IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO
Case no: A63/2023

In the appeal between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

And

DYNLOG RENTAL (PTY) LTD
t/a DYNAMIC TRUCK RENTAL 1st Respondent

PHILIPPUS CHRISTOFFEL WILLEM
VAN DER BERG 2nd Respondent

BERNADETTE VAN DER BERG 3rd Respondent

CORAM: CJ MUSI, JP et REINDERS, J et MOLITSOANE, J

HEARD ON: 25 MARCH 2024

DELIVERED ON: 06 JUNE 2024

JUDGMENT BY: CJ MUSI, JP

[1] This is an appeal against a judgment of a single Judge of this Division. The Judge dismissed a restraint application brought by the appellant in terms s 26 read withs 25 of the Prevention of Organized Crime Act 121 of 1998 (POCA). The appeal is with the leave of the court a quo.

[2] The appellant is the National Director of Public Prosecutions. The first respondent is Dynlog Rental (Pty) Ltd, trading as Dynamic Truck Rental, a company incorporated in terms of the laws of the Republic of South Africa. The second and third respondents are married to each other and were both Directors and shareholders of the first respondent during the relevant period. The second respondent resigned as a director of the first respondent on 22 December 2020.

[3] The second and third respondents (cited as the first and second defendants in the court a quo) are also trustees and beneficiaries of the Dynamic Trust and the Philberg Family Trust. These trusts were cited as the first and second respondents in the court a quo. Sedprop Development (Pty) Ltd, a company incorporated in terms of the laws of South Africa, was cited as the third respondent in the court a quo. These entities were cited as respondents since they may hold realizable property which may be the subject matter of a restraint order.

[4] The facts are mainly common ground. First respondent was registered with the South African Revenue Services (SARS) for Value Added Tax (VAT), Pay As You Earn (PAYE), Unemployment Insurance Fund (UIF), and the Skills Development Levy (SDL) purposes. It failed to make the requisite payments to SAAS.

[5] On 26 June 2018, SARS issued a final demand against the first respondent for the payment of the following arrears: R667 550.76 for VAT; R1 441 148.02 for PAYE; R223 332.69 for UIF and R190 922.31 for SDL. On 31 August 2020 SAAS sent a letter of demand to the first respondent for outstanding VAT amounting to R839 564.51.

[6] After noticing that the first respondent had not complied with its tax obligations, SAAS conducted criminal investigations with regard to outstanding PAYE payments for the period February 2017 to February 2020. SAAS discovered

that during this period, the first respondent had submitted EMP 201 returns without making any payments in terms of the EMP 201 declarations.[1] On 19 June 2020 SAAS contacted the third respondent regarding the outstanding debt and she advised that the first defendant had suffered a loss of R48m and that its external accountant, Mr. Herman Geyer (Geyer), was dealing with the matter. She further advised that the first respondent requested a compromise against the loss suffered, but the request had been denied by SAAS.

[7] On 17 August 2018 a final demand was sent to the first defendant for overdue PAYE amounting to R4 092 739.26. On 31 August 2020 the first respondent's VAT account was in arrears to the amount of A839 564.51. On 4 December 2020 the first defendant paid A200 000 towards the PAYE. The total due to SAAS for withheld taxes was A2 953 492.67 excluding interest and penalties.

[8] The second and third respondents, in their personal capacities, are tax compliant and do not owe SAAS. They stated that the first respondent had been experiencing financial difficulties since 2017 and had been operating on an overdraft facility. It had a monthly turnover of approximately A8m and a wage bill of A1,5m. The second and third respondents as well as the trusts advanced funds to the first respondent in order to keep it afloat. The advent of the Covid 19 pandemic was the final straw that broke the camel's back because most of the first respondent's client were unable to pay it.

[9] Many logistic companies in Bloemfontein closed permanently and this had a devastating effect on the first respondent, who had been a logistics company. During 2020, SAAS entered into a deferred payment agreement with the first respondent. The first respondent admitted that it did not comply with its obligations in respect of VAT, PAYE, UIF and the SDL. The first respondent has ceased its operations permanently. The respondents were charged and appeared in court on 1 September 2021 for the first time and this application was lodged on 9 September 2022. Although the application was brought on an ex parte basis, the respondents got wind

[1] All employers who deduct payroll taxes (PAYE, UIF and SDL) from their employees' salaries must submit a EMP 201 return to SARS on a monthly basis and pay the amount withheld by the employer over to SARS.

thereof and opposed it. The matter was postponed and enrolled as an opposed application for a final restraint order.

[10] The respondents further stated that the first respondent employed Mrs. Weihman as a financial and HR administrator who was responsible for the submission of all the relevant taxes to SAAS. It also employed Mr. Geyer to oversee Mrs. Weihman. They state that unbeknown to them, the latter did not fulfil her duties diligently.

[11] In the court a quo and in this court, the respondents argued that:

a) the restraint application is an abuse of POCA;

b) the provisions of POCA are used in terrorem (to scare) and to intimidate the respondents;

c) the provisions of POCA are used in fraus legis (to circumvent the law) and should not be applicable to a matter of this nature;

d) the charges of theft and those under the provisions of the Tax Administration Act are bad in law; and

e) the timing of the application is peculiar having regard to the fact that it was lodged more than 12 months after a decision to prosecute the defendants was taken.

[12] The court a quo agreed with the respondents on most of the bases on which the application was resisted. It correctly found that the fact that a charge sheet had been issued and served does not on its own 'fulfil the requirement that someone will be convicted'.

[13] In terms of s 26 of POCA a High Court may make a restraint order prohibiting any person from dealing in any manner with any property to which the order relates. Section 25(1}(a) provides that:

'A High Court may exercise the powers conferred on it by section 26(1)-

(a) when-

(i) a prosecution for an offence has been institution 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; ... '

[14] It is common cause that a prosecution had been instituted against the respondents and that the proceedings against them have not been concluded. The only issue is whether there are reasonable grounds for believing that a confiscation order may be made against any or all of the respondents. The appellant does not have to prove as a fact that a confiscation order will be made. The evidence must, however, be of such a nature that it satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make a confiscation order.[2]

[15] The respondents argued that POCA should not be used to recover money owed to SARS, and that assets confiscated under POCA should go to the State and not to SARS. What the State ultimately does with confiscated assets is irrelevant. If it decides to give the realized assets or a portion thereof to SARS as the victim of the particular crime it is free to do so. In terms of s 30(4) of POCA the court considering a confiscation order may allow a person who has suffered damages to or loss of property or injury as a result of an offence which was committed by the defendant an

[2] National Director of Public Prosecutions v Kyriacou 2004 (1) SA 379 (SCA) at para 10.

opportunity to make representations in connection with the realization of the property. SARS, as an entity who suffered loss, may therefore be allowed to make representations with regard to any realizable property which is the subject of a confiscation order.

[16] The respondents asserted that POCA was enacted to combat the crimes mentioned in its preamble. Its preamble states that POCA was enacted to:

> 'To introduce measures to combat organized crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities...'

[17] The respondents argued that none of the above mentioned crimes are applicable to them. In **Cook Properties** it was found that POCA applies to evasion of personal income tax by an individual.[3] The court put it thus:

> 'We cannot agree with this construction, which radically truncates the scope of the Act. It leaves out portions of the long title, as well as the 9th paragraph of the preamble. These show that the statute is designed to reach far beyond 'organized crime, money laundering and criminal gang activities'. The Act clearly applies to cases of individual wrongdoing.'

[18] Tax evasion and the non-compliance with one's tax obligations and duties has serious negative economic, social and developmental consequences for our country. The country is dependent on its tax revenue to fulfil its constitutional obligations to those who are entitled thereto. Tax evasion and non-compliance limits

[3] National Director of Public Prosecutions v Cook Properties 2004 (2) SACR 208 (SCA).

the government's ability to stimulate and grow the economy and to fulfil its social mandate. The theft of tax payers' money entrusted to an employer to pay over to SAAS is also very serious because of the trust relationship between the employers and their employees. I can conceive of no reason why POCA should be inapposite.

[19] The court a quo found that the s 163 of the Tax Administration Act[4] (TAA) differs slightly from POCA because the TAA is designed to recover debts owed to SAAS whilst POCA deals with asset forfeiture. It then concluded that on the facts of this matter there was no justification to utilize POCA. The fact that SAAS can apply for a preservation order in terms of s 163 of the TAA is no bar against the appellant applying for a restraint order in terms of POCA when it alleges that a tax payer committed a crime and there is reasonable ground for believing that a confiscation order may be granted after conviction. Section 163 does not deal with criminal conduct whilst a conviction and the possibility of a confiscation order being made are requirements for a restraint order in terms of POCA. There is sufficient justification, in this matter, to utilize POCA.

[20] The court a quo stated that the charges that the respondents are called upon to meet must be clear. It found that there are fundamental defects in the charge sheet. This is so, opined the court a quo, because s 234(2)(k) of the TAA was not yet in existence during the relevant period and s 234(2)(p) of the TAA was repealed by the Tax Administration Laws Amendment Act.[5] It concluded that the negligent manner in which the charge sheet was drawn is indicative of a weak case. The charge sheet is an example of how a charge sheet not be drafted. The theft of PAYE charges are, for example, formulated as follows:

> 'THAT the accused are guilty of the offenses of THEFT ... BECAUSE on or during the dates as in column 2 of Schedule "A", and at or near BLOEMFONTEIN and within the Free State Regional Division, the accused

[4] Section 163 of the Tax Administration Act 28 of 2011 reads as follows: ' Preservation Order - A senior SARS Official may, in order to prevent any realizable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorize an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates'

[5] See Section 35 of the Tax Administration Laws Amendment Act 24 of 2020.

> unlawfully and willfully Employee tax as in column 3 of Schedule "A", payable to the South African Revenue Service (SARS) stole.'

[21] The allegations with regard to the theft of UIF charges are also inadequate to sustain theft convictions. They inter alia, allege that the 'accused unlawfully and willfully [stole] UIF contributions as payable to SARS'. In the absence of main counts, reference is made to the alternative counts to counts 75 to 111. The sloppiness in drafting the charge sheet is not indicative of a weak case. The charges relating to respondent's failure to comply with the provisions of the Income Tax Act (ITA)[6] are not mentioned by the court a quo. There are also charges relating to non-payment of UIF and the SOL. The first respondent, at least, admitted that it did not comply with the provisions of the ITA[7], the Skills Development Levy Act[8] and the Unemployment Contributions Act[9]. A badly drafted charge sheet can always be amended before or during the trial. The badly drafted charge sheet is not indicative of a weak case. It is, rather, a display of prosecutorial ineptitude.

[22] Furthermore, the court a quo stated that **Grayston**[10] held that VAT and PAYE are incapable of being stolen. **Grayston** held that VAT is incapable of being stolen by a vendor. It, however, expressly found that PAYE is on a different footing. It said the following:

> 'In order to be convicted of theft on this ground, [theft of credit] aside from demonstrating that PAYE was not paid over to SARS on due date (which was conceded), the State would have to prove that initially an amount was received from the employee (via the deduction entry made) for which it was obliged to account to SAAS and that there was a fraudulent omission to do so,

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[6] Act 58 of 1962.
[7] In terms of paragraph 30(1)(a) of the Fourth Schedule of the ITA any person who wilfully and without just cause makes or becomes liable to make any payment of remuneration and who fails to deduct or withhold therefrom any amount of employees' tax or to pay such amount to the Commissioner as and when required by paragraph 2 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.
[8] In terms of s 20(b) of the Skills Development Levies Act, 9 of 1999 (SDLA) any person who fails to pay any levy on the date determined for payment thereof commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year.
[9] Section 17(1)(a) of the Unemployment Insurance Contributions Act, 4 OF 2002 (UICA) provides that a person commits an offence if that person fails to pay any amount due in terms of this Act on the day determined for payment thereof.
[10] Grayston Technology Investment (Pty) Ltd and Another v S (2016) 4 All SA 908 (GJ).

or a failure to make a proper entry in respect of the PAYE mount deducted from the employees' salaries.'

[23] **Grayston** therefore found that PAYE is capable of being stolen. By parity of reasoning UIF contributions would be in the same category. We do not have to decide whether **Grayston** was correctly decided. There being no other authority on this point the trial court is bound, by the stare decisis doctrine, to follow **Grayston.** The first respondent admits that it withheld the employees' money but states that it did not ring fence the money and utilized it for other purposes. It submitted EMP 201[11] returns stating how much of the employees' money it withheld but failed to pay it over to SAAS. The non-compliance with the provisions mentioned in paragraph 21 above are serious offences. The court a quo did not consider that the first respondent may be convicted of the statutory offences. It also incorrectly found that **Grayston** is authority for the proposition that PAYE cannot be stolen by the withholding agent, being the employer.

[24] The court a quo held the delay in bringing the restraint application against the appellant. The only time limitation in s 25 of POCA is that the proceedings against the accused should not have been concluded. The proceedings against these accused are not yet concluded. In fact, they have not pleaded to the charges. The court a quo took an irrelevant consideration into account.

[25] The respondent's contentions that the provisions of POCA are used to intimidate the respondents or to circumvent the law are without merit. The applicant conducts criminal proceedings on behalf of the State.[12] It has the right to apply for a restraint order when all the requirements for such an order are present. The fact that SAAS could utilize its administrative remedies to recover debts is no bar against the NPA using civil remedies against errant tax payers who commit crimes. As long as there is a proper basis for instituting criminal proceedings and there are reasonable grounds for believing that a confiscation order may be made against the respondents, then the appellant's conduct cannot be faulted. There is no indication

[11] A EMP201 is a tax return that is submitted monthly by an employer. All employers who withhold or deduct taxes from their employees must submit an EMP201.
[12] See section 20(1) of the National Prosecuting Authority Act, 32 of 1998.

that the NPA offered or proposed to withdraw the charges if the money is paid. Even after conviction the guilty respondents will still be under a duty to pay the debt owed to the State. It cannot be correct to say, without more, that the NPA is intimidating the respondents or circumventing the law when it is in fact harnessing the law to address criminal conduct.

[26] In the preamble to the charge sheet it is stated that the second and third respondents are described in the VAT registration application (VAT 101) as representative persons who are responsible for the performance of the duties of the employer. The duties of the first respondent, as the employer, cannot, without more, be imputed on its directors. The first respondent was responsible for the payment of the employees' remuneration and withholding of their money in order to fulfil their tax obligations.

[27] It is the employer's duty to pay a skills development levy equal to 1% of the employer's payroll.[13] In terms of the UICA an 'employer' is an employer as defined in paragraph 1 of the Fourth Schedule to the ITA. 'Employer' is defined in paragraph 1 of the Fourth Schedule of the ITA 'as any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executive or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds... '

[28] The second and third respondents were not employers as defined in all the relevant Acts. The employees' money was paid to and withheld by the first respondent. It had a duty to pay the monies to SAAS and not the second and third respondents. There is no legal basis on which the second and third respondents can be held liable for the acts of the first respondent. There is no allegation that they conducted the business of the first respondent recklessly. The fact that they are

[13] Section 3 of the SDLA.

representatives of the first respondent on the VAT 101 application form does not destroy the separate legal personality of the first respondent. Only the first respondent can be held liable for its own duties and obligations in terms of the tax Acts. SAAS may have other remedies against the second and third respondents, if it can prove the required jurisdictional facts.[14]

[29] The appellant argued that the second and third respondents received a benefit from the unlawful activities of the first respondent. It could not produce sufficient evidence to sustain this submission. The second and third respondents received salaries from the first respondent. On one occasion the third respondent paid R3000 to a church as tithes. This, contrary to what the appellant argued, does not show that the second and third respondents used the first respondent as their alter ego. There is also no evidence that any of the shareholders were enriched by the unlawful activities of the first respondent. The uncontroverted evidence is that the shareholders (second and third respondents) advanced money to the first respondent in an unsuccessful attempt to keep it afloat. They did not benefit, they lost money.

[30] In my view there are reasonable grounds for believing that the first respondent may be convicted and that a confiscation order may be made against it.

[31] I disagree with the respondents that these proceedings were an abuse of the court process. There is therefore no need to make a punitive costs order. Whether the evidence against the second and third respondents will establish their guilt is for the trial court to decide. Both parties were partially successful. Each party ought to

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[14] See section 163(4) of the Companies Act, 71 of 2008 which reads: '(4) Whenever a court, on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the company, or of such member or shareholder thereof, or of such other person as specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.' [Sub-s. (4) deleted by s. 102 of Act No. 3 of 2011.]

carry its own costs.

[32] The first respondent only owns one vehicle that is fully paid. The other vehicles are subject to finance agreements with financing companies. These companies' rights should be catered for.

[33] I therefore make the following order:

1. The appeal is partially upheld, with no order as to costs.

2. The order of the court a quo is set aside and replaced with the following:

(i) The application in respect of the second and third defendants is dismissed'.

(ii) The following order is issued against the first defendant:

1 Pending a further order of this court, and in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998, as amended **(POCA),** the following final order is hereby issued with immediate effect:

THE PROPERTY TO BE DISCLOSED AND SURRENDERED (THE PROPERTY)

1.1 This order relates to realisable property as defined in sections 12 and 14 of POCA limited to an equity of **R5 000 000** and extends to:

1.1.1 the property specified in this paragraph, in so far as it remains property held by the first defendant.

Movable Property

Registration Number	Engine Number	Make	Series
HCB […]	PF6[…]	NISSAN	A450
FYN […]	J08[…]	HINO	SUPER F
FXX […]	J08[…]	HINO	SUPER F
FYN […]	J08[…]	HINO	SUPER F
FGC […]	N04[…]	HINO	300
FGC […]	N04[…]	HINO	300
FGC […]	N04[…]	HINO	300
FGJ […]	N04[…]	HINO	300
OBJ […]	V02[…]	VOLKSWAGEN	LT
FYN […]	6M6[…]	MITSUBISHI	FUSO
FYN […]	4P1[…]	MITSUBISHI FUSO	CANTER
HBP […]	796[…]	TATANOVUS	V3TXFTMS A
FTK […]	QD 3[…]	NISSAN	YLO2A25U
FZF [...]	GH1[…]	UDTRUCKS	P9156
FYZ […]	6HK[…]	ISUZU	F-SERIES

Bank Accounts

a) Standard Bank account number 370[…].

b) FNB account number 621[…].

1.1.2 All other property held by the first defendant at the time of the granting of this order or subsequently, whether in its name or not, including all property held for or on behalf of the first defendant and by any person or entity and further including the shareholding of the first defendant in any company.

1.1.3 Any property held by any legal representative on behalf of first defendant, in trust or in any other way whether received from the first defendant or a third party on behalf of the first defendant before or after the granting of this order.

1.1.4 All property that would be realisable property, if transferred to the first defendant, after the granting of this order.

1.1.5 All other affected gifts received by any person or entity at any time before or after the granting of this order or any property held by any person or entity who received such gift, to the value thereof, whether or not in the name of first defendant, persons or entities.

RESTRAINT

1.2 Subject to paragraph 2 below, the first defendant and any other persons with knowledge of this order are hereby prohibited from dealing in any manner with the property, except as required or permitted by this order.

EXECUTION OF THE ORDER

1.3 This order will be executed under the supervision and control of the curator bonis. Representatives of the Applicant may accompany the curator bonis to represent the Applicant's interest in the execution of this order.

THE CURATOR BONIS

1.4 In terms of section 28(1)(a) of POCA, Kenosi Moroka **(Moroka) of Moroka Attorneys** a firm of attorneys, is hereby appointed as curator bonis subject to the applicable provisions of the Administration of Estates Act 66 of 1965, as well as the supervision of the Master of the High Court.

1.5 After obtaining letters of curatorship in terms of section 32(1) of POCA, the curator bonis is hereby authorised and required to take the property included in paragraph 1.1 into his possession or under his control, to take care of such property and to administer it, whether the property is situated inside or outside the Republic of South Africa.

1.6 He shall have such powers, duties and authority as provided for or implied in POCA and such further powers as are specified or implied in this order.

1.7 The curator bonis will also be entitled to pay expenses related to restrained assets which would ordinarily be carried by the estate out of the restrained assets. If no liquid assets are available to the curator bonis to pay these expenses, the curator bonis will have the power to sell assets under restraint to properly administer the assets under his control. The owner of the relevant restrained property must be consulted as to which assets under restraint should be sold.

1.8 The curator bonis will further be entitled to deal with any funds in any bank accounts forming part of the property and is accordingly authorised to hold the necessary signing powers on such accounts and to give directions to any banking institutions, and other persons in control of any of those funds regarding the use of such funds.

1.9 The curator bonis shall have the power and authority to act in any capacity required to locate any of the property, to take the property into his possession, to bring the property within the jurisdiction of this honourable court, to exercise effective control of the property, to take care of the property or to administer the property.

1.10 These powers of the curator bonis extend to property wherever it may be situated in the world.

1.11 This order will thus operate as a power of attorney for the curator bonis to deal with all the property in terms of this order as if he himself were its owner or holder.

1.12 The curator bonis shall have the power and authority, with regard to the shareholdings held by first defendant in any company, to act as shareholder in the place and stead of the first defendant.

1.13 The curator bonis may, where it is expedient for the effective execution of this order, authorise, in writing any person who, in his view, is capable of acting on his behalf, to exercise on his behalf any of the powers, duties and authority conferred on him, and may engage such agents, sub-contractors or service providers as he deems necessary.

1.14 The curator bonis is hereby authorised to take all reasonable and lawful steps to discover any fact relating to any of the property, and to locate such property with a view of achieving the objects of this order, read in the context of POCA and, in particular, section 33(1), including:

1.14.1 To inspect or temporarily remove and retain, copy and analyse all documents held by, or any data stored on any computer software or hardware used by:

- the first defendant with a view to tracing further realisable property; and

- any other Respondents insofar as this may reasonably be required to trace further realisable property.

1.14.2 To make enquiries of the first defendant as well as its accountant or auditor (if any) and, pursuant to such enquiries, to inspect or temporarily remove and retain, copy, and analyse all relevant documentation relating to the affairs of:

- the first defendant, with a view to tracing further realisable property; and

- any other Respondents insofar as this may reasonably be required to trace further realisable property.

1.14.3 To make contact with all financial institutions here and abroad known to or suspected by the curator bonis to be holding monies, interests or assets subject to this order, and to inform such institutions of the existence of the terms of this order, and to make arrangements for the recovery of such monies, interests and assets.

1.15 The curator bonis is further authorised to require any person obliged to make disclosure in terms of this order, to provide such further and specific information under oath as the curator bonis considers relevant to any fact that has been so disclosed or that should have been disclosed, which authority shall be exercised with a **view** to achieving the objects of this order, read in the context of POCA and, in particular, section 33(1) thereof.

1.16 If the curator bonis or the Applicant, should at any time have reasonable grounds for believing that any person **(donee)** has received an affected gift, as defined in sections 12(1) and 16 of POCA, he may apply to this court ex parte and on the same papers, supplemented so far as need be, for the joinder of the donee as a Respondent and for the extension of this order to the donee and to the affected gift or other property held by the donee to the value of such gift, so far as may be appropriate.

1.17 The curator bonis is authorised to convert any of the property under his control, including immovable property, into cash with the mutual consent of the Applicant; the owner of the property concerned and any other person or entity who may have a real right therein.

1.18 The curator bonis is required and directed, by noon on 04 July 2024 to serve on the Applicant's attorney, and on any other party, at the address given by such party for the service of documents, and to file with the registrar of this court, together with a copy for delivery to the Master of the High Court, an interim report in which he shall set out:

1.18.1 A description and a sworn valuation (market-value as well as forced-sale-value) of each item of property of which he has taken possession of or control in terms of this order. Each item shall be allocated a serial number by the curator and the description will include its manufacturer's serial number (if any) and the make, model and year of manufacture of any vehicle or electronic or photographic equipment.

1.18.2 In respect of any item that the curator bonis may have obtained from any person, or over which he may have assumed control whilst leaving it in the possession of a third party, the name and address of the third party, together with a description of the item and a statement of the grounds upon which he took possession or control of it.

1.18.3 The manner in which he has dealt with or intends to deal with the property taken into his possession or under his control.

1.18.4 Any other recommendation that he may see fit to make with regard to any realisable property of which he has not by then obtained possession or control; or in respect of the definition or extension of his powers and duties; or in respect of any other aspect of this matter directed to achieving the objects of **POCA.**

1.19 The curator bonis is further directed to thereafter file quarterly reports to the Registrar of the Court, the Master of the High Court, the Applicant and any interested party. In addition to reporting on the progress in the case, the quarterly report shall include a description of any new assets that were seized or identified and contain the information referred to in paragraph 1.21 above.

1.20 The curator bonis is entitled to recover interest not exceeding the prime lending rate of the major financial institutions on expenses and disbursements not paid within 90 days of approval of the curator's invoice by the Master. Such expenses and disbursements are those:

1.20.1 that are not related to expenses which would in the ordinary course be carried by the estate of the first defendant; and

1.20.2 that were incurred by the curator bonis in the execution of his duties, as approved by the Master.

1.21 The expenditure incurred by the curator bonis, that is, expenses and disbursements incurred by him in the execution of his duties, as approved by the Master of the High Court, shall be paid as follows:

1.21.1 from the restrained estate prior to the confiscation order being made, alternatively

1.21.2 from excess realisable property that does not form part of the final confiscation order, alternatively

1.21.3 if no such excess realisable property exists, from the realisable property that is to be used to pay the confiscation order that is made i.e. "the confiscated proceeds" referred to in s28(3)(c)(i) alternatively

1.21.4 if no confiscation order is finally made, from realisable property held under restraint in terms of this order alternatively

1.21.5 if no confiscation order is finally made, and no or insufficient realisable property exists, by the State limited to the value of the outstanding difference.

SURRENDER OF ASSETS
By First Defendant

1.22 The first defendant is hereby ordered in terms of section 28(1)(b) of POCA to surrender all the property into the custody of the curator bonis forthwith after the curator bonis has identified himself by displaying a copy of this order.

By third parties

1.23 Any third party who may be in possession of any of the property is hereby ordered in terms of section 28(1)(b) of POCA to surrender all such property into the custody of the curator bonis forthwith after the sheriff has served on them a copy of this order and an affidavit by the curator bonis setting out the grounds on which he believes that the third party is in possession or control of such property.

1.24 After serving this order and the affidavit referred to in the previous paragraph on the third party, the sheriff is required to deliver the original affidavit and his return of service to the Applicant's attorney, and the latter is required to file the original affidavit and return of service with the registrar of this court forthwith.

1.25 Any other third party who is in possession or control of any of the property and who in any other way receives notice or acquires knowledge of this order is hereby ordered to surrender such property, within 24 hours after receiving notice or acquiring knowledge of this order, to the curator bonis.

Repatriation

1.26 Any person who, in terms of this order, is required to surrender any of the property to the curator bonis, shall, where any such property is held or is situated outside of the Republic of South Africa, repatriate the property concerned in consultation with the curator bonis in order to comply with the obligation to surrender.

Release of property

1.27 The curator bonis shall have the discretion to release any of the property back into the custody of the person who held it, under conditions the curator bonis deems appropriate for its proper administration and preservation, and subject to the curator bonis:

1.27.1 retaining sufficient control over such property; and

1.27.2 ensuring the preservation of the value and/or physical state of such property.

SEARCH AND SEIZURE

1.28 If the curator bonis, after requiring the surrender of property in accordance with this order, should at any time have reasonable grounds for believing that first defendant or third party who has become obliged to surrender any property in accordance with this order has failed to do so, the curator bonis may give any member of the South African Police Services **(SAPS)** the particulars of the property concerned, the name of the first defendant, or third party suspected of being in possession of it, and the address at which he suspects the property may be found; and the member of the SAPS will thereupon be authorised by this order, without further enquiry, but subject to the safeguards set out below, to enter the premises indicated by the curator bonis, to search for the property concerned, and, on finding such property, to seize it and to place it in the custody of the curator bonis.

SAFEGUARDS

1.29 Before any search or seizure takes place, the first defendant, or third party whose premises are to be searched, or from whose possession property is to be seized, shall be afforded a reasonable opportunity, under the supervision of the curator bonis and/or any member of the SAPS who may be present, to summon a legal representative to be present during the search and seizure.

1.30 If it should appear to the curator bonis, from circumstances of which he shall keep a contemporaneous note, that the right to summon a legal representative is being made the occasion of needless or unreasonable delay, o that the first defendant, or third party appears to be using the delay to create an opportunity to dissipate or conceal or divest themselves of property or in any other manner obstruct the curator bonis in carrying out his functions under this order, the curator bonis is hereby empowered, after warning those present that the search is to commence, to authorise the members of the SAPS to proceed with the search and seizure forthwith, whether or not the legal representative of the first defendant or third party is then present.

INVENTORY

1.31 A detailed inventory of all property surrendered by any person, or seized, must be prepared by the curator bonis at the time of the surrender or the seizure. The person from whose possession the property is taken, or his or her legal representative, must be afforded an opportunity to check the inventory and either to sign it as correct or to note any alleged inaccuracy on it. A copy of the inventory must be left with the person from whose possession any property is taken.

1.32 Within 20 days of the seizure of property under this order, the curator bonis must file with the Master of the High Court an inventory of the property placed under restraint, including its estimated value.

DISCLOSURE BY DEFENDANT

1.33 In terms of section 26(7) of POCA, the first defendant is hereby ordered to disclose to the curator bonis on affidavit in such form as the curator bonis may determine forthwith, and in any event by no later than within 10 days of service of notice of this order, a description and the whereabouts of:

1.33.1 all the property (as defined in section 1 read with section 12(2) of the POCA), which has not been physically surrendered into the possession or otherwise placed under the effective control of the curator bonis immediately upon the service of this order.

1.33.2 All the property which, according to the present knowledge of the first defendant is to be transferred to the first defendant at any time.

1.33.3 Any and all affected gifts as defined in sections 12(1) and 16 of POCA, made by the first defendant, together with the name and address of the donee.

1.34 The first defendant is further ordered to disclose to the curator bonis in an affidavit, as soon as it come to know of it, the nature and the whereabouts of any property which it may hereafter come to learn is to be transferred to the first defendant at any time.

1.35 The first defendant is further required, on or before the]th day of each month, to provide the curator bonis under oath with monthly income and expenditure statements together with supporting documentation.

DISCLOSURE BY DONEES OF AFFECTED GIFTS AND BENEFICIARIES

1.36 Any person or entity who is, or who becomes aware of this order and who has received from the first defendant any affected gift as defined in sections 12(1) and 16 of POCA, is hereby ordered in terms of section 26(7) of the POCA to deliver to the curator bonis, within 10 days after coming to know of this order, an affidavit in which he or she shall set out:

1.36.1 the nature of the property which wholly or in part constituted a gift.

1.36.2 the date on which it was made over to the donee.

1.36.3 the value of such property at the date of the gift.

1.36.4 the value of any consideration given for such property.

1.36.5 whether or not the donee has retained the property in the form in which he or she received it.

1.36.6 if not, the manner and date of its alienation, the nature and value of the consideration received by the donee, and the proportion of such consideration that represented the gift.

1.36.7 the nature and value of the property which, in terms of section 20(3)(b) of POCA, directly or indirectly represents in the hands of the donee property into which the gift has been converted, and the proportion of such property that currently represents the gift.

INDEMNITY FROM USE IN CRIMINAL TRIAL OF DISCLOSURE MADE IN COMPLIANCE WITH THE ORDER

1.37 No disclosure made in compliance with this order which would tend to expose the person making the disclosure to a criminal charge pertaining to said disclosure, shall be used in evidence in the prosecution of an offence alleged to have been committed by the person who made the disclosure: provided that this indemnity shall not extend to any evidence going beyond the requirements of this order, and provided further that this indemnity shall not have the effect of preventing the use of any evidence provided by the person making the disclosure referred to above as evidence in any trial in which the person making the disclosure is charged with perjury in respect of the evidence so provided.

LIVING AND LEGAL EXPENSES

1.38 The court may order the release of realisable property within the control of the curator bonis if the first defendant satisfies the court that:

1.38.1 It has made full disclosure to the curator bonis under oath of all its interests in the property subject to the restraint; and

1.38.2 It cannot meet the expenses concerned out of it.

REFUSAL OR FAILURE TO COMPLY WITH ORDER, AN OFFENCE

1.39 In terms of section 75(2), read with section 75(4) of POCA, any person who intentionally refuses or fails to comply with this order shall be guilty of an offence and shall be liable on conviction to a fine or to a period of imprisonment of up to 15 years.

SERVICE

2 There is to be service forthwith by the sheriff on the Second and Third Defendants on behalf of the First Defendant in their capacity as the directors of:

2.1 this order, and

2.2 the notice of motion and its supporting affidavits and annexures.

NOTICE TO OTHER PERSONS AFFECTED

3 In terms of section 26(4)(a) of POCA, the Applicant is directed forthwith to give notice of this order, by delivering a copy by hand, facsimile or by registered post, to the following persons:

3.1 the curator bonis, Moroka

3.2 whenever the Applicant becomes aware that some other person is affected by this order, such other person.

C.J. MUSI, JP

I concur.

C. REINDERSI, J

I concur.

P.E. MOLITSOANE, J

Appearances:

On behalf of Appellant:	Adv S.N. Khumalo
Instructed by	State Attorney
	BLOEMFONTEIN
On behalf of 1st , 2nd & 3rd Respondents:	Adv L.J. Lowies
Instructed by	Blair Attorneys
	BLOEMFONTEIN