

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1280/2011

In the application of:-

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

T. M. E. M.

1st Defendant

L. M.

2nd Defendant

(In his personal capacity and in his capacity as
Beneficiary of Lumeyr Boerdery CC)

LUMEYER BOERDERY CC

1st Respondent

L. M.

2nd Respondent

L. M.

3rd Respondent

STANDARD BANK VAN SUID-AFRIKA

4th Respondent

MICHAEL STEPHEN COUTTS

5th Respondent

HEARD ON:

18 AUGUST 2011

JUDGMENT BY:

HANCKE, J

DELIVERED ON:

25 AUGUST 2011

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- [1] This is the return day of an *ex parte* application in which a rule *nisi* was issued in terms of section 26(3)(a) of the Prevention of Organised Crime Act, No. 121 of 1998 (“POCA”). The first defendant, second, third, fourth and fifth respondents are not

opposing the confirmation of the rule *nisi*. The second defendant and first respondent are opposing the confirmation of the rule *nisi* against them.

[2] The first defendant is an adult female residing at [...] G. farm, J. R., district Jacobsdal. The second defendant, an adult male from the same address, is married to the first defendant out of community of property. I hereinafter refer to him as “L.”. The first respondent is Lumeyer Boerdery CC, a close corporation with registered address at [...] G. farm, J. R., district Jacobsdal, hereinafter referred to as “the close corporation”. The second respondent is L. M., a minor male child and the third respondent is L. M., a minor female child, both of them being children of the first and second defendants.

[3] The purpose of a restraint order, dealt with in sections 25 and 26 of POCA, is to secure property to ensure that a confiscation order, under section 18, which may later follow a conviction in terms of section 18 of POCA, can be executed. A restraint order may be sought and granted prior to, or after, the

institution of a prosecution against a defendant.¹

[4] A court has a discretion to grant a restraint order if certain jurisdictional requirements are established, viz:

- (a) that the defendant has been charged or is to be charged with an offence;
- (b) that a confiscation order has been made or that there are reasonable grounds to believe that such an order may be made against them; and
- (c) that the proceedings against the defendant have not been concluded.²

[5] As far as (a) is concerned, it is clear from the founding affidavit of Mohlala and the confirmatory affidavit by De Bruyn that the defendants, amongst others, will be charged within a period of six months after the state's investigation in the criminal case has been concluded.

¹ Section 25(1)(b) of POCA.

² Section 25(1) read with section 17 of POCA.

[6] As far as the second jurisdictional requirement is concerned, the onus is on the applicant to establish that there are reasonable grounds to believe that

- (a) the defendants may be convicted of any offence, in respect of which they have or will be charged; and
- (b) the court convicting the defendants may find that they benefitted from such offence or from other criminal activity that the court finds to be sufficiently related to those offences and accordingly may make a confiscation order against them. A high court may exercise its powers to grant a restraint order where

“there are reasonable grounds for believing that a confiscation order may be made”.³

[7] It is important to note that a court is not required to be satisfied of the guilt of a defendant before a restraint order can be granted. What is required is, *inter alia*, reasonable grounds for believing that the defendant may be convicted.⁴

³ Section 25(1)(a) of POCA.

⁴ **NDPP v REBUZZI** 2002 (1) SACR 128 (SCA) at par [20]; **NDPP v RAUTENBACH AND OTHERS** 2005 (1) SACR 530 (SCA).

- [8] In an application for a restraint order, such as the present, if the court is faced with a dispute on the papers, a reference to oral evidence is undesirable. In this regard the following is stated in **Organised Crime and Proceeds of Crime Law in South Africa** by Albert Kruger on p. 158:

“The court must not be blinkered or gullible; it must look at the case as a whole. From such perspective, the respondent’s version might well lend itself to rejection out of hand as clearly false. Where there are several equally possible inferences, however, the NDPP will not be able to ask the court to exclude innocent explanations.”⁵

- [9] It is also important to note that the question is not whether a defendant is likely to be convicted and if so, whether it is likely that he or she will be found to have derived a benefit from the offence or any other related offence. The question is whether there are reasonable grounds for believing that those findings might be made. The court should therefore take all the evidence into account and ask itself whether the defendants might be convicted and that a confiscation order might be made. A court is entitled to come to the requisite conclusion

⁵ **NDPP v ZHONG** 2005 (2) SACR 544 (W) par [13].

that the evidence discloses such reasonable grounds for belief notwithstanding the existence of evidence to the contrary and notwithstanding the court's inability to determine who is speaking the truth.

[10] Mr. Cilliers, on behalf of L. and the close corporation, submitted that the applicant did not make out a case in respect of L. or the close corporation in view of the wording in the founding affidavit where it refers to "defendant" singular on several occasions. Although this is a sloppy and careless way of citation, on a reading of the founding affidavit as a whole, it is clear that the relief is claimed in respect of all the defendants and respondents.

[11] Mr. Cilliers also submitted that there is no reference to the first respondent being the close corporation in the founding affidavit.

In reply, Mr. Ontong, on behalf of the applicant, referred to the following two passages in the founding affidavit of Mr. Mohlala:

“26.8 The Defendant also used the money that was paid into her account for her own personal use and benefit, transferred money into the accounts of her family members and into an account of Lumeyr Boerdery CC of which she was a sole beneficiary off.”

and

“8.10 The Defendant also used the money that was paid into her account for her own personal use and benefit, transferred money into the accounts of her family members and into an account of Lumeyr Boerdery CC of which she was a sole beneficiary off.”

However, no facts were mentioned by the said deponent to substantiate the allegation that funds were transferred into the close corporation's account.

[12] Mr. Ontong submitted that there was a flow of funds in a fraudulent manner from the first defendant to the close corporation in view of a forensic report, of which a certain Jaco Spies was the author. Apart from the fact that the alleged unlawfulness does not appear from the said report, Spies at no stage made an affidavit confirming the correctness of the report

or explained the effect of the allegations made therein. In my view, the said report does not take the applicant's case any further.

[13] It is important to note that a detailed explanation of the close corporation's financial position is provided in the opposing affidavit. It appears that the first defendant sold her interest in the close corporation some time ago to L.. This transaction had been financed with a loan that second defendant obtained from Standard Bank against her registration of a first mortgage bond over the property of the close corporation, as security. These facts are not disputed by the applicant in its replying affidavit. It appears that the close corporation, owning the farm, was transferred from the first defendant to L. for the same amount of money which the first defendant bought it from a third party, which was R3,8 million. About ten months later L. sold the close corporation, including the farm, for R7,6 million.

[14] As far as the original funding of the purchase price is concerned, the amount R3,4 million was paid by way of a

deposit of R750 000,00 and a loan was obtained from Absa Bank in the amount of R2 750 000,00.

[15] When L. bought the interest in the close corporation from the first defendant a bond of R4 million was registered on the property in favour of Standard Bank, which amount was appropriated to pay R2,7 million to Absa Bank, being the outstanding loan, as well as R1,3 million on the purchase price of the first defendant's trust and loan account in the close corporation. The respondent's allegation that the said interest in the close corporation was legally transferred to L., is not disputed by the applicant in its replying affidavit.

[16] The fact that the farm had been sold approximately 10 months later at a significant profit is not in itself important. The question is whether money, unlawfully obtained by the first defendant, flowed to the close corporation. Only if applicant proves that money unlawfully flowed from the first defendant to the close corporation, would applicant be entitled to a restraint order against the close corporation. The aspect of profit is further

explained by the deponent in the opposing affidavit, where he states that the farm had been changed into a game farm, subsequent to the transaction where he purchased first defendant's interest in the first respondent.

[17] In the circumstances I am of the view that the applicant did not make out a case against the close corporation, being the first respondent, for a restraint order, and therefore cannot succeed against it.

[18] As far as L. is concerned, it appears that the first defendant transferred an amount of R859 210,71 to the bank account of L.. The transactions were made over a period of more than one year. To explain the said deposits, it is L.'s case that he received a salary of R25 000,00 per month. It appears, however, from L.'s bank accounts for the period August 2008 to June 2010 that he actually received a salary of R15 000,00 per month, which amounts to R345 000,00. No documentary proof to support L.'s allegations, exists. There is no clear explanation as to the balance of more than R500 000,00 which was paid to

L.. It follows therefore that the inference is irresistible⁶ that he was not entitled to the money and that the first defendant gave him an affected gift from the benefit of the proceeds of unlawful activities.⁷ L. tries to create an impression that he was not at all involved in the financial affairs. It is denied that he could have reasonably believed that the money that moved through his accounts had been lawfully gained. It is evident that L. was involved in the criminal activities of the first defendant at least by allowing his bank accounts to be used in the said way. There is a duty on any interest holder, *inter alia*, in an account to ensure that it is not being utilised for criminal activity and L. neglected duty.

In view of the foregoing, the applicant has made out a case against L. for a restraint order in the amount of R500 000,00.

Reserved costs of 23 June 2011

[19] On the said date the presiding judge informed the parties that he did not have sufficient time to prepare for this application in

⁶ Or the most readily apparent and acceptable inference, as stated in **A A ONDERLINGE ASSURANSIE-ASSOSIASIE BPK v DE BEER** 1982 (2) SA 603 (A) at 614H.

⁷ Section 12 of POCA; see also **NDPP v REBUZZI**, *supra*, par [14].

view of the fact that the paginated papers were only provided to him during the course of the afternoon of 21 June 2011. It is clear that the applicant did not comply with the rules of this court and that the late filing of the paginated papers led to the postponement. The applicant should therefore be ordered to pay the wasted costs of the hearing of 23 June 2011.

[20] According the following orders are issued:

1. The provisional restraint order is confirmed against the first defendant, second and third respondents with costs, excluding insofar as it relates to the farm G. [...] , J. R., Jacobsdal district, Free State Province.
2. The provisional restraint order is confirmed against the second defendant only in respect of an amount of R500 000,00, with costs.
3. The restraint order against the first respondent is uplifted and the applicant is ordered to pay the costs of the first respondent.

S.P.B. HANCKE, J

On behalf of applicant:

Adv. E.B. Ontong
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

On behalf of second defendant
and first respondent:

Adv. J.G. Cilliers SC
Instructed by:
Symington & De Kok
BLOEMFONTEIN

/sp