IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 3197/2009
Date heard: 18 March 2010
Date delivered: 06 July 2010

In the *ex parte* application of:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

FAHMIDA MANSOOR First Defendant

KRITH SINGH Second Defendant

IN RE: **APPLICATION IN TERMS OF SECTION 26 OF THE PREVENATION OF ORGANISED CRIME ACT, NO. 121 OF 1998**

J U D G M E N T

DAMBUZA, J:

[1] On 10 November 2009, this Court granted a provisional restraint order together with a rule *nisi*, calling upon the defendants to show cause on 15 December 2009, why the provisional restraint order should not be made final. The provisional restraint order was served on the defendants on 3 December 2009. In terms of the provisional order the defendants are prohibited from dealing with realisable property as defined in sections 12 and 14 of the Prevention of Organised Crime Act, Act 121 of 1998 (**"POCA"**). A *curator bonis* was appointed to take into his possession or under his control and to administer the property which is the subject of the order. The matter

was, however not finalised on 15 December 2009 and was postponed to enable the defendants to file their answering papers. The answering papers were filed out of time, which led to the applicant's reply also being filed out of time. The applicant requests that such filing of his replying affidavit be condoned.

[2] The application is brought in terms of s 26 of POCA. The applicant seeks a final order restraining the defendants from dealing in any manner with the property identified in the provisional restraint order.

[3] The applicant is the National Director of Public Prosecutions in South Africa. The first defendant is an adult female physiotherapist residing in Durban and who, during the period relevant to this application, conducted business as a physiotherapist at 73 Lorne Street, Durban. The second defendant is an adult male who, during the same period (1 August 2006 to April 2008), was employed as a practice manager at the business conducted by the first defendant.

[4] The defendant's have been charged in the Special Commercial Crimes Court, Port Elizabeth with 610 counts of fraud (alternatively, theft) involving an amount of R3,619,483.54 and 610 counts of forgery. The charges of fraud against the defendants emanate from a complaint made by the managing director of a business known as Compensation Solution Pty Limited (**"Compsol"**), Johann Julius Friedrich Lüttich. Compsol conducts a business of "debtors factoring" of injury on duty claims (IOD claims). In its business

Compsol purchases accounts from individual medical practices or practitioners in the country at a discounted value. The seller cedes his or her rights, title and interest in the accounts to Compsol. Compsol then submits the account to the Compensation Commissioner who pays Compsol the amount due on the account.

[5] In this case the allegation is that Compsol discovered forgery in the accounts it had bought from the first defendant's practice. In particular, it is alleged in the founding affidavit that during April 2008 it became evident to Compsol that a certain patient known as Jabulile Ndlovu, whose account was presented by the first defendant had, in fact, never received physiotherapy treatment from the first defendant. This caused Compsol to conduct an investigation which revealed that this account and many others were fraudulent claims sold by the first defendant to Compsol. The applicant contends that the first defendant never rendered physiotherapy treatment to the patients in respect of which the charges have been brought against the defendants and that they falsely presented that these patients had been referred to the first defendant by Doctors Harilall and Raniga who used to refer patients to her. By the time of discovery of the alleged fraud in 2008 Dr Raniga had left South Africa and had, during 2006, immigrated to Australia. There is no confirmation from him as to whether the disputed handwriting and signature appearing on documents relating to some of the patients to whom the charges relate, is indeed his and whether he had referred the patients concerned to the first defendant for treatment. Dr Harilall disputes that an

imprint made by a rubberstamp on referrals relating to the patients was his or was a stamp used by him.

[6] The details of the charges against the accused are that during the period August 2005 to April 2008, they falsely and with intent to defraud, gave out and pretended to Compsol and to the Compensation Commissioner that the persons mentioned in the charge sheets were patients treated by accused no. 1 and that those persons had been referred to the first defendant for physiotherapy by either Dr Raniga or Dr Harilall, and that as a result of such treatment, the first defendant was entitled to payment of the R3,619,483.54 by Compsol and/or the Compensation Commissioner.

[7] It appears to be common cause that as a result of the defendants or one of them rendering accounts in respect of physiotherapy rendered to the patients whose particulars are set out in the schedule which is also attached to the applicant's founding papers, payments were made by either Compsol or the Compensation Commissioner in respect of such accounts. The issue is whether treatment was rendered by the first defendant to the relevant patients and whether the patients had been referred to her by Drs Harilall and Raniga. The applicant's case is that no treatment was rendered to the patients and that the defendants forged referral notes, falsely representing that Drs Raniga and Harilall had referred the patients to the first defendant and that she treated the patients based on such referrals.

[8] Section 26 of POCA authorises an applicant to seek an order from the High Court, prohibiting any person from dealing in any manner with any

property to which the order relates. In terms of s 25 of POCA a High Court may grant a restraint order when:

> (1) a prosecution for an offence has been instituted against the defendant concerned;
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> (2) 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
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> (3) the proceedings against that defendant have not been concluded.

[9] It is common cause that prosecution has been instituted against the defendants and that such prosecution has not been concluded. What remains to be determined is whether there are grounds for believing that a confiscation order may be made against the defendants. In **National Director of Public Prosecutions v Kyriacou** 2004 (1) SA 379 (SCA) at para [10] the court held that a mere assertion to the effect that there are reasonable grounds for believing that a confiscation order may be made will not suffice. But the applicant is not required to prove as a fact that a confiscation order will be made; what is required is no more than evidence that satisfies the court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order. The principles applicable and the onus are those applicable in ordinary motion proceedings.

[10] In **National Director for Public Prosecutions v Basson** 2002 (1) SA 419 (SCA), at paragraph 19 the court held that a mere summary of the allegations made against the defendant concerned, and an expression of opinion by members of the appellant's (in this case, applicant's) staff that a confiscation order will be made is not sufficient; it should rather appear to the court itself that there are reasonable grounds for such a belief. This requires, at least, that the nature and tenure of the available evidence be disclosed.

[11] Sections 25 and 26 of POCA are aimed at depriving criminals from benefiting from their criminal activities. Other provisions in POCA, also intended to deprive criminals of the benefits of their criminal activities are section 18(1) read with section 12(3) of POCA which provide that a Court convicting a defendant may make a confiscation order if it finds that the defendant has derived a benefit from the offence convicted of or any other offence of which the defendant has been convicted at the time of trial or any criminal activity which the Court finds to be sufficiently related to such offences.[1]

[12] As I have stated, a Court is not required to be satisfied of the guilt of the defendant before a restraint order is granted; what is required is that there should be reasonable grounds for believing that the defendant may be convicted.[2] An applicant for restraint order is only required to set out evidence which satisfies a Court that there are reasonable grounds for

[1] Benefit is defined in section 12(3).

[2] **NDPP v Rebuzzi** 2002 (1) SACR 128 (SCA) at 133 E para 20.

believing that the Court that convicts the person concerned may make an order of confiscation.[3]

[13] Consequently, what I am required to determine is whether on the evidence set out in the applicant's papers there are reasonable grounds for believing that a Court that convicts the defendants of fraud and forgery, may make an order of confiscation against them.

[14] The defendants contend that the applicant has failed to establish that there are reasonable grounds for believing that a confiscation order may be made against them as envisaged in s 25(1)(a)(ii) of POCA.

[15] It was submitted both in the defendants' Heads of Argument and during argument, that the police investigations are inadequate and that the charge sheet is carelessly drawn. The defendants also rely on certain indications or undertakings allegedly made by the Special Prosecutor that, at the trial the state intends to lead (only) the evidence relied on in this application. They contend that this evidence is unlikely to lead to a conviction and a consequent confiscation order. Further, the first defendant maintains that she treated all the patients in respect of whom she submitted invoices to the Compensation Commissioner and/or to Compsol. She refers to the lack of sworn statements by the patients in this application and maintains that this is an indication that they (the patients) will not be called as witnesses at the criminal trial.

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[3] **NDPP v Kyriacou** 2003 (2) SA 524 (SCA) and **NDPP v Rautenbach and Others** 2005 (1) SACR 530 (SCA).

[16] I do not agree. Even if I were to accept that the State Prosecutor gave the undertaking referred to, it seems to me that the State cannot be precluded, as a result thereof, from leading other evidence in its possession presently or such evidence as it may secure at a later stage. In my view such an undertaking would, in any event, not be a proper one to make. However, during argument I did raise with the applicant's counsel the glaring lack of such evidence as one would ordinarily expect to find in a case of this nature. The response was that prior to this application the defendants or at least the first defendant, had expressed an intention to plead guilty to the charges. This gives an impression that the applicant then deemed it unnecessary to obtain further evidence to support this application. On the other hand the applicant does state that he still intended to revise (and improve) the charge sheet which the defendants contend was carelessly drawn.

[17] From the papers it appears that the first defendant was first charged during 2008. The application for provisional restraint order was made and granted during November 2009. But there is no evidence, for example by Ndlovu, whose account sparked the wider investigation, that s/he was never treated by the first defendant as the Investigating Officer in the criminal case alleges. If the applicant relies only on the account drawn by the defendants in respect of Ndlovu for concluding that Ndlovu never received treatment from the first defendant, details of the irregularity in this account are lacking. My view is that whatever indications may have been made by the defendants regarding their intended plea in the criminal proceedings do not relieve the

applicant of his responsibility to make out a proper case for the relief it seeks in this application and to properly support the allegations of fraud that the makes. It is not sufficient for the applicant to argue that the evidence it has presented in support of this application is not the same or the only evidence that it will use to prove the charges at the criminal trial. It remains the duty of the applicant to make out a coherent, persuasive case that there is evidence on which a court may convict the defendants of the charges against them and on which that court may also grant a confiscation order, based on the benefit derived by the defendants from their criminal conduct.

[18] The factual allegations in support of this application are contained in the supporting affidavit of the Investigating Officer, Keith Van Molendorff. Van Molendorff states that Dr Harilall denies having referred some of the patients to which the charges relate, to the first defendant for physiotherapy. According to him Dr Harilall also disputes the authenticity of referral notes presented by the defendants as having been made by Dr Raniga on a “prescription pad” which was no longer in use (presumably at the time of making the referral), instead of a “referral note pad” which the doctors used at the time. A further irregularity on which the applicant relies is the fact that some of the referrals by Dr Raniga were made after he had immigrated to Australia. Dr Harilall further disputes as ”false”, the rubberstamp imprint that appears on some of the referrals presented as having been made by him. He also denies that he used Dr Raniga’s stationery to refer patients to the first defendant for treatment as the defendants allegedly presented. A “statement” by a patient Naidoo in which he disputes receiving treatment from the first defendant forms

part of the applicant's founding papers. According to Van Molendorff, some of the patients, together with their employers, deny having received treatment from the first defendant; some of these patients allege that they were treated by other physiotherapists. One patient is presented as having been treated by the first defendant on a date when the patient was already dead.

[19] In the main, the defendants' case is that the first defendant treated all the patients referred to in the charges. They contend that the applicant has not shown that there is a reasonable prospect that the defendants will be convicted for fraud, theft and forgery and that a consequent confiscation order will be made in the amount of R3,619,483.54. In the answering affidavit the first defendant states that even on the applicant's version, only a small number of the patients deny having received treatment from her. Even then, none of these or any other patients have made sworn statements denying that she treated them.

[20] I do not think that the lack of sworn statements by the proposed state witnesses would detract from the overall weight of the evidence if clear details of the allegations by those "witnesses" were set out clearly. The difficulty in this case is that when I consider the allegations made against the defendants and the admissions that such denials or some of them, are correct, together with lack of basic detail in relation to the remaining counts I am unable to make an informed assessment as to whether a court that convicts the defendants may make an order of confiscation. In fact I have difficulty in

determining which of the counts of fraud and forgery the defendants could be convicted of.

[21] The defendants point out that only 114 charges of fraud relate to Dr Harilall's referrals (the applicant insists that the correct number is 121 instead of 114). Dr Harilall's written comments on the schedule with the patient's names are only to the effect that **the referrals are not in his handwriting.** Regarding Dr Raniga's referrals, Dr Harilall comments that 58 of these **appear to be in the handwriting of Dr Raniga**. The most that can be concluded from Dr Harill's comments, so contend the defendants, is that **it is unclear who made these referrals**, therefore it is improbable that the charges in the criminal case will lead to a conviction on the evidence presented by the applicant.

[22] In support of their contention that there is no reasonable prospect that the evidence against them will lead to a conviction the defendants refer to particular counts which, they argue, show that the Special Prosecutor did not apply her mind to the issue when drawing the charges. Count 28 of the charges relates to the patient Shunmugan Pillay . The amount alleged to have been fraudulently claimed is R2 314,25. Dr Harilall's comment in respect of the referral in respect of this patient is that the referral **"seems to be"** in the handwriting and signature of Dr Raniga. The defendants argue and I agree that, Dr Harilall's evidence in respect of this referral will be that it is most likely, a genuine referral. Consequently there is no evidence of fraud in respect thereof. Further patient, Ishanth Singh, according to the schedule,

confirmed telephonically that he had received treatment from the first defendant. Consequently there is no evidence to support this charge.

[23] The defendants have attached to the answering papers, affidavits by five patients, randomly selected from the charge sheet. It is not in dispute that these patients had not, at the time of deposing to the affidavits, been approached by the police or any investigators in respect of this application or the criminal case against the defendants. According to the defendants these five patients confirm having received treatment from the first defendant. The affidavits are however handwritten and the handwriting is illegible; as such I am unable to decipher the contents thereof. The applicant, however, does not dispute, in reply, that these patients did receive treatment from the first defendant. Mr **Willie Ludwig Kingsley** who deposed to the founding and replying affidavits merely points out that the defendants only rely on a few discrepancies amidst numerous irregular or fraudulent claims. He also criticises the defendants for contravening their bail conditions by approaching (potential) state witnesses without permission from the state.

[24] The courts have warned against literal interpretation of the provisions of sections 25 and 26 of POCA in the light of possible arbitrary deprivation of property contrary to the provisions of section 39 of the Constitution of South Africa Act 108 of 1996 (the Constitution).[4] In my view, this means that when considering an application for restraint, a court has to strike a balance

[4] **National Director of Public Prosecutions v R O Cook Properties (PTY) LTD**; **National Director of Public Prosections v 37 Gillespie Street Durban (PTY) (LTD) and Another**; **National Director of Public Prosecutions v Seevnarayan** 2004 (2) SACR 208 (SCA) para [15].

between the ultimate aim of depriving criminals of the fruits of their criminal conduct and the constitutional imperative of protecting the rights of accused in criminal cases, including the right to presumption of innocence until proven guilty. In this regard it was submitted on behalf of the applicant that the fundamental assumption is that the applicant is faced with a criminal who may be expected to conceal, as far as possible, the benefits of his/her nefarious activities. In my view the proper approach "where sufficient evidence of criminal activity has been presented before a court the fundamental assumption is . . . ".

[25] In this application the evidence on which most of the charges are founded (in respect of 381 claims) seem to be Dr Harilall's assertion that the handwriting and signature thereon "does not look" like Dr Raniga's. This comment is, on its own, not conclusive. Further, given that Dr Harilall is not a handwriting expert, I have difficulty in understanding how a conviction would result from a comment he makes about another person's signature and handwriting. Regarding the claims relating to patients referred by Dr Raniga after he had left South Africa, my view is, that although this may sound and look suspicious, there is no evidence indicating that the only inference that can be drawn in this case is that the defendants forged Dr Raniga's signature. I also have difficulty in determining exactly to which counts the allegations relate to the amounts received by the defendants in respect thereof and/or the amounts paid by the Compensation Commissioner in respect thereof.

[26] Dr Harilall's comments that the handwriting and/or signature on some referrals does look like Dr Raniga's is as inconclusive as his comments that on some referrals, the signature does not look like Dr Raniga's. A further factor to be considered is that, in respect of 304 of the charges referral notes or letters could not be found. It was submitted on behalf of the applicant and I agree that it is not, at this stage realistically able to place before the court more than a limited portion of the material which is likely to influence the court faced with an application for confiscation. Indeed the courts have held that at the restraint stage the applicant cannot produce more than a limited portion of the material which is likely to influence the court faced with the confiscation application **NDPP v Phillips**[5]. But I think even the limited evidence placed before a court in an application for restraint should, must at least, make out a relatively clear coherent and consistent case. The evidence before me in this application does not satisfy this requirement.

[27] As I understand the charges against the defendants, the counts of fraud are inextricably linked to the allegations of forgery. Where, at least, half of the referrals allegedly forged cannot be found I am unable to find that a conviction is likely to follow from the charges. I am mindful of the statement by one of the patients, Naidoo, that he was never treated by the first defendant. I am also persuaded that an inference of fraud and forgery may be drawn in respect of the patient where referral was made after his death. But the contention by the defendants that, based on the admissions by some of the five patients that they did receive treatment from the first defendant and

[5] **National Director of Public Prosecutions v Phillips and Others** 2001 (2) SACR 542 (W) at 554-6.

Dr Harillal that some of the referrals appear to be in Dr Raniga's handwriting and/or signature, it is probable that more patients to whom the charges relate may confirm having been treated by the first defendant is not unreasonable. The applicant does agree in reply that some of the counts are not supported by the evidence and in fact appear to be disproved by the evidence presented. It seems to me that the only counts in respect of which there is relatively clear evidence are the ones relating to Naidoo and the "dead" patient.

[28] A further consideration is that a confiscation order will be made if the court finds that the defendants derived a benefit from their criminal conduct. In this case, where the accounts were sold to Compsol at a discounted rate, I am not satisfied that a proper case has been made that the defendants benefited from these two cases. In any event the amount involved in the claims is only a minute fraction of the amount of R3,619,483.54, for which the applicant seeks an order of restraint.

[29] In the end I am not satisfied that the applicant has made out a proper case that there is evidence on which a court faced with an application for confiscation would be reasonably persuaded to grant the application.

[30] Consequently the following order shall issue:

The Rule Nisi is discharged with costs.

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N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Adv H J Van der Linde SC instructed by State Attorney.
For the defendants:	Adv J Howse instructed by Keeran Bhagwan Attorneys of Port Elizabeth.