



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 13 OCTOBER 2022

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Land and Agricultural Bank of South Africa v The Minister of Rural Development and Land Reform and Others (1174/2021) [2022] ZASCA 133 (13 October 2022)*

---

Today the SCA upheld an appeal with costs, including the costs of two counsel, against a decision of the Eastern Cape Division of the High Court of South Africa, Grahamstown.

In an effort to advance the objectives of increasing ownership of agricultural land by historically disadvantaged persons, the Land and Agricultural Development Bank of South Africa (the Land Bank) and the Minister of Rural Development and Land Reform (the Minister) both made funds available for the purchase of portion 1 and the remainder of the farm Poplar Grove No 303, as well as the farm Honeyville No 302 (collectively referred to as the property), situated in the Kouga Municipality in the Eastern Cape. The property was to be registered in the name of a trust of which 39 identified previously disadvantaged individuals would be the beneficiaries. However, due to corruption and fraud the property was registered in the name of CPAD Farm Holdings (Pty) Ltd (CPAD).

On 2 August 2006, the Minister paid out an amount in excess of R2.6 million for the purpose of acquiring the property for the trust. The Land Bank advanced a further sum of approximately R5 million to enable this transaction. CPAD defaulted in respect of payment to the Land Bank and it issued summons against CPAD in the Eastern Cape Local Division of the High Court, Port Elizabeth (the local division). On 3 September 2008, the Land Bank obtained default judgment against CPAD for the payment of the capital advanced, accrued interest and costs. The property was declared executable and on 14 October 2008 the Sheriff attached it in the execution of the default judgment. In the meantime, the NDPP instituted a criminal prosecution relating to the property against a director of CPAD and a former employee of the Minister. On 28 October 2014, the NDPP ex parte obtained a preservation order in respect of the property in the local division. The order placed the property under the control, custody and care of a curator bonis. It provided for notice of the order to interested parties, including the Land Bank. It further informed interested parties who intended to oppose the application for a forfeiture order or to apply for an order excluding an interest from it, to enter an appearance in terms of s 39(3) of the Prevention of Organised Crime Act 121 of 1998 (POCA).

When the preservation order came to the knowledge of the Land Bank, it immediately instructed its attorney to protect its interest in the property. The NDPP acknowledged the Land Bank's security consisting of the bond; that its interest in the property would be excluded from the forfeiture order; and that it was not necessary for the Land Bank to enter an appearance or become involved in the application for a forfeiture order. For reasons that are not apparent from the papers, the forfeiture order not only made no mention of the interest of the Land Bank, but provided that the property 'be handed back' to the Minister. After the forfeiture order had been made, the officials of the NDPP continued to maintain that the Land Bank would be entitled to the settlement of the debt secured by the bond from the proceeds of the sale of the property. They were not, however, authorised to represent or bind the Minister. Meanwhile, the curator bonis took steps to sell the property. The Land Bank had the property valued and informed the curator bonis that it would agree to the sale of the property for R8 million. The

curator bonis sold the property to a third party for the sum of R8 million. In these circumstances, the execution of the deed of sale would result in the Land Bank receiving the full proceeds of the sale and the Minister receiving nothing. The Minister was not pleased with this eventuality.

The relevant parties entered into a series of negotiations, but could not reach an agreement. Eventually the Land Bank approached the local division essentially for an order amending the forfeiture order to subject it to the full extent of its rights in terms of the bond. The Land Bank cited various parties that could have been affected by the order claimed, but only the Minister (the fourth respondent) opposed the application. The Minister expressly acknowledged the rights of the Land Bank under the bond and in principle had no objection to a variation of the forfeiture order to provide for the rights of the Land Bank. However, the Minister disputed that the Land Bank enjoyed 'a prior or stronger right'. As both the Minister and the Land Bank had been the victims of unlawful activities under POCA, so the Minister contended, they should share in the proceeds of the sale of the property in proportion to the capital loss sustained by each. That would result in a proportion of the proceeds of two thirds to the Land Bank and one third to the Minister. The practical effect would be that the Land Bank would receive about half of what was owed to it under the bond, whereas the Minister would obtain full recovery of the grant.

The matter came before Goosen J and he held that there was no conceivable reason why the Land Bank's interest should be limited to the capital sum advanced. He held that the Minister also had such an interest in the property. With the apparent consent of the parties, he determined the matter on the basis that both the Land Bank and the Minister effectively sought the exclusion of their respective interests from the operation of the forfeiture order.

With the leave of Goosen J, the Minister appealed and the Land Bank cross-appealed to the full court of the Eastern Cape Division of the High Court, Grahamstown (the full court). On appeal the parties sought the orders that they respectively had pursued in the local division. The full court (Rugunanan J, Beshe J and Krüger AJ concurring) rejected the argument that the Land Bank's rights took precedence and came to the conclusion that the interest in the property of both the Minister and the Bank should be limited to the equivalent of their capital loss without ranking in status or prior position. It accordingly upheld the appeal with costs and dismissed the cross-appeal with costs.

Against this background, the appeal raised two issues: Whether the Minister had an interest in the property as defined in POCA; and if so, how the competing claims of the parties for the exclusion of interests from the operation of the forfeiture order should have been determined. POCA defines 'interest' as including any right.

Regarding the first issue, the SCA found that the Minister had no interest in the property and provided the following reasons: The word 'interest' had no well-known primary meaning. It was a word of wide and vague import. Therefore it was unlikely that 'includes' was intended to add a wider meaning to a primary meaning that itself was in no need of definition. It rather seemed that the purpose of the expression 'includes any right' was to define 'interest' more precisely. This was strongly supported by the context of POCA. It should be recalled that s 52(2) and s 54(8) provided that the first requirement for an order excluding an interest in property that was the proceeds of unlawful activities from the operation of a forfeiture order was a finding, on a balance of probabilities, that the applicant 'had acquired the interest concerned legally and for a consideration'. In applications for exclusion under s 52(2A) and s 54(8A), the applicant must also show on a balance of probabilities that the interest concerned had been acquired legally. This was the language of acquisition of rights to property. That also accorded with the purpose of Chapter 6 of POCA. Its purpose was to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the State. That purpose would be undermined if the forfeiture was subjected to vague and flimsy interests as opposed to legal rights.

Coming to the second issue raised by the appellants, the SCA disagreed with the findings of the lower courts. It went on to find that, in the first place, the full court incorrectly placed reliance on the provisions of s 57(2) of POCA. Section 57(2) dealt with the effect of a forfeiture order and was clearly not applicable to interests that were excluded from the operation thereof. The SCA also disagreed with the Minister's argument that in terms of Chapter 6, victims of crime had to be treated equally. Instead the SCA held that the purpose of Chapter 6 of POCA was not to protect the interests of victims of crime by compensation of their losses but rather, the purpose of Chapter 6 was to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the State. To save it from unconstitutionality under s 25(1) of the Constitution, the Chapter had to provide for the protection of the pre-existing interests of innocent citizens in property subject to forfeiture,

whether such a person was (also) a victim of crime, was irrelevant. Moreover the SCA held that there was no indication in Chapter 6 of POCA of an intention to render common law principles inapplicable or to vary them. Such an intention would have required clear articulation. On the contrary, whether an interest in property was legally acquired clearly has to be determined under existing law, including the common law. It followed that there was no legal basis for depriving the Land Bank of the preference provided by its real right or of its secured claims for interest and costs. The Legislature must have contemplated that competing applications could be made for the exclusion of interests in property from a forfeiture order. Section 54(4) provided that the high court may consolidate the hearing of such applications. Yet, it did not prescribe principles for the ranking of such competing claims. It followed that this had to be determined according to principles of common law. Two main principles were relevant. The first was that a real right generally prevailed over a personal right. The second was that the maxim *qui prior est tempore potior est iure* applied to the ranking of rights that are equal in hierarchy. Therefore, the SCA found that the interest of the Land Bank had to be afforded precedence over any of the Minister.

~~~~ends~~~~