

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE – PORT ELIZABETH)**

**CASE NO.: 3494/2010**

In the matter between:

**FAHMIDA MANSOOR**

**First Applicant**

**KRITH SINGH**

**Second Applicant**

And

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**First Respondent**

**MR. JACQUES EYBERS N.O.**

**Second Respondent**

**THE MASTER OF THE HIGH COURT / EASTERN  
CAPE HIGH COURT / PORT ELIZABETH**

**Third Respondent**

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**JUDGMENT**

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**BESHE J:**

[1] The first applicant, an adult female physiotherapist and the second applicant who is her practice manager are charged in the Port Elizabeth Special Crimes Court with several counts of fraud alternatively theft.

[2] First respondent is the National Director of Public Prosecutions, second respondent is a Director of Advisory Services with the firm Price Water House Coopers and *curator bonis* having been appointed by the third respondent, who is the Master of Eastern Cape High Court, pursuant to an order of court.

[3] In this application, the applicants seek the release of their property which was restrained pursuant to a Provisional Restraint Order that was issued on the 10<sup>th</sup> of November 2009. In terms of that order the applicants were prohibited from dealing with their realisable property as provided for in sections 12 and 14 of the Prevention of Organised Crime Act 121 of 1998 (POCA).

[4] The Provisional Restraint Order was however discharged on the merits by *Dambuza J* on the 6<sup>th</sup> of July 2010.

[5] The first respondent filed an application for leave to appeal against *Dambuza J's* ruling of the 6 July 2010. Upon request by the applicants, the second respondent refused to release the restrained property pending the outcome of appeal procedures.

[6] The application for leave to appeal was dismissed with costs on the 14<sup>th</sup> of September 2010.

[7] Once again the release of the restrained property was refused on the basis that the State Attorney acting for the respondents, intended petitioning for leave to appeal. It is common cause that leave to appeal to the Full Bench of the Eastern Cape High Court was granted in November 2010.

[8] This application which is for the immediate release of first applicant's property which was attached pursuant to the Provisional Restraint Order is premised on the ground that the Provisional Restraint Order is no longer in place following the discharge of the rule that sustained it.

[9] The refusal by the respondents to release the restrained property pending the outcome of firstly, the application for leave to appeal and later the petition to the President of the Supreme Court of Appeal seems to have been motivated by a misconception that the noting of an appeal against *Dambuza J's* discharge of the provisional order had the effect of suspending her ruling pending the decision of the appeal. The respondents also suggest that applicants were prepared to remain subject to the restraint pending the finalisation of the appeal procedure. I however do not understand how the respondents may have gained this impression when applicants have consistently sought the release of the restrained property.

[10] The first respondent concedes that the position as set out in ***Erasmus' Commentary on the Superior Court Practice B1-370 on Rule 49*** reflects the legal position; which is namely that: The noting of an appeal against the refusal of a final order where interim interdictory relief was granted (but final relief refused) does not revive the interim order unless the parties have specifically agreed to the continued existence of the interdict pending the appeal. See also ***National Director of Public Prosecutions v Rautenbach 2005 (4) SA 603 (SCA) at 610 C-G***.

[11] As indicated there does not seem to be any basis for believing that the applicants agreed to the continued existence of the interdict.

[12] The first respondent now seeks, by way of a counter-application an order that *“The interim Restraint Order granted by the above honourable court on the 11<sup>th</sup> of December 2009 under case number 3197/09 remain effective pending the determination of the appeal against the entire judgment and costs order in that matter handed down by her Ladyship Dambuza J on the 6<sup>th</sup> of July 2010”*.

[13] The counter-application is based on the same grounds and facts as was the case in the initial application by the first respondent, which resulted in the issuing of the Provisional Restraint Order in question.

[14] It appears to be a rehashing of the initial application by the first respondent which was considered by *Dambuza J* and dismissed on the merits. In the penultimate paragraph of her judgment *Dambuza J* states that: *“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”*.

[15] In ***M V Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 SCA at 751 I-J and 752 A-B Harms JA*** commenting on two decisions

had this to say *“The essence of these judgments was that Cobertt J had failed to have regard to the common law rule as received by our courts that an appeal suspends the execution – or in the words of Rule 14 (II) the operation and execution of an order. (Cf Reid and Another v Godart and Another 1938 AD 511) Unfortunately the criticism was based upon a misunderstanding of the concept suspension of execution for instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which the execution can be levied. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same court (albeit not the same Judge) in the same proceedings after hearing the other side”.*

[16] In my view there is no order that should be ordered to remain in place, and that the counter-application should fail.

[17] I am not persuaded that there is any good reason in law why the property of the applicants should not be released.

**[18] Accordingly the following order is made that:**

**(1) The second respondent be and is hereby ordered to:**

**1.1 Return the original letters of curatorship No MC 32/09 to**

**the third respondent.**

**1.2 Uplift the attachment in the first and second applicant's property and to restore and or return the property to the applicants.**

**(2) In the event the second respondent fails to comply with paragraph 1.1 of this order within 2 days of service of this order on the second respondent, the sheriff of this court be and is hereby authorised to uplift the original letters of curatorship No MC 32/09 from the second respondent and to deliver the letters to the third respondent.**

**(3) The third respondent be and is hereby ordered, immediately upon receipt of the letters of curatorship No MC 32/09, to revoke and cancel the letters.**

**(4) The counter-application is dismissed.**

**(5) First respondent is ordered to pay the costs of this application.**

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**N G BESHE**

**JUDGE OF THE HIGH COURT**

**APPEARANCES**

For Applicant

ADV: J E Howse

Instructed by

KEERAN BHAGWAN ATTORNEYS

For Respondent

ADV: H Van der Linde

Instructed by

THE STATE ATTORNEY

Date Heard

10 December 2010

Date Reserved

10 December 2010

Date Delivered

12 May 2011