

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 18321/2022

In the matter between:

MATTHEW WINSTON HEATH JACK

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
LIONEL VAN TONDER N.O.
JEROME BOOYSEN
TINA ADELLE BOOYSEN
ALBATROSS ISLE TRADE (PTY) LTD
DEXAVISION (PTY) LTD**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

In re:-

Case No.: 6171/2021

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

**JEROME BOOYSEN
KENNETH HANSEN
KRISTO MARIENS
CLINTON LANGEVELD
JENEN JESMENE JANSEN
HERBERT ANTHONY ZOUTMAN**

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant
Sixth Defendant

**TINA ADELLE BOOYSEN
ALBATROSS ISLE TRADE (PTY) LTD
ASHLEY HANSEN**

First Respondent
Second Respondent
Third Respondent

Judgment was handed down electronically on 26 June 2023 by circulation to the parties' legal representatives' email addresses.

JUDGMENT

SLINGERS, J

Introduction

1. A restraint order places the defendant's property beyond his or her control and in the hands of a *curator bonis* pending the outcome of criminal proceedings instituted against that defendant.¹ Restraint orders are made in order to ensure that the defendant's realisable property is preserved so that it may in due course be realised to the satisfaction of a confiscation order.²
2. A restraint order may only be granted against a defendant if it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such defendant. A confiscation order follows the conviction of the defendant.³ Thus, a restraint order may only be granted if the NDPP discharges the onus of establishing a reasonable prospect of obtaining both a conviction in respect of all or some of the criminal charges levied against the defendant and a subsequent confiscation order.⁴
3. Section 14 of POCA defines realisable property as:

'(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely –

¹ Section 28 of POCA; *Fraser v ABSA Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para [12]

² *National Director of Public Prosecutions v Rebutzi* (94/2000) [2001] ZASCA 127 (23 November 2001) at para [4]

³ “ ‘Defendant’ is a person against whom a prosecution for an offence has been instituted irrespective of whether he or she has been convicted or not, and includes a person referred to in section 25(1)(b) of POCA.”- Albert Kruger *Organised Crime and Proceeds of Crime Law in South Africa*, LexisNexis, pg 62

⁴ *NDPP v Tam and Others* 2004 (1) SACR 126 (W) at 129

- (a) any property held by the defendant concerned; and*
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.*

(2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.'

4. On 3 May 2021, the National Director Of Public Prosecutions (**'the NDPP'**) obtained a provisional restraint order in terms of section 26 of the Prevention of Organised Crime Act, Act 121 of 1998 (**'POCA'**) against a number of persons, including the third respondent, Jerome Booysen (**'Mr Booysen'**). On 17 June 2021, the provisional order against Mr Booysen was confirmed.
5. The following properties are listed as realisable property in respect of Mr Booysen's restraint order:
- (i) the remainder of Erf 3[...]9 Eerste River in the City of Cape Town, Stellenbosch Division, Western Cape Province which is owned by Albatross Isle Trade (Pty) Ltd (**'Erf 3[...]9'**);
 - (ii) Erf 3[...]5 Wellington Municipality, Paarl Division, Western Cape Province which is owned by Albatross Isle Trade (Pty) Ltd (**'Erf 3[...]5'**); and
 - (iii) Erf 1[...]1 Bellville in the City of Cape Town, Cape Division, Western Province which is owned by Jerome and Tina Booysen (**'Erf 1[...]1'**).⁵

Background

6. In this application, the applicant, Matthew Winston Heath Jack (**'Mr Jack'**) seeks leave to have surety mortgage bonds registered over the properties. The application is opposed by the NDPP.

⁵ Erf 3[...]9, Erf 3[...]5 and Erf 1[...]1 are collectively referred to as 'the properties'.

7. Mr Jack graduated with a Bachelor of Business Science Honours degree and is a qualified Chartered Financial Analyst. He describes himself as an entrepreneur at heart. He has on a number of occasions extended bridging-type finance to a variety of entrepreneurs in need of quick cash.
8. Towards the end of July 2020, Mr Booysen approached Mr Jack with a business proposal pertaining to the procurement of non-ventilated masks. Mr Booysen, together with a Mr Denver Langenhoven and Mr Langenhoven's entity, the Dexavision Pty (Ltd)⁶ had the opportunity to procure non-ventilated masks but they required finance. To secure the required finance, Mr Booysen offered a loan structure between Mr Jack and Dexvision Pty (Ltd) which included him standing personal surety and registering mortgage bonds over the properties.
9. On 3 August 2020, Mr Jack approached James Phillipson (**'Mr Phillipson'**) of Smith Tabata Buchanan Boyes Attorneys (**'STBB'**) who was mandated to prepare the paperwork pertaining to the loan agreement and to do all things necessary to protect Mr Jack's interests.
10. On 4 August Mr Phillipson emailed Mr Jack a list of the information and documents he required to prepare the necessary paperwork. On 6 August 2020 communication between Mr Jack and Mr Phillipson ensued in terms whereof Mr Phillipson was to email Mr Jack the paperwork as soon as it was ready. On 6 August 2020, an attorney from STBB met with Mr Jack, Mr Booysen and Mr Langenhoven to take them through each of the documents STBB had prepared. After the attorney from STBB left with the signed documents, Mr Jack instructed his bankers to pay the agreed loan of R13.5

⁶ The sixth respondent

million to Dexavision Pty (Ltd). As it was too late to process the payment, it was only done the following day on 7 August 2020.

11. The payment of R13.5. million was made to Dexavision Pty (Ltd) before any mortgage bonds were registered over the properties.
12. The deal to acquire the non-ventilated masks floundered and came to nought.
13. Mr Jack states that he remains on good terms with both Mr Booysen and Mr Langenhoven, notwithstanding Dexavision Pty (Ltd)'s failure to comply with its obligations in terms of the loan agreement. Although Dexavision Pty (Ltd) defaulted on the payment in terms of the loan agreement, Mr Jack has taken no legal steps against Dexavision Pty (Ltd) or against Mr Boosyen, who stood surety for the loan, to recoup repayment of the R13.5 million.
14. During February 2022, Mr Booysen, Mr Langenhoven and Mr Jack discussed the properties as a means of reducing the debt owed to Mr Jack. It was at this stage that Mr Jack learnt of the restraint order, which caused him to follow up with Mr Phillipson in respect of the registration of the mortgage bonds over the properties. He was informed that the mortgage bonds had not been registered as Phillipson was not provided with all the necessary information.
15. Mr Jack disputes that had not provided Mr Phillipson with the necessary information and avers that Mr Phillipson '*messed up*' by not having the mortgage bonds registered over the properties.
16. On 6 September 2022, Mr Jack's attorneys of record addressed a letter to Mr Phillipson setting out Mr Jack's discontent. On 15 September 2022, STBB responded to the letter of 6 September 2022, stating *inter alia* that:

'Throughout the process, your client was acutely aware that the bonds had not been registered and inasmuch was made clear to your client throughout the

process subject to ourselves requesting your client to provide not only the necessary FICA documentation, but also the original title deeds in respect of the three properties concerned.

We point out that what was required was not only your client's FICA documentation, but we also required the FICA documentation of the various other parties involved in the transaction. Inasmuch was made quite clear in the e-mail from Phillipson to your client dated 11 August 2020. Regardless of whether or not we were in possession of your client's FICA documentation arising from a previous transaction, we were not in a position to lodge and/or register any mortgage bonds over the properties without the outstanding FICA documentation and title deeds. It was made unequivocally clear to your client throughout the process and in various telephonic discussions between your client and Phillipson.

In fact, there was a subsequent discussion between your client and Phillipson where it was again made clear to your client that we were in no position to register the mortgage bonds, and given the parties involved, Phillipson was not prepared to proceed with any execution in respect thereof.

At all times your client knew the position, and despite historically agreeing to obtaining the necessary outstanding documentation, your client never provided ourselves with the necessary documentation, never provided ourselves with any further instructions in respect of the matter, and never instructed ourselves to proceed with attempting to obtain the outstanding documentation and thereafter to proceed with the registration of the mortgage bonds.

At all times your client was well aware of the outstanding documentation, was well aware that he had assumed responsibility there for and was well aware

that the bonds had not been registered.'

17. There is no response to STBB's letter of 15 September 2022. In addressing the contents thereof, Mr Jack simply denies that it was brought to his attention that STBB did not have the necessary documentation and information to lodge the mortgage bonds. He goes on to state that he is advised that nothing turns on this dispute.
18. Other than the letter of 6 September 2023, Mr Jack has taken no steps against Mr Phillipson for his alleged failure to register the mortgage bonds.
19. In bringing the application, Mr Jack avers that, as far as he is aware, POCA is intended to protect third party interests and not to prejudice them. However, while POCA may not be intended to prejudice third party interests, third party interests cannot trump the objectives of POCA which is to combat crime, money laundering and criminal gang activities, to prohibit racketeering and to provide for a range of related measures as well as to prevent criminals from benefiting from the proceeds of their crimes.⁷

Discussion

20. Mr Jack initially relied upon section 26(10)(a)(ii) of POCA and paragraph 1.42.1 of the restraint order for the relief he seeks. However, the court was subsequently informed that as the relief sought does not require a variation or rescission of the restraint order, he no longer relies upon section 26(10)(a)(ii) but on paragraph 1.42.1 of the restraint order and section 29(2)(a) of POCA.
21. Paragraph 1.42.1 of the restraint order provides that:

'The Registrar of Deeds is directed to endorse the title deed of any of the property which is immovable (details of which will either appear from Annexure

⁷ *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at para [1]

A or to be supplied to the registrar of this court by the curator bonis) with the following restriction namely, that the property shall not, without the consent of this court:

1.42.1 be mortgaged or otherwise encumbered.'

22. Section 29(2) of POCA provides:

'(2)An order contemplated in subsection (1) may be made in respect of the following restrictions, namely-

(a) that the immovable property shall not without the consent of the High Court be mortgaged or otherwise encumbered;

(b) that the immovable property shall not without the consent of the High Court be attached or sold in execution; and

(c) that the immovable property shall not without the consent of the High Court –

(i) vest in the Master of the High Court or trustee concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated; or

(ii) where the owner of that immovable property is a company or other juristic person which is being wound up, form part of the assets of such company or juristic person,

if the owner of that immovable property has not made the payment referred to in that subsection to the State.'

23. When section 29(2) of POCA is given its ordinary meaning and is properly contextualised, it is clear that section 29(2)(a) cannot be read without having regard to section 29(1) of POCA.⁸

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

24. Section 29(1) provides that:

'A High Court which has made a restraint order in respect of immovable property may at any time, with a view to ensuring the payment to the State –

(a) where a confiscation order has not been made, of an amount equal to the most recent value of the immovable property; or

(b) where a confiscation order has been made, of an amount not exceeding the amount payable under the confiscation order,

order the registrar of deeds concerned to endorse any one or more of the restrictions contemplated in subsection (2) on the title deed of the immovable property.' (own emphasis)

25. The orders contemplated by section 29(2)(a) read with section 29(1) may be made to ensure payment to the State. Put differently, the orders contemplated by section 29(2)(a) read with section 29(1) are to be made for the benefit of the state.

26. However, the relief sought is not for the benefit of the state but to its prejudice.

This much is clear from the wording of section 29 (3), which provides that:

'(3) In order to give effect to subsection (1), the registrar of deeds concerned shall-

(a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the

immovable property concerned;

(b)when the original of the title deed is produced to him or her, make the necessary endorsement thereon.'

27. Therefore, the registration of the mortgage bond over the properties could, in terms of section 29(3) of POCA, result in the properties being exempt from being attached or sold in execution. This would limit the NDPP's ability to deal with the properties although they have been restrained and it would defeat the objectives of the restraint order as the properties could not be realised to the satisfaction of a confiscation order.
28. As the application is not brought to ensure payment to the state and is not to its benefit, Mr Jack's reliance on section 29(2)(a) is misplaced.
29. The objectives of POCA, together with the plain wording of section 29 do not provide for the relief sought by the applicant as it is not capable of a construction which would favour the granting of the relief sought by Mr Jack. It may even be contrary to the unambiguous expression of the legislative will.⁹
30. I turn now to whether the relief sought may be granted by relying on paragraph 1.42.1 of the restraint order and by the exercise of the court's discretion.
31. Mr Jack avers that he brings the application to ameliorate the hardship he may suffer as a consequence of the restraint order which denies him a significant component of security which was purportedly critical to his decision to conclude the loan agreement with Dexavision Pty (Ltd). However, he proceeded to make payment of the loan of R13.5 million before the mortgage bond could possibly have been registered over the properties. Therefore, it can be accepted that Mr Jack agreed to make the money available without the critical security being in

⁹ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 CC

place and that he accepted the risks which accompanied this election.

32. Mr Jack avers that the relief he seeks is not inconsistent with the objectives of POCA as he is an innocent party, entirely divorced from the conduct that informs the restraint order. However, if the properties were obtained with the proceeds of unlawful activities¹⁰, and the third, fourth and sixth respondents are able to use these properties to potentially reduce their obligations to Mr Jack, it would undermine the objectives of POCA. The registration of a mortgage bond over the properties would constitute an advantage or benefit to the respondents as it potentially allows them to reduce their indebtedness to Mr Jack.
33. As Mr Jack requires the court to exercise a discretion in his favour and given the possible consequences of the relief he seeks, it is incumbent upon him to place the necessary facts and information before the court relevant to the exercise of that discretion.
34. He elects not to disclose why he failed to follow up on the status of the registration of the mortgage bonds between 6 August 2020 and February 2022 when it was allegedly critical to his decision to conclude the loan agreement with Dexavision Pty (Ltd).
35. Furthermore, although Dexavision Pty (Ltd) defaulted on the loan agreement, no legal steps were taken to recover any monies or to limit the loss thereof. On the contrary, Mr Jack states that he remains on good footing with both Mr Booyesen and Mr Langenhoven and that over the proceeding months they explored a number of options to ensure that payment is made to him. He does not tell the court what those options were. Nor does he disclose why the issue

¹⁰ Proceeds of unlawful activities are defined as ‘any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property so derived.’

of the properties, as security, were not discussed prior to February 2022.

36. Importantly, the allegations by STBB that Mr Jack was at all times aware that the mortgage bonds were not and could not be registered are dealt with dismissively, with Mr Jack stating that nothing turns on this dispute with STBB.

37. I disagree. If Mr Jack was at all material time aware that the mortgage bonds were not registered over the properties, it would not behove him to come months thereafter to ask the court to exercise its discretion in his favour to have the mortgage bonds registered over the properties which are subject to the restraint order. Moreso when the relief sought and the exercise of the discretion has the potential to be prejudicial to the state and to undermine the objectives of POCA.

38. In the circumstances, I am not convinced to exercise my discretion in favour of Mr Jack. Therefore, I would make the following order:
The application is dismissed with costs.

Slingers J

26 June 2023