

COURT ONLINE COVER PAGE

IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Local Division, Johannesburg

CASE NO: **2022-036292**

In the matter between:

**The National Director of Public
Prosecutions**

Plaintiff / Applicant / Appellant

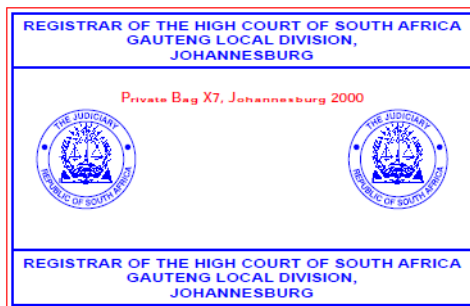
and

**Jacobus Stephanus Geldenhuys ,Jacoba
Magdalena Geldenhuys ,Classic
Financial Services (One) (Pty) Ltd,Marry
Pierce Kligour**

Defendant / Respondent

Affidavit

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ELECTRONICALLY SIGNED BY:

**Registrar of High Court , Gauteng
Local Division,Johannesburg**

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No:

In the urgent *ex parte* application of:

The National Director of Public Prosecutions

Applicant

In re: The amount of **R399 198.88** together with interest thereon held in **ABSA** account number 4097470165 held in the name of Classic Financial Services (One) (Pty) Ltd with registration number 2004/031624/07;



The amount of **R10 395 192.44** together with interest thereon held in Nedbank account number 1195277571 in the name of Classic Financial Services (One) (Pty) Ltd with registration number 2004/031624/07;

The amount of **R3 000 000** together with interest thereon held in FNB account number 62047917713 in the name of Jacoba Magdalena Geldenhuis with ID number 5410130145085; and

The amount of **R5 750 000** together with interest thereon held in Nedbank account number 1009637290 in the name of Murry Pierce Kilgour with ID number 5905195084087.

FOUNDING AFFIDAVIT

I, the undersigned,

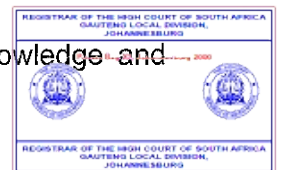
S'KHUMBUZO MAPHUMULO

do hereby make oath and say that:

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- 1 I am a Deputy Director of Public Prosecutions of the Republic of South Africa, and I have been duly appointed as such in terms of section 15 of the National Prosecuting Authority Act 32 of 1998 (**the NPA Act**), read with section 179 of the Constitution of the Republic of South Africa (**the Constitution**).
- 2 I am a functionary in terms of section 1 of the NPA Act which is under the control of the applicant. I have been duly authorised by the applicant to bring this application on the applicant's behalf.
- 3 The facts are within my personal knowledge unless the contrary is stated or the context indicates otherwise. These facts are, to the best of my knowledge and belief, both true and correct.



The Applicant

- 4 The applicant in this matter is the National Director of Public Prosecutions, appointed in terms of section 10 of the NPA Act read with section 179(1)(a) of the Constitution. The applicant's principal place of business is located in the VGM Building, 3rd floor, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

The Property

- 5 This is a preservation of property application brought in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 (**the POCA**) concerning certain property (**the property**) identified as:
 - 5.1 The amount of **R399 198.88** together with interest thereon held in ABSA account number 4097470165 in the name of Classic Financial Services (One) (Pty) Ltd with registration number 2004/031624/07 (**Classic Financial Services**);

- 5.2 The amount of **R10 395 192.44** together with interest thereon held in Nedbank account number 1195277571 in the name of Classic Financial Services;
- 5.3 The amount of **R3 000 000** together with interest thereon held in FNB account number 62047917713 in the name of Jacoba Magdalena Geldenhuys with ID number 5410130145085; and
- 5.4 The amount of **R5 750 000** together with interest thereon held in Nedbank account number 1009637290 in the name of Murry Pierce Kilgour with ID number 5905195084087 (**Kilgour**).
- 6 The Financial Intelligence Centre (**the FIC**) directed ABSA, FNB and Nedbank to place holds on the amounts in the bank accounts as set out in paragraphs 5.1 to 5.4 above in terms of section 34 of the Financial Intelligence Centre Act 38 of 2001 (**FICA**), on the basis that transactions or proposed transactions associated therewith may be linked to the proceeds of unlawful activities and/or offences related to fraud and money laundering, or may constitute transactions referred to in section 29(1)(b) of the FICA. The holds expire at midnight on **25 October 2022**.
- 7 For reasons that will be dealt with below, I submit that the property is or represents the proceeds of unlawful activities.



Jurisdiction

- 8 ABSA, FNB and Nedbank clients' funds are held electronically on the banks' databases which are situated at the banks' respective head offices in Johannesburg. The property is thus located within this honourable court's jurisdiction.


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- 9 ABSA, FNB and Nedbank were directed by the FIC interventions to freeze the property. The instructions related to the interventions are given by the respective banks' head offices, which are located within this honourable court's jurisdiction.
- 10 The order which the applicant seeks, to preserve the funds, will be given effect to by the respective banks' head offices, which are located within this honourable court's jurisdiction.
- 11 I thus submit that this honourable court has jurisdiction to consider the present application.

Urgency *Ex Parte* and *In Camera*



- 12 I submit that section 38(1), read with section 74, of the POCA, entitles the applicant to approach this honourable court on an *ex parte* basis and for the hearing to be held *in camera*.
- 13 I respectfully submit that the express provision made for *ex parte* proceedings under section 38 is based on the Legislature's recognition that there is an inherent need to proceed without notice in applications for preservation orders. Further, that the structure of Chapter 6 of the POCA is geared towards allowing in general for an initial *ex parte* order to secure assets, with any opposition to be dealt with after this initial objective has been achieved.
- 14 I submit, therefore, that it will only be in unusual circumstances that an *ex parte* application for a preservation order will be inappropriate. My submission is that no such circumstances exist in this case.
- 15 In fact, it is imperative for this application to proceed on an **urgent** *ex parte* basis. As indicated above, various holds have been placed over the property in terms of a FIC directives. The holds at issue are due to expire at midnight on **25 October**

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2022. Should a court order not be in place to secure the property once the holds expire, ABSA, FNB and Nedbank will have no authority to retain the property further.

- 16 According to the available evidence (elaborated on further below) there had already been an attempt to dissipate the property or part thereof from the ABSA and Nedbank accounts held by Classic Financial Services:

16.1 As at 16h00 on Friday 7 October 2022 the ABSA account had a balance of R9 339 553.88 and the Nedbank account had a balance of R16 623 000.50;

16.2 Between 10 and 11 October 2022 funds were transferred from the two accounts so that at 8h00 on 12 October 2022 the ABSA account had a balance of R399 198.88 and the Nedbank account had a balance of R10 395 192.44; and

16.3 The FIC, very fortuitously, managed to secure R8 750 000 of the funds that had been transferred from the ABSA and Nedbank accounts between 10 and 11 October 2022.

- 17 A substantial risk therefore exists that the funds will be dissipated or concealed, to the prejudice of the victims in this matter, rendering it impossible to trace. The risk is not unrealistic given the manner in which the proceeds of such unlawful activities have been dealt with thus far.

- 18 In particular, I submit that, despite the *ex parte* nature of the present application, the provisions of the POCA and of the order that is sought from this honourable court sufficiently safeguard the principle of *audi alteram partem*. This matter is dealt with in greater detail below.



Preservation of Property Order

- 19 The purpose of the preservation order sought is to ensure that the property is preserved pending the outcome of an application for a forfeiture order in terms of section 48 of the POCA. In terms of section 40 of the POCA, such an application must be brought within 90 days of the publication of a notice of the making of the preservation of property order in the Government Gazette, failing which it lapses.
- 20 The applicant seeks the following relief in terms of the draft preservation order:
- 20.1 In terms of section 38(1) of the POCA, to prohibit any person with knowledge of the order from dealing in any manner with the property; and
- 20.2 Directing that ABSA, FNB and Nedbank retain the property in **interest bearing accounts** to ensure that the property remains preserved and accrues interest, pending the institution and finalisation of the forfeiture application.
- 21 In terms of section 38(2) of the POCA, the High Court must make the order referred to in section 38(1) if there are reasonable grounds to believe that the specified property is an instrumentality of an offence referred to in schedule 1 or is the proceeds of unlawful activities as defined in section 1(1) of the POCA or both.
- 22 As a result of investigations, I believe that there is evidence indicating that the property is the proceeds of unlawful activities, namely contraventions of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 (**the FAIS Act**), fraud and money laundering.
- 23 For the purposes of this application, I intend to summarise as concisely as possible the facts of the matter as established by investigations conducted to date. In this regard this honourable court is referred to the supporting affidavits of:



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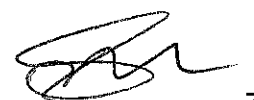
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- 23.1 Ahzur Mohamed (**Mohamed**), a forensic accountant employed by the FIC, and annexures thereto; and
- 23.2 Charlotte Breytenbach (**Breytenbach**), an investigator employed by the Financial Sector Conduct Authority (**the FCSA**), and annexures thereto,
- which set out the facts upon which this application is based.

Legal Framework

- 24 The issues raised in this application fall within the ambit of the FAIS Act. The relevant provisions are quoted below.
- 25 A **“financial services provider”** is defined in section 1 of the FAIS Act to mean *“any person, other than a representative, who as a regular feature of the business of such person – (a) furnishes advice; or (b) furnishes advice and renders any intermediate service; or (c) renders an intermediary service”*.
- 26 **“Authorised financial services provider”** or **“provider”** is defined in section 1 of the FAIS Act to mean *“a person who has been granted an authorisation as a financial services provider by the issue to that person of a licence under section 8”*.
- 27 A **“representative”** is defined in section 1 of the FAIS Act to mean *“any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service – (a) does not require judgment on the part of the latter person; or (b) does not lead a client to any specific transaction respect of a financial product in response to general enquiries”*.




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28 **"Advice"** is defined in section 1 of the FAIS Act to mean *"subject to subsection (3)(a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients –*

- (a) *in respect of the purchase of any financial product; or*
- (b) *in respect of the investment in any financial product; or*
- (c) *on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or*
- (d) *on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,*




and irrespective of whether or not such advice-

- (i) *is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or*
- (ii) *results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected".*

29 **"Financial product"** is defined in section 1 of the FAIS Act to mean, subject to subsection (2) -

- "(a) *securities and instruments, including-*
- (i) *shares in a company other than a 'share block company' as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980);*
- (ii) *debentures and securitised debt;*
- (iii) *any money-market instrument;*


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- (iv) *any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);*
- (v) *any 'securities' as defined in section 1 of the Financial Markets Act, 2012 (Act 19 of 2012);*
- (b) *a participatory interest in one or more collective investment schemes;*
- (c) *a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act 52 of 1998), and the Short-term Insurance Act, 1998 (Act 53 of 1998), respectively;*
- (d) *a benefit provided by-*
 - (i) *a pension fund organisation as defined in section 1 (1) of the Pension Funds Act, 1956 (Act 24 of 1956), to the members of the organisation by virtue of membership; or*
 - (ii) *a friendly society referred to in the Friendly Societies Act, 1956 (Act 25 of 1956), to the members of the society by virtue of membership;*
- (e) *a foreign currency denominated investment instrument, including a foreign currency deposit;*
- (f) *a deposit as defined in section 1 (1) of the Banks Act, 1990 (Act 94 of 1990);*
- (g) *a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act, 1998 (Act 131 of 1998);*



- (h) *any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar by notice in the Gazette to be a financial product for the purposes of this Act;*
- (i) *any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;*
- (j) *any financial product issued by any foreign product supplier and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraph (a) to (i), inclusive".*

30 **Section 7(1) and (3)** of the FAIS Act provides that:



- "(1) With effect from a date determined by the Minister by notice in the Gazette, a person may not act or offer to act as a –*
- (a) financial services provider, unless such person has been issued with a licence under section 8; or*
 - (b) a representative, unless such person has been appointed as a representative of an authorised financial services provider under section 13.*
- (3) An authorised financial services provider or representative may only conduct financial services related business with a person rendering financial services if that person has, where lawfully required, been issued with a licence for the rendering of such financial services and the conditions and restrictions of that licence authorises the rendering of those financial services, or is a representative as contemplated in this Act."*

31 The date on which section 7(1) came into effect is 30 September 2004 as per General Notice 270 published in the Government Gazette number 26080 of 5 March 2004.

32 **Section 8** of the FAIS Act deals with the circumstances under which licenses are issued to financial service providers. **Section 8(9)** of the FAIS Act provides that:

“(9) No person may –

- (a) in any manner make use of any licence or copy thereof for business purposes where the licence has lapsed, ~~has been~~ withdrawn or provisionally withdrawn or during any time when the licensee is under provisional or final suspension;
- (b) perform any act which indicates that the person renders or is authorised to render financial services or is appointed as a representative to render financial services, unless the person is so authorised or appointed; and
- (c) perform any act, make or publish any statement, advertisement, brochure or similar communication which – (i) relates to rendering of a financial service, the business of a provider or a financial product; and (ii) the person knows, or ought reasonably to know, is misleading, false, deceptive, contrary to the public interest or contains an incorrect statement of fact.”



33 **Section 9** deals with the circumstances under which licenses issued in terms of section 8 of the FAIS Act may be withdrawn or suspended by the registrar.

34 **Section 13(1)** of the FAIS Act provides that:

“A person may not –

- (a) *carry on business by rendering financial services to clients for or on behalf of any person who –*
 - (i) *is not authorised as a financial services provider; and*
 - (ii) *is not exempted from the application of this Act relating to the rendering of a financial service;*
- (b) *act as a representative of an authorised financial services provider, unless such person –*
 - (i) *prior to rendering a financial service, provides confirmation, certified by the provider, to clients –*
 - (aa) *that a service contract or other mandate, to represent the provider, exists; and*
 - (bb) *that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate;*
 - (iA) *meets the fit and proper requirements; and*
 - (ii) *if debarred as contemplated in section 14, complies with the requirements determined by the registrar by notice in the Gazette, for the reappointment of a debarred person as a representative; or*
- (c) *render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative.”*



35 **Section 14** of the FAIS Act deals with the circumstances under which a representative may be debarred. **Section 14(9)** provides as follows:

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"A person debarred in terms of subsection (1) may not render financial services or act as a representative or key individual of a representative of any financial services provider, unless the person has complied with the requirements referred to in section 13(1)(b)(ii) for the reappointment of a debarred person as a representative or key individual of a representative."

36 **Sections 36(a) and (d)** of the FAIS Act provide that:

"Any person who –

- (a) *contravenes or fails to comply with a provision of section 7(1) or (3), 8(8), 8(10)(a), 13(1) or (2), 14(1), 17(4), 18, 19(2), 19(4) or 34(4) or (6), or*
- (d) *is not a representative appointed or mandated by the authorised financial services provider in accordance with the provisions of this Act, and who in any way declares, pretends, gives out, maintains or professes to be a person who is authorised to render financial services to clients on the basis that the person is appointed or mandated as a representative by another representative,*



is guilty of an offence and is on conviction liable to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment."

37 I now turn to deal with the facts of the case.

The Facts of the Case

38 Breytenbach deposed to an affidavit on 7 October 2022, which was submitted to the FIC in support of an application in terms of section 34 of the FICA, to place holds on funds in the ABSA and Nedbank accounts held by Classic Financial Services. That affidavit is annexed to the supporting affidavit of Mohamed as AM1

and sets out the factual background of this matter. Breytenbach supplemented certain aspects of that affidavit in her supporting affidavit deposed to on 20 October 2022.

39 Breytenbach states that she is employed as an investigator by the FCSA and duly appointed as such in terms of section 134(1) of the Financial Sector Regulation Act 9 of 2017 (**the FSR Act**).

40 The FCSA is a statutory body established in terms of section 56 of the FSR Act. Its main objectives are to enhance and support the efficiency and integrity of financial markets and to protect financial customers by promoting their fair treatment by financial institutions.



41 Section 135(1)(a) of the FSR Act provides that: *“a financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority.”*

42 On 20 August 2022 the FCSA instructed Breytenbach, together with various other individuals, to conduct an investigation into Pecunia Systems (Pty) Ltd (FSP No 11332) (Registration Number 2001/003271/07) (**Pecunia Systems**), Jacobus Stephanus Geldenhuis with ID number 6003315080083 (**Geldenhuis**) and Classic Financial Services.

43 Pecunia Systems was authorised as a Financial Services Provider (**FSP**) on 6 December 2005 under licence number 1132. The current director is listed as Dewald Geldenhuis (**D Geldenhuis**) with ID number 8310175029086.

- 44 Pecunia Systems has a CAT I license and is authorised in the product category which includes shares, long and short-term deposits, long-term insurance, derivative instruments, debentures, warrants, money market instruments, bonds, structured deposits, retail pension benefits, pension fund benefits, participatory interest in a collective investment and participatory interest in a hedge fund.
- 45 Geldenhuis was previously a director of Pecunia Systems. He resigned from this position on 20 August 2010.
- 46 In 2009 Geldenhuis was debarred for dishonesty by Momentum Metropolitan Life Limited (FSP No 6406) in terms of section 14(1), read with section 13(5), of the FAIS Act, which was recorded as such on the central register.
- 47 As a result of the debarment, Geldenhuis is prohibited from conducting a financial services business. As at the date hereof, the debarment has not been lifted.
- 48 Classic Financial Services is not an authorised FSP, nor is it a juristic representative of an FSP. Geldenhuis is listed as its sole director and was appointed as such on 20 January 2005.
- 49 On 22 August 2022 the FCSA received a complaint from one Nico Retief (**Retief**) that Geldenhuis was soliciting investments from members of the public. Retief provided Breytenbach with a document titled "*Investment Application and Service Contract*" (**the investment document**), a copy of which is annexed to the first affidavit of Breytenbach as CB4.
- 50 Breytenbach draws attention to the following features of the investment document:
- 50.1 The name of Classic Financial Services, trading as Classic Invest, as well as Geldenhuis' name and contact details, appear in the header thereof;



50.2 Provision is made for prospective investors to indicate their choice of investment risk appetite, namely, low, moderate, aggressive or trading;

50.3 The following words appear at the bottom of the first page thereof "*I hereby give permission for the funds to be placed in a Managed Fund with Classic Invest*";

50.4 The banking details for the deposits of investment funds are indicated on page two thereof and lists two accounts purported to be held by Classic Financial Services, namely, ABSA account number 4097470165 and Nedbank account number 1195277571. Prospective investors are requested to use their ID numbers as references when making deposits;



50.5 Page three contains *inter alia* the following clauses: "*Classical Financial Services One are hereby mandated to establish and recommend to the client the most appropriate financial product within the range of available shares to satisfy the needs as indicated above within the context of the contracts and authority held by them*" and "*The total cost for the investment is 0.90% per annum*"; and

50.6 There is no reference to Pecunia Systems in the investment document.

51 Based on the information received by Breytenbach following the complaint by Retief, she requested and obtained bank statements and opening records for the two bank accounts held by Classic Financial Services with ABSA (account number 4097470165) (**the ABSA account**) and Nedbank (account number 1195277571) (**the Nedbank account**) in terms of the provisions of section 131 of the FSR Act, which she analysed.

ABSA account

- 52 The ABSA account was opened by Geldenhuis who indicated in the opening documents that his source of wealth is savings from employment income, dividends and director's fees. The source of funds was indicated as "*trading income services*".
- 53 Under the "registration as an FSP" section there is a question as to whether Geldenhuis is rendering financial services. Geldenhuis indicated that he is not.
- 54 Geldenhuis is the only signatory to the account.
- 55 During the period 1 January 2019 to 31 August 2022, approximately R412 419 440 was deposited into the account. There were multiple payments in round numbers with references that appear to be ID numbers.
- 56 Multiple payments were made from this account in round numbers, referencing the initials and surnames of individuals.
- 57 There were no payments for investment purposes or transfer of funds to Pecunia Systems.
- 58 On 9 September 2022 the account had a balance of R2 930 222.

Nedbank account

- 59 The account was opened by Geldenhuis, who is also the sole signatory to the account.
- 60 Geldenhuis indicated in the opening documents that the source of funds in this account would be "*Business proceeds*".

- 61 During the period 1 January 2019 to 31 August 2022 the account received approximately R83 513 962. There were multiple payments into the account in round numbers. The references appear to be ID numbers.
- 62 Multiple payments were made from the account in round amounts with references that appear to be the initials and surnames of individuals. R36 150 000 was transferred using the reference "*classic*" and R24 694 452 was transferred using the reference "*Geldenhuis JS*".
- 63 The statements reflect various cash withdrawals from the account.
- 64 Breytenbach noticed no payments to Pecunia Systems or for investment purposes.
- 65 On 20 September 2022 the balance of the account was R14 014 759.



FIC Intervention

- 66 Mohamed states that he is employed by the FIC as a forensic accountant, that he is a qualified Chartered Accountant and a member of the South African Institute of Chartered Accountants:
- 67 Mohamed confirms that the FIC received a request from the FCSA *via* Breytenbach on 7 October 2022 to block funds in the Absa and Nedbank accounts in terms of section 34 of FICA (**the section 34 directives**). The FIC was requested to institute the section 34 directives in conjunction with a search and seizure operation anticipated to be executed on 8h00 on 11 October 2022.
- 68 Mohamed requested bank statements, Know Your Client (KYC) information, contra account intelligence and account balances for the ABSA and Nedbank accounts from the respective banks through sections 27 and 32 of FICA, which he received at about 16h00 on Friday 7 October 2022. Mohamed then proceeded to analyse

the information and noticed transactional patterns similar to that detailed by Breytenbach in her first affidavit.

69 Mohamed thereupon took the necessary steps to ensure that the section 34 directives would be executed by the respective banks at 8h00 on 11 October 2022. It was anticipated that the value of the funds would be similar to the available balances indicated at 16h00 on Friday 7 October 2022, namely:

69.1 R9 339 553.88 in respect of the ABSA account and

69.2 R16 623 000.50 in respect of the Nedbank account.

70 At about 19h00 on 10 October 2022 Mohamed was informed that there was a challenge with the search warrant and that the intended search and seizure operation would not proceed on 11 October 2022. Mohamed thereupon withdrew the section 34 directives.



71 At about 14h56 on 11 October 2022 Mohamed was again informed that the search and seizure operation was ready to proceed and he was requested to re-institute the section 34 directives with effect from 9:00 on 12 October 2022. He thereupon prepared the section 34 directives.

72 When Mohamed queried the bank balances of the ABSA and Nedbank accounts at 8h00 on 12 October 2022, he was however informed that a significant value of funds had been transferred out of the accounts. He thus made additional queries in terms of sections 27 and 32 of FICA and requested the respective banks to provide him with records to trace the funds. The banks complied and he utilised the information to create a chart depicting the flow of funds. The chart is annexed to his supporting affidavit as AM4.

73 Mohamed established that large amounts had been transferred out of the ABSA and Nedbank accounts during the period 10 to 12 October 2022. Most of the transfers appear to have been to various individuals.

74 Of specific significance was the transfer of funds into two accounts, for the following reasons:

74.1 On 11 October 2022, R3 000 000 was transferred from the Nedbank account into FNB account 62047917713, held by Jacoba Magdalena Geldenhuys (the spouse of Geldenhuys); and

74.2 On 11 October 2022, two large round amounts totalling R5 750 000 were transferred from the ABSA and Nedbank accounts into Nedbank account 1009637290 held by Kilgour. These transfers were suspicious because since the inception of the ABSA and Nedbank accounts no funds were noted to have been received from Kilgour.



75 Directives in terms of section 34 of FICA were thereupon issued on 11 and 12 October 2022 to ABSA, FNB and Nedbank to secure the property. Copies of the directives are annexed to the supporting affidavit of Mohamed as AM6, AM7 and AM8, respectively. As indicated, the holds expire at midnight on 25 October 2022.

The Property as Proceeds or Property Representing the Proceeds of Unlawful Activities

76 It is evident from the facts as described in the preceding paragraphs that:

76.1 Geldenhuys is conducting the business of an authorised FSP as per the provisions of the FAIS Act through Classic Financial Services, by soliciting payments from members of the public on the understanding that such payments will be invested in a “managed fund” on their behalf;

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- 76.2 Classic Financial Services is not an authorised FSP, either primarily or in a representative capacity;
- 76.3 Geldenhuis is prohibited from conducting the business of an authorised FSP by virtue of his debarment for dishonesty in 2009 in terms of section 14(1) of the FAIS Act. His debarment has not been lifted;
- 76.4 Geldenhuis is the sole signatory to the ABSA and Nedbank accounts;
- 76.5 There is no evidence in either the ABSA or Nedbank account statements that any money transferred or paid into these accounts was paid into any investment product. What appears from the statements is that incoming clients' funds were again paid out to other persons. This amounts to a fraudulent scheme; and
- 76.6 Relevant to the timing of the search and seizure operation conducted by the FCSA, large amounts were transferred out of the ABSA and Nedbank accounts during the period 10 to 12 October 2022 in a clear attempt to dissipate the funds. One recipient account is held by Geldenhuis' spouse and the other account is held by a person whose details do not appear in any of the bank statements as having previously made any deposits.
- 77 In the premises, the property constitutes the proceeds of unlawful activities, to wit contraventions of *inter alia* sections 7(1) and 13(1) of the FAIS Act, which contraventions constitute offences in terms of section 36 of the FAIS Act, as well as fraud, theft and money-laundering.
- 78 I point out that the investigation is at an initial stage and is ongoing. As such the applicant reserves the right to supplement this application with any relevant evidence that may become available as and when it becomes necessary.



The Property as an Instrumentality of Offences

- 79 It is furthermore reasonable to conclude in the circumstances that the property or the accounts holding same also constitute(s) an instrumentality of offences as provided in Schedule 1 to the POCA, namely theft as per item 17, fraud as per item 19 and money laundering as per item 32.
- 80 In this regard I respectfully submit that the available evidence demonstrates that the ABSA and Nedbank accounts were used to facilitate the commission of the crimes of fraud and theft, including money laundering. For these reasons, I submit that the property was indeed instrumental in the facilitation of these offences in that it played a functional and substantial role therein.



Appointment of *Curator Bonis*

- 81 In terms of section 42 of the POCA, this honourable court is authorised to appoint a *curator bonis* to take control over the property placed under a preservation order.
- 82 It is submitted that there is no need for a *curator bonis* to be appointed as the objectives of the POCA will be properly met if the property is preserved in interest bearing accounts by ABSA, FNB and Nedbank pending the institution and finalisation of the forfeiture application.

Provision for *Audi Alteram Partem*

- 83 It is submitted that granting the preservation order *ex parte* does not deprive persons who have a legal interest in the property concerned of the opportunity to have their opposition heard and from safeguarding their interests during the operation of the order.

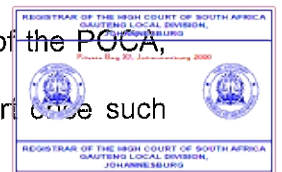
- 84 During the operation of a preservation and seizure order, anybody with an interest in the property concerned may apply to the High Court for rescission or variation of the preservation and seizure order in terms of section 47 of the POCA.
- 85 In addition to the specific provisions in the POCA, it is submitted that the honourable court also has a wide discretion in regulating its own process and to ensure that any interested party who wishes to contest the granting of the preservation order, can do so.
- 86 In the present matter, in order to provide any interested party with the opportunity to challenge the preservation order, a prayer for reconsideration is included in the draft order to the notice of motion.
- 87 I submit that this provision ensures that interested parties may be heard despite the initial *ex parte* granting of the order, and that it is compatible with the overall structure of the procedure set out in Chapter 6 read with the rules of the High Court and the law relating to the inherent jurisdiction of the court.
- 88 In addition to the safeguards set out above, I draw this honourable court's attention to the fact that Chapter 6 of the POCA establishes a two-stage asset forfeiture mechanism. The preservation order is only the first stage in these proceedings, with the second phase involving an application to this court for a forfeiture order.
- 89 I further draw this honourable court's attention to the fact that the POCA also contains a number of provisions safeguarding the interests of those who claim to have a legitimate interest in the property. The POCA provides such persons with sufficient opportunity to participate in the subsequent forfeiture proceedings and to oppose the granting of a forfeiture order, or to seek an order excluding their legitimate interests in the property from forfeiture. I refer this honourable court in particular to sections 39, 48(2) to (4), 52 and 54 of the POCA.



Notice and Publication of Preservation Order

90 In terms of section 39(1) of the POCA, the applicant is obliged, as soon as practicable after the granting of the order, to give notice of the order to any person known to him to have an interest in the property. The order, which the applicant seeks in the present application, contains the names of the persons who are known to me as possibly having an interest in the property that will be affected by the order.

91 To the best of my knowledge, the following entities and/or persons may claim to have an interest in the property and must, in terms of section 39(1) of the POCA, be served with notice of the order sought from this honourable court once such order is granted:



91.1 Classic Financial Services with registered address situated at 18 Montagu, Fiskaal Street, Glen Marais, Kempton Park;

91.2 Geldenhuis with his known residential address at 18 Montagu, Fiskaal Street, Glen Marais, Kempton Park;

91.3 Jacoba Magdalena Geldenhuis with ID number 5410130145085 and residing at 18 Montagu, Fiskaal Street, Glen Marais, Kempton Park; and

91.4 Kilgour with his/her known residential address at 63 Herschel Road, Fish Hoek, Cape Town.

92 Given the foregoing and the apparent nature of the activities with which such entities and individuals are engaged, it is in our experience that they may become untraceable or that they may avoid any attempts at service. In the event of a return of non-service on any of the entities or individuals identified for service, it is submitted that the objectives of the POCA will be achieved in the present case if this honourable court authorises service by publication of notice of the preservation

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order, in the form as set out in annexure A to the draft order, in one edition of *The Star* newspaper, which publication enjoys widespread circulation within the whole of South Africa. An order is accordingly sought in this regard.

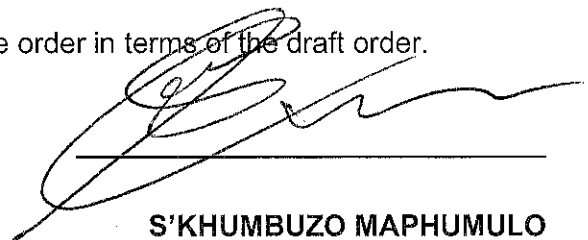
93 In terms of the order sought, the applicant is directed to cause a copy of the preservation order to be served by email on responsible individuals in the relevant departments at ABSA, Nedbank and FNB.

94 In terms of the order sought, the applicant is also directed to cause publication of notice of the order in the Government Gazette. A copy of the notice is annexed to the order sought, marked annexure A. The terms of the notice are intended to draw the attention of any person who receives or reads it to the position regarding the order and what he/she should do to safeguard any interests he/she may have in the property.



CONCLUSION

95 In conclusion, I respectfully submit that the factual and legal requirements for the granting of an order under section 38 of the POCA have been satisfied and I thus request this honourable court to grant the order in terms of the draft order.


S'KHUMBUZO MAPHUMULO

I certify that this affidavit was signed and sworn before me at Johannesburg on this the 20 day of October 2022 by the deponent who acknowledged that he knows and understands the contents of this affidavit, that to the best of his knowledge and belief it is true and correct, that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience.





2140560-3
R. SKOSANA

Commissioner of Oaths

Full Names: SKOSANA BATHABILE

Designation: CAPTAIN

Area: RSA

Address: 165 MEYER STREET
GERMISTON

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