



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

Reportable / Not reportable

Case no: 2427/2021

In the matter between

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

APPLICANT

and

IQBAL MEER SHARMA

FIRST DEFENDANT

NULANE INVESTMENTS 204 (PTY) LTD

SECOND DEFENDANT

**ISLANDSITE INVESTMENTS 180 (PTY) LTD
(In Business Rescue)**

THIRD DEFENDANT

KURT ROBERT KNOOP N.O.

FOURTH DEFENDANT

**JOHAN LOUIS KLOPPER N.O.
(4th and 5th Defendants cited in their capacities as
business rescue practitioners of 3rd Defendant)**

FIFTH DEFENDANT

ISSAR GLOBAL LIMITED

FIRST RESPONDENT

ISSAR CAPITAL (PTY) LTD

SECOND RESPONDENT

TARINA PATEL-SHARMA

THIRD RESPONDENT

Coram: Van Rhyn J

Heard: 3 October 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be at 15h00 on 27 December 2024.

Summary: Provisional restraint order in terms of s 26 of Prevention of Organised Crime Act 121 of 1998 (POCA) – return day – points of law raised – proper interpretation of s 17(a) of POCA. Third Defendant charged and tried in criminal trial of offences – discharge of all accused granted by trial court – leave to appeal by NDPP to Supreme Court of Appeal. Interpretation of provision that criminal proceedings have been ‘concluded’. Common law principle that noting of appeal suspends operation of order. Point of law dismissed.

ORDER

1. The legal point raised by the Third to Fifth Defendants is dismissed with costs, which costs shall include Applicant's counsel fees on Scale C as provided for in Rule 67A read with Rule 69.

JUDGMENT

[1] On 2 June 2021 the National Director of Public Prosecutions, the applicant, obtained a provisional restraint order pursuant to the provisions of s 26 of the Prevention of Organised Crime Act 121 of 1998 ("POCA") provisionally restraining the assets of the accused in the criminal proceedings, including those of the third defendant. It is not material to repeat the contents of the order. The third defendant is Islandsite Investments, a company in business rescue governed by Chapter 6 of the Companies Act, 71 of 2008. The fourth and fifth respondents are the duly appointed business rescue practitioners of Islandsite (the BRPs). The other parties were not involved in the hearing of this matter.

[2] The provisional restraining order was granted in the usual format coupled with a rule *nisi*, returnable on 5 August 2021, initially, calling upon the defendants and respondents to show cause why the order, issued with immediate effect, should not be made final. The return date has been extended over a number of postponements and at the hearing of this application the return date was extended, by agreement between the parties, to 5 February 2025. Islandsite and the BRPs oppose the confirmation of the provisional restraint order. Answering affidavits and heads of argument were filed by Islandsite and the BRPs. A point *in limine* ensued as to whether the directors of Islandsite and their attorneys or the BRPs, who were appointed prior to the provisional restraint order being made have *locus standi* to oppose the provisional order. The said dispute was decided in favour of the applicant and the BRPs.¹

[3] Islandsite as well as the other accused in the criminal proceedings were charged and tried in this court for offences which underpinned the restraint application. On 21 April 2023 Gusha AJ found Islandsite (as well as the other accused) not guilty. Gusha AJ dismissed the applicant's application (the State in the criminal proceedings) for leave to appeal. An application by the applicant for leave to appeal against the order of Gusha AJ is pending in the Supreme Court of Appeal. The Supreme Court of Appeal has directed that the pending application will be the subject of an oral hearing and has required the parties to be prepared to address the merits of the appeal, if called upon to do so. From the court roll dated 3 December 2024, it appears that the application for leave to appeal will be heard by the Supreme Court of Appeal on 7 March 2025.

[4] The applicant, Islandsite and the BRPs have agreed that this matter will only proceed on the points of law raised by Islandsite and the BRPs. Islandsite and the BRPs contend that the restraint proceedings against Islandsite have been concluded because of the acquittal of Islandsite by Gusha AJ. The applicant argues otherwise based upon the principle that there is a pending application for leave to appeal. The applicant therefore seeks the dismissal of the points of law raised by Islandsite and the BRPs and confirmation of the provisional restraint order, alternatively that the confirmation of the restraint order be postponed pending the outcome of the proceedings in the Supreme Court of Appeal.

¹ *Islandsite Investments 180 (Pty) Ltd v National Director of Public Prosecutions* 2024 (5) SA 20 (SCA).

[5] This judgment turns on the interpretation of the s 17(a) of POCA. Islandsite and the BRPs contend that on a proper interpretation of s17(a) of POCA:

- (a) The restraint proceedings against them have been concluded due to the court having found the defendants in the criminal matter not guilty of the offences which underpin the restraint order; and
- (b) The fact that the applicant has applied for leave to appeal against the finding of not guilty against the defendants does not change that the criminal proceedings have been concluded.

[6] With reference to the principles applicable to statutory interpretation that '...the proper approach is the objective process of attributing meaning to words used in legislation...' ² it is argued by Islandsite and the BRPs that the language used, the context in which the provision appears and the purpose to which it is directed, leads to the conclusion that in framing s17(a) of POCA, the Legislature decided to provide that proceedings 'shall be concluded' when the defendant is 'acquitted or found not guilty'. The Legislature did not provide that the proceedings would only be concluded after the acquittal of the accused was confirmed by a court on appeal. If the Legislature intended proceedings to only conclude after the determination of a review or an appeal against an acquittal of finding of not guilty, it would have been stated as much, given that such a condition or requirement was specifically included in s 17(c) of POCA.

[7] In Section 24 of POCA, which deals with the effect of a restraint order pending an appeal against such an order, the Legislature provides specifically that the order remain in force pending an appeal. On behalf of Islandsite and the BRPs it is contended that this lends further support for the argument that the proceedings have been concluded when Islandsite and the other accused were acquitted and found to be not guilty of the charges levelled against them in the criminal proceedings.

[8] The applicant argues that the contention on behalf of Islandsite and the BRPs is fundamentally misconceived, for at least, three reasons:

It is based on an interpretation of s 17(a) of POCA that is:

- (a) inconsistent with the common law;
- (b) contrary to authority in the Constitutional Court; and

² *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) para 29.

(c) inconsistent with the fundamental principles of interpretation.

[9] Mr Budlender SC, counsel on behalf of the applicant argued that if Parliament intended, in enacting s17 of POCA, to amend the well-established common law and to provide that the order of acquittal will remain in force notwithstanding a pending appeal, it would have said so. The attempt by Islandsite and the BRPs to distinguish the decision in *Falk v National Director of Public Prosecutions*³ (*Falk v NDPP*) cannot succeed on the basis that it is a final and definitive order by a court that determines whether s 17(a) or (b) is satisfied, not an order by a court of first instance whose order is the subject of a pending appeal.

[10] The purpose of a provisional restraint order is evidently to preserve certain assets identified at the time of the grant of the rule *nisi* so that it may in due course be realised in satisfaction of a confiscation order and to prevent the dissipation or concealment of the property of persons against whom criminal proceedings are pending or about to be instituted. Chapter 5 of POCA creates remedies which are directed at combatting organised crime, money laundering and criminal gang activity. The preamble of the Act records that 'it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves'. This caused the need to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity. This includes the planned, ongoing or repeated participation in or the involvement in any offence referred to in Schedule 1 of POCA.⁴

[11] A confiscation order under Chapter 5 is a civil judgment and the rules of evidence applicable to civil proceedings apply to such proceedings. The restraint and confiscation order provisions exist to provide for a civil remedy of preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence. It is thus designed to prevent convicted criminals from profiting from their crime. Section 25 of POCA provides that the court may grant a restraint order when it is satisfied that the person who is to be subject to it, is to be charged with an offence and there are reasonable grounds for believing that a confiscation order may be made against such person. The procedure by which a

³ *Falk v National Director of Public Prosecutions*³ 2012 (1) SACR 265 (CC).

⁴ Section 1 of POCA.

confiscation order may be obtained may only be initiated upon conviction of an accused person. It follows that the right created by the grant of a confiscation order is a right emanating solely from the provisions of Chapter 5 of POCA. Therefore, the procedures for enforcing that right, the constraints and procedural protections relating thereto and the discharge of a confiscation order, must be viewed in that context. The confiscation order proceedings are wholly separate from the criminal proceedings conducted against the defendant.

[12] The court adjudicating the application for a restraint order is not required to be satisfied of the guilt of an accused before a restraint order is granted. In *National Director of Public Prosecutions v Rebuzzi*⁵ it was held that what is required is that there should be reasonable grounds for believing that the defendant may be convicted. An applicant for a restraint order is only required to set out evidence which satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make an order of confiscation.⁶

[13] On the return day of the rule *nisi* the court must consider whether the provisional restraint order should be confirmed or not. Section 17 of POCA provides as follows:

‘17. Conclusion of proceedings against defendant

For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when—

- (a) the defendant is acquitted or found not guilty of an offence;
- (b) subject to section 18(2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her;
- (c) the conviction in respect of an offence is set aside on review or appeal; or
- (d) the defendant satisfies the confiscation order made against him or her.

[14] Common law is non-enacted law. The common law today derives its authority from the Constitution.⁷ At common law the general rule is that the execution of a judgment is automatically suspended pending the noting of an appeal with the consequence that until

⁵ *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SACR 128 (SCA) at para 20.

⁶ *National Director of Public Prosecutions v Kyriacou* 2003 (2) SACR 524 (SCA).

⁷ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

the finalisation of the appeal, the judgment cannot be carried into effect.⁸ In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) Corbett JA held that: 'Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland, . . . it is today the accepted common-law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment.'⁹ The foundation of the common-law rule is to prevent irreparable damage from being done to the intending appellant, whether the damage be done by a levy under a writ, or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.

[15] It is a fundamental presumption, in the interpretation of statutes, that a statute is not to be interpreted as altering the common law unless it explicitly provides as much or no other conclusion can be reached. In *Casserley v Stubbs* 1916 TPD 310 the operation of the presumption in respect of alterations to the common law is explained as follows: 'It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such intention.'¹⁰

[16] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹, Wallis JA in a unanimous judgment of the Supreme Court of Appeal stated the principles pertaining to interpretation as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is

⁸ *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 667; *Schoeman v Nedbank Ltd* 1989 (4) SA 812 (W) at 815D-816C.

⁹ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A.

¹⁰ *Casserley v Stubbs* 1916 TPD 310 at 312.

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B.

possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[17] The Constitutional Court in *Cool Ideas 1186CC v Hubbard and Another*¹² expressed the fundamental test of statutory interpretation in these terms:

'... the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualized; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[18] It is apposite to first consider the context within which POCA was promulgated. The primary purpose of Chapter 5 of POCA is not punitive, but to ensure that no person benefits from his or her wrongdoing. Its secondary purpose is to promote general crime deterrence and prevention by depriving people of 'ill-gotten gains'.¹³ In *National Director of Public Prosecutions v Swart*¹⁴ it was held that:

'The purpose of POCA is to counteract organised crime and criminal gang activities. It is the culmination of a protracted process of law reform aimed at attempting to ensure that criminals do not benefit from their crimes. Chapter 6 thereof (comprising s 37 to s 62) is focused on property that either has been used to commit an offence or which constitutes the proceeds of crime, rather than on the wrongdoers themselves. It provides for forfeiture of the proceeds of and

¹² *Cool Ideas 1186CC v Hubbard and Another* 2014 (4) SA 474 (CC) at 484 -485 para [28].

¹³ *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC) at paras 50-8; *Falk v NDPP* at para 15.

¹⁴ *National Director of Public Prosecutions v Swart* 2005 (2) SACR 186 (SECLD).

instrumentalities used in crime, but is not conviction-based and may be invoked even where there is no prosecution.¹⁵

[19] Where a prosecution for an offence has been instituted against the defendant or the court is satisfied that a person is to be charged with an offence, the National Director of Public Prosecutions is required in an application for a restraint order, in either event, to demonstrate that there are reasonable grounds for believing that a confiscation order may be made against that defendant. The nature and the tenor of the evidence disclosed by the applicant, in the matter at hand, evidently demonstrated that there are reasonable grounds for believing both that the defendants may be convicted and that a confiscation order may be made, resulting in the order made by Naidoo J on 2 June 2021. Mr Bham SC, counsel on behalf of Islandsite and the BRPs argued that where the trial court has found an accused (defendant) not guilty in the criminal proceedings it has established, on a standard of proof higher than that prescribed in Chapter 5 of POCA, and in effect beyond reasonable doubt, that there is no reasonable possibility of a conviction against the defendant.

[20] Islandsite and the BRPs therefore contend that having regard to the lowest threshold of proof (a belief based on reasonable grounds) for granting a restraint order, it would result in POCA having unconstitutional application when innocent persons are deprived of their property if s 17 of POCA is interpreted to mean that the provisional restraint order is to be confirmed or extended pending the hearing of the appeal in the criminal matter. On behalf of Islandsite and the BRPs it is contended that the context of POCA is essentially civil proceedings which prohibits a person, pre-conviction, from dealing with his or her property.

[21] It is trite that the State can only appeal on a question of law and not on any incorrect factual findings of a trial court in criminal proceedings.¹⁶ In enacting s 17 of POCA the Legislature did not provide that the proceedings contemplated against a defendant shall be concluded when a defendant is acquitted or found not guilty of an offence notwithstanding a pending appeal by the prosecution. The common law rule that an order of a court is suspended pending the outcome of an appeal is thus left in place. In contrast the Legislature provided in s 24A of POCA that: 'A restraint order and an order

¹⁵ *National Director of Public Prosecutions v Swart* at 188f – g.

¹⁶ *S v Basson* 2003 (2) SACR 373 (SCA).

authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned'. (emphasis added)

[22] Evidently, being aware of the common law rule that an appeal suspends the operation of the order, the Legislature intended that the restraint order would remain in force notwithstanding a pending appeal against the order. The purpose is obviously to ensure that the accused's assets could not be disposed of or dissipated or concealed pending the outcome of the appeal. Section 24A was inserted later by the POCA Amendment Act. In *Falk v NDPP* the issue was the interpretation of and the relationship between POCA and the International Co-operation in Criminal Matters Act 121 of 1998, which provides for the enforcement in South Africa of restraint orders that have been issued in the course of criminal proceedings in foreign states and whether the proceedings had concluded in terms of s 17(b) of POCA.

[23] A restraint order granted in the course of criminal proceedings against Mr Falk by a court in Hamburg, Germany was registered in South Africa by the Registrar of the High Court. The High Court subsequently issued an order interdicting the applicants from dealing with assets in South Africa. The Constitutional Court adjudicated the question whether the proceedings against the applicants were concluded in terms of s 17(b) of POCA and reasoned that, when the decision of the Hamburg Regional Court was taken on appeal to the Federal Court, the German proceedings were clearly not concluded. The reason being that a confiscation order could still be made. It was held that: 'This necessarily flows from the nature of the appeal'.¹⁷ The court therefore held that s 17(b) of POCA, which states that proceedings are concluded when the court convicting the defendant of an offence sentences the defendant without making a confiscation order does not assist the applicants on the basis that s 17(b) could not apply only to a court of first instance. Section 13(1) of POCA allows for an appeal by the NDPP. With reference to s 24A that a restraint order or ancillary order, which is in force at the time of any decision by the court in relation to the making of a confiscation order, 'shall remain in force pending the outcome of any appeal against the decision concerned', it was held that the argument that the proceedings have been concluded, notwithstanding an appeal, would elevate form above substance. This is an approach that our courts have not endorsed.

¹⁷ *Falk v NDPP* at [67].

[24] I agree with the submission on behalf of the applicant that the attempt by Islandsite and the BRPs to distinguish the decision in *Falk v NDPP* cannot succeed. Section 17(a) like s 17(b) is not satisfied when a court of first instance makes an order contemplated in the subsection. It does not apply only to a court of first instance. Therefore, if an appeal is pending, the provisions of s 17(a) are not triggered. The word 'acquitted' refers to a final order of acquittal, not an order which is subject to a pending appeal.

[25] In essence this matter concerns the interpretation of the word 'concluded' in s17 of POCA. The dictionary meaning of the word 'conclude' is *inter alia*: to bring to a close or end, to finish, to terminate or make an end, to settle or arrange finally, resolve.¹⁸ For obvious reasons the parties are seeking different outcomes in the interpretation of the word 'concluded' as used in s 17 of POCA. The applicant's preferred outcome is confirmation of the *rule nisi* and the continued restraint over the properties of Islandsite (and other defendants) pending the outcome of the appeal in the Supreme Court of Appeal. Islandsite and the BRPs, on the other hand, want the discharge of the restraint order and the restoration of the restrained properties. Having regard to the language used and in the light of the ordinary rules of grammar and syntax, I am not convinced that the word 'concluded' in s17 of POCA exclude a final determination of the criminal matter on appeal.

[26] Whilst the impact of POCA appears severe because the legislation intercepts the property rights of individuals who may be, when the criminal proceedings have been concluded, found to be innocent of any complicity of the alleged crime, the Constitutional Court has found the provisions of POCA not only to be consistent with the Constitution, but to be a "friend" to its aims. In *National Director of Public Prosecutions v Elran*¹⁹ it was held that the purpose of a restraint order is to preserve sufficient property to satisfy a reasonably anticipated confiscation order and the person whose property is subject to a restraint order is precluded from dealing with the property in any manner other than permitted by the court. It is clear that the effect of POCA leads to a 'draconian intrusion' into the rights of those people who are affected by POCA orders. To find that Islandsite and the BRPs are correct in their interpretation of s 17 of POCA, in that the proceedings

¹⁸ The New Shorter Oxford English Dictionary Vol 1 A-M (1993 Edition) p 469.

¹⁹ *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) at [23].

against Islandsite have been concluded, prior to the hearing of the application for leave to appeal in the Supreme Court of Appeal, would defeat the purpose of POCA.

[27] Having regard to the language used, the context in which the provision appears and the purpose to which it is directed, namely a mechanism for ensuring that the assets of offenders are preserved until a final decision has been made whether the accused are guilty, leads to a finding that it would not be in the interest of justice to set aside the restraint order pending the appeal by the applicant in the criminal matter. The purpose would be defeated if the applicants ultimately succeed with the pending appeal, and the defendants are, prior to the hearing of the appeal, enabled to dissipate the assets forming the subject of the restraint order. Such an interpretation of s 17 of POCA would not be sensible and would make travesty of the system of appeals which is designed to ensure that justice is done and that the law takes its course.

[28] In the result, I am of the view that, the points of law raised by Islandsite and the BRPs are without substance. The provisional restraint order has been extended, by agreement between the parties pending the adjudication of this matter, to the pre-trial roll of 5 February 2025.

[29] The purpose of an award of costs to a successful party is to indemnify such party for the expense to which he or her has been put through having been unjustly compelled to initiate or defend litigation, or in this matter the adjudication of points of law raised by Islandsite and the BRPs. The issue whether to award costs is primarily based on two basic rules namely: That the award of costs is a matter of judicial discretion by the court and that the successful party should as a general rule be awarded costs. There is no reason why costs should not follow the event.

[30] ORDER:

In the result the following order is made:

1. The legal point raised by the Third to Fifth Defendants is dismissed with costs, which costs shall include Applicant's counsel fees on Scale C as provided for in Rule 67A read with Rule 69.



VAN RHYN J

Appearances

For the Appellant:

G BUDLENDER SC
K KOLLAPEN

Instructed by:

THE STATE ATTORNEY
BLOEMFOINTEIN

For the Third to Fifth Respondents:

A E BHAM SC
T SCOTT

Instructed by:

MCINTYRE VAN DER POST
BLOEMFONTEIN