

Media Statement



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TO : ALL MEDIA

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RE : NDPP'S DECISION TO ABANDON THE PRESERVATION ORDER AGAINST MR FANA HLONGWANE

The NDPP has taken a decision to abandon the preservation court order against Mr Fana Hlongwane. This order was granted at the beginning of March following authorisation by the NDPP for the application. The NDPP had authorised the application for the preservation order after considering and receiving reports from Mr Hofmeyr, the deputy National Director of Public Prosecutions assigned for asset forfeiture processes. From these reports, the NDPP was persuaded that a preservation order was justified.

Such a decision by the NDPP is based on whether or not there is evidence of criminal conduct and on which to maintain the forfeiture process. The preservation order is usually a first step in this regard.

On Monday 15 March, the NDPP held a second meeting with the legal representatives for Mr Hlongwane to seek a solution to the matter, i.e. whether to pursue the forfeiture process in which case the frozen money would be released to SA authorities following a substantive forfeiture application or a takeover of the investigation by the SA authorities. The latter process happens if there is proof of criminal activities (there is no criminal investigation in the NPA. Such an investigation is with the police and they are best placed to comment on this aspect). The NDPP was accompanied by Mr Hofmeyr and other NPA members privy to the issues.

The issue was therefore that the NPA either continues with the forfeiture process along the lines explained or abandons the preservation order. If the preservation order is abandoned, the Lichtenstein authorities would deal with the matter in terms of their laws, which were used to freeze the money in the first place. The NPA has no say on how they should deal with the matter. However the NPA processes would remain as they always have been - nowhere, because the NPA has not brought a forfeiture application as it has no basis for doing so (there is no evidence of criminal conduct based on the investigation so far).

Further, even if forfeiture process were to be instituted by the NPA, it would require a good basis for doing so as opposed to a simple suspicion. The test though remains lesser than the criminal test of proof beyond a reasonable doubt. It is a civil test of balance of probabilities.

In the meeting with the legal representatives of Mr Hlongwane the NDPP indicated that he required of them to submit detailed information indicating the basis for the monies in Mr Hlongwane's account in Lichtenstein. They needed to show on a balance of probabilities that the money was not obtained from criminal activities. Put another way, they needed to rebut the suspicion of criminal activity. They did not have to prove beyond a reasonable doubt that the money was obtained legally. For this purpose they were advised to submit a formal memorandum supported by annexures, if any.

The NDPP did not prescribe to them what to submit. They were advised (at their request) that the purpose of the submission would be to enable the NDPP to make a decision on the preservation order obtained earlier. They instead wanted to go ahead, as per the court order, to file their responding papers to court and "fight the matter" as they believed that they had a strong case. The meeting reflected on the merits of their argument and considered further options. It was agreed that in light of the importance of the matter and its sensitivity, it would be prudent to deal with the issues exhaustively especially where the necessary information was readily available and could be submitted to the NDPP.

More options to the impasse were considered. One of those was that the parties could agree to extend the dates for filing of papers as per the court order, in order to enable Mr Hlongwane to file a comprehensive response. The parties decided against this because the issue which sought to be addressed simply

needed a credible explanation on the part of Mr Hlongwane. The NDPP and his team felt that they could do this if they had nothing to hide.

The other option was that the NDPP could withdraw the preservation order if Mr Hlongwane undertook to "NOT TOUCH" the money that was frozen if and when the Lichtenstein authorities release it. Mr Hofmeyr suggested that as part of this approach, the trustees of the relevant trust which is a beneficiary of the frozen mone, should also be covered in the undertaking.

The concern was that the trustees were not part of the preservation order and could therefore do as they wished with the money if it was released because the preservation order only addressed Mr Hlongwane. The meeting agreed with this approach. The NDPP felt that it would give the NPA time to consider the submissions on behalf of Mr Hlongwane without affecting the subject of the dispute, which is the frozen money. The undertaking would be submitted into court.

The following day the submissions were given to the NPA. They contained a memorandum explaining Mr Hlongwane's attitude to the matter and annexures. The annexures consisted of Mr Hlongwane's consultancy contract with Mr Modise and also his consultancy agreement with BAE Systems. In essence, the latter contracts also showed rights and obligations of the contracting parties including monies due when performance requirements were met. Lastly, they also contained papers filed in arbitration proceedings by Mr Hlongwane against BAE Systems seeking to enforce payment for monies allegedly due to him (it appears that BAE Systems paid only a portion of the money).

The NDPP advised Mr Hofmeyr that having read the documents there is no reason for the retention of the preservation order. The undertaking by the parties was also no longer necessary. In other words, the NPA could withdraw the preservation order as agreed the day before at the meeting, but that this time, an undertaking was not necessary from the parties. In line with this view, the NDPP instructed that the preservation order be abandoned.

Furthermore, the NDPP was persuaded on the papers submitted that the suspicion of criminality that informed the application for a preservation order, was rebutted by the information provided. In any event it had been agreed at the meeting that there would be a withdrawal by the NPA because the principle of

who bears the onus of proof, was agreed the day before. The onus of proof of criminality vests with the NPA. Because asset forfeiture processes are civil, the burden on the NPA is on a balance of probabilities as opposed to beyond a reasonable doubt.

Also it was agreed the day before what standard had to be met in order to dispose of the matter. The filed papers did this. Firstly, they showed that there are legitimate contracts on which monies could be paid to Mr Hlongwane by BAE Systems. Secondly, the papers rebutted suspicions of criminality. So, the source of the money is known.

Therefore, in order to NOT WITHDRAW the preservation order, the NPA needed to have good reasons supported by evidence, as opposed to suspicions. Whilst there was and still is room to argue for the retention of the preservation order, the evidence available does not support this approach. The NPA therefore has a burden to submit additional evidence if it is to continue with its line of action. It does not have this evidence. Simply arguing around the interpretation of existing information does not take the matter further. The weight of the evidence available strongly shows that there is no criminality. In this regard, the reports of a settlement by BAE Systems with the UK and US authorities are instructive. The settlement undermines the NPA argument of criminality because the source of the NPA matter remains the BAE Systems case internationally.

Therefore what remained before the NDPP were reasons previously discussed to support the application for the preservation order. These were addressed in the submissions.

“The business of the NPA is to deal with criminal and forfeiture matters in a fair and transparent manner. Whilst we may have good reasons to take a particular course of action against any individual and also be able to justify it, we are also enjoined to respect individual rights. We should, in our desperation to fight crime and prove our worth, not be tempted to go overboard and find ourselves in a position where we face criticism for profiling certain people without legal justification” said Simelane.

“Our decisions are informed by principles of law and the facts available at the time of making the decision. So, when the facts change, fresh decisions on those facts can be made. However in all of this the NPA seeks to ensure that it is

consistent and just in its actions. This decision does not mean that the NPA will not consider information on this matter again. This decision only affects the issue of the preservation order”, he added.

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