asking the Court for a rule nisi, returnable on a certain day, but in the meantime to operate as a temporary interdict.'*(See too, *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A) at 674H -675C.*) *If the order authorising attachment is provisional and subject to confirmation, it must follow that an attachment effected and any entitlement acquired on the strength thereof must likewise be provisional and subject to confirmation.*

*[40] I agree with Grosskopf J's conclusion that the interim order of attachment had a mere holding effect. For otherwise it would mean that in all kindred cases a real right supposedly vesting in a bondholder on the execution of a provisional order of attachment would thereafter be abrogated should the provisional order be discharged on the return date, be it at the instance of the liquidator or a third party or because the Court for good reasons resolved to exercise its discretion against the bondholder. Grosskopf J in effect decided that an attachment pursuant to a rule nisi that was issued ex parte and which is in competition with a provisional winding-up order issued before its return day is not to be equated in law with an attachment sanctioned by a confirmed rule nisi."*

- [20] It is common cause that the order obtained *ex parte*, which was accompanied by the entire application, was served on the respondents or was properly brought to their notice. It was accordingly up to them to challenge the averments made therein or to abide the final outcome of the NDPP's application. Obtaining an interim order does not place a respondent at a disadvantage when the issues are fully ventilated and argued on the return date. No march has been stolen.

**I find that under the circumstances, and for the stated reasons, the applicant NDPP was justified in approaching the Court on an *ex parte* basis.**

### **APPLICANT'S DISCLOSURE OF MATERIAL FACTS**

- [21] The following have been disclosed in para 46 of the NDPP's affidavit:

*"I wish to immediately draw this Honourable Court's attention to the fact that there is:*

*46.1 Civil and application proceedings under Case Number 3735/2011 in the North Gauteng High Court, Pretoria, which respectively pertained to civil recovery and restraint by the eleventh respondent and others against the fifth respondent and others;*

*46.2 A docket of a criminal case of theft of the fifth respondent's data registered as Garsfontein CAS 545/02/2011 and opened by the first respondent against Magdalena Elizabeth Buizer (Buizer), the former*

*book keeper of the fifth respondent;*

*46.3 A letter dated 7 June 2011 and marked NCN 1 from the fifth respondent's attorneys requesting the applicant:*

*46.3.1 Not to proceed in this matter by way of an ex parte application; and*

*46.3.2 To serve process in this matter at Naudè's. The applicant advised the fifth respondent's attorneys that it is not prepared to supply an undertaking not to proceed in this matter by way of an ex parte application as set out in NCN 2.*

*46.4 A preservation order under Case Number 1825/2012 returnable on 14 December 2012 against fourteenth respondent in respect of renovations to 12 Jawno Street, Kimberley, and 10% shares in JYBA Beleggings Trust registered as 105/2012 (the JYBA Trust)."*

[22] It is accordingly evident that the NDPP was not prepared to settle for a mere undertaking by it not to proceed *ex parte*. There was therefore no agreement that the NDPP broke which the respondents opposing this application can now seek to hold the NDPP to.

[23] In *National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA)* at 428 para 21 Nugent AJA held:

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

[24] Mlambo AJA in ***National Director of Public Prosecutions v Kyriacou*** **2004 (1) SA 379 SCA** at 387 pronounced:

*“[17] Counsel for the respondent submitted that the appellant should be non-suited for failing to disclose in the ex parte application that the trial Court had granted a forfeiture order in terms of s34(1) of the Criminal Procedure Act and the amount thereof. It was submitted that such disclosure was called for as it is likely to have influenced the Court whether to grant the provisional order or refuse it. It is common cause that the s34 order was not referred to in the papers.*

*[18] It is correct that utmost good faith must be observed when initiating an ex parte application, and failure to disclose and present fully and fairly all known material facts may constitute a ground to dismiss an application. The duty to disclose extends to all facts which might influence a court in coming to its decision.*

*[19] The learned Judge in the Court a quo had a discretion, on being apprised of all the facts, to either set aside the provisional order or*

*confirm it. An important consideration in the Court a quo was the question whether the Court that granted the provisional order might properly have been influenced by non-disclosure of the s 34 order to refuse relief. The learned Judge in the Court a quo heard full argument on this issue but elected to discharge the rule on another ground. He did not deem it necessary to deal with this one. I can see no reason to have discharged the order by reason of the non-disclosure in question. Had disclosure been made the s34 order would not have been the answer to a confiscation order. There was, in addition, as already said, the matter of related criminal activity and the force of the presumptions.”*

- [25] In addition to there being no bar against the NDPP to approach the Court *ex parte* and that the NDPP broke no agreement, I am satisfied that the NDPP has not failed to disclose material information as alleged by the respondents but has made a full and frank disclosure. I have approached and considered the information cited in para 21 above in the context of the cited jurisprudence.

**I find therefore that there was adequate disclosure of material facts by the applicant NDPP and reject the argument advanced by Mr Cilliers.**

- [26] The question is whether on the evidence before me there are reasonable grounds for believing that a confiscation order may be made against those respondents who have been charged with any relevant criminal activity. See s25(1)(b)(ii) of POCA. If I am persuaded that



there are reasonable grounds to believe that a confiscation order may follow after the criminal trial I, would then be vested with a discretion to confirm the provisional restraint order. On the other hand, if there are no such reasonable grounds for so believing, I would in all fairness and in the interests of justice, have to decline to confirm the order and discharge the rule *nisi*.

- [27] For me to arrive at an informed decision it is crucial to examine all the evidence. It is imperative to determine if there is evidence which “might”, as opposed to “shall”, support the conviction which may result in a confiscation order. It is essential further to be satisfied that such evidence “might” be believed by the trial Court. Southwood AJA in *National Director of Public Prosecutions v Kyriacou* (supra) at 388 para 23 observed:

“[23] Section 25 of POCA provides for the jurisdictional requirements for an order in terms of s26. The jurisdictional requirements in issue in the present case is contained in s25(1)(a)(ii):

‘...when-

*it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant.’”*

I have to consider the circumstances under which a confiscation order will be made against the backdrop of the case in *casu* and whether the established facts would induce a reasonable person to believe that a confiscation order may be made against the respondents. See *National Director of Public Prosecutions v Basson* (supra) at para 19.

[28] The aforementioned section confers upon me a discretion to grant a restraint order if there are reasonable grounds for believing that a confiscation order may be made.. It is so that the respondents have been deprived of the restrained realizable property. I believe there is a real possibility that the trial court may confiscate the assets at the end of the trial in favour of the NDPP. Brand JA in *National Director of Public Prosecutions v Kyriacou* (supra) at 394G pronounced:

*“All s25 (1)(a)(ii) requires are reasonable grounds for the belief that the trial Court may (not will) conclude that respondent benefited from related criminal activities”*(Emphasis added)

[29] Mr Cilliers and Mr South have both argued that the NDPP should not have joined the trustees and the individuals as well as the companies that have not been criminally charged. They referred to the Shosholoza Trust in particular as well as other individuals and entities cited on the basis that they may be having an interest in the realisable property. Their submissions in this matter are incorrect. Having perused the White Report it seems to me that there is a correlation particularly between Scholtz, the first respondent in this matter, who is the sole director in Trifecta Investment Holdings (Pty) Ltd, the main company to which all these trusts and other companies are subsidiaries. Trifecta Trading 434 Property 5 (Pty) Ltd has been criminally charged and its shareholders are Shosholoza Trust 75% and Casee Trust 25% shares. Mr South argued that it has not been shown in the founding affidavit that any of the respondents has transferred anything to the Shosholoza Trust. Mr Ndzengu relied on the investigation of Col Luis, Col Smit and Mr White’s report. In White’s report, at page 310 thereof,

Shosholoza Trust leased Keur and Geur building in Douglas from November 2008 and has received 40 payments to the total sum of R997, 791.24, just under a million rands. The other criminally charged individuals and companies also have an association which is so intertwined and diffused that it is unfortunate for those with interest in these realizable properties who are affected by this order.

- [30] It is necessary to pierce the corporate veil here. See ***Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others*** 1995 (4) SA 790 (A) at 803 C-G where Smalberger JA pronounced:

*“The principle of a company's separate juristic personality was first asserted in the House of Lords in Aron Salomon v A Salomon and Co Ltd [1897] AC 22. There already it appears to have been recognised that proof of fraud or dishonesty might justify the separate corporate personality of a company being disregarded. (See, in this regard, the speeches of Lord Halsbury at 33 and Lord Macnaghten at 52-3.) And over the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil. Recently this was confirmed in The Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A) where Corbett CJ expressed himself as follows at 566C-F:*

*'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil.*

*And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used. . . .'*

- [31] I have carefully considered this matter and discovered that there were a lot of shenanigans, misrepresentations and obfuscation at destroying the paper trail. I need not be satisfied that the charged respondents are guilty of offences for which they have been charged or whether they probably benefited from the unlawful activities. All that I need to be satisfied with is whether it appears to me, on reasonable grounds, that there might be a conviction followed by a confiscation order. I am satisfied based on the facts before me that there are reasonable grounds that the respondents may be convicted of *inter alia*, fraud, corruption and money laundering. With regards to the confiscation order it remains undisputed that Scholtz, the sole director in the holding company with shares in the individual Trusts and subsidiary companies, Yolanda Botha, John Block and Alvin Botes with shares in the Trusts, as well as the three employees in the Department of Social Development who received cash payments, benefited from the proceeds generated by the Trifecta Group of Companies with tenders awarded to them through the influence of John Block, Yolanda Botha

and Alvin Botes, who were in authority in the Provincial Government.

[32] I have noted the judgment of my sister Pakati J in ***John Fikile Block and Others v The National Director of Public Prosecutions*** Case No 988/2013 delivered on 29 November 2013 in this division concerning some of the parties listed therein who are also cited in my judgment and note that I have not discovered anything inconsistent in the two judgments of this division.

[33] In the result, I make the following order

**Order:**

- 1. The Provisional Restraint Order issued on 30 November 2012 is confirmed.**
- 2. The respondents are ordered to pay the costs of the application which includes costs of the *curator bonis* jointly and severally, the one paying the other to be absolved.**

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M C MAMOSEBO

ACTING JUDGE: NORTHERN CAPE HIGH COURT

<b>On behalf of the Applicant:</b>	Adv HJ van der Linde SC
Assisted by:	Adv T de Jager
Instructed by:	Johan Kotze Attorneys

	Mr OF Lategan, from the Office of the State Attorney
<b>On behalf of the Respondents:</b>	
1, 10, 25, 27, 30, 31, 32, 33	Adv JG Cilliers SC
Instructed by:	WA Du Plessis Attorneys
<b>On behalf of Respondents: 11<sup>th</sup> -13<sup>th</sup></b>	Adv South Weavind & Weavind Inc. Engelsman Magabane