

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D3146/2023

In the matter between:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

NAVIN MADHOE

First Defendant

ASWIN NARAINPERSHAD

Second Defendant

MMAMONNYE NGOBENI

Third Defendant

THOSHAN PANDAY

Fourth Defendant

ARVENDA PANDAY

Fifth Defendant

PRIVISHA PANDAY

Sixth Defendant

SEEVESH MAHARAJ ISHWARKUMAR

Seventh Defendant

KAJAL ISHWARKUMAR

Eighth Defendant

TASLEEM RAHIMAN

Ninth Defendant

VIJAYANTHY MADHOE

First Respondent

LEESHA NARAINPERSHAD

Second Respondent

MOSESENYANE LUCAS NGOBENI

Third Respondent

THOSHAN PANDAT N.O.

Fourth Respondent

CALANDRA TRADING 592 CC

Fifth Respondent

BORWA ICONS TRADING & PROJECTS CC

Sixth Respondent

KASEEV PETROLEUMS (PTY) LTD

Seventh Respondent

KASEEV TRADERS CC

Eighth Respondent

NIRVASH NARAINPERSHAD

Ninth Respondent

ABOOTHALIB SHEIK AHMED

Tenth Respondent

SYNERGY PETROLEUM (PTY) LTD

Eleventh Respondent

GURUS & IDOLS TRADING & PROJECTS CC

Twelfth Respondent

PRIVISHA SUMMURJEETH N.O.

Thirteenth Respondent

USHIA RAMLOCHAN N.O.

Fourteenth Respondent

JUDGMENT

Olsen J:

[1] This is the extended return day of a provisional restraint order and associated *rule nisi* made on 29th March 2023 in terms of s 26(3)(a) of the Prevention of Organised Crime Act, 121 of 1998 (the “Act”). The applicant is the National Director of Public Prosecutions. Nine defendants and fourteen respondents are cited. The defendants are the accused persons in a prosecution which has been instituted by the State. The trial has not yet commenced. It is the applicant’s case that a successful prosecution will result in a confiscation order or orders.

Legislative Background.

[2] In terms of section 18 of the Act when a defendant is convicted of an offence the court may at the request of the prosecution

“enquire into any benefit which the defendant may have derived from –

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial;
- (c) any criminal activity which the Court finds to be sufficiently related to those offences,

and, if the Court finds that the defendant has so benefitted, the Court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it

considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.”

[3] In terms of section 18(6) of the Act, a court deciding the application for a confiscation order or orders may refer to the evidence and proceedings at the trial, such further oral evidence as the Court may deem fit, and statements produced by the prosecution and the defence contemplated respectively by ss 21(1)(a) and 21(3)(a) of the Act.

[4] Restraint orders may be made by the High Court on application by the National Director of Public Prosecutions. The purpose of such an order is to protect property so that it is available to meet a future confiscation order when it appears to the court that there are “reasonable grounds for believing” that a confiscation order may be made against the defendant concerned.

[5] In terms of s 26(1) of the Act a restraint order prohibits any person from dealing in any manner with any property to which the order relates. Section 26(2) deals with the property to which the order may relate. It is extremely wide. It may relate to specified realisable property held by the person in question, to all realisable property held by such a person whether it is specified or not, and also to property which, if it were to be transferred to such person after the restraint order is made, would become realisable property in the hands of such person. Section 14 of the Act defines realisable property as any property “held” by a defendant and any property held by a person who has received an affected gift from the defendant. A court hearing an application for a restraint order makes its decisions concerning the scope of the order without the benefit of all the evidence and information which will be available to the court ultimately charged with the duty of making a confiscation order.

[6] In terms of section 26(3) of the Act the High Court may make a provisional restraint order and simultaneously grant a rule nisi calling upon the defendant or defendants to show cause why such an order should not be made final. As already mentioned, a provisional order in the present matter was made in March 2023. At this stage of the proceedings a decision must be made as to whether that order should be made final, and as to whether such a final order should be on modified terms.

The Parties.

[7] The applicant's founding affidavit was attested to by a Mr Richard James Chinner who brought the application on the authority of the applicant. As he states in his affidavit, the nine defendants are the nine accused in the criminal proceedings where it is alleged that they associated "to form and conduct a racketeering enterprise and participated in racketeering activities including fraud, forgery, corruption, money laundering, extortion, bribery and defeating the ends of justice". All of this was done, according to the State, with the purpose of "capturing and manipulating the supply chain management (SCM) system of SAPS KZN".

[8] The first three defendants comprise the Police component of the enterprise. I will refer to them collectively as the Madhoe defendants. The remaining defendants are Mr Thoshan Panday (the fourth defendant), his personal assistant and other members of what may conveniently be referred to as the (wider) Panday family. I will refer to them collectively as the Panday defendants.

[9] The respondents are persons who are or may be affected by the provisions of the restraint order, given their relationships with or connections to one or more of the defendants. On the applicant's case each respondent is affected by the restraint order for one or more of the reasons that she, he or it is related to a defendant by marriage, is a recipient of an affected gift, or holds realisable property on behalf of a defendant.

The alleged crimes and the provisional order.

[10] There is no need for the purposes of the present proceedings to go into any detail concerning the alleged criminal activities of the Panday defendants. (My reasons for saying that will follow.) The charges of money laundering aside, the case relied upon by the applicant is that through a course of conduct reflected in the other charges (fraud, forgery, corruption, extortion, bribery and defeating the ends of justice), contracts came to be concluded between the business interests of the Panday parties and SAPS which resulted in the latter paying various amounts to the former totalling R47 346 598 (hereafter "R47 million"). The evidence to support this contention is set

out in near consummate detail in an affidavit attested to by Colonel Philip Herbst, a member of SAPS attached to the Directorate for Priority Crime Investigation who is seconded to the National Prosecuting Authority. His affidavit runs to some 200 pages to which are annexed some 1600 pages of annexures comprising exhibits and affidavits of State witnesses.

[11] Colonel Herbst's affidavit also describes the money laundering charges. The money received from SAPS was moved around, on the applicant's case for the purpose of laundering it as contemplated in section 4 of the Act. It is the applicant's case that the amount received through each of these transactions constitutes the proceeds of the further crimes of money laundering. Details of these transactions are provided in the affidavit of Colonel Herbst. According to the applicant this has the effect of elevating the proceeds of all the crimes which are the subject of the indictment to an amount of R165 575 730.00 (hereafter "R165 million").

[12] Insofar as the identification of property subject to the restraint order is concerned, the provisional order adopts the method of defining the property by stating it in the widest terms, and then providing for what shall be excluded in paragraph 1.2 of the order. The restricting provision which is material to the principal issue raised by the defendants and respondents is contained in paragraph 1.2.3 of the order. It provides for the exclusion of

"such realisable property as the *curator bonis* may certify in writing to be in excess of R165 575 730 which has been calculated to be the proceeds of unlawful activities of the defendants which must still be adjusted to take into account

1.2.3.1 the value of money as calculated in terms of sections 15 and 20 of the POCA and

1.2.3.2 interest at the legal rate."

[13] Each of ss 15 and 20 of the Act makes provision for the adjustment of the value of any property at any time to take account of fluctuations in the value of money between that time and the date of the confiscation order.

[14] The issues I am called upon to decide are those raised by the Panday parties and the Madhoe parties. I will deal with their contentions separately, although

there is some overlap. Before doing so I must deal with the procedure adopted by the defendants and respondents in presenting their cases.

The variation applications

[15] The fourth, fifth, sixth and ninth defendants, together with the fifth and sixth respondents, launched an application to vary the provisions of the provisional order. This was said to be done in terms of s 26(10) of the Act. The seventh and eighth defendants, and the seventh, eighth and eleventh respondents did likewise. All of these defendants and respondents fall within the category I have referred to as the Panday parties. In their applications the principal relief sought is the amendment of the provisional order so that it limits the amount or value to be restrained to R47 million. In both applications relief is also sought releasing certain respondents from the operation of the provisional order altogether.

[16] Certain of the Madhoe parties, that is to say the first and third defendants and the first and third respondents, launched similar variation applications directed also at the provisional order. They sought the discharge in its entirety of the provisional order insofar as it relates to the first and third defendants and the first and third respondents. In the alternative they sought to have the provisional order amended by reducing the amount of realisable property subject to the provisional restraint in the case of the first defendant to R89 105, and in the case of the third defendant to R20 962.

[17] The applicant has objected to these variation applications from the outset upon the basis that there is no provision in the Act for the amendment of a provisional order. In my view the objection was well taken. In terms of s 26(10)(a) of the Act, the court which has made a "restraint order" may on application by a person affected by the order vary it or rescind it if it is satisfied on both of two requirements, namely

- (a) that the operation of the order will deprive the applicant of the "means to provide for his or her reasonable living expenses and cause undue hardship for the applicant"; and (not "or"),
- (b) the hardship suffered by the applicant outweighs the risk that the restrained property might be destroyed, lost, damaged, concealed or transferred.

The scope for variation of a restraint order under s 26(10)(a) is therefore restricted.

[18] Section 26 of the Act is part of chapter 5, which contains its own definitions section. The term "restraint order" is defined as an order made in terms of s 26(1). A provisional restraint order is not made in terms of s 26(1). It is made in terms of s 26(3).

[19] In response to the applicant's objection to the variation applications the parties who launched the first of them (lead by the fourth defendant, Mr Thoshan Panday), delivered an answering affidavit very late in the day. In it the fourth defendant requested that his affidavit in the variation application should be taken to be an answer in the main application. In the second of the Panday variation applications a request was made that the founding affidavit be regarded as an answer in the main application, and a similar request was made with regard to the variation applications brought by the Madhoe parties.

[20] The applicant complains that the allegations made in the founding affidavits in the variation applications do not speak directly to any of the allegations made in the founding papers which generated the provisional restraint order. There is no reference to any of the paragraphs in the founding papers. It was not therefore possible for the applicant to discern the precise scope of the challenge to the allegations made in the original founding papers.

[21] In my view the product of the approach followed by the various applicants for variation orders is properly described as a mess. The variation applications were not competent and must be dismissed.

[22] However at the hearing I requested counsel for the applicant to address the issues raised by the applicants in the variation applications upon the footing that their affidavits in those applications should be regarded as their answering affidavits in the application for confirmation of the *rule nisi* and the consequent final restraint order. The matter was argued on that footing.

[23] I requested that the matter should proceed in that fashion for the following reasons.

- (a) The defendants and respondents had a right to deliver affidavits challenging every aspect of the applicant's case, or some aspects of it; which if successfully done would have resulted in the first instance in an order discharging the rule nisi, and in the second with the issue of a final order in a modified form.
- (b) As undesirable as it would have been, it would have been the right of the defendants and respondents to deliver such answering affidavits in the form which their founding affidavits took in the variation applications.
- (c) Having chosen that course those defendants and respondents would have had to shoulder the burden of the inadequacies of their answers to the case made against them. Factual allegations in the applicant's papers not clearly challenged would be taken to be correct. Inferences from such facts not clearly challenged would be taken to be fairly drawn.
- (d) In short, whilst the course adopted by these defendants and respondents made life difficult for the applicant and, for that matter, for the court, the parties ultimately prejudiced are the defendants and respondents themselves.

[24] Before proceeding further I must say something about the manner in which a proposed amendment by the State to a provisional restraint order was dealt with in *National Director of Public Prosecutions vs Wood and others* 2022 (2) SACR 245 (GJ), a most informative and helpful decision of a full court. It was held at paragraph 275 that s 26(10)(a) of the Act did not apply to provisional restraint orders. However the court accepted that a provisional restraint order can nevertheless be amended, like any other provisional order. I respectfully agree with that proposition. Here the variation applications were squarely founded on s 26(10) of the Act. If they had not been brought on that basis, the question would arise as to when and in what circumstances defendants and respondents in such proceedings can seek a variation of a provisional restraint order. I suggest that such relief would only be granted in exceptional circumstances. To approach the matter otherwise would be to open the gates to multiple applications and hearings in advance of the hearing for which the Act does provide, ie upon the occasion of the application for the confirmation of a provisional order. There are no exceptional circumstances in this case, and it has not

been argued that there are. Neither is there any room for speculation on my part as to what might constitute such exceptional circumstances.

The Panday Parties

[24] The Panday parties do not dispute that the state has achieved the threshold for the grant of a restraint order. It is therefore conceded that there are “reasonable grounds for believing that a confiscation order may be made against” the defendants. As a confiscation order can only follow a conviction, the Panday defendants concede that, notwithstanding their claimed innocence, there are reasonable grounds for believing that the prosecution will result in guilty verdicts. That concession extends equally to the charges of money laundering.

[25] The threshold criteria having been met, the court has a discretion with regard to the grant of a restraint order, and as to the terms and extent of such an order. But the court may not “frustrate those criteria when it purports to exercise its discretion”. (See *NDPP v Rautenbach and Others* 2005 (4) SA 603, para 27.)

[26] The principal relief sought by the Panday parties is that the rule should be confirmed subject to an amendment to the cap on the value of property which may be restrained, so that it may not exceed the sum of R47 million. The proposed cap of R47 million represents the amount of money actually paid by SAPS in terms of the contracts allegedly unlawfully concluded, principally in connection with the provision of accommodation for members of SAPS during the 2010 World Cup. It is argued that the benefit to the defendants could not conceivably exceed that amount, as it is that money, and no more, which was moved around amongst the members of the enterprise. It is argued that the applicant cannot add amounts which were involved in the money laundering transactions to the sum of R47 million in order to increase that figure to R165 million, because it was only money forming part of the R47 million that was allegedly laundered.

[27] The applicant has presented its case upon the basis that the defendants will ultimately be liable jointly and severally for the full amount of all benefits if a confiscation order is made. The Panday parties have not objected to that approach; it

remains built into the relief they seek. One assumes that they accept the proposition that if the state proves the participation of each of the defendants in a single racketeering enterprise, then each benefit enjoyed by the enterprise is one enjoyed by each of the defendants. Whether that is the correct approach, and whether it might be ultimately sanctioned, will be a matter for the court which may be asked to make a confiscation order. Such an order may be regarded as justified by the defendants' "common involvement in the alleged offences at issue, their collective benefit and the need to serve the legislative purpose of POCA." (I quote from paragraph 263 of the judgment in *Wood*, and refer to paragraphs 259 to 263 of that judgment in support of my view that the applicant's approach involving capping the value of the restraint, and regarding the liability of the defendants as joint and several, should be maintained in the final restraint order.)

[28] It bears repeating that the Panday parties have not contended that the applicant cannot at this stage assert, as it has, that the various transfers of monies which elevate the cap from R47 million to R165 million amounted to money laundering. They provide no evidence on the subject.

[29] The modification which the Panday parties claim should be made to the cap would result in no account being taken of the changes in the value of money which have occurred since the crimes were allegedly committed. As far as I can see the argument in support of that approach, made in Mr Thoshan Panday's affidavit, is that a confiscation order will be confined to the profit made by the enterprise which will never reach R47 million even if the trial is much delayed. That argument loses sight of the fact that it is the gross proceeds of crime, not the net proceeds, which will be taken into account if and when a confiscation order is considered. (See *S v Shaik and Others* 2008 (2) SACR 165 (CC) at para 60.) The curator has calculated that, taking into account CPI rates over the years from January 2010 to July 2023, the then (in July 2023) present-day value of R47 million was in excess of R94 million. I asked counsel for the Panday parties during the course of argument to explain the basis upon which it was contended that these inflationary changes can be disregarded. His answer was that the applicant's case had not been presented on that basis. That is obviously incorrect. The order granted in March 2023 (quoted earlier in this judgment) makes specific provision for the inflationary adjustments provided for in the Act. (The curator's

calculation just mentioned was provided in Mr Chinnners replying affidavit to Mr Panday's belated answering affidavit in the main application.)

[30] It should be observed that according to the latest curator's report delivered to this court the value of property presently under restraint does not reach the figure of R94 million, and that it is the contention of the Panday parties that they have made a full disclosure of all property which is liable to be restrained. Upon the assumption that any future increase in the value of the property currently restrained will be reflected in future changes in the value of money, and in the light of the fact that the provisions of ss 15 and 20 of the Act cannot be disregarded, it is arguable that the reduction in the base cap from R165 million to R47 million sought by the Panday parties raises a moot issue. Nevertheless the question remains as to whether the applicant is entitled to add to the sum of R47 million each of the various amounts which were laundered.

[31] Section 19(1) of the Act provides that the
"value of a defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person."
It is clear that once an amount has been received, it matters not whether it has been retained by the receiver.

[32] I think that the argument for the Panday parties amounts to this. In the case of money laundering the amount of money in question is already the proceeds of crime, liable to be treated as such when a confiscation order is considered. Its character does not change. It does not take on a second incarnation as a benefit of crime. A difficulty with the argument is that in terms of s 19(1) the value of "advantages" is amongst the "sum of the values" which together make up the value of a defendant's proceeds of crime. The offence of money laundering is established by s 4 of the Act. In terms of s 4 money laundering involves an arrangement or transaction

"which has or is likely to have the effect –

- (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof or

- (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere –
 - (aa) to avoid prosecution; or
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,”.

The “advantage” which is sought to be obtained or achieved through money laundering is implicit in the definition. The question as to how such an advantage may be valued for the purposes of a confiscation order may prove to be complex. But that the proceeds of money laundering need to be taken into account, and that they are intended to be taken into account, is apparent from the Act as a whole, and from the fact that the penalty for money laundering is potentially a fine not exceeding R100 million or imprisonment for a period not exceeding 30 years. It is not without significance that the statutory crime of money laundering is created by the Act itself.

[33] The court dealing with the question of the confiscation order in this case, assuming it arises, will be in a better position to attribute a value to the advantages accruing in the present cases of money laundering than the court is at present, where it is dealing merely with a restraint order in contemplation of what might be done at a later and ultimately final, and better informed, stage of proceedings under the Act.

[34] Counsel for the applicant have argued that money laundering involves the receipt of the funds concerned by one person from another, and that the money constitutes to its full value the proceeds of the crime in the hands of the recipient. They argue that whilst counting the laundered sum at its face value may result it being counted more than once, that is a permissible outcome under the Act. (See *Shaik and Others v S* [2007] 2 All SA 150 (SCA) para 25.) There is merit in the argument, which carries the advantages of recognising the crime of money laundering as independently generating a liability under the provisions of the Act, whilst avoiding an esoteric enquiry into the value of the advantage of laundered money over the original proceeds of crime.

[35] In my view at this stage of proceedings, where a restraint as opposed to confiscation is at issue, the court should ordinarily allow the applicant the benefit of

the face value of laundered money. In my view this approach is consistent with what Cameron JA had to say about the Act in paragraphs 67 and 68 of the judgment in *National Director of Public Prosecutions vs Elran* 2013 (1) SACR 429 (CC).

[67] The second reason POCA-like legislation is indispensable is the intricacy and complexity of modern law-breaking. No longer is economic crime committed only through romantically imaginable methods like piracy, highway robbery and smuggled contraband. All that, if not past, is now of comparatively lesser importance. Most modern crime is committed through infinitely more sophisticated means – indirect and electronic. More importantly even, it is then concealed through those same means. The internet, electronic communication and the arcane recesses of the international banking system have enabled criminals to outsmart even the smartest of law enforcement systems.

[68] Hence, here and elsewhere, the indispensable response has been asset forfeiture legislation. Follow the money. Seize the profits. Target the spoils of criminality. This is what POCA does. As in other democracies, it creates broad, new categories of offences. These include offences relating to racketeering activity, dealing in the proceeds of unlawful activities (money laundering, assisting another to benefit from the proceeds of unlawful activities and acquisition, possession or use of proceeds of unlawful activities) and criminal gang-related activities. It targets the proceeds of unlawful activities by enabling confiscation of their proceeds upon a criminal conviction, as well as restraint orders and realisation of property after a confiscation order has been made. In addition, civil recovery of property is made possible through preservation and forfeiture orders.”

[36] I accordingly conclude that the request by the Panday parties for a reduction in the cap on the value of restrained property should be denied.

[37] In their affidavits in support of their variation applications already dealt with, the Panday parties have sought to have the property of the fifth, sixth and the eleventh respondents excluded from the operation of the restraint order. Certainly in the case of the fifth and the eleventh respondents the case is sought to be made that it is not

established that they are or were the recipients of affected gifts. I do not propose to go into the arguments for and against that proposition.

[38] In my view the argument advanced by counsel for the applicant with regard to each of these respondents (companies in each case), that they are parties which hold property on behalf of defendants, is correct, and the relevant allegations in the founding papers supporting the argument stand uncontradicted by the defendants.

[39] In the case of the fifth respondent (Calandra Trading 592 CC) the fifth defendant is its sole member, but she has concluded a contract in terms of which the fourth defendant is entitled to deal with the fifth respondent's main asset, certain immovable property registered in its name. In the case of the sixth respondent (Borwa Icons Trading and Projects CC) the applicant's uncontradicted case is that the respondent holds its property for the fourth defendant.

[40] In the case of the eleventh respondent (Synergy Petroleum (Pty) Limited), of which the seventh defendant is the sole director, the case is a little less clear as there is uncertainty as to whether it owns property. In his affidavit in his variation application the seventh defendant says that the eleventh respondent "has no realisable assets". That is not quite the same thing as saying that it has no assets, a significant point because the applicant's case is that whatever it holds, the eleventh respondent holds on behalf of the seventh defendant, which would render its property realisable.

[41] I conclude that the fifth, sixth and eleventh respondents should remain subject to a restraint order.

The Madhoe Parties

[42] The Madhoe parties who launched variation applications are the first and third defendants. It is unnecessary for the purposes of this judgment to go into any great detail concerning the applicant's case against these defendants for reasons which will become apparent.

[43] The first defendant, Mr Navin Madhoe, was at the material time a member of SAPS holding the position of Section Head: Acquisition Management attached to Supply Chain Management Services, KZN. According to the applicant's founding papers he manipulated the supply chain management processes under his control intentionally to advantage the Panday defendants and the companies through which they concluded contracts with SAPS, by eliminating any competition they would or might be confronted with but for his manipulations of the system to their profit, and at the expense of SAPS. This was done with criminal intent. For example, contracts which ought to have been subjected to a competitive process were divided up into tranches of R200 000 in order to bypass the processes which the law required to be followed. In the specific case of accommodation for members of SAPS during the course of the 2010 World Cup the first defendant deliberately delayed his departments submission to the National Office for so long that at National level there was no option but to endorse the proposal of the award of very substantial contracts in that regard to the Panday interests, notwithstanding that no competitive process had actually been followed. These courses of conduct resulted in the payment to and on behalf of the Panday parties of amounts totalling the sum of R47 million. Details of the first defendant's conduct in this regard are fully set out in the applicants founding papers.

[44] The precise manner in which gratifications which have been tracked down by the applicant's staff, totalling R89 000.00, were paid to the first defendant are also fully set out in the founding papers.

[45] The third defendant is Ms Mmamonnnye Ngobeni who was at the material time a Lieutenant General in the service of SAPS and the Provincial Commissioner of Police, KZN. The principle accusation with which she is confronted is that she deliberately obstructed, and sought to put an end to, the investigation which culminated ultimately in the prosecution of the Panday defendants. In her case the gratification for this service identified by the deponents to the applicant's founding affidavits was some R20 000.00.

[46] The case against each of the first and third defendants is dealt with in the applicant's founding papers in fine detail. Each asks that the *rule nisi* insofar as it relates to them and their spouses (in the latter case as respondents) should be

discharged. That outcome would be justified only by a conclusion that with regard to them, the applicant has failed to pass the threshold of the existence of reason to believe that a confiscation order will be made against them. However the detailed evidence comprising the intended State case against them has not been challenged in any meaningful manner. Their responses to the evidence against them amount to little more than bare denials.

[47] In the case of the first defendant the high-water mark appears to be his assertion that the contract for the accommodation of SAPS members during the World Cup was actually executed or signed off at National level. With regard to the "gratifications" amounting to some R89 000.00 the first defendant had this to say.

"I deny that these were gifts and I record that like SAPS use service providers for accommodation and purchasing goods likewise I did so by utilising the same service provider in my personal capacity and duly paid for the services rendered."

Nothing is said beyond that. No evidence of payment is tendered.

[48] In relation to the "gratification" asserted against her, the third defendant made much the same sort of statement saying that her staff secured for her the use of the "reputed service provider for my husbands surprise birthday party...". As in the case of the first defendant, the third defendant offered no evidence to support her contention that she paid the amount in question. As is the case with the first defendant the benefit received by the third defendant emanated from the Panday parties. The third defendant states more than once that she came too late on the scene to be party to the conspiracy with the Panday interests alleged by the applicant. She protests her innocence, without dealing with the allegations against her that she persistently attempted to put a stop to the investigation of the relationship between SAPS and the Panday interests.

[49] During the course of the argument I asked the attorney who represented the first and third defendants (and their spouses) whether he intended to persist in the contention that the threshold for a restraint order against his clients had not been achieved by the applicant. He answered in the affirmative. However, notwithstanding my invitation, he declined to argue the point, saying at one stage that he had left his notes on the topic in his office.

[50] In the circumstances there is no need for me to say any more than that I am satisfied on the papers that the threshold was clearly met in relation to both the first and third defendants, and that their explanations for the “gratifications” which the investigators were able to identify are insubstantial, weak, and cannot prevail in these proceedings.

[51] The first and third defendants also raised a contention that because each of them is married in community of property, they only own one half of the estates which, through the inclusion of their spouses as respondents, are subject to the restraint provisions in the provisional order. In making this submission they overlook the central feature of marriages in community of property, that the community estate is indivisible whilst the marriage subsists unless a court orders otherwise in terms of section 20 of the Matrimonial Property Act, No. 88 of 1984.

[52] The applicant’s founding papers illustrate that, accepting the facts stated therein as true, there was a symbiotic relationship between the Madhoe defendants and the Panday defendants which on the probabilities was indispensable if the project was to achieve the success which it did. I agree with the submission of the first and third respondents that the gratifications which the applicant has identified are paltry. But I reach that conclusion not measuring it against their then incomes as employed SAPS officers, but measuring it against the vital roles that each played according to the applicant’s founding papers. The applicant’s case that this was a joint enterprise which generated a return of R47 million extends also to the first and third defendants, and their alternative prayer that the operation of the restraint against them and their spouses should be restricted to the known gratifications cannot be granted.

[53] However, in my view the contention of the applicant that the joint enterprise insofar as it relates to money laundering also included the first and third defendants, whilst it may reasonably possibly be true, seems not to be supported by the available evidence. The transactions giving rise to the money laundering charges involved the Panday parties. It is a central feature of the applicant’s argument that the money laundering activities themselves generate separate identifiable proceeds of crime, and that there is a clear distinction between what might be termed the primary crimes

generating the sum of R47 million, and the subsequent crimes of money laundering which lift the restraint claimed to R165 million. No evidence is tendered of the participation of the first and third defendants in money laundering activities. The same goes for the second defendant, who was a Captain in SAPS serving under the direct command of the first defendant. The second defendant (and his wife, the second respondent) made no application to vary the provisional order and has not opposed the confirmation of the *rule nisi*. Although it will be cold comfort to them, in my view in the case of the Madhoe parties the base sum under restraint should be R47 million, and not R165 million.

Costs

[54] In my view none of the defendants has achieved any success in opposing the confirmation of the provisional restraint order in its original form. The adjustment I propose to make to the order is not the product of the case made by, and the submissions made on behalf of, the defendants affected by the adjustment.

[55] The request from the applicant is that the failure of the opposition to the confirmation of the provisional order justifies an award of costs against the defendants in the restraint application, by which I understand the applicant to mean the entire application. In my view, properly viewed, the restraint application is one which seeks a benefit for the applicant which cannot be secured otherwise than through a restraint order, even if there is no opposition to it by the affected defendants and respondents. In those circumstances I take the view that the only costs for which the opposing defendants should be held liable are those occasioned by their opposition.

The Order

[56] I make the following order:

- 1) The applications to vary the provisional restraint order are dismissed with costs.**

- 2) Subject to the variation of paragraph 1.2.3 of the order by the insertion after the figure “R165 575 730” of the following:

“in the case of the fourth to ninth defendants (inclusive), and in excess of R47 346 590 in the case of the first, second and third defendants,”

the provisional restraint order made on 29th March 2023 is confirmed.

- 3) The costs of the applicant occasioned by the opposition to the confirmation, or unqualified confirmation, of the provisional order on the part of the first and third to ninth defendants (inclusive) shall be paid by those defendants, their liability being joint and several. Such costs shall include the costs of two counsel, senior counsel’s fees to be taxed on scale C and those of junior counsel on scale B.


Olsen J

Case Information:

Date of Argument: 25 July 2024

Date of Judgment: 2 December 2024

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