



## **BARNES AJ**

### ***Introduction***

[1] Two related applications have come before me for determination.

[2] The first application is one in terms of sections 30 and 31 of the Prevention of Organised Crime Act 121 of 1998 (“**the POCA**”). It is for an order to realise certain property and apply the proceeds thereof in order to satisfy a confiscation order issued by the Regional Court, Johannesburg in terms of section 18 of the POCA. This application is brought by the Applicant, the National Director of Public Prosecutions.

[3] The second application is one in terms of Rule 42 of the Uniform Rules of Court for an order varying the confiscation order made by the Regional Court. This application is brought jointly by the defendant, against whom the confiscation order was made, and the respondent, who is married to the defendant in community of property.

### ***Background***

[4] On 24 October 2018, the defendant was convicted by the Regional Court, Johannesburg on charges of fraud, corruption and possession of suspected stolen property and sentenced to an effective five years imprisonment.

[5] On 16 July 2019, pursuant to an application by the Applicant, the Regional Court made a confiscation order against the defendant in the amount of R2 953 600.00. The defendant applied for leave to appeal against his conviction, sentence and the confiscation order. Leave to appeal was refused by the Regional Court.

[6] On 11 November 2019, on application by the Applicant, on an *ex parte* basis, this Court granted a provisional restraint order, with a *rule nisi*, in terms of section 26 of the POCA against the realisable property of the defendant. This comprised: the

matrimonial home and primary residence of the defendant and the respondent, which is registered in both their names, the household contents in respect thereof and a Toyota Fortuner motor vehicle, which is registered in the name of the defendant.

[7] The defendant and the respondent opposed the confirmation of the provisional restraint order.

[8] After hearing submissions from both sides, this Court confirmed the provisional restraint order in a judgment handed down on 19 March 2021.

[9] The Applicant now seeks the realisation of the property under restraint in order to satisfy the confiscation order. The defendant and the respondent seek the variation of the confiscation order.

[10] It is convenient to deal with the variation application first. I do so below.

### ***The Variation Application***

[11] In the variation application, the defendant and the respondent seek the following relief:

*“To amend, add to, or vary; and further confirm the Order dated 16 July 2019, under the above case number in the above Honourable Court in terms of section 18 of the Prevention of Organised Crime Act 121 of 1997 (“POCA”) the amount of R2 953 600.00 in the following terms:*

- 1. by varying the amount of R2 953 600.00.*
- 2. by deleting the amount of USD188 350.00 as well as the R72 200.00 and the Nigerian Naira 2843.00 (approximately R111.00 as at 4 May 2023)”*

[12] The variation application is opposed by the Applicant on the basis that it is not competent in law, *inter alia*, because this Court lacks jurisdiction to entertain it.

[13] This is undoubtedly correct. The confiscation order was granted by the Regional Court sitting as the trial court and this Court does not have jurisdiction to vary it. Furthermore, as was correctly submitted by the Applicant, the confiscation order made by the Regional Court does not need to be confirmed by this Court.

[14] There are further fundamental difficulties with the variation application. It was brought after an application for leave to appeal against the confiscation order had been considered and dismissed by the Regional Court. Furthermore, it was brought almost four years after the grant of the confiscation order.<sup>1</sup>

[15] The purpose of Rule 42 is “to correct expeditiously an obviously wrong judgment or order.”<sup>2</sup> It is therefore the case that even if an applicant establishes that subrule (1) applies, she should not be heard to complain after the lapse of a reasonable time.<sup>3</sup> What is a reasonable time depends upon the facts of each case.<sup>4</sup> In this case the variation application was brought almost 4 years after the confiscation order was granted with no explanation whatsoever for this extreme delay. This, in my view, is unreasonable.

[16] In oral argument, the Applicant sought to contend that the variation application was brought not only in terms of Rule 42 of the Uniform Rules of Court but also in terms of sections 47 and 48 of the POCA. There is no merit in this contention. Section 47 of the POCA applies to variation and rescission of preservation of property orders; orders for the appointment of a curator *bonis* and orders in respect of immovable property. It does not apply to confiscation orders. Section 48 of the POCA does not deal with variation or rescission at all.

[17] Section 34 of the POCA deals with the variation of confiscation orders by the High Court but only in the following limited circumstances:

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<sup>1</sup> The confiscation order was granted on 16 July 2019 in the Regional Court. The application to vary the confiscation order was brought in the High Court on 11 May 2023.

<sup>2</sup> *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B-I.

<sup>3</sup> *First National Bank of Southern Africa Ltd v Van Rensburg NO: in re First National Bank Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) at 681B-G.

<sup>4</sup> *Promedia Drukkers & Uitgewers (Edms) Bpk* 1996 (4) SA 411 (C) at 421G.

*“34 (1) If the High Court is satisfied that the realisable property is inadequate for the payment of the balance of the amount to be recovered under a confiscation order, that court may, on the application of the defendant, issue a certificate to that effect stating the reasons for the court being so satisfied.”*

[18] The present variation application was not brought in terms of section 34 of the POCA.

[19] In the circumstances, the court lacks jurisdiction to deal with the variation application which is also hopelessly out of time. The application stands to be dismissed on this basis alone, without regard to its merits.

[20] I deal next with the realisation application brought by the Applicant.

### ***The Realisation Application***

[21] The realisation application is brought in terms of sections 30 and 31 of the POCA.

[22] There are three jurisdictional requirements set out in section 30(1) of the POCA which must be satisfied in order for a court to exercise its powers in terms of section 30(2) to grant an order for the realisation of property that is subject to a confiscation order. These are the following:

- a. a confiscation order has been made against the defendant concerned;
- b. such confiscation order is no longer subject to review or appeal; and
- c. the proceedings against the defendant have not been concluded.

[23] In this matter, the following important facts are common cause between the parties:

- a. A confiscation order in terms of section 18 of the POCA has been granted against the defendant but has not been satisfied.

- b. There is no pending review or appeal against the conviction of the defendant or the confiscation order itself.

[24] The first two jurisdictional requirements stipulated in section 30(1) of the POCA are therefore satisfied in this case.

[25] Turning to the third jurisdictional requirement, section 17 of the POCA defines “*conclusion of proceedings*” as follows:

*“Conclusion of proceedings against defendant*

*17. 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.”*

[26] The Applicant submitted, correctly, that where a confiscation order has been made against a defendant, the proceedings may be said to be concluded in terms of section 17 of the POCA in one of two ways, namely:

- a. having the confiscation order set aside by a competent court on appeal or review; or
- b. the defendant paying the confiscation amount in full.

[27] It is common cause that neither of these things have happened in this case. The Applicant accordingly submitted that, the requirements for the grant of a realisation order having been satisfied, this Court ought to grant the order sought.

#### The Nature of the Opposition

[28] The defendant and the respondent did not oppose the realisation application on the basis that any of jurisdictional requirements stipulated in section 30(1) of the POCA had not been satisfied. Instead, their opposition was based on the following grounds:

a. Firstly, it was contended that the respondent did not have the opportunity to make representations in connection with the realisation of the property under restraint, as is required in terms of section 30 of the POCA. There is no merit in this contention. The respondent opposed this application and deposed to an affidavit in support of her opposition thereto.

b. Secondly, it was contended that the property under restraint, notably the matrimonial home and the motor vehicle, were neither utilised nor instrumental in the offences committed by the defendant. While this appears to be common cause on the facts, the correct legal position is that realisable property in terms of the POCA need not be the proceeds of crime, nor instrumental in the commission thereof. In *National Director of Public Prosecutions v Rautenbach and Others* 2005 (1) SACR 530 (SCA) the Supreme Court of Appeal held that “*once it is shown that a material benefit accrued, the offender may be ordered to pay to the state the monetary equivalent of that benefit even if it means that it must be paid from assets that were legitimately acquired.*”<sup>5</sup> The second ground of opposition does therefore not assist the defendant and the respondent.

c. Thirdly, it was contended that the respondent, who is married to the defendant in community of property, is an innocent party and that her rights and interest in the property under restraint should therefore be excluded from any realisation order in terms of section 52 of the POCA. It is this third ground of opposition that requires closer scrutiny.

#### The “Innocent Owner” Argument

[29] In support of the contention that the respondent’s rights and interest in the

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<sup>5</sup> At para 52.

property under restraint should be excluded from any realisation order made by the court in terms of section 52 of the POCA, counsel for the defendant and the respondent sought to rely on a number of judgments. All of these, however, are matters which deal with forfeiture orders in terms of the POCA and not with confiscation or realisation orders.<sup>6</sup>

[30] The Applicant, for its part, contended that section 52 of the POCA applies only to forfeiture orders and not to confiscation or realisation orders.

[31] This issue was not adequately ventilated in either the heads of argument or in oral argument and accordingly, on 3 September 2024, the Court addressed correspondence to the parties which stated the following:

*“The application is one in terms of sections 30 and 31 of the Prevention of Organised Crime Act 121 of 1998 (“the POCA”) for an order to realise certain property and apply the proceeds thereof for the purposes of satisfying a confiscation order issued by the Regional Court, Johannesburg against the defendant, Mr Alkpehae, in terms of section 18 of the POCA.*

*The property sought to be realised is however part of the joint estate of Mr and Mrs Alkpahae, who are married in community of property, and includes the matrimonial home, in which Mrs Alkpehae and a minor child born of the marriage presently reside.*

*During argument of the matter, counsel for Mr and Mrs Alkpehae submitted that “in the event that any Order is made, the above Honourable Court will exclude the rights and interests of [Mrs Alkpehae] from the operation thereof in terms of section 52 of the POCA.”*

*Counsel for the State however submitted that section 52 of the POCA is only relevant to forfeiture orders made in terms of the POCA.*

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<sup>6</sup> For example and most notably: *Brooks and Another v NDPP* 2017 (2) All SA 690 (SCA).

*Furthermore, all the case law referred to by counsel for Mr and Mrs Alkpehae in support of the contention quoted above, are matters which dealt with forfeiture orders, and not with confiscation orders.*

*In the circumstances, counsel for both the State and Mr and Mrs Alkpehae are requested to assist the Court by providing written submissions which address the following questions:*

*Whether section 52 of the POCA applies to confiscation orders or may competently be applied in the context of an application for the realisation of a confiscation order; and*

*If the answer to the above is in the negative, what are the legal and constitutional implications for the rights of an “innocent owner” such as Mrs Alkpehae in the context of an application for the realisation of a confiscation order.”*

[32] Counsel for both parties submitted supplementary submissions and the Court is indebted to them for their assistance.

[33] The issue in respect of which supplementary submissions were requested by the Court is a novel one, as was noted by the Applicant:

*“There is currently no known precedent in our law wherein a spouse’s interest in joint property, by virtue of marriage in community of property, has been raised and determined in an application for a realisation order.”*

[34] The Applicant’s supplementary submissions provided a helpful analysis of the distinct legal character of forfeiture orders on the one hand and confiscation and realisation orders on the other. The Applicant submitted that it followed from this, and from the clear language of the POCA, that section 52 of the POCA applies to forfeiture orders only.

[35] The defendant and the respondent, in their supplementary submissions, made the following contention:

*“It is patently clear in relation to the above matter that the application in terms of sections 30 and 31 of the POCA, in relation to the wife of the Defendant who has been married to the Defendant in community of property since 16 May 2022 and that her rights and interests in the property will be excluded from any Order that the Honourable Court might make in the circumstances.”*

[36] Their submissions failed, however, to explain how this is “patently clear.” Moreover, the judgments sought to be relied on by the defendant and respondent in their supplementary submissions still pertained to forfeiture orders under the POCA and not to confiscation or realisation orders.<sup>7</sup>

### Analysis

[37] The starting point in the analysis is of course the language of the POCA. Section 52 of the POCA explicitly provides that a person’s interest may be excluded from a forfeiture order in certain circumstances. Section 52(1) of the POCA provides in relevant part as follows:

#### **“Exclusion of interests in property**

**52 (1)** The High Court may, on application –

(a) under section 48(3); or

(b) by a person referred to in section 49(4),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for such an order –

(a) had acquired the interest concerned legally; and

(b) neither knew nor had reasonable grounds to suspect that the property in which the interest is held:

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<sup>7</sup> Most notably: *Mazibuko v NDPP* 2009 (3) All SA 538 (SCA).

- (i) is an instrumentality of an offence referred to in Schedule 1; or
- (ii) is the proceeds of unlawful activities.”

[38] There is no similar provision in the POCA in respect of confiscation or realisation orders. A plain reading of POCA then, does not permit the exclusion of interests where confiscation or realisation orders are concerned.

[39] In addition to the plain language of the provisions, a proper interpretation of the POCA must take due cognisance of the distinct legal character of forfeiture orders on the one hand and confiscation and realisation orders on the other.

#### *Forfeiture Orders*

[40] A forfeiture order in terms of the POCA is made against the property itself in circumstances in which the property was either the proceeds of unlawful activities or was used as an instrument in the commission of an offence or both.

[41] A forfeiture order is not made against the owner of the property or a person who has an interest in the property.

[42] In terms of section 52 of the POCA the Court may, on application, and when it makes a forfeiture order, make an order excluding certain interests therefrom, if it finds on a balance of probabilities that the applicant:

- a. had acquired the interest concerned legally; and
- b. neither knew nor had reasonable grounds to suspect that the property in which the interest is held was an instrumentality of an offence referred to in Schedule 1 or was the proceeds of unlawful activities.

#### *Realisation Orders*

[43] A realisation order is a consequential step following on a confiscation order and sometimes a restraint order.

[44] A confiscation order is a money order granted against a defendant.

[45] The amount of the confiscation order is determined by the court after having considered the amount of benefit derived by the defendant from the relevant criminal activities, subject to the value of the realisable property of the defendant.

[46] In this regard, section 18(2) of the POCA, which deals with confiscation orders, provides as follows:

*“(2) The amount which a court may order the defendant to pay to the State under subsection (1) –*

*(a) shall not exceed the value of the defendant’s proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or*

*(b) if the court is satisfied that the amount which might be realised as contemplated in section 20(1) is less than the value referred to in paragraph (a), shall, not exceed the amount which in the opinion of the court might be so realised.”*

[47] As noted above, realisable property need not be the proceeds of crime, nor instrumental in the commission thereof.

[48] Once granted, a confiscation order has the effect of a civil judgment. Thus section 23 of the POCA provides as follows:

***“Effect of confiscation orders***

*23(1) A confiscation order made –*

*(a) by a magistrate’s court, other than a regional court, shall have the effect of a civil judgment of that court;*

*(b) by a regional court shall have the effect of a civil judgment of the magistrate’s court of the district in which the relevant trial took place.*

*(2) Where a High Court makes a confiscation order –*

*(a) the confiscation order shall have the effect of a civil judgment of that court.”*

[49] It is important to emphasise that the grant of a confiscation order does not mean that the realisable property itself is being confiscated.

[50] To satisfy a confiscation order a defendant is at liberty to utilise any legitimate means to pay the amount ordered by the court. It is only in circumstances where a defendant fails or is unable to pay the ordered amount that an application for realisation may be brought in terms of sections 30 and 31 of the POCA.

[51] In summary then, unlike a forfeiture order which attaches to the property itself and not to any person, a confiscation order is a money order against an individual which has the effect of a civil judgment. If an individual against whom a confiscation order is made is married in community of property, then the patrimonial consequences of that marital regime apply.

[52] As the Applicant pointed out in its supplementary submissions, this issue was dealt with by the High Court in the restraint application which preceded this one. There, the Court held as follows:

*“Spouses married in community of property become co-debtors in respect of debts incurred by each prior to the marriage and are co-debtors in respect of debts incurred during the marriage. Such debts are payable from the joint estate and may be enforced through litigation proceedings against the spouse who incurred common liability or both spouses jointly.”<sup>8</sup>*

*“Although the confiscation order was granted against the defendant only, the liability to satisfy the order is not that of the defendant separately from the respondent. The defendant and the respondent are co-debtors and the order stands against the joint estate.”<sup>9</sup>*

[53] This is undoubtedly correct, and the same logic must apply in respect of realisation applications under the POCA. It follows, in my view, that the present

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<sup>8</sup> At para 9 of the Judgment.

<sup>9</sup> At para 11 of the Judgment.

realisation order stands to be granted against the joint estate of the defendant and the respondent and that there is no scope for the application of section 52 of the POCA which applies to forfeiture orders only.

[54] Despite my invitation to do so, the parties did not deal in their supplementary submissions with the legal and constitutional implications for the rights of the defendant and/or the respondent of granting a realisation order in the present context.

[55] There is, in my view, an issue that must be addressed in this context and that is the impact of the realisation order on the defendant and the respondent in relation to the immovable property that they jointly own.

[56] As I have noted above, a confiscation order is a money order which has the effect of a civil judgment. A realisation order, then, permits property to be sold in execution to satisfy that order. It can be understood as effectively granting leave to execute because it authorises enforcement of a confiscation order by converting assets into monetary value.

[57] In my view, when immovable property that is a primary residence is the subject of a realisation order, leave to execute against that property is subject to it being declared specially executable. Section 26(1) of the Constitution of the Republic of South Africa, 1996 guarantees the right to have access to adequate housing. Any measure that may result in the loss of a primary residence requires judicial scrutiny to ensure that the process is fair and does not disproportionately affect this fundamental right. Our courts, in cases such as *Jafftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) and subsequent decisions,<sup>10</sup> have emphasized that judicial oversight is mandatory when immovable property, particularly a primary residence, is at risk of being sold in execution. In my view, the POCA must be read subject to these constitutional principles and protections.

[58] The Applicant did not ask for an order that the immovable property be

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<sup>10</sup> See also *Gundwana v Steko Development* CC 2011 (3) SA 608 (CC).

declared specially executable. Accordingly, while there is some information before me, including, importantly, the fact that a minor child resides in the residence, certain of the key considerations that must necessarily be canvassed in applications to declare a primary residence specially executable have not been addressed by the parties. These include *inter alia*:

- a. whether the defendant and the respondent are able to find alternative accommodation before the property is realised; and
- b. whether there are less invasive means of satisfying the confiscation order such as a payment arrangement, perhaps with the respondent, who as I have noted above is a co-debtor.

[59] This is not intended to be an exhaustive list of matters that would ordinarily have to be dealt with. It is common cause that the immovable property that is referred to in my order is the primary residence of the defendant and the respondent. During argument, the Applicant submitted that it would be amenable to an order granting the defendant and the respondent reasonable time to seek alternative accommodation before the property is realised. While this is appreciated, I am of the view that this is not sufficient to ensure compliance with the constitutional protections demanded by section 26 of the Constitution.

[60] In my view, this can only be done if a proper application to declare the immovable property specially executable is made. I intend to make provision for this in my order.

[61] In the circumstances, I make the following order:

### **Order**

1. The application for the variation of the confiscation order made by the Regional Court is dismissed, with costs.
2. The application in terms of sections 30 and 31 of the Prevention of Organised Crime Act 121 of 1998, as amended (“**the POCA**”) is granted, with costs, subject to the conditions set out below.

3. The endorsement on the title deed of the immovable property is uplifted.
4. The need for a curator *bonis* to be appointed is dispensed with.
5. Ms Telani Shabangu (“Shabangu”) of Rihlazana Auctions or her delegated representative or any authorised official of Rihlazana Auctions is authorised to assume control of the following property into her custody:
  - a. A silver Toyota Fortuna 4.0 V6 A/T vehicle with registration number Y[...], 2009 model, chassis number A[...] and engine number 1[...], registered in the name of the defendant as both the owner and titleholder;
  - b. Household contents of value, jewellery, valuables, any other realisable property of the defendant or property in which the defendant has an interest.
6. The defendant and respondent and any other person who holds such realisable property listed above are directed to surrender the said property into the custody of Shabangu or her delegated representative or any authorised official of Rihlazana Auctions.
7. Shabangu or her delegated representative or any authorised official of Rihlazana Auctions is authorised and directed to:
  - a. realise the property in such manner as will, in her discretion, yield the highest market-related returns in the most cost-effective way;
  - b. deduct from the amount realised, any expenses incurred in the realisation of the property and her reasonable fees as agreed between Shabangu and/or Rihlazana Auctions and the Applicant;
  - c. thereafter, pay the amount realised into the Criminal Assets Recovery Account (“**CARA**”) number 803033056 held at the South African Reserve Bank with branch code 900145, established in terms of section 63 of the POCA, with reference “**Alkpehae P – JAFU 242/2015,**” in satisfaction of the confiscation order made against the defendant on 16 July 2019 by Magistrate Twele, sitting at the Johannesburg Regional Court (“**the confiscation order**”);
  - d. perform any ancillary acts which, in the opinion of Shabangu or her delegated representative or authorised official of Rihlazana Auctions, subject to the direction by the Applicant, are necessary;
  - e. in the event of sums of money remaining from the realised amount after deduction of expenses incurred, auctioneer fees and payment into CARA as directed above, return such excess amount to the defendant and the

respondent in the manner in which the defendant and the respondent will direct;

f. inform the relevant parties in writing by email or registered post or by delivering a letter to them personally of the value of sums of money that remained in her hands after the amount payable in terms of the confiscation order has been fully paid.

8. Shabangu or her delegated representative or authorised official of Rihlazana Auctions shall, as soon as possible but no later than a period of within 30 days after payment of the realised amount into CARA, file a report with the Applicant and this court, indicating the manner in which:

a. she conducted the administration and realisation of the assets mentioned above;

b. the manner in which she complied with the terms of this order; and

c. whether the confiscation order has been satisfied and if not, what the shortfall is.

9. Shabangu or her delegated representative or any authorised official of Rihlazana Auctions shall as soon as possible provide a copy of the confiscation order and proof of all payments in satisfaction of the order to the clerk of the Johannesburg Magistrate's Court.

10. In the event of the confiscation order not being satisfied, the Applicant may, within 20 days of filing of the report referred to in paragraph 8 above, apply to the High Court for an order declaring the following immovable property specially executable with a view to satisfying the balance of the amount owing in terms of the confiscation order: *Erf 5[...], Alberton, with the physical address Number 1[...], B[...], Street, S[...], A[...], Gauteng, registered in the names of the respondent and the defendant, each holding a 50% share.*

11. Should such an application not be made or should it be made but be refused, the defendant may apply to the High Court for the variation of the confiscation order in terms of section 34 of the POCA.

**H BARNES**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, JOHANNESBURG**

Heard: 12 February 2024

Supplementary submissions received: 17 September 2024

Judgment: 19 December 2024

Appearances:

Applicant:

Adv M Mbatha

Instructed by the State Attorney, Johannesburg

Defendant and Respondent:

Adv M Witz

Instructed by Witz Incorporated