FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1157/2013

In the matter between:-

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant

and

MZWANDILE GAILORD SILWANA	First Defendant
ZONGEZILE ADAM ZUMANE	Second Defendant
MOTLALEPULE JACOB THITHI	Third Defendant
KEGOMODICOE RETLATHOLA LEKONE	Fourth Defendant
KEABECOE GAOPALELOE LEKONE	Fifth Defendant
LAETITIA GLADNESS HOFFMAN	Sixth Defendant
EVODIA LENA KOK	Seventh Defendant
BUYELWA NOMBUYISELO KHETHELO	Eighth Defendant
GIVENCHY LIDIA HOFFMAN	Ninth Defendant
R AND B BED AND BREAKFAST CATERING AND EVENTS CC	Tenth Defendant
BRIGITTE SILWANA	Eleventh Defendant

HEARD ON: 12 SEPTEMBER 2013

JUDGMENT BY: KRUGER, J

DELIVERED ON: 19 SEPTEMBER 2013

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[1] The applicant seeks confirmation of a provisional restraint order in terms of section 26 of the Prevention of Organised

Crime Act 121 of 1998 (POCA) which was granted against all the defendants on 28 March 2013. A final order of restraint was granted against the second to tenth defendants on an unopposed basis. At this stage the application is only opposed by the first and eleventh respondents, Mr and Mrs Silwana. Mr Pieter Nel from Legal Aid South Africa appeared on their behalf. The applicant was represented by Mr K.J.A. Ntimutse.

[2] The history of this matter can be set out as follows:

2.1 On 22 October 2012 the nine defendants were convicted of fraud and related charges.

2.2 After conviction, before sentence, a representative of the applicant handed in an application for confiscation in terms of section 18 of POCA. In that application the applicant stated that it would file founding papers on 13 December 2012 and the defendants' opposing papers were to be filed by 14 February 2013. The applicant's replying papers were to be filed by 14 March 2013. That application was postponed *sine die* on 23 October 2012.

2.3 The applicant on 14 December 2012 filed its statement in terms of section 21 of POCA setting out the offences of which each defendant was convicted and the amounts involved at each count.

2.4 The first and eleventh defendants did not file any papers in that confiscation application.

2.5 In March 2013 the applicant issued the present restraint application.

2.6 On 28 March 2013 a provisional restraint order was granted against all eleven defendants.

2.7 The first and eleventh defendants opposed the provisional restraint order and a notice of opposition on their behalf was filed on 19 April.

2.8 On 8 August 2013 the provisional restraint order was made final against the second to tenth defendants.

2.9 The opposed application for a restraint order against the first to eleventh defendants was argued before me on 12 September 2013.

[3] Mr Nel takes the point that a restraint application cannot be granted, because the criminal proceedings against the defendants have been concluded. Section 25(1)(b)(iii) lists as one of the jurisdictional requirements for the granting of a restraint order that the proceedings against the defendant have not been concluded:

> "(1) A High Court may exercise the powers conferred on it by section 26 (1)-
>
> (a) when-

> (i) a prosecution for an offence has been instituted against the defendant concerned;
>
> (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
>
> (iii) the proceedings against that defendant have not been concluded; or
>
> (b) when-
>
> (i) that court is satisfied that a person is to be charged with an offence; and
>
> (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person."

Section 17 of POCA reads as follows:

> "**17 Conclusion of proceedings against defendant**
>
> For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when-
>
> (a) the defendant is acquitted or found not guilty of an offence;
>
> (b) subject to section 18 (2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her;
>
> (c) the conviction in respect of an offence is set aside on review or appeal; or
>
> (d) the defendant satisfies the confiscation order made against him or her."

Mr Nel relies on section 17(b) for his submission that a restraint order cannot now be made, because the defendants were sentenced without the court making a confiscation order against them.

[4] In the scheme of POCA a restraint application precedes a confiscation application. Mr Ntimutse, for the applicant, informed the court that there have been a number of cases where restraint applications have been launched where confiscation proceedings are pending. In this case the restraint application was launched because of the difficulty the applicant had in tracing the defendants and their assets. The defendants are at present on bail pending the outcome of their applications for leave to appeal to the Supreme Court of Appeal.

[5] In **National Director of Public Prosecutions v Kyriacou** 2003 (2) SACR 524 (SCA) it appears from paragraph [1] of the judgment that the trial judge convicted the appellant on 102 counts of receiving stolen property and on the day after conviction commenced an enquiry to determine whether a confiscation order should be made as contemplated by section 18(1) of POCA. The trial judge found that the appellant had benefitted from the offence and postponed further conduct of the enquiry to enable the parties to make submissions regarding the amount of the benefit. The accused was sentenced to 15 years imprisonment. No confiscation order was granted before sentence. Then, on a date before the confiscation enquiry was concluded, another judge granted an *ex parte* provisional restraint order against the appellant. On the return day that provisional restraint order was set aside. The Supreme Court of Appeal dealt with an appeal against the setting aside of the provisional restraint order. The appeal succeeded. The point now raised by Mr Nel, namely that a restraint order cannot be

granted after the defendant has been sentenced, is not raised or dismissed in any of the judgments of the Supreme Court of Appeal in the **Kyriacou** case.

[6] The purpose of the application for a restraint order is to secure property held by the defendants which is likely to yield a value sufficient to satisfy the pending confiscation order (**National Director Public Prosecutions v Kyriacou** 2002 (2) SACR 67 (O) at 76b-c, being the judgment of Cilliè J in the restraint application). In my view the applicant cannot be non-suited because the confiscation enquiry has not been concluded. There is a need for the applicant to secure its position. Properly interpreted, section 17(b) of POCA contemplates a situation where no restraint or confiscation order was pending before sentence. Once a confiscation application is pending, the issues of both restraint and confiscation remain alive.

[7] Mr Nel in his heads of argument raises the point that the curator might be in a position of conflict of interest because the proposed curator, Mr Shawn Williams works for KPMG, which company did the forensic investigation and drafted the forensic report used in the criminal trial in which the defendants were convicted. Mr Nel questions the impartiality and lack of bias of the curator. In his oral address in court Mr Nel pointed out that the evidence in the criminal trial was given by another person, and that there is no indication that the proposed curator, Mr Shawn Williams, was involved with the forensic examination or the case against the defendants. The work that auditors do is a matter of record. If there are

actions in the future which in the view of the defendants point to bias or a lack of impartiality, the defendants can approach the court for appropriate relief, setting out the facts and circumstances that justify their belief.

[8] The defence on the merits is that applicant intends to restrain the assets of the first and eleventh defendants on an incorrect calculation. In the section 21 statement by State Advocate De Nysschen he states that the value of the proceeds of the unlawful activities of the first defendant was R6 920 000, with reference to the convictions on counts 240 – 245. The same amount of R6 920 000 is stated as being the proceeds in respect of the eleventh defendant, with reference to counts 240, 243, 244 and 245. Mr Ntimutse for the applicant conceded that this refers to the same amounts.

[9] As to the confiscation of specific items, the provisional order refers to the affidavit of Phillip Claassen. Mr Ntimutse asks for the following assets to be restrained in terms of section 26:

<u>First Defendant</u>

(i) BMW 318i, black, registration number DTF 376 FS, engine number A 027 H 150 (value R80 000).

(ii) 100% member's interest in Sange-Lathitha Trading CC, registration number 2009/182872/23.

<u>Eleventh Defendant</u>

(i) BMW 325i, registration number 723 BRG FS, engine number 022 678 34 (value R250 000).

(ii) 100% member's interest in Lihle Marketing CC, registration number 2006/082703/23.

(iii) 50% member's interest in Red Purple Media CC, registration number 2007/116052/23.

[10] The defendants say in their answering affidavit that they are both employed by Lihle Marketing CC, one of the entities which the applicant wishes to place under restraint. The defendants say that attachment of Lihle Marketing CC will be fatal for the survival of the business as well as their economic survival. In my view the curator should be directed to make allowances for the defendants in respect of their reasonable living expenses out of the income of the restrained assets, in particular Lihle Marketing CC, as contemplated in section 26(6)(a) of POCA.

[11] As to costs, Mr Nel stated that the arrangement between the Asset Forfeiture Unit and Legal Aid South Africa is that, because both institutions are funded by the state, no costs order should be made.

[12] The following order is made:

1. A final restraint order under section 26 of the Prevention of Organised Crime Act 121 of 1998 is made against the first and eleventh defendants in respect of the following assets:

<u>First Defendant</u>

(i) BMW 318i, black, registration number DTF 376 FS, engine number A 027 H 150.

(ii) 100% member's interest in Sange-Lathitha Trading CC, registration number 2009/182872/23.

Eleventh Defendant

(i) BMW 325i, registration number 723 BRG FS, engine number 002 678 34.

(ii) 100% member's interest in Lihle Marketing CC, registration number 2006/082703/23.

(iii) 50% member's interest in Red Purple Media CC, registration number 2007/116052/23.

2. The curator is directed to make allowances for the defendants in respect of their reasonable living expenses out of the income of the restrained assets, in particular Lihle Marketing CC, as contemplated in section 26(6)(a) of POCA.

3. No order as to costs is made.

A. KRUGER, J

On behalf of applicant:	Adv K.J. A. Ntimutse Instructed by: State Attorneys BLOEMFONTEIN
On behalf of first and eleventh defendants:	Adv Pieter Nel Instructed by: Legal Aid South Africa BLOEMFONTEIN

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