

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 11305/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

30 September 2024 _____

In the matter between:

RAMAHLAPI JOHANNES MOKWENA

1st Applicant

RAMAHLAPI JOHANNES MOKWENA NO

2nd Applicant

MARCUS JOSEPH MOKWENA NO

3rd Applicant

ELIZABETH MAKGOSI MOKWENA NO

4th Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1st Respondent

BOMBANI LIQUIDATORS & TRUSTEES CC

2nd Respondent

In Re:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Plaintiff

And

VIMPIE PHINEAS TLALEFANG MANTHATA	1st Defendant
INSTRUMENTATION FOR TRAFFIC LAW ENFORCEMENT (PTY) LTD	2nd Defendant
JOHANNES KGOMOTSO PHAHLANE	3rd Defendant
RAMAHLAPI JOHANNES MOKWENA	4th Defendant
NOMBHURUZA LETTIE NAPO	5th Defendant
JAMES RAMANJALUM	6th Defendant
DELIWE DE LANGE	7th Defendant
RAVICHANDRAN SWAMIVEL PILLAY	8th Defendant
JOSEPH MAETAPESE	9th Defendant
BONANG CHRISTINA MGWENYA	10th Defendant
And	
BEAUTY NTOMBIZODWA PHAHLANE	1st Respondent
THE SINDANE TRUST FUND	2nd Respondent
NORMAN DE LANGE	3rd Respondent
MOGANAMBAL PILLAY	4th Respondent

JUDGMENT

Mdalana-Mayisela J

[1] This is an interlocutory application brought by the applicants against the first and second respondents for the order authorizing the release of funds from the Sindane Trust Fund (“the Trust”) to meet the applicants’ legal expenses and the tertiary education fees for first applicant’s daughter. The interlocutory application is opposed by the first respondent.

[2] Having read the documents filed of record, heard counsel for the parties and having considered the matter, I granted the order sought by the applicants in the following terms:

“1. The curator bonis, Mr Richard Masoanganye of Bombani Liquidators & Trustees CC is authorized in terms of paragraph 1.43 of the Court Order attached to the founding affidavit as annexure “FA1” to release an amount of R378 312.26 from Sindane Trust Fund to settle the applicants’ legal expenses.

2. The curator bonis, Mr Richard Masoanganye of Bombani Liquidators & Trustees CC is authorized in terms of paragraph 1.43 of the Court Order attached to the founding affidavit as annexure “FA1” to release an amount of R106 428.01 from Sindane Trust Fund to settle the first applicant’s daughter’s tertiary education fees.

3. Payment of the aforesaid amount recorded in paragraph 1 hereof, shall be made by way of direct transfer within 7 days from the grant of this Order into the Trust Account of the applicants’ attorneys, AJ Venter & Associates, details of which are as follows:

Bank: F[...] N[...] B[...]
Account Number: 6[...]
Branch code: 2[...]
Branch name: B[...] G[...] 9[...]
Reference: A[...]

4. The first respondent to pay the costs of this application, including the costs of two counsel.”

[3] The first respondent has requested to be provided with the reasons for the order. They are provided herein.

[4] The background facts are as follows. In August 2022, the first respondent launched an ex parte application in terms of section 26(1) of the Prevention of Organised Crime Act 121 of 1998, as amended, (“POCA”) to obtain a provisional restraint order against dealing with realisable property of the defendants and respondents (including the first applicant and Sindane Trust Fund) identified in the main application.

[5] The provisional restraint order was granted by this Court on 18 August 2022 (“restraint order”). A rule nisi returnable on 10 November 2022, was issued calling upon the defendants and respondents to show cause if any on the return day, why the provisional order should not be confirmed pending the outcomes of the trial of the defendants and of any proceedings for a confiscation order that may follow after the conclusion of the trial. Their rule nisi was extended to 26 January 2023.

[6] On the return date, the provisional order was confirmed and made final. The Court appointed Richard Masoanganye of the second respondent to take property of the defendants and respondents into his possession or under his control, to take care of such property and administer it until the final determination of a confiscation order.

[7] The applicants have instituted the interlocutory application in terms of section 26(6) of the POCA and paragraphs 1.43 and 1.44 of the restraint order which provide as follows:

“26 Restraint orders

(6) Without derogating from the generality of the powers conferred by subsection (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”

“LIVING AND LEGAL EXPENSES

1.43 The court may order the release of realizable property within the control of the curator bonis if any defendant or respondent satisfies the court that:

1.43.1 He/she has made full disclosure to the curator bonis under oath of all his/her interests in the property subject to the restraint, and

1.43.2 He/she cannot meet the expenses concerned out of his/her unrestrained property.

1.44 Such order would be aimed at meeting:

1.44.1 The reasonable current and prospective living expenses of such person and his/her family or household, and/or

1.44.2 The reasonable current and prospective legal expenses, as taxed by the Registrar of the High Court, of such person in connection with any proceedings instituted against him/her in terms of Chapter 5 of the POCA or any criminal proceedings to which such proceedings relate.

[8] The first respondent is opposing the interlocutory application on the following grounds:

[8.1] The first applicant has failed to satisfy the court that it has the authority to order the release of funds from the restrained property of the Trust for his legal or living expenses;

[8.2] The first applicant has failed to satisfy the court that the requested legal and living expenses are reasonable or that he cannot meet same from his unrestrained property; and

[8.3] The first applicant has failed to satisfy the court that his daughters tertiary education fees are due and payable by him and that same are living expenses as contemplated by the POCA.

[9] In terms of section 26(6) of the POCA, the following jurisdictional facts must be met for the order sought by the applicants. *First*, that the legal expenses relate to the legal expenses of a person against whom the restraint order was made; *second*, that the full disclosure has been made by a person against whom a restraint order was made; and *third*, that the first applicant cannot meet the legal and living expenses out of his unrestrained property.

[10] The following facts are common cause. The first applicant is a retired civil servant. He is a founder, funder, trustee and beneficiary of the Trust. The first respondent obtained a restraint order against the first applicant and the Trust. The

Trust and first applicant surrendered and disclosed all their properties to the *curator bonis* in terms of Section 28(1)(b) of the POCA and sub-paragraphs 1.1.1 to 1.1.6 of the restraint order.

[11] The issues to be determined by this court are as follows:

[11.1] Whether the first applicant is entitled to the release of funds from the restrained property of the Trust;

[11.2] Whether the first applicant cannot meet his legal and living expenses out of his unrestrained property; and

[11.3] Whether the tertiary education fees of the first applicant's daughter constitute living expenses as contemplated in the POCA.

[12] First I deal with the question, whether the first applicant is entitled to the release of funds from the restrained property of the Trust to meet his reasonable living and legal expenses. The Supreme Court of Appeal has held, based on its interpretation of section 26(6)(b) read with section 26(6)(a) of POCA, that a restraint order may make provision for the reasonable legal expenses of only a person against whom the restraint order is being made and not for the legal expenses of a third person against whom a restraint order is also being made at the same time.¹

[13] The first applicant has brought this interlocutory application in his personal capacity as a beneficiary of the Trust and also in his capacity as a trustee. The third and fourth applicants are supporting this interlocutory application in their capacity as the trustees of the Trust. Section 12 of the Trust Property Control Act 57 of 1988 ("the Trust Act") provides that Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property. The first applicant as a beneficiary of the Trust is entitled to the Trust property.

¹ National Director of Public Prosecutions v Naidoo & Others 2011 (1) SACR 336 (SCA).

[14] Paragraph 1.40 of the restraint order requires the first applicant as a beneficiary of the Trust to make a disclosure in terms of section 28(7) of the POCA to the *curator bonis*. From the aforesaid paragraph, it is clear that the restraint order was also made against the first applicant as a beneficiary of the Trust, and he therefore is not a third party. I find that the first applicant as a beneficiary of the Trust is entitled to the release of funds from the restraint property of the Trust.

[15] I now turn to determine whether the first applicant cannot meet the legal and living expenses out of his unrestrained property. The first applicant has made disclosures in relation to his income and expenditure in the annexures to his founding affidavit, of which I do not deem it necessary to repeat the contents herein. It is not disputed that the applicant receives the net income of R2 266.00 monthly from Metropolitan Retirement Annuity and R45 335.70 monthly from Government Employee Pension Fund ("GEPF") into a transactional account which he has unrestricted access to. His expenditure comes up to an amount of R40 805.00. After deducting the expenditure, he is left with an amount of R6 796.00 which he utilizes for miscellaneous and ad hoc expenses.

[16] His expenditure includes R10 000.00 which he pays monthly to his attorney of record towards counsel's fees in the pending criminal trial. His legal team has estimated the legal fees for the criminal trial in the amount of R1 500 000.00. He cannot afford to pay the estimated criminal trial expenses at once. He has arranged with his legal team to pay an amount of R10 000.00 monthly towards the estimated legal expenses. He has been paying the said amount since 2018. He is a member of Legalwise Legal Insurance. Legalwise pays for the appearance of his attorney in the magistrate court. It does not cover counsel fees because the criminal trial is heard in the magistrate court.

[17] The first applicant submitted that he does not have sufficient funds to pay for the legal expenses of R378 312.36 incurred in the main application as well as in this interlocutory application. He further submitted that the aforesaid legal expenses are reasonable as he agreed to his legal team that he would pay costs on an attorney and own client scale. He agreed to this scale of costs because the restraint order provided that the defendants and respondents should obtain legal assistance as

soon as possible and that non-compliance with the restraint order is a criminal offence and a sentence of direct imprisonment may be imposed.

[18] He stated that upon receipt of the main application papers he contacted his attorneys of record who advised him that given the seriousness and voluminous nature of the matter, it was prudent and reasonable to obtain the services of two counsel, including a senior counsel. At that stage the record consisted of 7852 pages. Pursuant to the consultation with his legal team and having considered their legal advice he instructed his attorney to withdraw his opposition to the main application.

[19] His legal team represented him in his personal capacity and the Trust. His legal expenses for the main application amounted to R137 348.58. Legalwise allocated an amount of R115 000.00 for the main application. The amount of R137 348.58 was invoiced to Legalwise, which paid only the allocated amount of R115 000.00 leaving a shortfall of R22 348.58 for which the first applicant is personally liable. He attached to his papers proof of the allocated amount and depletion thereof.

[20] The statement of account submitted to Legalwise did not include counsel's fees. Further legal expenses in the amount of R277 293.83, including counsel's fees were incurred in launching the interlocutory application and remain unpaid. The statement of account together with the invoices showing that the aforesaid legal expenses are related to the main application and interlocutory application are attached to founding affidavit and further explained in the replying affidavit. The counsel's fees are included in the attorney's invoice.

[21] Some invoices relate to the initial interlocutory application that was withdrawn after the first respondent raised an issue of non-joinder of the other trustees of the Trust. The first applicant submitted that the legal expenses incurred in the initial interlocutory application are not wasted because it still assisted him in pursuing the current interlocutory application.

[22] The legal expenses in the amount of R78 669.95 were incurred on behalf of the Trust and in consultation with the other trustees. They were incurred in compliance

with the restraint order and charges for copies for counsel of documents and annexures received from the first respondent.

[23] In my view the legal expenses sought by the applicants to be paid from the restrained property of the Trust are reasonable.

[24] I turn to deal with the question whether the tertiary education fees of the first applicant's daughter constitute living expenses as contemplated in the POCA. The first respondent contended that they do not constitute living expenses, and the first applicant's daughter is personally liable to settle the outstanding fees.

[25] The first applicant's daughter is a minor who is undertaking her tertiary education with the University of Pretoria. Her 2023 fees for accommodation, meals, tuition and other ancillary fees amounting to R106 428.01 are outstanding. The fees statement from the University of Pretoria has been attached to the founding papers.

[26] The first applicant's daughter is not working, and she therefore is not yet self-supporting. The first applicant submitted that the responsibility to ensure that his daughter receives further education is naturally bestowed on him. He therefore seeks access to the restrained property of the Trust in his capacity as a beneficiary of the Trust to fulfill his parental obligations and responsibilities towards his daughter.

[27] Section 18 of the children's Act 38 of 2005 provides *inter alia* that a parent has a responsibility to contribute to the maintenance of the child. Section 15 of the Maintenance Act, 99 of 1998 provides that a parent's duty to support the child extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education. Such duty does not terminate when the child reaches the age of 18 but in certain instances, it extends beyond the age of majority.²

[28] Section 29 of the Constitution provides that everyone has the right to basic education and further education. The POCA preamble states that the Constitution

² Kemp v Kemp 1958 (3) SA 736 (D & CLD) at 737.

places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

[29] For the reasons stated above, I am of the view that tertiary education fees of the first applicant's daughter constitute reasonable living expenses as contemplated in the POCA. The contention that the first applicant's daughter should settle the aforesaid fees on her own is nonsensical. It is in the best interests of the first applicant's daughter that she receives further education and that is paramount.

[30] I am satisfied that the first applicant and the Trust have made full disclosure in compliance with the restraint order. I am also satisfied that the first applicant cannot meet the reasonable legal expenses incurred in his personal capacity and in his capacity as a trustee, and the tertiary education fees for his daughter out of his unrestrained property.

[31] The applicants are successful in this interlocutory application. They are entitled to the costs of this application, including costs of two counsel.

[32] In the premises, I made the order as aforesaid.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

(Electronically delivered by uploading on Caselines and emailing to the parties)

Date of delivery: 30 September 2024

Counsel for the Applicants: Adv H van Eeden SC
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Instructed by: Annelize Venter attorneys

Counsel for the respondent: Adv TS Sethe

Instructed by:

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Asset Forfeiture Unit, Johannesburg