THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 95/2016

In the matter between:

MATTHEWS TUWANI MULAUDZI	**APPELLANT**

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED	**FIRST RESPONDENT**
MMI GROUP LIMITED	**SECOND RESPONDENT**
ABSA BANK LIMITED	**THIRD RESPONDENT**

and in the matter between

Case no: 210/2015

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPELLANT**
OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED	**SECOND APPELLANT**

and

MATTHEWS TUWANI MULAUDZI	**RESPONDENT**

Neutral citation: *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* (95/2016) [2017] ZASCA 88 (6 June 2017)

Bench: Ponnan, Cachalia, Theron and Mathopo JJA and Mbatha AJA

Heard: 12 May 2017

Delivered: 6 June 2017

Summary: First appeal – appeal lapsing on account of failure to timeously prosecute it – application for condonation. Second appeal – discharge of provisional restraint order – failure on the part of presiding judge to bring an open and impartial mind to bear – proceedings before the high court on the return day set aside – provisional restraint order revived. Both appeals – sequestration - substitution of insolvent by trustees on appeal – leave to intervene by insolvent.

ORDER

On appeal from: Gauteng Local Division of the High Court, Pretoria (De Vos J sitting as court of first instance) (the first appeal):

and

On appeal from: Western Cape Division of the High Court, Cape Town (Hlophe JP sitting as court of first instance) (the second appeal):

(1) In the first appeal under SCA case number 095/16:

(a) The application for the substitution of the trustees is granted. Mr Mulaudzi is to pay the costs of that application.

(b) The application by Mr Mulaudzi for leave to intervene is granted.

(c) The application by Mr Mulaudzi for the joinder of Nedbank Limited is dismissed. Mr Mulaudzi is to pay the costs of that application.

(d) The application for condonation and for the reinstatement of the appeal is dismissed with costs, such costs, which are to include the costs of the appeal (inclusive of the costs occasioned by the application by Mr Mulaudzi for leave to

intervene) and the wasted costs of the hearing before this court on 4 May 2016, shall be paid by Mr Mulaudzi (in his personal capacity) and his insolvent estate jointly and severally, the one paying the other to be absolved.

(2) In the second appeal under SCA case number 210/15:

(a) The application for the substitution of the trustees is granted.

(b) The application by Mr Mulaudzi for leave to intervene is granted.

(c) The application by Mr Mulaudzi for the joinder of Nedbank Limited is dismissed.

(d) The appeal succeeds with costs, including the costs of the application for leave to intervene by Mr Mulaudzi and the wasted costs of the hearing before this court on 4 May 2016.

(e) The order of the court below is set aside and substituted with:

'The rule nisi issued on 28 August 2014 is hereby extended until discharged or confirmed.'

(f) The costs of (a), (b), (c) and (d) above shall be paid by Mr and Ms Mulaudzi, their insolvent estate and the three close corporations namely, Mulaudzi and Associates CC, Luvhomba Legal Edge CC and Luvhomba Financial Services CC, jointly and severally, the one paying the other to be absolved.

(3) In both appeals, the orders above relating to costs are to include the costs of two counsel.

JUDGMENT

Ponnan JA (Cachalia, Theron and Mathopo JJA and Mbatha AJA concurring):

[1] On 26 May 2009 Mr Matthews Mulaudzi invested R 33.5 million in a Fairbairn Capital Investment Frontiers Policy with number 15715207 (the policy). The policy, which was underwritten by Old Mutual Life Assurance Company (South Africa) Limited (Old Mutual), was a five-year fixed bond policy with a maturity date of 2 June 2014. On

24 March 2011 Mr Mr Mulaudzi concluded a written deed of cession with Nedbank Financial Planning, a division of Nedbank Limited (Nedbank), in terms of which he ceded 'all rights, title and interest in and to all and any claims which exist in his favour now owing to him in the Insurance Policy.' On 13 April 2011 Nedbank notified Old Mutual of the cession and requested the latter to 'send us confirmation that the policy has now been endorsed with this cession in favour of [Nedbank]'. Due to an error on the part of an employee, Old Mutual did not substitute Nedbank as the owner of the policy in the place of Mr Mulaudzi on its computer system. In the result Mr Mulaudzi continued to be reflected as the owner of the policy and to receive automatically generated quarterly statements and notifications in respect of the policy from Old Mutual.

[2] On 9 August 2012 Mr Mulaudzi informed Nedbank in writing that he wanted to cancel the cession and to have his investment documents returned. Nedbank declined to cancel the cession. On 2 June 2014 Mr Mulaudzi submitted a disinvestment application form to Old Mutual in respect of the policy in terms of which he sought payment of the full disinvestment value of the policy. On 6 June 2014 Old Mutual paid the full maturity value of the policy, namely R 48 163 098.55, into an Absa Bank Limited (Absa) account nominated by Mr Mulaudzi. Old Mutual did so in the mistaken belief that Mr Mulaudzi was still the owner of the policy. On 28 July 2014 Nedbank sought payment of the proceeds of the policy from Old Mutual on the basis of the cession concluded on 24 March 2011 between it and Mr. Mulaudzi. Old Mutual then realised that it had effected payment to Mr Mulaudzi in error. On 8 August 2014, Old Mutual paid Nedbank the full maturity value of the policy as it was obliged to in terms of the cession. Old Mutual thereafter sought repayment from Mr Mulaudzi, who refused.

[3] On 15 August 2014 Old Mutual reported the matter to the South African Police Services (SAPS) pursuant to the provisions of s 34(1)*(b)* of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (POCA). On 28 August 2014 the National Director of Public Prosecutions (the NDPP) applied *ex parte* to the Western Cape Division of the High Court, Cape Town for a provisional restraint order in terms of s 26 of POCA. The application cited Mr Mulaudzi, his wife, Ms Violet Mabontsi Mulaudzi

(Ms Mulaudzi), as the second respondent, and three close corporations of which he is a member, namely, Mulaudzi and Associates CC, Luvhomba Legal Edge CC and Luvhomba Financial Services CC (the three CCs), as the third, fourth and fifth respondents, respectively. The application succeeded before Weinkove AJ, who issued a rule nisi returnable on 27 November 2014. The provisional order is a lengthy one. Its detailed provisions are not material for present purposes. It is sufficient to state that the order placed under restraint, and appointed a curator bonis to take charge of, property, save for such property as the curator may certify to be in excess of R 48 163 098-55. The assets subject to restraint included those then known to the NDPP. They included four investments made by Mr Mulaudzi using the proceeds of the policy, being two Old Mutual investment policies of R 1 million each, an investment with Momentum Group Limited of R 6 372 474 and a R 10 million investment with Absa (the four investments).

[4] On 17 September 2014 Mr Mulaudzi and the other respondents anticipated the return day on 24 hours' notice to the NDPP in terms of s 26(3)*(c)* of POCA. They sought the discharge of the rule nisi, alternatively, a variation of the provisional restraint order to *inter alia* exclude from its ambit the four investments. The application came before Hlophe JP on 18 September 2014, who discharged the provisional restraint order. The learned Judge President also dismissed an application by Old Mutual to intervene in the application. On 21 October 2014 and, pursuant to requests therefor by both the NDPP and Old Mutual, Hlophe JP furnished reasons for his orders.

[5] On 11 November 2014 both the NDPP and Old Mutual applied for leave to appeal the judgment. One of the grounds raised was that they reasonably apprehended that Hlophe JP was biased. As a result Hlophe JP allocated the applications for leave to appeal to Dolamo J, who, after hearing argument, delivered a written judgment on 16 March 2015 granting leave to both the NDPP, as the first appellant, and Old Mutual, as the second appellant, to appeal to this court. Mr Mulaudzi was cited as the first respondent, Ms Malaudzi, as the second, and the three CCs, as the third to fifth respondents.

[6] In the meanwhile, on 3 October 2014, Old Mutual launched an urgent application out of the North Gauteng Division of the High Court, Pretoria against Mr Mulaudzi (as the first respondent), the MMI Group Limited (formerly Momentum) (MMI) and Absa, as the second and third respondents respectively. Relief was sought in two parts. Under Part A, it sought an order 'prohibiting the First Respondent [Mr Mulaudzi] from dealing in any manner with the [four investments] or any part thereof remaining to his credit, pending the determination of the relief sought in Part B'. In terms of Part B, it sought payment from Mr Mulaudzi in the sum of R48 163 098.55, together with interest and costs on the attorney and client scale. No substantive relief was sought against MMI and ABSA. Both were 'cited merely for the purposes of ensuring compliance with the terms of any interim order that may be granted in [the] proceedings.'

[7] Mr Mulaudzi filed his answering affidavit to that application on 22 October 2014 and Old Mutual filed its replying affidavit on 30 October 2014. The parties agreed to deal with both Parts A and B when the matter came before De Vos J on 4 November 2014. He delivered his judgment on 17 November 2014 ordering Mr Mulaudzi 'to make payment . . . in the amount of R48 163 098.55, together with interest thereon calculated at the prescribed rate as from the date of service of the Notice of Motion' and costs (including those consequent upon the employment of two counsel) as prayed on the punitive scale. Pending payment, the learned judge directed that the four investments be held in trust.

[8] Mr Mulaudzi sought and obtained leave from De Vos J to appeal to this court. Old Mutual, who was cited as the first respondent, opposed the appeal. The MMI Group and Absa, who were cited as the second and third respondents took no part in the appeal. Mr Mulaudzi delivered his notice of appeal on 3 March 2015. His appeal lapsed on 4 June 2015 on account of his failure to timeously file the record of appeal with the registrar of this Court. Some eight months later, on 9 February 2016, Mr Mulaudzi delivered the record together with an application for condonation and reinstatement of the lapsed appeal.

[9] With the leave of the President of this Court, Mr Mulaudzi's appeal against the judgment of De Vos J, under SCA case number 095/16 (the first appeal), was set down for hearing together with the appeal by the NDPP and Old Mutual against the judgment of Hlophe JP, under SCA case number 210/15 (the second appeal). On 4 May 2016, when both matters were called in this court, we were informed by counsel, who then represented Mr Mulaudzi that he was ill and in support thereof a medical certificate was handed up from the bar. In any event, according to counsel for the NDPP, an internet search by him the previous afternoon revealed that Mr Mulaudzi's estate had been provisionally sequestrated. In the result both matters had to be adjourned sine die.

[10] It subsequently emerged that the joint estate of the Mulaudzis was provisionally sequestrated on 2 December 2015 and finally sequestrated on 27 May 2016. After an application for leave to appeal that order was dismissed by the high court, a petition to this court met the same fate on 9 November 2016. An application to the Constitutional Court was also dismissed on 30 January 2017. On 3 March 2017 a further application to the President of this court for a reconsideration of the dismissal of Mr Mulaudzi's petition also failed.

[11] On 2 December 2016 both the NDPP and Old Mutual duly gave notice to the Master of the High Court (the Master) in terms of s 75(1) of the Insolvency Act 24 of 1936 (the Insolvency Act) of their intention to proceed with the second appeal. On 20 February 2017, the Master appointed Christopher Peter van Zyl, Selby Musawenkosi Ntsibande and Oscar Jabulani Sithole as the co-trustees of the joint estate of the Mulaudzis.

[12] On 24 February 2017 Old Mutual applied to join of the trustees as the sixth, seventh and eight respondents respectively (the Old Mutual joinder application). In support of the Old Mutual joinder application it was stated:

'37. As the joint trustees to the insolvent estate . . . have now been appointed, they are necessary parties in these proceedings in their capacities as such joint trustees.

38. In appeal proceedings other than appeal proceedings concerning a restraint order or preservation of property order made in terms of the POCA, an application for the substitution of the insolvent parties with the trustee(s) of their joint estate, as the respondents in the appeal, would follow. However, in *National Director of Public Prosecutions v Ishwarlall Ramlutchman* [2016] ZASCA 202 at paragraphs 16 to 18 this Court held that an insolvent retained the right to participate in confiscation proceedings under s 18 of POCA in his personal capacity, notwithstanding the fact that his insolvent estate vests in the Master or the trustee(s) of the estate. There is no reason to think a different principle applies to restraint proceedings under s 26 of POCA, which are a precursor to confiscation proceedings.'

[13] Mr Mulaudzi opposed the Old Mutual joinder application. He contended that Mr Sithole 'and his joint trustee were illegally, irregularly and fraudulently appointed due to what I term "inside job" at the Master's Office.' He stated that he had laid a complaint with the Master and opened a case of extortion, bribery, fraud and corruption against Mr Sithole. On 3 March 2017 the Mulaudzis instituted review proceedings against the Master and the trustees. The review application sought to set aside the appointment of the trustees, the first meeting of creditors and the decisions taken at that meeting. On 18 April 2017, and in circumstances that remain unexplained, the Malaudzis obtained an order out of the Gauteng Division of the High Court (per Mothle J) on an urgent basis, interdicting, inter alia, the Master and the trustees 'or any other person acting on their behalf from proceeding with the creditors' meeting of the 11 April 2017 or any other special or general meeting or any other processes. . .'.

[14] On 24 April 2017, the trustees launched an urgent application for the reconsideration and variation of that order. Despite opposition from the Mulaudzis, the application succeeded before Vally J on 5 May 2017. He set aside the order issued by Mothle J, struck the Mulaudzis' interdict application from the court roll due to lack of urgency and ordered the costs to be borne by their insolvent estate. Thereupon, the second meeting of creditors proceeded on 9 May 2017. Mr Mulaudzi was in attendance. The creditors adopted resolutions, inter alia: (a) authorising the trustees to engage the services of attorney and counsel for the purposes of taking any legal action that may be

considered necessary in the interest of the estate; and (b) ratifying and confirming any actions previously taken by the trustees.

[15] In a related development, on 10 May 2017, the trustees gave notice of their intention to be substituted for: (a) the Mulaudzis, as respondents in the second appeal; and (b) Mr Mulaudzi, as the applicants in the application for condonation and reinstatement of the lapsed first appeal.

[16] In terms of s 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee.[1] One of the consequences of this is that '. . . the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent'.[2] For this reason alone, the trustees are therefore necessary parties in both matters. And, as the trustees correctly point out, their appointment remains valid until set aside by the Master or the Court hearing the review application. Until then, the trustees must continue to perform their duties in terms of the Insolvency Act. It follows that the review application has no bearing on these matters. The trustees remain trustees until such time as a court removes them from office. In such event, the Master retains control of the estate and may appoint new trustees.

[17] The real issue therefore was whether the Mulaudzis should also be entitled to participate in the proceedings in this court (which they would be if the trustees were to have been joined) or whether they must seek and obtain this court's leave to participate (something they would have to do if the proper course is for the trustees to be substituted for them). In *Aboo v Firstrand Bank Ltd*,[3] Streicher JA observed: '. . . after the sequestration of the appellant, the right that he acquired to appeal against the judgment of De Jager AJ no longer vested in him but vested first in the Master and upon

[1] *Aboo v Firstrand Bank Ltd* (319/2004) [2005] ZASCA 25 (29 March 2005) para 12.
[2] *Mears v Rissik, MacKenzie NO and Mears' Trustee* 1905 TS 303 at 305.
[3] *Aboo v Firstrand Bank Ltd* para 12.

the appointment of a trustee in his estate. The appellant therefore had no right to proceed with the appeal to the court a quo and with a further appeal to this court.'

[18] The Mulaudzis have a reversionary interest in the insolvent estate. As Innes CJ pointed out in *Mears*:[4]

'Now, no doubt the general rule is that an unrehabilitated insolvent cannot, over the head of his trustee, bring actions connected with his estate . . . The reason of the rule is that his estate has been taken out of him and vested in his trustee; and that therefore the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent. But from the fact that the insolvent is under this disability, it does not follow that he has no rights whatever regarding the estate. In my opinion he has a very real reversionary interest in it. The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that that is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interests of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate.

As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether bona fide or mala fide does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not to be; the law should provide some remedy.'[5]

[19] And, as Jansen JA pointed out in *Sassoon Confirming and Acceptance CO (Pty) Ltd v Barclays National Bank Ltd*:[6]

'. . . Any residual right the insolvent may have to the estate, must necessarily be subject to the due exercise of the trustee's powers during his regime. Should there in fact be a residue,

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[4] *Mears* supra at 305.
[5] See also *Nieuwoudt v The Master & others NNO* 1988 (4) SA 513 (A) at 524G-526E and 530B-D.
[6] *Sassoon Confirming and Acceptance CO (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 647H-648.

the insolvent will, in effect, be a successor to the trustee – and, therefore, subject to judgments given against the trustee as representing the estate, which judgments will then be *res judicata* against the insolvent.'

Thus: (a) upon the sequestration, the trustees had to take the place of the Mulaudzis in the litigation; and (b) the Mulaudzis could take steps only if the trustees decided not to take steps in the litigation. It follows, that the proper course was for the trustees to be substituted for: the Mulaudzis in the second appeal; and Mr Mulaudzi in the application for condonation and the reinstatement of the first appeal.

[20] Save for a narrow point (to which I shall latterly turn) sought to be advanced in the second appeal, the trustees formally stated that they would abide the decision of this court in both matters. In the result, the Mulaudzis were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The Mulaudzis were thus entitled to intervene in both matters.[7]

[21] One further interlocutory application remains: On 2 May 2017 Mr Mulaudzi filed an urgent application with the registrar of this court giving notice that he would be seeking an order that Nedbank be joined as a party to both matters. Mr Mulaudzi persisted in that application from the Bar. In support of the application Mr Mulaudzi stated:

'32. In brief, I had a banking relationship with Nedbank since time immemorial. I also had various investments with Nedbank, one for R25 000 000.00 and the other for R35 000 000.00. Nedbank also financed my properties and various other movable and immovable assets. When the bank-client relationship got sour, Nedbank recalled all the overdraft facilities. They then refused to release all other monies, as annexure MTM3 will show, held in the investments accounts until the dispute, in their words, is resolved in a court of law.

33. Nedbank then issued summonses against me and the rest of the legal entities under my control. I defended these vexatious actions. I lodged a counter-claim in the amount of R25 000 000.00. These matters are still pending before the North Gauteng High Court . . . .

[7] To the extent that the contrary view was expressed in *National Director of Public Prosecutions v Ishwarlall Ramlutchman* [206] ZASCA 20; 2017 (1) SACR 343 (SCA) paras 16-18, it is clearly wrong and should not be followed.

34. As the above honourable court will observe, these are purely civil disputes between the bank its client. To be accused of theft and stealing my own monies, boggles my mind, moreso when Nedbank refused to release my monies upon closure of my accounts.'

[22] Assuming in Mr Mulaudzi's favour (without deciding) that the application is properly before this court, the question that it raises is whether Nedbank is a necessary party in either or both matters? The relief sought by the NDPP and Old Mutual in the second appeal is the reinstatement of the order made under s 26 of POCA, restraining the Mulaudzis and the three CCs from dealing with certain property. On the other hand, the relief sought by Mr Mulaudzi in the first appeal is the reinstatement of his lapsed appeal and, if reinstatement is granted, the upholding of his appeal and the setting aside of the orders made by De Vos J.

[23] Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.[8] Nedbank does not have any such interest in either matter. When Nedbank claimed repayment of the proceeds of the policy from Old Mutual, which the latter had previously paid to Mr Mulaudzi, Old Mutual paid Nedbank in full. Nedbank therefore has no interest in the outcome of either matter before us. Such other asserted legal disputes as may exist between Mr Mulaudzi (as a client) and Nedbank (as his banker) bear no connection to the matters before us. It is thus plain that Mr Mulaudzi's application for the joinder of Nedbank as a party to both matters before this court had to fail.

[24] I now turn to consider whether Mr Mulaudzi's appeal against the judgment of De Vos J (the first appeal), which lapsed on 3 June 2015, should be condoned and revived. The appeal lapsed on account of Mr Mulaudzi's failure to lodge the appeal record with the registrar of this court within three months of his notice of appeal, as required by rule

[8] See *Judicial Service Commission & another v Cape Bar Council & another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) para 12, where Brand JA stated: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned . . . .'

8(1) of this court. The record was eventually lodged more than eight months later, on 9 February 2016.

[25] In *Uitenhage Transitional Local Council v South African Revenue Service*[9] it was pointed out:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[26] What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay.[10] A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility.[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.[12]

[27] I shall assume in Mr Mulaudzi's favour that the matter is of substantial importance to him. I, however, cannot be as charitable to him in respect of the remaining factors. The explanation proffered by Mr Mulaudzi for his delay of almost

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[9] *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA) para 6.
[10] *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.
[11] *Uitenhage Transitional Local Council* para 6.
[12] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

eight months to file the appeal record was an alleged lack of funds. In that regard he stated:

'15. Because the order by His Lordship Mr Justice de Vos differed with that of Hlophe JP, De Vos J had no alternative but to grant me leave to appeal his decision to the above court. This judgment is before this honourable court.

16. In the meantime, the NPA successfully appealed against the decision of Hlophe JP to the above honourable court.

17. The result of all these cases is that they are both pending before the above honourable court and the parties agreed that the matters be heard on the same day, in the interest of justice.

18. In the meantime, my family life has literally come to a standstill. My businesses have also come to a halt. I am being sued by all and sundry for lack of payments of rental and for goods and services that my companies have obtained and received.

19. These financial constraints has led to the delay in paying my attorneys and counsel, as I did not have money to put my attorney in funds to cover their and counsel's fees.

20. It has also transpired that, when I spoke a[t] Colleen Gardner, a director at Appeal Document Services, that they also were struggling to get the clear and legible records and thus the records would not have been made available within the prescribed three months period in any event.

21. In the process, my appeal lapsed on 03 June 2015 as the records could not be filed on time.

22. I can confirm I was only able to pay for the records, albeit not in full and the records were only delivered to me on Friday, the 05th February 2016.

23. At all material times, respondents' attorneys were kept abreast of all these developments and progress relating to the appeal records.'

[28] In answer to those allegations, Old Mutual's attorney stated:

'6. On 4 June 2015 the Registrar of this court consequently advised the parties that the appeal had lapsed.

7. Old Mutual thereupon took steps to execute the judgment . . . . In this regard, on 18 June 2015 the Sheriff served a Writ of Execution . . . on Mr Mulaudzi. The Sheriff thereafter issued a *Nulla Bona* return . . . .

8. On 30 June 2015 Mr Mulaudzi served on my correspondent in Pretoria a notice of motion and supporting affidavit, by means of which he sought condonation for the late filing of the appeal record and re-instatement of the lapsed appeal. . . .

9. On 29 July 2015 Old Mutual attempted to file in this court its opposing papers in the application . . . It was however advised by the Registrar that no such application had been lodged . . . The Registrar therefore refused to accept Old Mutual's answering papers.

10. I consequently instructed the Sheriff, Goodwood, to proceed with the attachment of two Old Mutual policies held by Mr Mulaudzi. On 16 September 2015 the Sheriff duly served a warrant of execution against property on Old Mutual attaching the two policies.

11. On 7 October 2015 Mr Mulaudzi again re-served the application reinstatement of the lapsed appeal on my Pretoria correspondent, yet once again the application was not lodged with the Registrar of this court in accordance with Rule 12(1).

12. On 22 October 2015 Mr Mulaudzi addressed an e-mail to me in which he advised that the appeal record along with the application for condonation and reinstatement are "almost ready to be lodged with the Registrar of the SCA".

. . .

15. On 10 November 2015, in an email addressed to me, Mr Mulaudzi said that he had been in contact with the Registrar of this court and would be "filing our heads (in both cases – 139/2015 and 210/2015) along with the records of Appeal, our condonation and reinstatement as agreed with the Registrar as both matters will be heard on the same day. We await finalisation of the appeal record herein."

16. On the same day Mr Mulaudzi sent an email to the Sheriff of Goodwood, stating that as "there is an appeal pending" in both this court and the Constitutional Court the Sheriff ought not to proceed with the execution of the order of the court a quo, as instructed by me.

17. Despite Mr Mulaudzi's assurances that the filing of the application papers and the appeal record was imminent, I heard nothing further from him for several months. On 29 January 2016 the Sheriff, Goodwood forwarded to me an email he had received from Mr Mulaudzi relating to the appeal record, in which once again Mr Mulaudzi said "the appeal records have just been finalised and are ready to be lodged with the Registrar".

18. Late on 29 January 2016 Mr Mulaudzi sent me an email . . . saying he had been advised by Appeal Document Services CC that 'the long-outstanding appeal records have now been finalised, are now ready and we shall be filing them on Monday 01st February 2016, along with the Condonation and re-instatement applications, which were served on your correspondent in Pretoria'.

19. Neither the appeal record nor the condonation application was filed on 1 February 2016.

20. On 2 February 2016 Mr Mulaudzi addressed an e-mail to the Registrar of this court, which was also copied to me, informing the Registrar that he had been advised by Appeal Document Services CC of a delay in finalising the appeal record and saying that it would be lodged by close of business the following day . . . As things turned out the record was only served on my correspondent in Bloemfontein [on] 9 February 2016 . . . .

21. On 10 February 2016 Mr Mulaudzi sent me an email . . . stating that his appeal record and condonation application had been accepted by the Registrar of this court and that he ha[d] until 22 March 2016 to file his heads of argument. He also said that he had written to the president of this court requesting that his intended appeal against the judgment and orders of the North Gauteng Division of the High Court be heard together with the pending appeals by the National Director of Public Prosecutions and Old Mutual against the judgment and orders of the Western Cape Division of the High Court in case number 15403/14, something to which Old Mutual is opposed because it will result in a delay in the hearing of the latter appeals.

22. I point out that none of the facts concerning the events described above were placed before this court by Mr Mulaudzi in his affidavit filed in support of his condonation application.

. . . .

48.1. In the restraint proceedings referred to above, Mr Mulaudzi placed before court a personal balance sheet dated 31 July 2014 . . . in which he claimed to own assets worth R105 255 878.74. He has not explained the dramatic deterioration in his financial position, save to place the blame for all his financial woes on the provisional restraint order granted by Weinkove AJ on 28 August 2014.

48.2. Yet the provisional restraint order granted on 28 August 2014 was discharged and all his property restored by the order Hlophe JP made on 18 September 2014, less than a month later.

48.3. Moreover, when the restraint order was discharged on 18 September 2014, the *curator bonis* appointed to administer his estate while it was subject to the restraint order paid over to him R9 759 781.57. This was the early realisation value of a long-term investment Mr Mulaudzi took out with Absa Wealth Ltd using R10 million of the R48 163 098.55 he criminally obtained from Old Mutual.

48.4. What is more, Mr Mulaudzi received R17 612 128 from MMI on 24 July 2014 in the form of a loan secured against a R25 million investment he acquired on 18 June 2014, also using the proceeds of the R48 163 098.55 received from Old Mutual on 6 June 2014.

48.5 Apart from the remainder of the R25 million MMI investment, which is valued at approximately R6 million, and the R2 million Mr Mulaudzi re-invested with Old Mutual, the

whereabouts of balance of the proceeds of the R48 163 098.55 he received from Old Mutual on 6 June 2014 remains entirely unexplained.

49. In this context, Mr Mulaudzi's vague and unsubstantiated protestations of a lack of funds ring hollow and fall to be rejected.'

[29] Mr Mulaudzi's response (in his replying affidavit) was:

'18. As indicated above, after the rule nisi was discharged in the Western Cape, I received an amount of R9 million from the curator. All this amount went into paying for stock that had been ordered from and in China, which stock was at the Durban harbour for more than 3 weeks after all my bank accounts were frozen following the restraint order. This stock accumulated a lot of storage costs to a point it became uneconomical to pay for the demurrage costs.

19. Whilst the remainder of the stock arrived at the Durban harbour, the entire consignment was auctioned by the South African Revenue Services as I failed to clear and pay for customs and related charges.

20. I may hasten to add that the amount of R17 million which I had taken as loan from Momentum has also gone into store rollout. At the time the restraint order was granted, I had signed no less than 26 leases for the rollout of the corporate stores and these funds went into shop fitting, equipment costs, branding and marketing costs. As I depose to this affidavit, these stores have since closed down following the order of 4 November 2014.'

[30] It will be immediately apparent that there are huge gaps in Mr Mulaudzi's version. He furnishes no explanation regarding the steps he took from the time the appeal lapsed on 3 June 2015 until he received the record on 5 February 2016. His founding affidavit is silent as to the source of his funding to pay for the record or why he was not able to access those funds eight months earlier. What is more, he responds in the vaguest of terms, without any documentary proof, to the facts put forward by Old Mutual in its opposing affidavit.

[31] Given the nature of the transactions, it was imperative for documents to have been annexed to his affidavit evidencing proof of the: (i) purchase of stock from China – such as invoices, consignment notes and forex transfers; (ii) customs and related charges – such as consignment and clearing notes, assessments by the South African

Revenue Services and correspondence from his clearing agent; and (iii) contemplated rollout of 20 plus stores – such as lease agreements and agreements for shop fitting and marketing. Surely, it ought to have been a relatively simple exercise for Mr Mulaudzi to have adduced proof of those claimed disbursements. It is thus difficult to accept his mere assertion that he had spent some R26 million on legitimate business transactions.

[32] Although Mr Mulaudzi studiously refrains from furnishing the relevant dates, as best as one can discern, it appears that he frittered away a substantial sum between 18 September 2014 (when the rule nisi was discharged by Hlophe JP) and 17 November 2014 (when judgment was entered against him by De Vos J). Accordingly, the questions that remain are: What was the nature, name of supplier, cost and date of purchase of the stock from China? What was the quantum of the storage, demurrage and customs related charges; when was it incurred and when did it fall due for payment? What stores were being rolled out and why? What shop fitting, equipment, branding and marketing was undertaken? What were the associated costs in relation to each? To whom and when were such costs payable?

[33] Mr Mulaudzi's application demonstrates an obvious lack of attention to matters that plainly called for an explanation and evidences a failure to fully and candidly enlighten the court, as an applicant in a matter such as this was obliged to do.[13] I thus find it impossible to hold that the delay in bringing this application has been explained in a manner that is remotely satisfactory.

[34] In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*,[14] it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success. This was not done in the present

[13] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* supra para 16.
[14] *Rennie v Kamby Farms (Pty) Ltd* [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131E.

case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success.[15] It has been pointed out[16] that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.

[35] In my view, the circumstances of the present case are such that we may well have been entitled to refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal.[17] Here, the delay is so unreasonable and the explanation offered so unacceptable and wanting that we may well have been justified in adopting that course. However, and not without some hesitation, I shall nonetheless briefly touch on Mr Mulaudzi's prospects of success.

[36] In finding for Old Mutual, De Vos J held:

'35. . . . On the only available evidence before Court, the First Respondent was not entitled to the proceeds of the policy and any appropriation thereof constituted a fraud. On the evidence there can be no doubt that he was fully aware of the fact that he had effected such outright cession to Nedbank and that he was not entitled to the proceeds himself. He acted solely on the wrong information supplied to him by the Applicant. Being aware of the incorrectness of the facts contained in the quarterly statements pertaining to the absence of a cession supplied by Old Mutual, he was fully aware of the fact that he had effected such outright cession to Nedbank and that he was not entitled to the proceeds himself . . . When he became aware of Old Mutual's mistake he tried to obtain a re-cession of the policy to himself which was not accepted by Nedbank. The amount involved was a large amount. There could not have

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[15] *Moraliswani v Mamili* [1989] ZASCA 54; 1989 (4) SA 1 (A) at 10E.
[16] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C.
[17] See inter alia *Blumenthal v Thomson NO & another* [1993] ZASCA 190; 1994 (2) SA 118 (A) at 121I; *Ferreira v Ntshingila* [1989] ZASCA 149; 1990 (4) SA 271 (A) at 281J-282A; *Moraliswani v Mamili* supra at 10F; *Rennie v Kamby Farms (Pty) Ltd* [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131H-132A; *P E Bosman Transport Works Committee & others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A.

been an innocent mistake on the part of the First Respondent. He applied for the money to be released on him on the 2nd June 2014. When he completed the form he must have known that he is not entitled to the proceeds of the policy. After receiving the said money he immediately started appropriating this money as if he was the legal owner thereof. The SCA in the case of *Nissan South Africa (Pty) Ltd v Marnitz* 2005 (1) SA 441 (SCA) in paragraph 25 rightly held that the appropriation of an amount to which a person was not entitled by using it for his own purposes well knowing that it was not due to him, constituted theft. In the present case the First Respondent fraudulently failed to disclose to Old Mutual that he had effected such outright cession and fraudulently represented to the Applicant in the application form that he was the owner of, and entitled to, the proceeds of the policy. This clearly constituted fraud on his part. The only inference that can be drawn is that the First Respondent wilfully, with the necessary intent, misrepresented to Old Mutual that he was entitled to the proceeds of the Policy when he knew that he has ceded his right to title and interest in and to the policy to NFP and that such cession was still binding on the parties thereto.'

[37] I can find no fault with the reasoning of De Vos J. The evidence shows that Mr Mulaudzi well knew that he had ceded his right, title and interest in and to the policy to Nedbank and that the cession remained binding on him. Thus, when he submitted the disinvestment application form to Old Mutual he dishonestly held out that he was the owner of, and entitled to, the proceeds of the policy. In doing so, he acted with the intention of inducing Old Mutual to pay to him the R48 163 098.55, which it did. The thrust of Mr Mulaudzi's argument on appeal was that having failed before Hlophe JP, it was impermissible for Old Mutual to have instituted further proceedings against him in the Gauteng High Court. Instead, so the argument went, the only avenue available to Old Mutual, was to seek to appeal (as it did) the judgment of Hlophe JP. Accordingly, so contended Mr Mulaudzi: first, the judgment of Hlophe JP meant that the *lis* between Old Mutual and him was *res judicata*; and, second, in rejecting the findings of and failing to follow the judgment of Hlophe JP, De Vos J improperly sat as a court of appeal. Mr Mulaudzi raised both of these contentions before De Vos J, who rejected them.

[38] The requirements for the defence of *res judicata* are that there must be: (i) concluded litigation; (ii) between the same parties; (iii) in relation to the same thing; and

(iv) based on the same cause of action. In the present matter none of these requirements was met. As to (i): the POCA restraint proceedings are still not concluded due to the appeals by the NDPP and Old Mutual. As to (ii): the parties to the POCA restraint proceedings were the NDPP as applicant, the Mulaudzis and the three CCs as respondents. Old Mutual applied for leave to intervene in that matter, but its application was refused. The parties to the present matter in the court a quo were Old Mutual, as applicant and Mr Mulaudzi, the MMI Group Ltd and Absa, as respondents. As to (iii): the relief sought in the restraint proceedings was an order in terms of s 26 of POCA preventing Mr Mulaudzi and the other respondents from dealing with their property, pending the conclusion of criminal proceedings to be instituted against Mr Mulaudzi and, in the event of his conviction, the making in those criminal proceedings of a confiscation order in terms of s 18 of POCA. The relief sought in the present matter was an interim interdict *pendente lite* relating to specific investments and thereafter a final order directing Mr Mulaudzi to pay Old Mutual R48 163 098.55. As to (iv): the NDPP's cause of action in the POCA restraint proceedings was based on the requirements for a restraint order set out in s 25(1)*(b)* of POCA, which provides that such an order may be made if the court is satisfied that a person [i.e. Mr Mulaudzi] is to be charged with an offence and it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person. In terms of s 18(1)*(a)* of POCA, whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from the offence and, if the court finds that the defendant has so benefited, it may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate. The question for decision in the POCA restraint proceedings was therefore whether there was evidence that might reasonably support a conviction and a consequent confiscation order (even if all the evidence had not been placed before it [the court] and whether that evidence might reasonably be believed).[18]

[18] *National Director of Public Prosecutions v Rautenbach and another* [2004] ZASCA 102; 2005 (4) SA 603 (SCA) paras 25 and 27.

[39] There is, moreover, a fundamental legal difficulty with Mr Mulaudzi's reliance on *res judicata* in the present matter. It is that, as this court held in *National Director of Public Prosecutions v Rebuzzi*[19] and the Constitutional Court held in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*,[20] s 30(5) and 31(1) of POCA recognise that a POCA confiscation order (to which a POCA restraint order is directed) may co-exist with a claim by the victim against the defendant or a judgment in the victim's favour against the defendant. Where, following the making of a confiscation order, the defendant's property has not yet been realised to satisfy the order, s 30(5) expressly authorises the High Court to suspend the realisation until the victim's claim or judgment has been met; and where the property has been realised, s 31(1) enables the High Court to direct that the victim's claim be paid before any remaining proceeds of the realisation are used to satisfy the confiscation order.

[40] Insofar as the contention that De Vos J was bound by the reasoning and conclusions of Hlophe JP is concerned, De Vos J held, quite correctly that they constitute the opinion of another court which is neither relevant nor admissible in the proceedings before him. The rule to this effect enunciated in *Hollington v Hewthorn & Co Ltd*[21] has been adopted by this court in *Hassim (also known as Essack) v Incorporated Law of Society of Natal*[22] and the Constitutional Court in *Prophet v National Director of Public Prosecutions.*[23] In any event, as appears from the following

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[19] *National Director of Public Prosecutions v Rebuzzi* [2001] ZASCA 127: It was there held: 'In my view, ss 30(5) and 31(1) make it clear that the Legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss. Not only do those sections recognise that a confiscation order might co-exist with a claim by the victim (which would hardly have been provided for if the legislature intended that to be avoided) but they provide the means to avoid the claims competing for the defendant's property. Where the defendant's property has not yet been realised s 30(5) expressly authorises the High Court to suspend the realisation until the victim's claim or judgment has been met, and where the property has been realised s 31(1) enables the High Court to direct the manner in which the proceeds are to be distributed. There is no reason to think that a court that is called upon to give such directions will not recognise the claim of a victim and order that it be paid before any moneys accrue to the State bearing in mind that s 31(1) expressly provides that it does not have a preferential claim. Thus the making of a confiscation order need not deprive the victim of the means of recovering his loss, nor is there reason to think that it will ordinarily do so.'

[20] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) [*2006] ZACC 24; 2007 (3) SA 484 (CC) para 58.4.

[21] *Hollington v Hewthorn & Co Ltd* [1943] KB 587 (CA) ([1943] 2 All ER 35 (CA).

[22] *Hassim (also known as Essack) v Incorporated Law of Society of Natal* 1977 (2) SA 757 (A) 764E-765G.

[23] *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC) para 42.

passage of the judgment of De Vos J, the learned judge did have regard to the judgment of Hlophe JP but considered it to be unpersuasive:

'Even if it was permissible to have regard to such court's reasoning, it would at most have persuasive value but only to the extent that it was correct on the evidence and in law, as appears from the reasoning. The only part of the judgment of Hlophe JP that is conceivably of relevance is paragraph 10 thereof . . . It is to be noted, that this paragraph, with respect, reflects conclusions without any analysis of neither the evidence, nor of the so-called 'defence' advanced by the respondent in those proceedings . . . In my view it is important to note that there is no mention in the written reasons aforesaid of the Nedbank affidavit evidence or of the actual outright cession or of the email communication and attempt by first respondent [Mulaudzi] to buy back the policy and/or obtain the release of the policy from the cession. It follows necessarily that either this evidence was not before him, or if it was, he clearly had no regard thereto. In my view, on either approach, the Hlophe JP judgment or written reasons thereto can accordingly, have no persuasive value and cannot affect the conclusion arrived at.'

[41] Thus, in addition to the unreasonable delay and woefully inadequate explanation, the contemplated appeal is devoid of merit. Moreover, to tolerate the type of conduct encountered here would be prejudicial to a party in the position of Old Mutual, the administration of justice, the integrity of any appeal process and to the functioning of our highest courts of appeal.[24] It follows that the application for condonation must fail.

[42] I turn to the second appeal: The logically anterior enquiry is the allegation that Hlophe JP did not bring an impartial and open mind to bear on the matter. It is no small matter that one of the litigants who raises that assertion is the NDPP. The NDPP is an officer of the court and thus no ordinary litigant. The NDPP assured us, and it must be accepted, that the allegation is not lightly made. In any event, 'the law will not lightly suppose the possibility of bias in a judge. But, there is also the simple fact that bias is such an insidious thing that even though a person may in good faith believe that he was

[24] *The Commissioner for the South African Revenue Service v van der Merwe* [2015] ZASCA 86; 2016 (1) SA 599 (SCA) para 18.

acting impartially, his mind may unconsciously be affected by it.'[25] It is thus our duty to examine the allegation.

[43] On 20 April 2015 and, after leave to appeal had been granted by Dolamo J against the order of Hlophe JP, Old Mutual's attorney wrote to the latter:

'In paragraph 13 of the written judgment of His Lordship Mr Justice Dolamo, a copy of which is attached for ease of reference, his Lordship said the following, amongst other things: ". . . The allegation of an apprehension of bias only arose in the application for leave to appeal. This does not afford the Judge President an opportunity to present his version, creating an unsatisfactory state of affairs. . .".

We are instructed to respectfully invite you to make a statement of the facts you consider necessary for the proper adjudication of the reasonable apprehension of bias grounds of appeal raised by the NDPP and [Old Mutual], i.e. a statement like the one by the Justices of the Constitutional Court which is quoted in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 23.'

[44] In the application for leave to appeal, it had been stated:

'25. The applicant for intervention reasonably apprehends that the Judge President failed to bring an impartial mind to bear upon the adjudication of the matter for the following reasons:

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[25] See S v *Le Grange* 2009 (2) SA 434 (SCA) para 25-26. *Le Grange* added:
'Benjamin Cardozo recognised this when he stated:
"We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."
Cardozo, while affirming the importance of judicial impartiality, recognised that true objectivity was impossible because judges, like other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991) at 12, "(t)here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:
". . . the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind".'

25.1. As they were entitled to do, on 17 September 2014 the defendant and respondents brought an application to anticipate the return day of a rule *nisi* on 24 hours' notice to the NDPP.

25.2. Although the judges assigned to hear urgent applications on 18 September 2014 were His Lordship Mr Justice Saldanha and His Lordship Mr Acting Justice Bremridge, on 17 September 2014 the Judge President decided that he himself should hear the application on 18 September 2014.

25.3. The attorney of record for the defendant and the respondents, Mr Barnabus Xulu, is the Judge President's personal attorney in matters relating to a complaint of misconduct made against him by judges of the Constitutional Court.

25.4. On the morning of 18 September 2014 the parties' legal representatives met with the Judge President in his chambers. During that meeting the Judge President was advised of the applicant for intervention's intention to bring, that morning, its application for leave to intervene in the restraint proceedings and of the NDPP's intention to file, that morning, his replying papers in response to the defendant's application to anticipate the return day of the rule *nisi*.

25.5. The NDPP's replying papers, which comprised 97 pages and contained evidence which undermined the defendant's defence that there were no reasonable grounds to believe that he might be convicted, including an affidavit from a Nedbank official (Frans Lukas Jooste) showing Nedbank had remained the cessionary of the policy, were handed to the Judge President during the meeting in chambers.

25.6. The Judge President arrived in court shortly after the conclusion of the meeting in his chambers.

25.7. When the matter was called, the papers in the application for leave to intervene were handed to the Judge President from the Bar.

25.8. The Judge President immediately heard argument on the application for intervention and, having done so, immediately dismissed the application for intervention with costs without furnishing reasons.

25.9. The Judge President then immediately heard argument on the anticipated return day of the rule *nisi* and, having done so, immediately discharged the rule *nisi* with costs without furnishing reasons.

25.10. The Judge President could have, but did not, reserve judgment on the application for leave to intervene and on the anticipated return day of the rule *nisi*, in order to read the application papers of the applicant for intervention and the replying papers of the NDPP including the affidavit from Nedbank.

25.11. The written reasons for his decision which the Judge President gave on 21 October 2014 are based on the defendant's version and do not address the evidence put up by the NDPP and the applicant for intervention, especially the refutation in the NDPP's replying papers of the defences put up by the defendant in his answering papers.
25.12. The applicant for intervention consequently reasonably apprehends that the Judge President was influenced by his relationship with Mr Xulu to hear the matter himself and to discharge the rule *nisi* forthwith.'

[45] Although Hlophe JP did file a written response, he did not take issue with the factual matrix raised by Old Mutual. Instead he asserted:

'Under the specific facts of the case, a reasonable person familiar with the legal system and the referral rules would not harbour a reasonable apprehension of bias. A judge is not compelled automatically to accept as true the allegations made by the party seeking recusal. I am also fortified in my belief that the objective circumstances do not create an appearance of partiality. I reject the notion that required recusal can be based on an unsupported, irrational, or highly tenuous speculation. I do accept that where the appearance of partiality exists, recusal is required regardless of the judge's own inner conviction that he or she can decide the case fairly despite the circumstances. It would indeed be an absurd, unjust and perverse ruling to hold that Mr Xulu may not instruct an independent advocate to appear before me simply because he happens to represent me in pending litigation in totally unrelated matters.'

[46] It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.[26] The general principles are well-established. They are now enshrined in s 165(2) of the Constitution, which provides 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. Thus, a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, either he or she is either actually biased or there exists a reasonable

[26] *Take and Save Trading CC & others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) para 5.

apprehension that he or she might be biased, acts in a manner that is inconsistent with the Constitution.[27]

[47] *S v Le Grange*[28] put the position thus:

'[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be "manifest to all those who are concerned in the trial and its outcome . . . ." The right to a fair trial is now entrenched in our Constitution . . . . The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial . . . .

. . .

[21] It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean ''a departure from the standard of even-handed justice which the law requires from those who occupy judicial office". In common usage bias describes "a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

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[27] *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 11; 1999 (4) SA 147 (CC) (SARFU II) para 30; *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC) (Basson II) para 27.

[28] S v *Le Grange & others* 2009 (2) SA 434 SCA.

[27] Notwithstanding that a judge's own insights into human nature will play a role in credibility findings or factual determinations, judges must make those determinations only after being open to, and giving proper consideration to the views of all the parties before them. “The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.” In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality.’ [Footnotes omitted.]

[48] An apprehension of bias may arise from an association or interest a judicial officer has with or in one of the litigants or in the outcome of the case. It may also arise from conduct or utterances by a judicial officer prior to or during proceedings. There is as well what has been described as ‘prejudgment’, which means that a decision may have been made or an opinion formed, most often unfavourable, about a person or issue before knowing or examining all the facts.’[29] In all these situations, the judicial officer must ordinarily recuse himself or herself.[30] The test for recusal adopted by the Constitutional Court is whether there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.[31] In *SARFU II* para 48 the Constitutional Court formulated the approach to an application for recusal as follows:

‘It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can

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[29] C Okpaluba & L Juma ‘Apprehension of Bias and the Spectacle of the Fair-Minded Observer: A Survey of Recent Commonwealth and South African Decisions on Prejudgment’ (2014) 28 *Speculum Juris* 2 at 19.
[30] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC) para 28; see also *Stainbank v South African Apartheid Museum at Freedom Park & another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC).
[31] *SARFU II* at paras 36-39.

disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.' [Footnotes omitted.]

[49] The application of these well-established principles to the present matter raises the question whether Hlophe JP should have heard a matter in which one of the parties, Mr Mulaudzi, was represented by his personal attorney. The attorney, Mr Barnabus Xulu, currently represents Hlophe JP in disciplinary proceedings pending before the Judicial Service Commission (JSC) regarding allegations that he approached two Justices of the Constitutional Court in an attempt to improperly influence that court's pending judgment in a case involving the President of the Country. The proceedings are yet to be finalised and have generated much public debate and controversy.[32]

[50] It must be accepted, I believe, that the long-standing professional relationship between the Judge President and his personal attorney, who has represented him in various judicial and quasi-judicial tribunals since approximately 2009, and who continues to do so, in grave disciplinary proceedings, gives rise to the reasonable apprehension that in the light of the particular nature of that relationship, the Judge President would not bring an impartial mind to bear on the adjudication of a matter brought before him by his attorney. It is noteworthy in this regard that s 5.2. of the 'Norms and Standards for the Performance of Judicial Functions' issued by the Chief Justice in terms of s 8 of the Superior Courts Act 10 of 2013 stipulates that the allocation of cases by the Head of Court must as far as possible be 'effected in a transparent and open manner'. In *S v Dube*[33] it was held that it was not proper for a Judge to sit in a matter in which his wife, a State Advocate, represented the State. This court there stated:

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[32] See *Nkabinde & another v Judicial Service Commission & others* [2016] ZASCA 12; 2016 (4) SA 1 (SCA).
[33] *S v Dube & others* [2009] ZASCA 28; 2009 (2) SACR 99 (SCA) para 14.

'It is not possible to define or list factors that may give rise to apprehension of bias – the question of what is proper will depend on the circumstances of each case.
In situations where the judge has a relationship with a party or a legal representative appearing before him or her, it is always appropriate for the judge to consider the degree of intimacy between himself or herself and the person concerned. The more intimate the relationship, the greater the need of recusal.'

[51] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 2)[34] concerned an application by Senator Pinochet, the former head of Chile, to set aside an order made for his arrest on various crimes against humanity (whilst head of state), on international warrants issued by Spanish judicial authorities. The question before the House of Lords was whether Senator Pinochet was entitled to immunity. The majority, Lord Nicholls and Lord Steyn (who each delivered speeches), with whom Lord Hoffman agreed, held that Senator Pinochet was not entitled to immunity. Before the hearing of the appeal, Amnesty International (AI) sought and obtained leave to intervene. It subsequently emerged that Lord Hoffmann was a Director and Chairperson of Amnesty International Charity Limited (AICL), a registered charity incorporated to undertake those aspects of the work of Amnesty International Limited (AIL), which are charitable under UK law. In considering whether Lord Hoffman should have recused himself, Lord Browne-Wilkinson stated:

'My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr Duffy.

[34] *R v Bow Street Metropolitan Stipendiary Magistrate & others, ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a director of AICL that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234).'

[52] The issue which confronts us has arisen more directly in other countries. In the United States of America, Federal Judges are bound by the Code of Conduct for United States Judges, described as 'A set of ethical principles and guidelines adopted by the Judicial Conference of the United States'.[35] The Committee on Codes of Conduct issues Advisory Opinions amplifying the Code of Conduct. Advisory Opinion 99 concerns 'Disqualification where counsel is involved in a separate class action in which the judge or a relative is a class member'. It states inter alia that:

'Under Canon 3C(1) of the Code of Conduct for United States Judges, judges should recuse, subject to remittal, in cases in which one of the parties is represented by a lawyer who is a member of a firm that currently represents the judge in an unrelated matter. . . .

The question addressed here is whether, and to what extent, that general advice should apply to cases in which the representation of the judge or the judge's relative in an unrelated matter consists of representation in a Rule 23(b) (3) class action.

The Committee is of the view that there is no absolute requirement of recusal in cases in which the judge or the judge's relatives are represented in the unrelated matter solely in their capacity as class members. In some instances, the relationship between the judge (or the judge's relatives) and the attorney for the class may be quite similar to the relationship between attorney and client in a conventional setting and, in such cases, recusal would be required. However, where the class action is a large one, in which the judge (or the judge's relatives) are not lead

[35] http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/committee-reports. This website contains the Code of Conduct and the Advisory Opinions.

plaintiffs or named plaintiffs, have had no role in selecting the attorney for the class, have not had – and do not expect to have – personal contact with the attorney, and have no reasonable expectation of a substantial personal recovery, the case for recusal is not nearly as strong. In that setting, the Committee is of the view that the mere fact that the judge, or a relative of the judge, is represented as a class member by the same attorney or firm that is appearing before the judge does not give rise to a reasonable question as to the judge's impartiality and therefore does not require recusal under Canon 3C(1).'

[53] Advisory Opinion 102 deals with 'Disqualification issues relating to a judge being sued in an official capacity, including representation by Department of Justice'. It states:

'When judges are sued in an official capacity, it is not uncommon for representation to be provided by an attorney from the Department of Justice ("DOJ"), which includes members of the local U.S. Attorney's staff. In the event a DOJ attorney is assigned to represent a judge, it is not necessary for the judge to recuse in unrelated litigation in which other DOJ attorneys appear. It may even be unnecessary to recuse from cases handled by the same attorney assigned to represent the judge, depending upon the nature of the representation and the judge's relationship with the attorney. . . .

Although disqualification is not routinely required from unrelated matters handled by a government attorney assigned to represent a judge, it may be appropriate in some instances. This situation may arise because of the nature of the claims (such as those involving personal liability and not subject to absolute immunity or because of the attorney-client relationship necessary to mount a proper defence).'

[54] What emerges clearly from the Advisory Opinions is that subject to exceptions which are not relevant here, a Judge may not sit in a matter in which lawyers who are currently representing that Judge also represents one of the parties. A review of the practice in the various States of the USA concludes that in general:

'A judge is disqualified from the case if one of the attorneys is also representing the judge either in personal matters, including litigation and disciplinary proceedings, or in lawsuits in which the judge is involved in an official capacity'.[36]

[36] C Gray "Disqualification: Judge's Attorney Appears in a Case" in Judicial Conduct Reporter published by American Judicature Society Centre for Judicial Ethics (2002) Vol 24, No 3 at page 9.

[55] In his response to the request from Old Mutual for the statement of facts, Hlophe JP called in aid the case of *Fletcher v Conoco Pipe Line*,[37] a decision of the Court of Appeals for the Eighth Circuit. In that case, the appellants (the Fletchers) submitted an affidavit by an attorney, Mr Baldwin. In a summary judgment application, the judge refused an application by Conoco to strike out Baldwin's affidavit. He also made an order precluding several of the Fletchers' witnesses, including Baldwin, from testifying at the trial. He granted summary judgment in favour of Conoco. Subsequently, the Fletchers submitted an affidavit stating that Baldwin and the judge were close friends, and that the judge was a client of Baldwin's law firm. They contended that the judge should have recused himself. The Court of Appeals held that the evidence established, at best, merely a social relationship between Baldwin (a witness) and the judge. Baldwin had not represented the Fletchers in the litigation. The court held: 'It strains credulity that Baldwin would not have fully disclosed to the Fletchers and their trial counsel his relationship with Judge Whipple well in advance of summary judgment';[38] and, the Judge granted summary judgment against the Fletchers, 'a decision contrary to the expectation of a reasonable person, if Judge Whipple had been biased in favour of Baldwin.'[39]

[56] The key features of *Fletcher* differ fundamentally from the present in the following respects: first, the attorney was not personally involved in the litigation in question; second, there appears to have been evidence only that the attorney's firm had represented the judge in other matters, but no evidence that the attorney had personally done so; third, the judge gave a judgment against the party in whose favour he was allegedly biased; and fourth, that party (the party in whose favour he was allegedly biased) then complained that the judge should have recused himself. In those circumstances, it is hardly surprising that the court rejected the non-recusal complaint.

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[37] *Fletcher v Conoco Pipe Line Company* 323 F.3rd 661,665 (8th Circuit, 2003).
[38] Para 15.
[39] Para 18.

[57] In the United Kingdom, in *Taylor v Lawrence*,[40] the trial judge had disclosed that the solicitors for the claimants had also drafted and kept his will for him. He had not disclosed that he and his wife were to meet representatives of the claimants' solicitors to execute a codicil and have it witnessed immediately after hearing the closing submissions and the day before he was to give judgment. Woolf LCJ, on behalf of the Court of Appeal, endorsed the statement of Peter Gibson LJ that 'The use by a judge of the services of a firm of solicitors for his personal purposes, such as for drafting his will, would not, I think, give rise to any expectation, or even any suspicion, in the fair-minded and informed observer that the judge in his judicial capacity would, by reason of that connection over his will, be untrue to his judicial oath and favour another client of those solicitors.'[41] Woolf LCJ further held: 'We regard it as unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party in litigation with whom he has no relationship merely because that party happens to be represented by a firm of solicitors who are acting for the judge in a purely personal matter in connection with a will.'[42] That case, however, differs from the present matter in that the representation was of a limited kind and took place within a non-litigious and non-contentious context. As Peter Gibson LJ pointed out: 'The witnessing of the signature of the testator on a testamentary document as the informed observer would know, is a mere ministerial task'.[43]

[58] In Australia, the Supreme Court of Western Australia's 'Guide to Judicial Conduct' stipulates that '[f]riendship or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification.'[44] The Canadian Judicial Council's *Ethical Principles for Judges*, contains the following principles under the heading 'Conflicts of Interest':

'1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

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[40] [2002] EWCA Civ 90, [2002] 2 All ER 353, [2002] 3 WLR 640,[2003] QB 528.
[41] Peter Gibson LJ at para 22 quoted by Woolf LCJ at para 67 and endorsed at para 68.
[42] Para 73.
[43] Peter Gibson LJ at para 23 quoted by Woolf LCJ at para 67.
[44] Supreme Court of Western Australia's "Guide to Judicial Conduct" (Second Edition, 2007) page 14.

2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest . . . and a judge's duty.

3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.'[45]

[59] The proper test for recusal where the judge is currently represented by an attorney who represents a party to litigation before him requires consideration of factors such as: (a) whether the matter in which the judge is represented involved the judge in his or her personal capacity; (b) whether the attorney is personally representing the judge, or only a member of a firm of which another member is representing the judge; (c) whether the attorney is personally representing a party to the litigation, or only a member of a firm of which another member is representing the party; (d) the nature of the representation - whether it involves litigation and, if so: (i) whether the litigation is of a contentious nature; and (ii) whether the case is a substantial matter. All of these factors weigh heavily in favour of a conclusion that in circumstances such as the present matter, it may be inappropriate for a Judge to allocate the matter to himself, and then hear it.

[60] Here, the apprehension of bias is not limited to the fact of the relationship between Hlophe JP and the attorney. The apprehension is strengthened by the following additional considerations: Hlophe JP was not one of the duty judges, but allocated the matter to himself. He then proceeded to dismiss Old Mutual's application for leave to intervene on the turn, in circumstances where he had not afforded himself sufficient time to read and properly consider the papers before coming into court. He thereafter proceeded to discharge the rule *nisi* granted in favour of the NDPP, also on the turn, in circumstances where he had not had the opportunity of first reading the replying affidavit, which was filed shortly before the hearing. When he subsequently

[45] *Liszkay v Robinson* 2003 BCCA 506 para 52.

gave reasons for his order, he did not refer to the material evidence in the NDPP's replying affidavit, which pertinently contradicted Mr Mulaudzi's defence.

[61] What is more, in a matter that was neither easy nor clear, those reasons, when they were eventually delivered only ran to some six pages. That fortifies the view, so it was submitted, that Hlophe JP, whether consciously or subconsciously, was partial to Mr Mulaudzi's cause. It is so that where the offending conduct sustains the inference that the presiding judge was not open-minded, impartial or fair during the hearing, this court will intervene and grant appropriate relief, including declaring the proceedings invalid without considering the merits.[46] Here, however, it was submitted that an examination of the reasons furnished, fortifies the inference that the Learned Judge President was prejudiced against Old Mutual and the NDPP and prejudged the case against them. It is accordingly necessary to consider those reasons to determine whether this submission is well grounded.

[62] The reasons advanced by Hlophe JP for discharging the provisional restraint order are to be found in a single paragraph, which reads:

'10. There are no reasonable prospects of a successful prosecution in the matter. This is due to the fact that the respondent committed no criminal offence in gaining access to these funds. The Fairbairn Capital under policy no 15715207 was an investment to which he was entitled. At the time the respondent requested that the value of the investment be made available to him he was fully entitled to do so and was entitled to the proceeds. Prior to making the funds available, Old Mutual had verified that he was indeed entitled to realise the investment. Having legitimately obtained the R48 163 089.55 to which he was entitled, he was at liberty to apply it in the manner that he saw fit in meeting his financial commitments and furthering his business interests. In the absence of any misrepresentation the evidence cannot sustain a fraud conviction. There had also been no unlawful contrectatio by Defendant in that the funds were paid over to him on the basis of Fairbairn Capital/Old Mutual's authority and their indication that he was entitled to the funds. In the absence of an unlawful contrectatio the evidence cannot sustain a conviction of theft. There could be an argument for civil litigation in due course, but if he were to be brought to a criminal trial on these facts, the likelihood would be

[46] *S v Tyebela* 1989 (2) SA 22 (A) at 30C.

that of an acquittal. One needs to bear in mind that Courts cannot be used as a debt collection agent to hold otherwise would be debtors. That would amount to an abuse of the court process.'

[63] In reasoning in this manner, the Learned Judge President misdirected himself. This is apparent from *NDPP v Rautenbach*,[47] where Nugent JA pointed out:

'[25] A Court from which such an order is sought is called upon to assess what might occur in the future. Where it is "satisfied that a person is to be charged with an offence" and that there are "reasonable grounds for believing that a confiscation order may be made against such person" (s 25(1)) it has a discretion to make a restraint order.

. . .

[27] . . . It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (*National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) (2001 (2) SACR 712) in para [19]) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the Court is properly seized of its discretion, it is not open to the Court to then frustrate those criteria when it purports to exercise its discretion (cf *Kyriacou,* fn 6, in paras [9] and [10]). The misdirection by the Court *a quo* pervaded all its reasoning and was instrumental to the conclusion to which it came and I have approached the matter afresh.'

[64] The Learned Judge President could only have reached the conclusion that there were no reasonable prospects of a successful prosecution in the matter if he

[47] *National Director of Public Prosecutions v Rautenbach & another* [2004] ZASCA 102; 2005 (4) SA 603 (SCA) paras 25-27.

disbelieved the evidence of the NDPP. But, the evidence showed that Mr Mulaudzi was not entitled to the proceeds of the policy because of the outright cession he had entered into with Nedbank. The indisputable effect of the cession was that Mr Mulaudzi had lost all of his rights under the policy, which were transferred to Nedbank. Nothing remained vested in him. Thus, on the test in *Rautenbach* there was no basis on which Hlophe JP could properly make a finding that Mr Mulaudzi was entitled to the investment. In any event, as held in *Rautenbach*, the court was 'not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order . . . and whether that evidence might reasonably be believed.'

[65] Likewise, Hlophe JP's finding that Mr Mulaudzi had 'committed no criminal offence in gaining access to these funds' and that 'there had also been no unlawful contrectatio', is equally untenable. In *Nissan SA (Pty) Ltd v Marnitz NO & others*[48] at 24A-D, Streicher JA stated:

> 'Where A hands over money to B mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B in these circumstances appropriate the money such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E-H).'

[66] In dismissing Old Mutual's application for leave to intervene, Hlophe JP held that although 'Old Mutual has been involved in the restraint proceedings since their inception'; it had chosen 'not to be a party [to those] proceedings until much later'. This statement is factually incorrect as the affidavit filed in support of the application for intervention stated clearly that: (i) Old Mutual was the party that had suffered patrimonial loss as a result of Mr Mulaudzi's conduct; (ii) Old Mutual had instructed its legal representatives to institute civil recovery proceedings against Mr Mulaudzi; and (iii) if a confiscation order is made against Mr Mulaudzi in terms of POCA, Old Mutual intends approaching the court in terms of ss 30(5) and 31 of POCA for an order

[48] *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 (Pty) Ltd Intervening)* [2006] 4 All SA 120 (SCA).

directing that payment of its claim against Mr Mulaudzi be made from the proceeds of the assets under restraint before any of those proceeds are used to pay the confiscation order sought by the NDPP.

[67] The principles governing applications for intervention by unsecured creditors like Old Mutual in restraint proceedings have been set out in *Fraser v Absa Bank Ltd (NDPP as amicus curiae)*.[49] Hlophe JP appears to have thought that it was incumbent on Old Mutual to have applied for leave to intervene at the inception of the restraint proceedings on 28 August 2014 or at any rate far sooner than it did on 18 September 2014 (on the anticipated return day). This is however inconsistent with the principle expressed in *Fraser* para 74 that 'any creditor who wishes to intervene has to approach the court as soon as it becomes aware of s 26(6) proceedings.' In the present case Mr

[49] In *Fraser v Absa Bank Ltd (NDPP as amicus curiae)* 2007 (3) SA 484 (CC para 58 reads: 'The NDPP has illustrated in its submissions the circumstances under which, and the reasons why, a creditor would wish to intervene. The purpose of a creditor's intervention would probably be to influence the Court in the exercise of its discretion, for example to persuade it not to make an allowance for the defendant's legal expenses, or to limit the allowance to preserve as much of the defendant's estate as possible for the creditor's ultimate benefit. There are a variety of circumstances in which a creditor may participate in the distribution of a defendant's estate subject to a restraint order. They include the following:
1. The purpose of a restraint order is to preserve the defendant's assets pending the ultimate determination of the NDPP's application for a confiscation order in terms of s 18 of POCA. The Court may ultimately not make a confiscation order, because the defendant is acquitted, because the NDPP does not meet the requirements of a confiscation order, or because the Court decides in the exercise of its discretion not to make one. The restraint order must then be rescinded in terms of s 26(10) *(b)*, read with s 17. The defendant's assets would be returned to him or her, and are again available to creditors for execution of their claims. The s 26(6) discretion may not be exercised on the basis that a confiscation order will inevitably be made.
2. If a prosecutor applies for a confiscation order in terms of s 18(1) of POCA and discharges the requirements for such an order, the Court still retains discretion. It 'may' make a confiscation order for 'any amount it considers appropriate'. It may in other words decline to make a confiscation order at all, or make one for an amount less than the value of the defendant's assets subject to restraint. In either event, the effect is that all or some of the defendant's assets are returned to him or her and again become available to creditors for the execution of their claims. The Court may even in a worthy case deliberately make a confiscation order in a reduced amount to ensure that the claim of a worthy creditor is not defeated.
3. The value of the defendant's property may in any event be more than the amount required to satisfy the confiscation order against him or her. In terms of s 31(1) the excess is then restored to the defendant and again becomes available to creditors for execution of their claims.
4. When a confiscation order is made, the defendant's assets under restraint are realised in terms of s 30 and the proceeds are distributed in terms of s 31. The first charge on the proceeds is 'such payment as the High Court may direct'. The payment must be made from the proceeds even before the confiscation order is paid. The section does not restrict the High Court in the exercise of its power. Section 31(2) makes it clear that it is not restricted to the payment of claims that enjoy priority in terms of s 20(4). The High Court may accordingly, in an appropriate case, direct that a worthy creditor's claim be paid before the proceeds are used to satisfy the confiscation order.'

Mulaudzi and the other respondents applied for an order discharging the rule *nisi* and setting aside the provisional restraint order, alternatively, for the restraint order to be varied. Mr Mulaudzi and the other respondents only took these steps on 17 September 2014, when they served their notice in terms of s 26(3)(*c*) of POCA on the NDPP's attorney. Old Mutual then acted quite promptly. It immediately prepared its application for intervention and delivered and moved it at the commencement of the proceedings on the following day, 18 September 2014 at 10 am. On Old Mutual's showing, it was a worthy creditor with an interest in the confirmation of a provisional restraint order or its variation. It was the victim of the alleged criminal offence giving rise to the restraint proceedings, which concerned a very substantial sum of money.

[68] It is so that some of the individual factors raised, would not in and of themselves, be a sufficient indication that the NDPP and Old Mutual did not have a fair hearing. Taken cumulatively though, I have no doubt that their complaint that they reasonably apprehended that the Judge President did not bring an open and impartial mind to bear on the adjudication of the matter, is justified. It follows that the order of the Western Cape High Court, per Hlophe JP, of 18 September 2014 refusing Old Mutual leave to intervene and discharging the provisional POCA restraint order made by Weinkove AJ on 28 August 2014, falls to be set aside. And, as the proceedings before Hlophe JP amount to a nullity, the matter must be remitted to the High Court (differently constituted) to enable it to properly adjudicate the matter.[50]

[69] That result, according to the trustees, means that s 35(3) of POCA finds application (the narrow point alluded to earlier to which the trustees restricted themselves). Section 35, headed 'Effect of sequestration of estates on realisable property', provides:

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[50] See s19*(c)* or *(d)* of the Superior Courts Act 10 of 2013, which provides: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law- . . . (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

'(1) When the estate of a person who holds realisable property is sequestrated – (a) the property for the time being subject to a restraint order made before the date of sequestration; and

(b) the proceeds of any realisable property realised by virtue of section 30 and for the time being in the hands of a *curator bonis* appointed under this Chapter, shall not vest in the Master of the High Court or trustee concerned, as the case may be. (3) Where the estate of an insolvent has been sequestrated, the powers conferred upon a High Court by sections 26 to 31 and 33(2) or upon a *curator bonis* appointed under this Chapter, shall not be exercised- (a) in respect of any property which forms part of that estate; or (b) in respect of any property which the trustee concerned is entitled to claim from the insolvent under section 23 of the Insolvency Act, 1936. (4) Nothing in the Insolvency Act, 1936, shall be construed as prohibiting any High Court or *curator bonis* appointed under this Chapter from exercising any power contemplated in subsection (3) in respect of any property or proceeds mentioned in subsection (1).'

[70] On behalf of the trustees it was submitted:

'The effect of the discharge of the order by Hlophe JP was that the property of the insolvent was not under restraint when the sequestration order was granted. There are no assets under the control of the *curator bonis* at the moment (nor were they under such control when the sequestration order was granted).'

Accordingly, so the submission went:

'The effect of section 35(3) is to protect the property in the estate from the operation of a subsequently granted POCA order – this accords with the principle of a *concursus creditorum*. The fact that there was a discharge restraint order at the time of the grant of the sequestration order cannot operate to the benefit of one party (the NDPP) to the disadvantage of the *concursus*. The assets in the estate of the insolvent all vested in the Master (and now in the trustees) as a result of the sequestration order when it was granted.'

[71] In support of that submission reliance was sought to be placed on *Rautenbach* para 12 and the authorities there cited. In my view, on this aspect, there are two features that distinguish *Rautenbach* from this matter. First, *Rautenbach*, was concerned with the contention that the lodging of an application for leave to appeal against the discharge of a provisional restraint order had the effect of reviving the

provisional order. In that regard Rule 49(11) was invoked by the appellant there.[51] In rejecting that contention, Nugent JA stated:

'[12] That is to misconstrue the true nature of the orders. As pointed out by Goldblatt J in *Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) E at 190B-E, orders of this kind are not independent of one another. An interim order that is made *ex parte* is by its nature provisional – it is "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side" (per Harms JA in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) in para [6]), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) in para [45]). It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order were made in the first place.

[13] The appellant submitted that even if that is so in relation to ordinary civil practice a distinction should be made in relation to an order of the kind that is now before us, otherwise the purpose and intent of the Act will be undermined. I see no grounds upon which to make that distinction. The reason for permitting restraint orders to be sought *ex parte* is not to ease the burden upon the appellant by ensuring that he can obtain such order without opposition: It is to ensure that the property concerned is not disposed of or concealed in anticipation of such proceedings. The Act contemplates that such an order is only provisional until it is confirmed on the return day (s 26(3) (*a*)) and in that respect it is no different to an order made in ordinary civil proceedings. If that means that property will not be under restraint where a court erroneously refuses to make such an order (either provisionally at the outset or finally on the return day) – and in my view it does – that is the inevitable consequence of insisting upon an order of a court before property is placed under restraint.'

[72] The second distinguishing feature between *Rautenbach* and this case is that the proceedings before Hlophe JP amount to a nullity. In that respect, the High Court cannot be said to have acted at all. This court's order setting aside the order of Hlophe JP will accordingly operate *ex tunc*, i.e. the restraint order will be revived with effect

[51] Rule 49(11) provides: 'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

from 18 September 2014.[52] In the circumstances, ss 35(1), (3) and (4) of POCA, read with the decision of this court in *Bester NO and Another v National Director of Public Prosecutions*, *In re National Director of Public Prosecutions v Kleinhans*[53] (a case dealing with the comparable provisions of s 36 of POCA relating to the liquidation of corporate entities), have the effect that assets which are under the control of the *curator bonis* by virtue of a restraint order on the date of the sequestration of a person's estate are excluded from the insolvent estate. In this case the provisional restraint order was made on 28 August 2014, a date before the sequestration application was issued on 28 April 2015 and the Mulaudzis' estate was provisionally sequestrated on 2 December 2015. As a result, the Mulaudzis' insolvent estate will be subject to the restraint order.

[73] Costs remain. In each of the appeals there were three interlocutory applications: first, the substitution application by the trustees; second, the application by Mr Mulaudzi for leave to intervene; and, third, Mr Mulaudzi's application for the joinder of Nedbank. *In the first appeal:* Mr Mulaudzi's opposition to the first application was both unreasonable and unjustified and, in consequence, he must be held liable for those costs in his personal capacity.[54] Insofar as the second application is concerned – the application, which was made from the bar to which Old Mutual, the NDPP and the trustees' consented, occupied very little, if any, additional time during the course of the hearing of the matter. Accordingly, those costs should be costs in the cause because it is simply not possible to distinguish them from the costs of the appeal itself. The costs of the third application, which was entirely devoid of any merit, should be paid by Mr

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[52] *General Accident Versekerings- maatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) 358H-359A and *MV Snow Delta: Discount Tonnage Ltd v Serva Ship* Ltd 1998 (3) SA 636 (C) 643G-644A (cf. MV *Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) para 7 (at 7521).

[53] *Bester NO and Another v National Director of Public Prosecutions*, *In re National Director of Public Prosecutions v Kleinhans and Others* [2012] 2 All SA 453 (SCA) para 6 put it thus:

'I see no ambiguity in the wording of these provisions. Given their plain meaning and read in context, their operation is governed by two jurisdictional facts envisaged in both subsecs (1) and (2) – ie the 'making' of an order for the winding-up of a company and the grant of a restraint order in respect of its realisable property. The sequence in which these two events occur is crucial. Section 36(1) presents no controversy. Read with the definition of 'relevant time' set out in subsec (4)(a), it expressly excludes assets under restraint from a company's estate where the restraint order preceded the presentation to court of such company's winding-up application.'

[54] There are a number of instances where orders for costs have issued against insolvent litigants. See inter alia *Nieuwoudt v The Master & others* NNO *1988 (4) SA 513 (A); De Beer v Olivier en 'n Ander* 1966 (1) SA 684 (O) and *De Polo & another v Dreyer & others* 1991 (2) SA 164 (W).

Mulaudzi (from his personal estate). That leaves the application for condonation and the reinstatement of the lapsed appeal. The costs thereof are to be borne by the insolvent estate and Mr Mulaudzi, jointly and severally, the one paying the other to be absolved. *In the second appeal:* The costs of the first application fall to be borne by the insolvent estate (i.e. the trustees in their capacities as such), by Mr and Mrs Mulaudzi (in their personal capacity, i.e. as co-owners of those assets in their joint estate, which fall outside of their insolvent estate or which may later accrue to them personally) and by the three CCs, jointly and severally, the one paying the others to be absolved. The insolvent estate is so liable because the substitution of the trustees was necessitated by the sequestration of the Mulaudzis' joint estate. The Mulaudzis and the three CCs are so liable because (represented by Mr Mulaudzi)[55] they opposed the substitution. For the same reasons as in the first appeal, the costs of the second application shall be costs in the cause. As with the first appeal, the costs of the third application must be paid by the unsuccessful applicants, namely the Mulaudzis (from their personal estates) and the three CCs, jointly and severally, the one paying the others to be absolved. The costs of the second appeal, which succeeds, must also follow the result. As the appeal succeeds, those costs must be borne by the insolvent estate, the Mulaudzis (from their personal estate) and the three CCs, jointly and severally, the one paying the others to be absolved. The trustees are liable because they sought to exclude the assets in the insolvent estate from the operation of the restraint order. Accordingly, the insolvent estate would have benefited if the appeal had been dismissed. The Mulaudzis and the three CCs should be so liable because they opposed the second appeal and their reversionary interest in the insolvent estate stood to benefit should the appeal have been dismissed. That leaves the wasted costs of the hearing before this court on 4 May 2016: those must be borne by the insolvent estate and Mr Mulaudzi jointly and severally. The insolvent estate is held liable on the basis that the sequestration of the joint estate of Mr and Ms Mulaudzi was one of the reasons that the appeal could not proceed on that day. Mr Mulaudzi's indisposition was another of the reasons why the hearing could not proceed. In any event he was remiss in not informing the parties or

[55] *Manong & Associates (Pty) Ltd v Minister of Public Works & another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA).

the court well before the date of the hearing that his (and his wife's) joint estate had been provisionally sequestrated on 2 December 2015. Hence, his liability.

[74] In the result, the following orders are made -

(1) In the first appeal under SCA case number 095/16:

(a) The application for the substitution of the trustees is granted. Mr Mulaudzi is to pay the costs of that application.

(b) The application by Mr Mulaudzi for leave to intervene is granted.

(c) The application by Mr Mulaudzi for the joinder of Nedbank Limited is dismissed. Mr Mulaudzi is to pay the costs of that application.

(d) The application for condonation and for the reinstatement of the appeal is dismissed with costs, such costs, which are to include the costs of the appeal (inclusive of the costs occasioned by the application by Mr Mulaudzi for leave to intervene) and the wasted costs of the hearing before this court on 4 May 2016, shall be paid by Mr Mulaudzi (in his personal capacity) and his insolvent estate jointly and severally, the one paying the other to be absolved.

(2) In the second appeal under SCA case number 210/15:

(a) The application for the substitution of the trustees is granted.

(b) The application by Mr Mulaudzi for leave to intervene is granted.

(c) The application by Mr Mulaudzi for the joinder of Nedbank Limited is dismissed.

(d) The appeal succeeds with costs, including the costs of the application for leave to intervene by Mr Mulaudzi and the wasted costs of the hearing before this court on 4 May 2016.

(e) The order of the court below is set aside and substituted with:
'The rule nisi issued on 28 August 2014 is hereby extended until discharged or confirmed.'

(f) The costs of (a), (b), (c) and (d) above shall be paid by Mr and Ms Mulaudzi, their insolvent estate and the three close corporations namely, Mulaudzi and Associates CC, Luvhomba Legal Edge CC and Luvhomba Financial Services CC, jointly and severally, the one paying the other to be absolved.

(3) In both appeals, the orders above relating to costs are to include the costs of two counsel.

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V M Ponnan

Judge of Appeal

APPEARANCES:

1. Case no: 95/2016

For Appellant:	M T Mulaudzi (in person)
For the trustees:	S Olivier S C Instructed by: Ashersons Attorneys, Cape Town Webbers, Bloemfontein
For First Respondent:	A Breitenbach SC (with him H Cronje) Instructed by: MacGregor Stanford Kruger Inc., Cape Town Phatshoane Henney, Bloemfontein

2. Case no: 210/2015

For First Appellant:	G M Budlender SC (with him T Mosikili) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For Second Appellant:	A Breitenbach SC (with him H Cronje) Instructed by: MacGregor Stanford Kruger Inc., Cape Town Phatshoane Henney, Bloemfontein
For First to Fifth Respondent:	M T Mulaudzi (in person)
For the trustees:	S Olivier S C Instructed by: Ashersons Attorneys, Cape Town Webbers, Bloemfontein