

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
IN THE HIGH COURT OF SOUTH AFRICA
 (Noord-Kaapse Afdeling / Northern Cape Division)

Saakno: / Case number: **100/04**
 Datum verhoor: / Date heard: **11/2/2004**
 Datum gelewer: / Date delivered:

In die matter of:

NEL, OLOFF HUMBOLDT

1st Applicant

DU TOIT, GIDEON JOHANNES

2nd Applicant

and

**NATIONAL DIRECTOR OF
Respondent
PUBLIC PROSECUTIONS**

1st

FOSTER, DEREK ARTHUR

2nd

Respondent

Coram: Lacock J

JUDGEMENT

LACOCK J:

On 11 February 2004 I made the following order in this matter:

1. 1.1 “DAT die tweede respondent ‘n kontant bedrag van R36 000,00 plaas in die trustrekening van GF Pieterse Ceronio & Derks, prokureurs te Hartswater, voor of op 13 Februarie 2004 om deur hulle gebruik te word vir die geregskostes in die strafsak van die Staat teen die eerste en tweede applikante, sowel as die koste van die saak van die eerste respondent teen die applikante onder saaknommer 863/2002 in hierdie Hof.
- 1.2 DAT die tweede respondent gemagtig word om skriftelike toestemming te verleen aan die applikante voor of op 13 Februarie 2004 om ‘n tweede verband te registreer ten gunste van Paulus Retief Derks oor alle onroerende eiendomme geregistreer in die applikante se name vir ‘n bedrag van R100 000,00 ter versekering van geregskostes aan hom verskuldig of verskuldig te word deur die applikante in verband met die aansoek van die eerste respondent teen die applikante onder saaknommer 863/02 in hierdie Hof asook vir die hangende strafsak.
- 1.3 DAT die opbrengste van die borgkwitansies in die naam van Paulus Retief Derks in die bedrag van R75 000,00 deur die voormelde Derks gebruik mag word vir die betaling van die applikante se geregskostes in verband met die aansoek van die eerste respondent teen die applikante onder saaknommer 863/2002 in hierdie Hof asook vir die hangende strafsak.
2. DAT alle regskoste reeds aangegaan deur die applikante onder saaknommer 863/02 en enige verdere kostes aangegaan kragtens hierdie aansoek sowel as koste aangegaan en aangegaan te word in die strafsak tussen die Staat en die applikante, moet takseer word op die Hooggeregshofskaal soos tussen party en party (ten aansien van alle siviele verrigtinge) en ingevolge die riglyne van sodanige professionele liggaam wat gemoeid en/of bevoeg is om fooie t.a.v. strafregtelike

verrigtinge te takseer.

2.1 Alle gelde kragtens hierdie bevel betaal aan prokureurs Paul Retief Derks, sal in trust gehou word en slegs aangewend word vir die betaling van die regskoste van die appikante na taksasie daarvan.

2.2 Enige oorskot van gelde wat mag bestaan na betaling van die voormelde getakseerde regskostes van die applikante, moet aan die tweede respondent oorbetal word vir die voordeel van die boedel van die eerste applikant.

3. DAT die eerste respondent die applikante se koste van hierdie aansoek betaal."

Since the matter was one of urgency, and since I was satisfied what my judgement should be, I delivered my judgement forthwith and indicated that my reasons would follow in due course. These are my reasons.

- 1] On 11 September 2002 **Van der Walt J** granted a provisional restraint order in terms of sec 26 (1) of the Prevention of Organised Crime Act, no 121 of 1998, (the Act) on the *ex parte* application of the National Director of Public Prosecutions (the NDPP) against the two applicants in the present matter, as well as four others under case no 863/02.

The rule *nisi* thus issued was confirmed by **Kgomo JP** on 27 November 2002.

[1.1]In terms of the aforesaid order, the applicants hereto were *inter alia* ordered to disclose and surrender all their realisable property as defined in sections 12 and 14 of the Act; were prohibited from dealing in any manner with their property, except as required or permitted by the order; and were to surrender all their property into the custody of the curator, Mr Derek Foster of Price Waterhouse Coopers (the second respondent hereto) appointed as such in terms of sec 28 (1) (a) of the Act. The said curator was amongst others authorised to take the property of the applicants into his possession and control, to take care of such property and to administer same.

[1.2]The aforesaid action was taken against the applicants by the NDPP on the strength of the provisions of sec 25 (1) of the Act. The applicants were charged with fraud, alternatively theft, in that they allegedly defrauded a company where they were employed, Senwes (Pty) Ltd, over a period of more than one year in an amount of approximately R1.75 million. It was further alleged that there were reasonable grounds for believing that the applicants may be convicted on the offences as charged, and that they benefited from those offences. Therefore, so it was alleged, there were reasonable grounds for believing that a confiscation order may be

made against the applicants in terms of the applicable provisions of the Act, following upon the successful prosecution and conviction of the applicants.

- 2] The applicants filed a notice to oppose the confirmation of the aforesaid rule *nisi*, as well as opposing affidavits, but the matter did not proceed to Court for argument as the rule was confirmed by consent.
- 3] What is of particular relevance for purposes of the present application, is par 1.11 of the restraint order, reading,

“The curator is authorised to release such of the property to which the order relates as may be required for:

- a) Defendants’ reasonable living expenses, including the living expenses of his (sic!) family or household;*
- b) Defendants’ reasonable legal expenses in connection with these proceedings;*

Provided that Defendants have disclosed under oath to the satisfaction of this Honourable Court.

- i) All of their interests in the property to which the order relates;*
- ii) That they cannot meet such expenses out of such of their property as is not subject to this order.”*

[31] The Court was entitled to make the aforesaid order in terms of sec 26 (6) of the Act. This section provides,

“Without derogating from the generality of the powers

conferred by subsections (1), a restraint order may make such provision as the High Court may think fit-

- a) *for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and*
- b) *for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,*

if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

[32] It will be observed that in par 1.11 of the restraint order provision is only made for the applicants' reasonable legal expenses "*in connection with these proceedings*" (viz the application for a restraint order) and not for their legal expenses in regard to "*any criminal proceedings to which such proceedings may relate*" as envisaged in sec 26 (6) of the Act.

This omission in the restraint order prompted the present application.

4] The applicants applied for the following relief:

"1.Dat daar afgesien word ooreenkomstig die bepalings van hofreël 6 (12) van die vorms en betekening wat die reels voorskryf en dat die

bogemelde aansoek op 'n dringende basis afgehandel word.

2.

2.1 Dat die tweede respondent gelas word om 'n kontant bedrag van R36 000.00 te plaas in die trustrekening van GF Pieterse Ceronio & Derks, prokureurs te Harswater, voor of op 13 Februarie 2004 om deur hulle gebruik te word vir die geregskostes in die Strafsaak van die Staat teen die eerste en tweede applikant, sowel as die koste van die saak van die eerste respondent teen die applikante onder saaknommer 863/2002 in die bogemelde Agbare Hof.

22 Dat die tweede respondent gemagtig en gelas word om skriftelike toestemming te verleen aan die applikante voor of op 13 Februarie 2004 om 'n tweede verband te registreer ten gunste van Paulus Retief Derks oor alle onroerende eiendomme geregistreer in die applikante se name vir 'n bedrag van R100 000.00 ter versekering van geregskostes aan hom verskuldig of verskuldig te word deur die applikante in verband met die aansoek van die eerste respondent teen die applikante onder saaknommer 863/02 in die bogemelde Agbare Hof asook vir die hangende strafsak.

23 Dat die opbrengste van die borgkwitansies in die naam van Paulus Retief Derks in die bedrag van R75 000.00 deur die voormelde Derks gebruik mag word vir die betaling van die applikante se geregskostes in verband met die aansoek van die eerste respondent teen die applikante onder saaknommer 863/2002 in die bogemelde Agbare Hof asook vir die hangende strafsak.

3.Dat die koste van hierdie aansoek betaal word

deur die eerste respondent."

[41]The application was opposed by the NDPP as first respondent. The curator appointed under case no 863/02, second respondent, filed an affidavit explaining his reasons for refusing to make funds available to the applicants for payment of their legal expenses in respect of the pending criminal trial.

- 5] In their supporting affidavits the applicants alleged that they have engaged the services of an attorney, Mr Paulus Retief Derks (Derks) and adv Nel of the Bloemfontein Bar to represent them in the criminal trial which was enrolled from 9 to 27 February 2004 in this Division of the High Court.
- 6] The applicants have demonstrated in their supporting affidavits that they have disclosed all their property subject to the restraint order, and that they are unable to meet the legal expenses out of their unrestrained property.
- 7] First and foremost Adv Henriques, appearing on behalf of the NDPP, submitted that I should not entertain the application as one of urgency since the applicants unreasonably delayed the bringing of the application.

[71]The reasons advanced for the urgency of the matter are the following:

The criminal trial was to commence on Monday 9 February 2004. Although the legal representatives of the applicants were instructed and ready to proceed with the trial, they were not prepared to act on behalf of the applicants unless and until their fees were secured. Attorney Derks was in constant contact with the curator since approximately May 2003, during which time numerous requests were directed to the curator to make funds available for the criminal trial of the applicants.

Despite a number of written communications addressed to the curator and various verbal requests, it was not until the end of January 2004 that the curator and Adv Volmink of the office of the NDPP, indicated to the attorney for the applicants that they were unable to assist the applicants. Since the criminal trial was at that time to start within days from the time communication broke down, the applicants had no choice but to urgently approach this Court for relief.

[72]Even if it can be said that the applicants should have approached this Court at an earlier date, one can

appreciate the predicament in which the applicants found themselves: They had no funds, except as indicated herein, to pay their legal representatives for the criminal trial, and were unable to fund an application like the present one. It is therefore understandable that the attorney opted to rather embark on negotiating an agreement with the respondents instead of bringing a Court application.

[73]The application was initially set down for hearing on 5 February 2004. but was postponed on that date to 11 February 2004. This was done to enable the respondents to file answering affidavits. This had been done. Any prejudice the respondents may have suffered was thereby obviated.

[74]To my mind it would be in the interest of justice not to further delay the commencement and disposal of the criminal trial.

8] By reason of the aforesaid considerations I was satisfied that justice required of me to exercise my discretion in favour of the applicants and to dispose of the application in terms of Uniform Rule 6 (12).

9] The second respondent raised the point in his affidavit that

he was not cited in his official capacity, and was therefore not a party to the proceedings in his official capacity as curator in the estates of the applicants.

Mr Haddad on behalf of the applicants conceded this oversight and moved for an amendment of the citation of the second respondent to read “*Derek Arthur Foster, Nomine Officio*”.

[91] Since it was undoubtedly clear that the second respondent was joined in the application in his official capacity as curator and not in his personal capacity, I granted the amendment.

Mr Botha who represented the second respondent, did not object to the granting of the amendment.

[92] The first respondent did not object to the citation of the second respondent, but in fact admitted the allegation of the first applicant that the second respondent was appointed as curator *bonis* in terms of the Court order under case no 863/02. The second respondent clearly accepted that the second respondent was joined as a party to these proceedings in his aforesaid official capacity.

- 10] The first respondent raised one further preliminary point in the answering affidavit of deponent Rabaji reading,

“Moreover, the Applicants have not sought any order for the variation of the order granted on the 27th November 2002 to make provision for the endorsement against the property by the Registrar of Deeds. In fact the Applicants have not even joined the Registrar in these proceedings even though he is an affected party. Further legal argument will be addressed at the hearing of the matter.”

[101] In argument Ms Henriques and Mr Botha informed me that the endorsement referred to in par 5 of the order under case no 863/02 had been effected against the title deeds of the immovable properties of the first applicant. The wording of the endorsement, so I was informed, echoes the order which reads,

"5. IMMOVABLE PROPERTY

The Registrar of Deeds, Kimberley, is directed to endorse the title deeds of the immovable property specified in the Schedule of Known Assets and any other property that is not so specified but which is subject to this order, with the following restrictions, namely, that the property shall not without the consent of this Court:

- (a) be mortgaged or otherwise encumbered;*
- (b) be attached or sold in execution; or*
- (c) vest in the Master of the High Court, or the trustee of the insolvent estate, if the*

estate of the owner should be sequestered.”

[102]In my view the wording of this paragraph of the order is crystal clear: No mortgage bond may be registered against the title deeds of the properties unless authorised by an order of this Court.

[103]The submission of Ms Henriques that, unless the order is varied, this Court is precluded from authorising the registration of a mortgage bond against the relevant properties, escaped me. The order in its present form clearly authorises this Court in so many words to authorise the Registrar to register a mortgage bond. This is exactly what the applicants requested this Court to do.

[104]I accordingly concluded that no variation of par 5 of the restraint order was required before the relief requested in par 2.2 of the Notice of Motion could be granted.

[105]Ms Henriques did not support the allegation that the Registrar of Deeds should have been joined as a party to these proceedings. The registrar has in any event no direct and substantial interest in these proceedings. See **PE Bosman Transport Works Committee &**

**Others v Piet Bosman Transport (Pty) Ltd 1980
(4) SA 801 (T) at 804 B; Segal & Another v Segil
1992 (3) SA 136 (C) at 140 F to 141 E.**

- 11] In par 18 of her answering affidavit, deponent Rabaji set out the grounds upon which the NDPP opposed the application:

"The First Respondent opposes this application on the following basis:-

- 18.1 The Applicants have not disclosed under oath all their interest in the property and neither have they submitted to the Court a full statement of their assets and liabilities;*
18.2 Secondly, having regard to the affidavit of DEREK FOSTER filed in this application, there is not sufficient realisable assets in the respective estates from which to make legal expenses available to the Applicants."

- 12] It is apparent from the contents of her affidavit that deponent Rabaji had no first-hand knowledge of the correctness or otherwise of the aforesaid factual averments, and that she relied exclusively on the evidence in the affidavit of the second respondent in regard hereto.

- 13] In regard to the first ground referred to above, Ms Henriques relied on the following allegations:

"19.If one has regard to the founding affidavit filed in

support of the restraint application, it is clear that the approximate benefits which the First and Second Applicants received are the sum of R1.7 million. The First Respondent goes further to say that this is not the total benefit which the Applicants are alleged to have received.

20. *Moreover, both Applicants have an interest in Vaalharts Fruit & Veggie CC which is the Sixth Respondent in the restraint application. I annex hereto marked 'JGR2' and 'JGR3' affidavits filed by the First and second Applicants with the curator bonis in terms of which they have purported to make full disclosure of their assets and liabilities.*
21. *It is further clear that none of their interests in the Sixth Respondent have been disclosed.*
22. *Moreover, neither of the Applicants have to date made full disclosure in writing exactly what income they have derived from the farming activities and what their liabilities have been in that regard. Both Applicants merely make bald allegations regarding their income but have not provided any supporting documentation to substantiate these allegations.*
23. *It is clear the Applicants have not made a full disclosure to the above Honourable Court and have not taken the Court into their confidence in making a full disclosure of what amounts they have been able to acquire from property that is not subject to the restraint application.*
24. *Moreover, having regard to the affidavit of the First Applicant, neither of the Applicants have disclosed where they obtained the monies to pay for their bail nor have they disclosed fully to this above Honourable Court what benefits affected parties derived from their alleged unlawful activities, namely the Third to*

Sixth Respondent in the restraint application.”

[131]The averment in par 19, is completely unsubstantiated by any evidence and is not corroborated by the second respondent. In the restraint application Ms Rabaji averred that the actual loss suffered by Senwes as a result of the applicants’ alleged unlawful conduct “*amounted to at least R1 751 894.17*”. No evidence was submitted indicating that this amount was not the total benefit allegedly received by the applicants.

[132]The averments in paragraphs 20 and 21, to the effect that the applicants failed to disclose their interest in Vaalharts Fruit & Veggie CC, are simply not correct. The NDPP knew all along and was fully aware of the fact that the applicants were members of the aforesaid close corporation. This close corporation was in fact one of the respondents in the restraint application for the very reason that the applicants as members had an interest therein. The second respondent too was fully aware of the applicants’ interest in this close corporation. All assets of the close corporation had been in the possession and under the control of the second respondent. It appears from a statement of affairs of the close corporation prepared by the second respondent that the only assets of the close corporation,

being two Landcruiser vehicles, had been conditionally released to the applicants for their personal use.

The affidavits referred to in par 20 are not, as alleged, affidavits purporting to make full disclosure of their assets by the applicants, but are both affidavits in terms whereof additional assets were disclosed to the second respondent.

[133]The averments in par 22 are not correct. Only the second applicant was allowed by the curator to continue his farming activities. In his affidavit, the second respondent had the following to say in regard hereto:

“Toe ek met die tweede applikant ooreengekom het dat hy kan boer om vir hom ‘inkomste te verdien, is daar verder met hom ooreengekom dat hy weekliks finansiële state aan my beskikbaar moet stel. Ek heg hierby aan ‘n afskrif van ‘n staat gebaseer op inligting deur tweede applikant aan my verskaf gemerk DF6.”

Annexure DF6 contains a detailed analysis of income and expenditure under a variety of sub-headings.

[134]I had no idea to what property Ms Rabaji referred in par 23. Nowhere in his affidavit did the second respondent make mention or refer to property not

disclosed by the applicants, let alone from which property they derived an income. No detail or particulars of such property were supplied by Ms Rabaji.

[135]The averments in par 24 of Ms Rabaji's affidavit do not support the above quoted ground of opposition. The applicants were not required in terms of the restraint order to disclose the source of any funds or moneys they had prior to the issue of the order. It is common cause that the funds used for payment of their bail, had been disclosed to the second respondent. What is required of an applicant as a prerequisite for the exercise of its discretion by a Court in terms of sec 26 (6) of the Act, is a disclosure of "*all his or her interests in property subject to a restraint order.*"

The second respondent however, declared under oath that the first applicant disclosed under oath that the amount of R50 000.00 paid in respect of his bail was derived from prior farming activities. The second applicant did not disclose the source of the amount of R25 000.00 paid in respect of his bail.

[136]In par 11 of his founding affidavit the first applicant averred that

“Die tweede respondent het aan prokureur Paul Derks te kenne gegee dat hy tevrede is dat beide ek en die tweede applikant ‘n volledige openbaring aan hom gemaak het van ons bates en dat ons niks van hom probeer wegsteek het nie.”

The second respondent replied to these allegations:

“Ek verwys die hof na my getuienis met betrekking tot die fondse wat aangewend is om die borgtog van die applikant te betaal. Die applikante het nie in hul eedsverklarings openbaar dat die borggeld aan Derks betaal is wat beheer daarvan geneem het deur die borgkwitansie in sy naam te laat uitreik nie.”

The word “*ander*” refers to what was said in the preceding paragraph, viz,

“Die inhoud van die paragraaf word erken, sover my kennis strek is die ander bates en laste van die applikant openbaar.”

What the second respondent failed to realise and failed to disclose in his affidavit was that the funds for payment of the bail were paid prior to the granting of the provisional restraint order. The funds for the payment of the bail was however duly disclosed to the second respondent .

[137]Ms Henriques, properly so in my view, conceded that the second respondent had intimate knowledge of the

affairs of the applicants, and that I should prefer his word to the effect that the applicants made full disclosure of their interests in property subject to the restraint order, to that of Ms Rabaji.

- 14] In regard to the second ground of opposition referred to above Ms Henriques was again constraint to concede that the statement that *“there is not (sic!) sufficient realisable assets in the respective estates from which to make legal expenses available to the applicants”*, was not correct.

[141]The sum required by the attorney acting for the applicants in respect of legal fees and disbursements for the restraint proceedings, as well as the criminal trial amounts to R221 894.14. A detailed breakdown of this amount had been given, and I do not deem it necessary to repeat same herein, since the reasonableness of the amount was not disputed by the respondents.

The Court has authorised the second respondent in the restraint order to release such property to which the order relates as may be required for the applicants' legal expenses in connection with those proceedings, but to date of the hearing of this application, the second respondent has – despite various demands thereto – refused and or failed to

release any funds or property for that purpose to the applicants. Hence the inclusion of an amount in respect of such fees and disbursements in the amount of R221 894.14.

[142]It was common cause that the second respondent had a cash amount of at least R36 000.00 available on trust in the estate of the first applicant which amount could immediately be made available to the applicants or their attorney for legal expenses.

[143]It was furthermore common cause that the bail funds of R75 0000.00 was also available and could be released to the applicants for legal expenses.

[144]Included under the assets of the first applicant subject to the restraint order, are two immovable properties worth R677 000.00 encumbered by a first mortgage bond of approximately R371 000.00.

The total value of the first applicant's property under the control of the second respondent amounted to approximately R967 000.00, and that of the second respondent to approximately R78 700.00.

[145]"Realisable property" is defined as follows in sec 14 of the

Act:

- 1) *Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely-*
 - a) *any property held by the defendant concerned; and*
 - b) *Any property held by a person to whom that defendant has directly or indirectly made any affected gift.*
- 2) *Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.*

The respondents do not deny that all property of the applicants in the custody and under the control of the second respondent is realisable property as defined in sec 14 of the Act and subject to the restraint order.

[146] There were therefore sufficient assets available in the estates of the applicants to meet their demands for legal expenses.

- 15] The second respondent raised two further points that need to be addressed.
- 16] Firstly, the second respondent contended that, should funds or assets be released to the applicants for defrayment of their legal expenses, this will probably have a detrimental effect on the creditors of the applicants. The correctness of

this contention is beyond doubt.

[161]In my view however, the aforesaid consideration – valid as it is – cannot be regarded as an impediment whereby the Court’s discretion to grant relief under sec 26 (6) of the Act, is fettered. If this was the intention of the Legislature, I would have expected an express provision to this effect, or at least a clear indication of such an intention in the Act itself. I could find none.

[162]The interests of creditors are certainly one of the factors to be taken into consideration when a Court has to exercise its aforesaid discretion under sec 26 (6). What other factors are to be considered and what weight is to be attached thereto will depend on the particular circumstances of each case.

17] Secondly, the second respondent contended that, should the relief as prayed for in the Notice of Motion be granted the legal expenses of both applicants will be recovered almost exclusively from the estate of the first applicant.

[171]This contention is undoubtedly correct. However, the attorney for the applicants averred that, whether the legal representatives act for one or both applicants, will hardly make any difference to their fees, since they

charge on an hourly or daily rate. The first applicant is, for reasons not known to me, content with this arrangement, and is prepared and willing to carry the heavier financial load.

[172] It is not quite correct that the first applicant will bear all expenses. The second applicant contributed R25 000.00 to the bail money.

[173] According to the second respondent there is no cash available in the estate of the second applicant. The second applicant owns no immovable property. The only manner in which funds can be made available from the estate of the second applicant would be to convert assets into cash. This appeared to me to be an unpractical and time consuming route to follow.

18] It was common cause that the applicants are not able to meet the legal expenses concerned out of their unrestrained property.

19] By reason of the aforesaid, I concluded that the applicants met the statutory requirements laid down in sec 26 (6) of the Act.

20] What I had to consider was whether this was a proper case

for exercising my discretion under sec 26 (6) of the Act in favour of the applicants. I found in favour of the applicants for the following reasons:

[201]The very fact that the Legislature made provision in the Act for the granting of such an order, is an indication that the Legislature itself realised the harsh consequences a restraint – or preservation order may have on a person whose assets become subject to the order, and who has to face criminal prosecution for the very alleged acts that gave rise to the granting of the order.

[202]The effect of the restraint order was that the applicants were virtually stripped of all their assets and financial means. The implementation of the relevant provisions of the Act violated a fundamental constitutional right of the applicants, as enshrined in the Bill of Rights, and more particular, in sec 25 (1) of the Constitution of 1996, viz the right not to be deprived of property except in terms of law of general application. The restraint order, besides the violation of their constitutional rights, effectively deprived the applicants of their common law use and enjoyment of their property for their personal advantage and interests.

I realise that the relevant provisions of the Act as presently applied, passed constitutional muster but this does not detract from the reality that restraint – and/or preservation orders may cause enormous hardships to suspected perpetrators of organised crime at a time before being convicted of any crime.

See **Mohamed NO v NDPP 2002 (4) SA 366 (W) at 374 C; NDPP v Prophet, 2003 (6) SA 154 (C) at 167 G.**

[203]The applicants are at present the victims of a restraint order issued against them, and are about to face a number of criminal charges brought against them. They have a constitutional right to a fair trial (sec 35 (3) of the Constitution) which includes the right to choose, and be represented by, a legal representative. It is common cause that they do not have the means, or unrestrained property available, to afford legal representation for the criminal trial. To deny them the right to tap into their assets to pay for legal representation is practically tantamount to denying them the right to legal representation of their choice.

[204]The applicants have not been convicted of any crime

yet, and it cannot be assumed that a conviction will necessarily follow. They have a fundamental right to defend themselves. Fairness and justice demand that they be afforded the opportunity to exercise this right. This they cannot do without the necessary means.

[205]Although the second respondent did not explicitly oppose the application, he expressed himself in no uncertain terms, that he is not supporting the application. The second respondent's concern, as alluded to above, is the prejudice that may be caused to creditors if the relief prayed for is granted. This is a valid concern and needed to be considered.

It appears from his affidavit that the second respondent was under the impression that a confiscation order had already been issued, and that he was instructed or authorized to distribute the assets of the applicants amongst creditors. I quote but a few averments from his affidavit:

"11. In aggenome dat daar nie genoegsame kontant is in die boedel van die eerste en tweede applikante om die bedrag waarop die applikante aanspraak maak, te betaal nie, sal die dividend betaalbaar aan die applikante se skuldeisers pro rata verminder. Ek kan nie die bedrag waarmee die dividende sal verminder bereken nie

omdat ek nie weet watter bydrae tot die strafregtelike verrigtinge deur die applikante benodig word nie.

13. *Na my mening en ek is so geadviseer het die skuldeisers waarna ek verwys in die state van bates en laste hierby aangeheg as 'DF1', 'DF2' en 'DF3' 'n direkte en substansiële belang in hierdie aansoek aangesien die betaling van fondse aan die applikante om hul reghskostes voortspruitende uit die aansoek en die strafregtelike verrigtinge waarop hulle teregstaan, 'n wesentlike invloed sal uitoefen op die bedrae wat aan die skuldeisers betaal sal word.*

15.11.16 Ek is van mening dat as kurator bonis ek die ter saaklike reghsbeginsels wat van toepassing is met betrekking tot die betaling van skuldeisers behoorlik in ag moet neem wanneer ek 'n verdeling maak."

The second respondent was not instructed nor authorised per the restraint order, to liquidate – and/or distribute the assets of the applicants. He was merely authorised to take into custody and to administer the assets. Only in the event of a successful prosecution of the applicants and the making of a confiscation order may the second respondent be authorised to liquidate and distribute the assets. (**NDPP v Mohamed NO 2003 (4) SA 1 (CC) at 18 A to B**) Should the applicants be

acquitted in the criminal matter, the restraint order will of necessity be rescinded and the property restored to the applicants. In my view it will be presumptuous to accept that the applicants will be convicted in the criminal matter.

21] Having weighed up the prejudice creditors may suffer against the rights of the applicants, as well as the hardships that may be caused to them should relief be refused, I concluded that in this matter, the interests of creditors should yield to that of the applicants. If, in the event of a liquidation and distribution of the applicants' assets, a shortfall should occur, creditors will not be deprived of their ordinary civil procedural rights of collecting their dues; whereas the applicants have only one chance in a criminal trial to defend themselves.

22] What needed further consideration was whether it was competent for me to make an order in the format as requested in the notice of motion.

[221]In my view the wording of sec 26 (6) is wide enough to embrace all reasonable means a Court may deem expedient to give effect to the intention of the Legislature.

[222]The payment of available cash in the estate of the applicants to themselves or their attorneys, will certainly qualify as a means of providing for their legal expenses. So too will the making available of bail funds, qualify as such. And I can think of no reason why the provision of security by means of a bond over the immovable property of the applicants should not qualify as a means of providing for their legal expenses.

What is of importance is to make provision for legal expenses, and not so much the means whereby such provisions are made.

The attorney for the applicants was quite prepared to have the greater portion of his fees secured by the bail funds, as well as a second bond registered over the immovable properties of the first applicant.

- 23] That brings me to the question of costs. Ms Henriques argued that it was not unreasonable for the first respondent to oppose the application since the first respondent has a legal duty to protect assets subject to a restraint order in the interest of creditors who were victims of organised crime.

In my view this is not the test. If it was the only reason for opposing the application, the first respondent could have

filed an affidavit setting out all relevant facts, and left the matter in the hands of the Court. The first respondent however, actively opposed the application by instructing counsel and by having the matter argued in Court.

Despite various requests on behalf of the applicants, the first respondent refused to agree to a compromise to assist the applicants. The applicants had no choice but to approach this Court for relief. They were successful and I could find no reason why the cost order should not follow the result of the application. (Mr Haddad did not ask for costs against the second respondent).

24] By reason of the aforesaid, I made the order referred to hereinbefore.

HJ Lacock
JUDGE

For the Applicants:

Mr Haddad

(instructed by Elliot Maris & Wilmans)

For the 1st Respondent:

Adv Henriques

(instructed by Towell & Groenewald)

For the 2nd Respondent:

Mr Botha