IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

CASE NO: 154/2010
Date heard: 27th & 28th August 2013
Order granted: 30 August 2013
Reasons furnished: 19 September 2013
REPORTABLE

In the matter between:

MICHAEL WHARTON RANDELL	Applicant
and	
JACQUES EYBERS N.O.	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
GREENWOOD PRIMARY SCHOOL	Intervening Respondent
GARY DEAN PIKE N.O JENNIFER HAYSOM N.O. MICHAEL EDWIN NURSE N.O. obo GREENWOOD PROPERTY TRUST	Intervening Respondent

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JUDGMENT

GOOSEN, J.

Introduction

[1] On 30 August 2013, following full argument on an opposed urgent application for the release of funds for legal expenses, brought in

terms of section 26(6) of the Prevention of Organised Crime Act, Act 121 of 1998 (hereinafter referred to as “POCA”), I made an order in the following terms, indicating that my reasons for doing so would be furnished in due course:

Ad the application to intervene in the proceedings:

1. The applicants are granted leave to intervene and oppose the relief sought.
2. The first respondent (the applicant in the main application) is ordered to pay the costs of the application.

Ad the main application:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application.

These are my reasons.

[2] The applicant is an attorney who served as a trustee of the Greenwood Property Trust. The Greenwood Primary School was the beneficiary of the Trust. It is alleged that the applicant, together with the then-trustees improperly benefited from a property transaction undertaken by the trust and misappropriated funds to be held for the benefit of the School. A restraint order was granted in terms of section 26 of POCA. This application concerns the release of funds presently restrained in terms of that restraint order. The application was brought as an interlocutory application citing only the first and second respondents. It was set down to be heard on 22 August 2013. Upon being alerted to the application the Greenwood Primary School, represented by its School Governing Body and the Greenwood Property Trust, represented by its three Trustees applied for leave to intervene in the proceedings and to oppose the release of the

restrained funds. All of the parties were *ad idem* that the matter required urgent adjudication prior to the commencement of the criminal proceedings which were scheduled to commence on Monday 2 September 2013. It was agreed that once all of the parties had filed papers in the matter I would hear the matter on 27 August 2013 and issue an appropriate order prior to the commencement of the pending criminal proceedings. The matter was argued on 27th and 28th August and, as indicated, I made an order on 30 August.

[3] In order to avoid confusion regarding the parties I shall refer to them as cited in the main application. I shall refer to the parties seeking leave to intervene as 'the School' and 'the Trust' respectively and, where appropriate, as 'the intervening parties'.

[4] The School and the Trust seek leave to intervene and oppose the main application on the basis that they are either direct or indirect victims of the alleged criminal conduct which is the subject matter of the charges brought against the applicant; that they accordingly have a material interest in opposing the application for the release of funds to cover legal expenses and ought to be joined as respondents to the main application. Their application to intervene is supported by the second respondent. The application is opposed by the applicant on the basis that the School and the Trust have no interest in the proceedings; are not creditors of the applicant and that this court has no discretion to permit the intervention of parties other than creditors.

In respect of the School it is also alleged that the School's conduct in seeking to intervene in these proceedings is *ultra vires* the South African Schools Act.

[5] The central issues to be decided are the following:

5.1. whether a court has a discretion to allow an alleged victim of criminal conduct to intervene in proceedings relating to the release of property subject to a restraint order made in terms of POCA;

5.2. if so, whether leave to intervene should be granted to the School and / or the Trust;

5.3. whether the applicant has complied with the jurisdictional requirements provided for in section 26(6) of POCA; and

5.4. If so, whether this court should exercise its discretion in regard to the release of funds for the payment of legal expenses in favour of the applicant.

[6] The answer to these questions necessarily involves a close analysis of the provisions of POCA and the authorities that have addressed the interpretation of those provisions. Before embarking upon that

analysis is necessary to briefly sketch some background to the matter.

[7] The applicant is an attorney of this Division who, for a number of years, served on the governing body of the Greenwood Primary School. During 2009 allegations of alleged impropriety on the part of the applicant, the then headmaster of the School and one other person were made. At the time the applicant and the two other persons served as trustees of the Greenwood Property Trust, a trust established as a vehicle to hold certain property interests in favour of the Trust beneficiary, namely the School. The allegations of impropriety in respect of the Trust property gave rise to criminal charges being laid against the applicant and the other trustees. It is these criminal charges that are presently pending against the applicant.[1]

[8] On 26 January 2010 Tokota AJ granted a provisional restraint order in terms of section 26 of POCA. The provisional order was made final by Sangoni JP on 2 March 2010. The property which the applicant was required to surrender in terms of the order included certain specified property set out in a schedule annexed to the order as well as all other property held by him at the time of granting the order or subsequently and any property held by a legal representative on his

[1]The criminal proceedings initially involved two accused persons, namely Shelver and Randell. In January 2013 the trial proceeded against both accused. During the conduct of the proceedings Shelver changed his plea from one of not guilty to a plea of guilty to an alternative charge. As a consequence the trial of Shelver was separated from that of Randell and the latter proceedings were postponed to be commenced before another magistrate de novo. It is these latter proceedings which were scheduled to commence on 2 September 2013.

behalf. As a consequence of the order the first respondent was authorised to take into his possession the property and to administer the realisable property. According to the first respondent's first interim report dated 22 February 2010 the applicant's restrained assets had an expected realisation value of R813 293.61.

[9] The applicant now applies for the release of R500 000.00, or such lesser amount as may be allowed, from the restrained assets to meet his reasonable legal expenses in the criminal trial.

The application to intervene

[10] As indicated the School and the Trust seek leave to join the proceedings as respondents opposing the relief sought. The application is based upon this court's inherent jurisdiction at common law to order the joinder of further respondents so as to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the order are before the court. In this regard the interest relied upon is the fact, given the nature of the criminal charges preferred against the applicant and the facts upon which same are based, that the Trust is the direct victim of the alleged criminal conduct and the School is the indirect victim. By virtue of this it is alleged that the rights and interests of the Trust and the School may be adversely affected by an order permitting the release of the restrained funds.

[11] It is further alleged that the intervention is also competent by virtue of the provisions of POCA which seek *inter alia* to protect the rights and interests of victims of alleged criminal conduct. It is submitted that this court is vested with a discretion to grant leave to a victim to intervene in proceedings and that the circumstances warrant the exercise of the discretion in favour of the School and Trust.

[12] The applicant opposes the intervention on the basis that neither the School nor the Trust has the necessary *locus standi*. In respect of the School it is submitted that the School is acting *ultra vires* the terms of South African Schools Act [2](hereinafter SASA) in seeking to join. In respect of both the School and the Trust it is submitted that in any event neither fall within the category of creditors and that, to the extent that the court has a discretion to admit a creditor to these proceedings, such discretion does not extend to a victim of the alleged crime who is not a creditor.

The challenge to the School's locus standi

[13] It was submitted by counsel for the applicant that the governance of the School vests in its school governing body by virtue of section 16(1) of SASA. That section provides that a governing body may perform only those functions and obligations and exercise such rights as are prescribed by the Act. These functions are enumerated in

[2]Act 84 of 1996

section 20(1) of SASA and, so it was submitted, do not include the power to intervene in proceedings such as the present. It was also argued that the provisions of SASA provide that a school's funds may only be used for educational purposes and for no other purpose. On this basis it was submitted that the governing body had acted *ultra vires* its powers in seeking leave to intervene.

[14] Mr Rorke, on behalf of the School, submitted that there is no merit in the attack on the School's *locus standi* by reason of the fact that the governing body is plainly obliged, by section 20(1) of SASA, to promote the best interests of the School. In seeking to protect the interests of the School as a beneficiary of the Trust in circumstances where the Trust was the direct victim and the School the indirect victim of the alleged criminal conduct of the applicant, the School was clearly acting in its best interests.

[15] I agree. Section 20(1)(a) indeed establishes an obligation on the School Governing Body to act in the best interests of the School. It is striking that section 20 does not stipulate that the governing body may institute or defend legal proceedings on behalf of the School. To suggest that on this basis the School has no *locus standi* (which is the effect of the argument) is untenable. It is after all common cause that the School is a juristic person. Ordinarily this means that the School has full legal capacity to protect its interests by either instituting or defending legal proceedings.

[16] It was argued that section 37(6) of SASA restricts the use to which school funds may be put. On this basis it was argued that the employment of school funds for the payment of legal fees, alternatively the exposure of the school to a possible adverse costs order, does not constitute use of school funds for educational purposes and that therefore the decision to enter what was described as “commercial” litigation is contrary to the provisions of SASA. The argument, in my view, loses sight of section 37(6)(c) of SASA. That section permits the use of school funds for “the performance of the functions of the School Governing Body”. It is perhaps appropriate to note that the law reports are replete with judgments in which school governing bodies have litigated on a broad range of matters in the interests of the schools they serve. I am not aware that it has been suggested in any of those matters that the litigation is *ultra vires* because the litigation involves use of resources other than for educational purposes. Having come to the conclusion that the application to intervene (a) is competent by virtue of the School’s status as a juristic person; and (b) falls within the ambit of the obligation to act in the best interests of the School, I conclude that the employment of school funds for this purpose is indeed authorised by section 37(6)(c). It follows that the challenge to the School’s *locus standi* on this basis cannot succeed.

[17] I turn now to consider the question whether the School and the Trust ought to be permitted to intervene in these proceedings. The first aspect to consider is whether this court is vested with a discretion to permit the intervening parties, as victims of the alleged criminal conduct, to intervene.

[18] In *Fraser v Absa Bank Limited* [3] (referred to hereafter as *Fraser (CC)*) it was held that a court has a discretion to grant a creditor leave to intervene in proceedings in terms of section 26(6) of POCA for the release of funds under restraint. In that matter Absa Bank had instituted action for recovery of monies advanced to Fraser in terms of certain credit agreements. Absa obtained judgment against Fraser and sought to execute upon its judgment but could not do so by virtue of the preservation order obtained restraining Fraser's assets. When an application was made by Fraser for the release of certain funds to cover legal expenses Absa sought leave to intervene. The High Court refused leave to intervene. On appeal the Supreme Court of Appeal, on a careful analysis if the provisions of POCA, found that the court has a discretion to permit a creditor to intervene.[4] The SCA accordingly upheld the appeal, granted Absa leave to intervene and issued certain further orders relating to the protection of the funds Absa sought to claim. The matter then came before the Constitutional Court which endorsed the SCA's findings in respect of the existence of the discretion but disagreed in respect of the further orders made.

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[3] 2007 (3) SA 484 (CC)

[4] *Absa Bank Ltd v Fraser and Another* 2006 (2) SACR 158 (SCA); [2006] 2 All SA 1 (SCA) (*Fraser SCA)*

[19] It was argued, on behalf of the applicant, that the finding that the Court has a discretion to permit a creditor to intervene in section 26(6) proceedings is confined to creditors. Such discretion does not extend to permitting victims (whether direct or indirect) to intervene in the proceedings.

[20] In the light of this argument it is necessary to consider carefully the effect of the judgment in *Fraser (CC).* I begin first by examining the overall legislative scheme of POCA and the approach that has been adopted in respect of the protection of the interests of victims.

[21] The purpose of POCA is to foster the prevention of crime by striking at the heart of the incentive for criminal activity, namely the gain of the criminal. As noted by the Constitutional Court in *National Director of Public Prosecutions v Elran*[5] the provisions of POCA provide a framework for a strategy for the combating of modern organised criminal activity. The purpose is achieved, in part, by ensuring that the proceeds of criminal activity and those assets utilised as an instrumentality of crime can be wrested from the control of the alleged criminal and, following a process of forfeiture to the state, be utilised for combating crime. This broad scheme, in terms of which assets may be seized, preserved and ultimately confiscated, is however not intended merely to enrich or benefit the state. On the contrary the seizure and forfeiture of assets is subject to a range of checks and

[5] 2013 (1) SACR 429 (CC)

safeguards designed to balance the interest of the state in the restrained or preserved assets and those of third parties who may have an interest in such assets. On the one hand the process of seizure and restraint or preservation has built into it mechanisms by which the rights and interests of persons affected by a restraint or preservation order can be protected. These 'affected persons" include not only persons who have an interest in the property restrained (i.e. the defendant or any other party who holds an interest in the property which is the subject matter of the restraint or preservation order) but also victims of the alleged criminal conduct (i.e. persons who have suffered a loss of damage to property).

[22] Persons who may be affected by any order made in restraint or preservation proceedings are also given procedural and substantive protection by those provisions which require notice or publication of the restraint / preservation orders. It is also for this reason that POCA specifically accords protection at the stage of the realisation of property after a confiscation order is sanctioned by a court. At this stage of the proceedings POCA permits persons who, by virtue of the defendant's obligations, have an interest in the restrained property to participate.

[23] In *National Director of Public Prosecutions v Mcasa and Another*[6] the court was faced with an argument that Chapter 5 of POCA was not intended to apply to situations where there is a clearly identifiable

[6]2000 (1) SACR 263 (TkH)

victim. The argument was advanced on the premise that the legislature could not have intended to prejudice the rights of identifiable victims by declaring forfeit to the state assets of the criminal equal in value to the victims claim. The court dismissed the argument, accepting that section 30(4) and (5) provide protection for the rights and interests of victims. The court came to the conclusion that a possible forfeiture order is not at odds with the victim's right to recover.[7]

[24] The protection of the interests of third parties and / or victims is to be seen in a number of provisions. By way of example, section 20(1) provides that the amount which may be realised at the time of making a forfeiture order shall be the amount equal to the value of all realisable property and / or affected gifts less the sum of all obligations of the defendant having priority and which may be recognised for this purpose. Of particular significance for present purposes is section 20(5) which states that:

> (5) A court shall not determine the amounts which might be realised as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.
>
> (Emphasis added)

[7] *Mcasa*, *supra,* at para 67. This approach is illustrated in a recent judgment in this court (*National Director of Public Prosecutions v Tango Wordsworth Nqini*, case no 4190/12, unreported, 16 August 2013) where Plasket J, in granting a forfeiture order ordered that a motor vehicle which had been purchased with the proceeds of the alleged criminal activity be sold by public auction and the proceeds, together with a further cash amount which also formed part of the preserved property, be paid to the victim of the criminal conduct.

[25] These provisions are mirrored in section 30 which deals with the realisation of property. Subsection (2)(b) authorises a High Court to authorise a *curator bonis* to realise any realisable property. Subsections (3) and (4) in turn provide:

> (3) A High Court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.
>
> (4) If the court referred to in subsection (2) is satisfied that a person –
>
> (a) is likely to be directly affected by the confiscation order, or
>
> (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 18(1) which was caused by the defendant,
>
> the court may allow that person to make representations in connection with the realisation of that property.
>
> (Emphasis added)

[26] A few observations are appropriate in respect of these provisions. The first is that the legislature plainly intended to ensure that the interests of any and all persons who may be affected by a confiscation order are properly protected. This intention is consonant with the overall purpose of POCA which is to ensure that criminals do not benefit from their criminal activity and to ensure that victims of criminal conduct are afforded an opportunity to recover that which may be due to them in consequence of such criminal conduct.

[27] The second aspect of significance is that POCA recognises a broad category of persons "holding any interest in the property" (s 20(5)). The reach of the category of potentially interested persons is restricted only by the exercise of the court's discretion. Thus section 30(4) refers to all persons known to have any interest who, it appears, are entitled as matter of right to be heard (the court "shall not make" … "unless"..), whereas section 30(5) refers to persons "likely to be affected" or persons who have suffered loss or injury as a result of the criminal conduct.

[28] The judgment of the Constitutional Court in *Fraser (CC)* does not state that the court only has a discretion to permit a creditor to intervene in section 26(6) proceedings. It will be remembered that the court in *Fraser (CC)* was dealing with a judgment creditor who had obtained judgment prior to the restraint order being made. There is no suggestion that the creditor was in any way a person who had suffered or was likely to suffer loss as a result of the alleged criminal conduct.

[29] The Constitutional Court in *Fraser (CC)* endorsed the Supreme Court of Appeal's careful analysis of the provisions of POCA and its finding that the High Court has a discretion. At para 56 the Court stated that:

> 'The Supreme Court of Appeal is correct in its criticism of the High Court's construction of s 33(1) and in concluding that a claim such as Absa's does

> not fall to be 'left out of account'. An obligation to satisfy a judgment debt is a relevant consideration to be taken into account in the exercise of the s 26(6) discretion and s 33(1) is no warrant for the contrary proposition. Section 33(1) comes into consideration primarily when property is being realised. Section 30(5) supports a conclusion that concurrent debts are not irrelevant to what constitutes realisable property, and therefore s 26(6) should not be interpreted as impeding the exercise of the discretion by a Court.'

[30] The Constitutional Court itself considered the basis upon which a creditor would seek to intervene, noting (at para 62) that:

> 'When a defendant's estate is under a restraint order and thus beyond the reach of creditors, it remains in their interest that as much of the estate as possible be preserved, because part or all of it might still become available to them for the satisfaction of their claims. If the defendant is paid a living and/or legal expense allowance from his or her estate while it is under restraint, the effect is to dissipate the estate and so reduce or even destroy creditors' prospects of recovery. It is accordingly usually in their interest to oppose any application in terms of s 26(6) to persuade the Court not to allow the defendant to draw a legal expense allowance.'

[31] The court then concluded (at para 63) that:

> 'It is therefore clear that on the wording of POCA the High Court has a discretion to allow a creditor to intervene. This interpretation is not at odds with the obligation to promote the spirit, purport and objects of the Bill of Rights.'

[32] The only respect in which the Constitutional Court appears to have qualified the interpretation of the relevant provisions of POCA by the SCA lies in the following dictum (at para 57) where the court said:

> 'However, the relevant provisions of POCA cannot mean that all concurrent creditors must under all circumstances be allowed to intervene. Nor even if permitted to intervene, may they automatically be treated as if they were preferential creditors, in a manner that prevents a defendant from using his or her funds for reasonable legal expenses in the criminal trial or in forfeiture proceedings in terms of POCA.'

[33] The latter statement in the quoted paragraph is consistent with the Court's finding (at para 78) that the SCA erred in assuming that an applicant (in terms of s26(6)) bears an onus to justify reasonable expenses over the claims of concurrent creditors. It is to this extent only that the Court differed with the approach of the SCA in regard to the matter. Accordingly the judgment of the SCA on the meaning and effect of the relevant provisions of POCA is authoritative.

[34] Of particular relevance for present purposes are the following passages from the SCA judgment[8]:

> [15] Properly construed, s 31(1) empowers a High Court to apply s 26 with a view to making available the current value of realisable property to satisfy a confiscation order. In this context the purpose of a restraint order is, therefore, to preserve a defendant's property to facilitate the satisfaction of, amongst others, a confiscation order.
>
> [20] But it does not follow that claims of concurrent (unsecured) creditors are thereby simply left out of account. The Act provides a mechanism for them to be taken into account, subject to the approval of the Court at the time of the realisation of the defendant's property, but before satisfaction of a confiscation order. In this regard, s 30(5) expressly authorises the High Court to delay the realisation of the property so as to enable a victim of the defendant's crimes to obtain a judgment and to satisfy that judgment from the defendant's property before the property is realised.
>
> [21] Once the property has been realised, s 31(1) authorises the High Court to direct that 'payments' be made from the realised proceeds of the defendant's property before the State's claim is satisfied. Clearly, the 'payments' that are contemplated by that section include payments in discharge of the defendant's concurrent obligations.
>
> [22] I can fathom no reason for this provision, other than that it is intended to provide persons with an 'indirect interest' in the restrained property, such as the defendant's concurrent creditors, to bring their claims to the Court's attention, to be taken into account for payment, should the Court be satisfied of their validity, before satisfaction of the confiscation order. This, in my view, can mean only that the High Court retains the power to entertain applications by persons or entities with claims, concurrent or otherwise, in the restrained property.

[8] *Fraser SCA* para 15, 20, 21, 22

[35] It is clear from these passages that the SCA, whilst dealing with the particular claim of a judgment creditor, did not consider that intervention was to be confined only to judgment creditors. On the contrary, the SCA recognised and accepted, in my view, that the discretion to permit intervention is one which, in appropriate circumstances, extends to 'third parties'. That this is so is to be gleaned from the express finding of the SCA that the ambit of the discretion (provided for in POCA) is consistent with the "exercise of [the court's] general powers to hear any person who has an interest in the proceedings".[9] This common law power is not excluded by POCA. The Constitutional Court judgment does not differ with the SCA's interpretation of the ambit of the discretion and must, in my view, be taken to have approved it.

[36] It follows that the submission by applicant's counsel that this court does not have a discretion to permit a victim (who may not yet be a creditor or who may only be a contingent creditor) to intervene in proceedings in terms of section 26(6) cannot be supported. Such discretion is plainly not excluded by the provisions of POCA. At common law a court enjoys a wide discretion to permit a party to intervene in proceedings if the court is satisfied, *prima facie*, that the party has a sufficient interest in the subject matter of the dispute. The legislative scheme provided by POCA, rather than serving to limit the ambit, suggests that a court faced with an application to intervene in

[9] *Fraser SCA* para 29.

section 26(6) proceedings will be astute not to exclude hearing a potentially interested victim of crime.

[37] I turn now to consider whether in the exercise of the discretion I should permit the School and the Trust to intervene. The first point to consider here is that intervention is essentially directed to the process of adjudication i.e. it is by its nature concerned with a preliminary issue regarding the assertion of a right or entitlement to be heard in relation to the subject matter of the dispute. Intervention is therefore concerned with placing before the court relevant facts or submissions as seek to persuade the court as to an appropriate outcome in the matter.

[38] In *Hutton & Pearson NNO v Hitzeroth and Others* [10] a full bench on appeal was concerned with the effect of a decision to grant leave to certain respondents to be heard, a circumstance akin to intervention. It was said that the court *a quo* "did no more than decide what evidence could be tendered for a decision on the merits" and that the decision "was similar to and of no greater effect than a ruling that certain evidence is admissible".[11] The court went on to state:

> As already shown the issue before Addelson AJ was whether the respondents were entitled to be heard. That involved merely a finding *prima facie*. It is quite clear from the decisions in *Elliot v Bax* 1923 WLD 228, and *Ex parte Marshall: In re Insolvent Estate Brown* 1951 (2) SA 129 (N), that prima facie proof of interest is all that is required to give a right to intervene.

[10] 1967 (1) SA 111 (ECD)

[11] At 114 – 115I

(Emphasis added)

[39] If regard is had to the judgment of Addelson AJ (as he then was)[12], it will be noted that it was accepted that the discretion to grant leave to intervene is wider than where joinder of another is demanded as of right. The court said:[13]

> It appears from the decisions cited in *Marais and Others v Pangola Sugar Milling Co. Ltd. and Others, supra* at p. 702, that the Court has a discretion where a party seeks leave to intervene; but that 'even in those cases where the Court has a discretion where the matter of joinder of a party is raised, it must be shown that that party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court.'
> I respectfully agree with the approach just stated and I proceed to consider whether the respondents fall within the ambit of that approach.
> In *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD) at p. 659, it was held by FAGAN, J.A., that the Court would not determine issues in which a third party may have a direct and substantial interest without being satisfied that the rights of such third party would not be prejudicially affected by its judgment. In *Henri Viljoen (Pty.) Ltd v Awerbuch Brothers, supra*, HORWITZ, A.J.P., at p. 167, interpreted 'the direct interest' referred to, as
> 'an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation'.
> See also *Abrahamse and Others v Cape Town City Council*, 1953 (3) SA 855 (C).
> It will be observed that the use of the word 'may' by FAGAN, J.A., indicates, as was held in *Abrahamse's* case, *supra* at p. 859,
> 'that it suffices if there exists the possibility of such an interest. It is not necessary for the Court to determine that it in fact exists'. [14]

[40] In this matter the interest that the School and the Trust seek to protect is the interest in the potential recovery of the value of the property which, but for the alleged criminal conduct, would have vested in the Trust for the benefit of the School. It is common cause

[12] *Ex Parte Pearson and Hutton, NN.O*. 1967 (1) SA 103 (E)
[13] At 107B-D
[14] cf *United Watch & Diamond Company v Disa Hotels* 1972 (4) SA 409 (C) at 416A-C

that the Trust has instituted action against the applicant. The Trust is accordingly at least in the position of a prospective or contingent creditor who is also, upon the facts alleged to found the criminal charges against the applicant, a victim of the alleged conduct. It is also common cause that the Trust has been divested of all funds. This too, it is contended, is a direct consequence of the alleged criminal conduct. These circumstances of the Trust bear upon the position of the School which, it is common cause, is a beneficiary of the Trust. Whilst there may be some debate concerning whether or not the School enjoys any separate enforceable claim against the applicant, it cannot be disputed that the School has at least indirectly suffered loss or potential loss. Having regard to the fact, recognised in *Fraser CC*[15], that an order releasing funds in terms of section 26(6) necessarily will have the effect of reducing the value of restrained property and that such reduction may impact upon the potential for recovery should a confiscation order be made, the School and the Trust, have, in my view, at least established their interest in the subject matter of the application on a *prima facie* basis. They should therefore be permitted to intervene. I should add that allowing the School and the Trust as alleged victims of the alleged criminal conduct an opportunity to be heard accords not only with the scheme of interest protection provided by POCA but also with the principle of fairness that animates the common rules relating to intervention of parties. It accords too with the spirit, purport and objects of the Bill of

[15] *Fraser CC* at para 62

Rights inasmuch as it fosters fair and open adjudication in the public interest.

[41] Allowing a party to intervene upon the exercise of this court's discretion is not to be confused with the exercise of the discretion in terms of section 26(6). The latter discretion is one which concerns whether or not to grant an order releasing funds under restraint for the purposes of meeting either reasonable legal expenses or living expenses. That discretion only arises once a court has found that the jurisdictional requirements set by section 26(6) have been met, namely once the court is satisfied that the applicant has made full disclosure in terms of the section and that the applicant cannot meet his / her reasonable legal expenses from unrestrained assets.[16] The section 26(6) discretion is not concerned with whether or not to permit a party to intervene in the proceedings. The existence of the discretion to permit intervention is founded upon a proper interpretation of the provisions of POCA as a whole as read with the common law. This much, as I have demonstrated, is apparent from a proper reading of the *Fraser CC* judgment.

[42] Having found that the applications of the School and the Trust to intervene succeed I turn now to consider the merits of the application.

The application to release funds in terms of section 26(6)

[16]See *Elran* at para 77 - 79

[43] Section 26 provides that:

> (1) The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.
> ….
> (6) Without derogating from the generality of the powers conferred by sub-section (1), a restraint order may make such provision as the High Court may think fit –
> (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
> (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate;
> if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.

[44] Although the Constitutional Court was concerned in *Fraser* with the question as to whether a creditor may be granted leave to intervene in section 26(6) proceedings, it nevertheless provided guidance as to the proper application of the section. The court stated at paragraph 55 that:

> A defendant who applies to the High Court in terms of section 26(6) to make provision for reasonable living and / or legal expenses must satisfy the Court that he or she has disclosed under oath all his or her interest in property subject to the restraint order and that he or she cannot meet the expenses for which an allowance is sought out of the unrestrained property. If the Court is satisfied in this regard, section 26(6) gives the Court a discretion: it may "make such provision as the High Court may think fit" for the reasonable living and / or legal expenses.

[45] An applicant must therefore meet both of the threshold requirements before a court is entitled to exercise its discretion in his or her

favour.[17] It follows therefore that in order to succeed in this application the applicant must establish compliance with these requirements.

The requirement of full disclosure

[46] The section requires that the applicant should satisfy the court that he has made a full disclosure under oath of all of his interests in the restrained property. It was argued on behalf of the applicant that in determining this issue the court would be guided by the evidence presented by the first respondent who has expressed himself as satisfied in his Interim Report, confirmed under oath in this application, that the applicant has made a full disclosure. Counsel for the applicant argued that section 26(6) does not require that the applicant must disclose the origin of his interests in the restrained property, it being sufficient to state that he has disclosed all of his assets, a fact affirmed by the first respondent. Reliance was placed on the fact that the applicant had, pursuant to the terms of the retraining order issued in 2010, made a declaration under oath to the first respondent of his assets and that this was accepted by the first respondent as constituting a full disclosure.

[47] In my view the argument advanced on behalf of the applicant loses sight of the plain wording of section 26(6) which requires the

[17] See in this regard *Fraser CC* at para 55; *Naidoo and Others v National Director of Public Prosecutions and Another* 2012 (1) SACR 358 (CC) at para 30 where Cameron J describes the requirements as preconditions for the exercise of the discretion; the majority judgment in *Elran* at para 77 -79 as also the judgment of Zondo J in *Elran* (with which the majority concurred) in which he draws a distinction between the discretion conferred by section 26(6) and the lack of such discretion in section 44.

applicant to satisfy the court that he has disclosed all of his interests in the restrained property under oath.

[48] Mr Scott relied on the fact that the applicant had, pursuant to the restraining order deposed to a statement under oath in which he disclosed his assets to the curator. In that statement the applicant stated the following:

> 'This statement is made in terms of paragraph 2.36 of the order granted by the High Court, Eastern Cape (case no 154/2010) on 26 January 2010 and constitutes a full disclosure of all assets relating to the determination of the value of realisable property held by me.

[49] Paragraph 2.36 of the order reads as follows:

> In terms of section 26(7) of the POCA, the Defendants is (*sic)* hereby ordered to disclose to the *curator bonis* on affidavit in such form as the *curator bonis* may determine forthwith, and in any event by no later than within 10 days of service of this order, a description and the whereabouts of:
>
> 2.36.1 all the property (as defined in section 1 read with section 12(2) of the POCA), which has not been physically surrendered into the possession or otherwise placed under the effective control of the *curator bonis* immediately upon the service of this order;
> 2.36.2 all the property which, according to the present knowledge of the Defendants and respondents is to be transferred to the Defendants at any time;
> 2.36.3 any and all affected gifts as defined in sections 12(1) and 16 of the POCA, made by any of the Defendants, together with the name and address of the donee;

[50] The statement was made shortly after the restraining order was issued by this court. Even if it is accepted that the disclosure at that stage was a full disclosure, and there is no reason to doubt the assertion of the first respondent that it was, it is plain that the

disclosure was not one in relation to “interests in” the restrained property as contemplated by section 26(6).

[51] Mr Scott argued however that the applicant has now disclosed that his interest in the bulk of the restrained property, namely R565000.00 held on his behalf by his attorneys is a “cash” interest, thus disclosing ownership sufficient for the purposes of section 26(6). In this regard he relied on a passage from the judgement of Zondo J in *Elran* [18] where the learned judge, dealing with the reasons for requiring disclosure of interests in property, said:

> The reason for requiring the person to disclose all his or her interests in the preserved property is obvious. The court needs to know whether his or her interest covers the whole of the property or whether it covers only part of the property. In the latter event, the court would also need to know the extent of the part of the property that is covered by his or her interest or interests. The reason for this is that, in considering whether or not to provide for the expenses and how much provision it should authorise for such expenses, the court should know the precise extent of his or her interest in the property.

[52] On the basis of this passage it was suggested that all that need be disclosed is the extent of the interest and that since we are here dealing with a cash ownership interest this constitutes sufficient disclosure of the ‘extent’ of the interest.

[53] In the first instance, I am not persuaded that the requirement in section 26(6) relating to full disclosure is met by the mere assertion, even under oath, that the applicant has made a full disclosure of his assets to the curator pursuant to the restraining order. If that were

[18] *Elran* at para 112

what was contemplated the wording of section 26(6) would no doubt have simply referred to such a disclosure. Instead the section specifically refers to disclosure of interests. Nor am I persuaded that such disclosure is confined to a statement of the 'extent' of the interest. That is certainly a relevant factor but cannot suffice in all instances. The very purpose of the requirement is to enable the court to determine whether it should exercise a discretion in favour of the applicant. In my view it must follow, as a matter of logic, that the court should be apprised of the nature of the property, the origin of the interest in such property, the extent of such interest where relevant and, perhaps most importantly, what, if any, competing interests in said property exist.[19]

[54] In this instance the bulk of the restrained assets derive from the transaction involving the Echo Edge property. It is this very transaction which the prosecution alleges constitutes the proceeds of the alleged criminal activity on the part of the applicant.

[55] It does not avail the applicant to merely state that his interest is one of ownership of cash without fully disclosing the origin of the asset which is subject to restraint. Lest it be thought that it is here suggested that the applicant is required to make a disclosure which is adverse to him in relation to the criminal charges preferred against him, this is not so.[20] But, in the light of the premium attached to a full

[19]See in this regard *Mcasa* at para 82 (p287e-g)
[20]cf *Mcasa* p.287a

and frank disclosure the least that may be expected is that the applicant should disclose that the particular funds now restrained and which he seeks to have released to him are those funds which it is alleged constitute the particular proceeds of the alleged criminal conduct.

[56] In this regard the applicant is silent. In my view this silence does not constitute a full disclosure such as required by section 26(6).

[57] Even if I am wrong in so finding the applicant faces the further difficulty of establishing that he is unable to meet his reasonable legal expenses from his unrestrained property.

The requirement of establishing an inability to meet expenses out of unrestrained property

[58] The evidence presented by the applicant in this regard consists of financial statements of his practice for the year ending 28 February 2013 and for his personal estate for the year ending 29 February 2012. No other evidence as to the state of his finances in the period between the date of these financial statements and the launching of this application was provided.

[59] It was argued on behalf of both the second respondent and the intervening parties that the applicant's mere assertion that he is

unable to fund his legal expenses from current income is plainly insufficient to meet the requirements of section 26(6).

[60] I agree. What is required of an applicant who seeks to have restrained assets released for the purpose of meeting living or legal expenses is to place facts before the court which (a) establish on balance that he is unable to meet his reasonable expenses from unrestrained assets or income and (b) place the court in a position to exercise its discretion in regard to the release of such funds. This the applicant has not done. The applicant has placed no evidence before this court as to current financial position of his legal practice, nor as to his own income. The financial position of the practice in the intervening period between February 2013 and when the application was launched is not explained. It is apparent from that evidence which has been presented that the applicant derives his day to day income from drawings made against the legal practice. In the previous financial year he drew in excess of R900 000 from the practice. Quite apart from there being no evidence as to what he has drawn since February 2013, there is also no evidence as to what these drawings were expended on and what, if any, provision has been made to meet his ongoing legal expenses.

[61] The remarks made in *Mcasa* regarding the failure by the applicant in that matter to meet the threshold requirement regarding his inability to

meet expenses out of unrestrained assets are apposite to this matter. There it was said that[21]:

> There must be clear evidence which sufficiently demonstrates that there are no other assets available out of which such expenses may be met (cf *A v C* [1981] 2 All ER 126; also see *Courtney (op cit* at 88 *et seq*) and the authorities cited therein). On the available evidence the hotel business continues to generate an income. …. It is not sufficiently clear to us that living and legal expenses cannot be met out of such funds and any other funds the business may have generated subsequently.
> The first respondent does make the bald assertion that there are no other available assets to meet living, legal and other related expenses. He must go further than that. He must, for example, indicate what the turnover of the hotel business is at present, what the running expenses are and what the nett profit is. It may very well be that the funds are available from that business for whatever use by the first respondent and his family.

[62] Similarly in this case, the applicant has not presented evidence as to the income currently generated by his legal practice; he has also not set out what his running expenses are and what the net profit is. Mr Rorke submitted that the applicant ought to have been in a position to present such evidence since he is required by the restraint order to present monthly management accounts to the first respondent.

[63] I do not consider that it is necessary to undertake an analysis of such financial statements as the applicant has produced. It is for the applicant to establish that he is, on a balance of probabilities, unable to meet his reasonable legal expenses from unrestrained property and his available income. This he has not done. I am therefore unable to conclude that the applicant has met the threshold requirements stipulated by section 26(6) for the release of funds to cover his legal expenses. In these circumstances the question of the

[21] *Mcasa* para 85 - 86

exercise of the discretion conferred by section 26(6) does not arise and the application must fail.

Costs

[64] I was urged, by Mr Rorke, to consider a punitive costs order against the applicant on the basis that the applicant has failed to comply with the terms of the restraint order requiring him to make disclosure of his monthly income and expenditure to the first respondent. It was also argued that I should take into consideration the delay in the bringing of this application and find that it was so delayed in order to bring about a delay in the criminal trial which was scheduled to commence of 2 September.

[65] I am unable to agree with these submissions. Even if it is assumed that the applicant's alleged non-compliance with the restraint order is relevant to the question of costs in this application, which is doubtful, it is not established that the applicant has in fact not complied with the terms of the restraint order. The first respondent is silent about this and, it must be accepted, would no doubt have said as much if that were so. Also I cannot find that the applicant was motivated by some ulterior purpose in bringing the application at this stage. There is no basis for such an adverse finding.

[66] In my view there is no reason not to deal with the question of costs on the basis of the ordinary rule. The applicant has been unsuccessful in his application and should accordingly be ordered to pay the costs of the application.

[67] For these reasons I granted the order set out above.

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G. GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant
Mr. P.W.A Scott SC,
Assisted by Mr. A. Moorhouse
Instructed by Randell Attorneys

For the Second Respondent
Mr. T de Jager

National Director of Public Prosecutions

For the Intervening Respondents
Mr. S. Rorke SC
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