

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 1903/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

07/08/2023.....

DATE

.....

SIGNATURE

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Plaintiff

and

MHLELEI MLUNGISI TSHAMASE

First Defendant

WALTER SHAIKI

Second Defendant

FAREED FAKIR

Third Defendant

RUKAARD STEFFERINE LEZARION ABRAMS

Fourth Defendant

ANDREA JOLEEN WESSELS

Fifth Defendant

NADIA GERWEL

Sixth Defendant

DAVID EDUARD LE ROUX

Seventh Defendant

**LE ROUX INC (a duly registered company
represented herein by the Second Defendant
and the Fourteenth Respondent as directors)**

Eighth Defendant

ZANDISILE JOSEPH QUPE	Ninth Defendant
THANDO NGCOLOMBA	Tenth Defendant
NOSIBELE TSHAMASE	First Respondent
NOSIBILE TSHAMASE (in her capacity as the trustee of the Mawela Trust)	Second Respondent
AGNES SHAIKI	Third Respondent
JEAN ALAN GERWEL	Fourth Respondent
TERRYROBIN GERWEL	Fifth Respondent
JULIETTE LE ROUX	Sixth Respondent
NOKUZOLI NOLITHA RUTH QUPE	Seventh Respondent
WOODLAND SAFARI (PTY) LTD (a duly registered company, represented by the Seventh Defendant and the Fourth Respondent as directors)	Eighth Respondent
ABRAHAM LE ROUX (in his capacity as trustee of the Abraham le Roux Family Trust)	Ninth Respondent
DAVID EDUARD LE ROUX (in his capacity as the trustee of the Abraham le Roux Family Trust)	Tenth Respondent
BENHEIM HOUSE UITENHAGE INVESTMENTS (PTY) LTD (a duly registered company, represented by the seventh defendant as director)	Eleventh Respondent
MRS SAVAGE (PTY) LTD (a duly registered company, represented by the seventh defendant as director of the twelfth respondent)	Twelfth Respondent
VINDEX ADVISORY (PTY) LTD (a duly registered company, represented by the seventh defendant and the fourteenth respondent as directors)	Thirteenth Respondent
ABRAHAM LE ROUX	Fourteenth Respondent

DE MIST INVESTMENTS (PTY) LTD (a duly registered company, represented by the fourteenth respondent as director)	Fifteenth Respondent
FURNIX (PTY) LTD (a duly registered company, represented by the fourteen respondent, as director)	Sixteenth Respondent
JW CONSTRUCTION (PTY) LTD (a duly registered company, represented by the fourteenth respondent as director)	Seventeenth Respondent
NECHAKO CAPITAL (PTY) LTD (a duly registered company, represented, by the fourteenth respondent as director)	Eighteenth Respondent
THANGANA LE ROUX (PTY) LTD (a duly registered company, represented, by the fourteenth respondent as director)	Nineteenth Respondent

JUDGMENT

DREYER AJ

1. The Prevention of Organised Crime Act¹ (“POCA”) authorises the National Director of Public Prosecutions (“NDPP”) to attach assets of accused persons or assets that accused person acquired from the proceeds of crime either held in their own name or transfer to another entity to be retained pending the finalisation of the criminal proceeding.² At the conclusion of the criminal proceedings, the assets are either confiscated to the state, on the conviction of the accused or released to the accused on the acquittal of the accused.³

¹ Act 121 of 1998

² s25 of POCA

³ s18 of POCA

2. The defendants have been charged *inter alia*, fraud, money laundering and racketeering in terms of the provisions of POCA, and corruption in terms of the provision of the Prevention and Combatting Corrupt Activities Act,⁴ arising from the awarding of tender by the Nelson Mandela Bay Municipality in relation to an integrated public transport system. The NDPP in her indictment contends that the National Treasury through the Nelson Mandela Bay Municipality suffered a cumulative loss of approximately one hundred million rand (R100 000 000).⁵ The eighth defendant,⁶ the NDPP contends further, benefitted to the sum of approximately thirty-three million rand (R33 000 000).of the full loss suffered by the state. The criminal trial is pending before the high court.
3. On 13 July 2022, the NDPP obtained a provisional restraint order and rule nisi against all the defendants and the respondents (“the *provisional restraint order*”).
4. The provisional restraint order required the defendants and respondents to disclose and surrender all their property, either specifically listed in a schedule of assets attached to the provisional restraint order and/or all property held by the defendants at any time before or after the granting of the order, including property held for and on behalf of the defendants and their shareholding in any company. The provisional restraint order limits the extent of the realisable property to be restrained to the value of R100 million.

⁴ Act 12 of 2004

⁵ Vol 1 Annexure NCN1 to the founding affidavit of Dr Ndzengu pp76 to 178

⁶ Represented in the criminal trial by the seventh defendant, who is one of two of its directors. The second director, the fourteenth respondent has not been charged by the NDPP.

5. The provisional restraint order prohibited the defendants and respondents from dealing with the property subject to the order. In addition, the restraint order appointed Mr Dhanesvarin Appavoo as a curator bonis charged with the control and supervision of the properties subject to the restraint order.⁷
6. On 30 August 2022, the provisional restraint order and *rule nisi* was made absolute as against the second defendant, fourth defendant, fifth defendant, tenth defendant and third respondent.
7. On 13 September 2022, the provisional restraint order was confirmed as against the seventh defendant, the eighth defendant, the sixth respondent and the fourteenth respondent.
8. At the commencement of these proceedings, counsel for NDPP requested that, by agreement between the representative of the NDPP and representatives of the respective defendants and respondents⁸,
 - 8.1 the provisional restraint order was made final and absolute as against the first, third, sixth and ninth defendants;
 - 8.2 the provisional restraint order was made final and absolute as against the first and second respondents;
 - 8.3 the provisional restraint order is discharged against the fourth and fifth respondents, with costs on an attorney and client scale;

⁷ The full extent of the provisional restraint order granted by Justice Schoeman is at Vol9 p 2643

⁸ The full extent of the provisional restraint is filed on record.

- 8.4 the provisional restraint order is discharged against the seventh respondent, with no order as to costs;
- 8.5 the provisional restraint order *is* confirmed over :
- 8.5.1 an amount of R52 500.00 deposited into the trust account of the curator by the eleventh respondent on behalf of the seventh defendant; and
- 8.5.2 the shareholding held by the seventh defendant and fourteenth respondent in the seventeenth respondent, which was handed into the possession of the curator, held in trust;
- 8.6 that the provisional restraint order and *rule nisi* is discharged against the eleventh, fifteenth and seventeenth respondents.
9. The result of these orders, is that the provisional restraint order has been declared absolute as against :
- 9.1 all of the defendants, who are the accused in the pending criminal trial before this court.
- 9.2 the first, second, third, sixth and fourteenth respondents.

10. The only remaining respondents who dispute the confirmation of the provisional restraint order are the eighth, ninth, tenth, twelfth, thirteen, sixteenth, eighteenth and nineteenth respondents (“the respondent entities”).
11. The respondent entities argue that the NDPP has not met the requirements for the confirmation of the provisional restraint order in that she has failed to prove on a balance of probabilities that any of the respondent entities acquired “*affected gifts*” from the defendants or hold “*realisable property*” as defined. I agree.
12. The NDPP may apply *ex parte* for a restraint order against realisable property pending the finalisation of the criminal process.⁹ To succeed in the confirmation of the provisional restraint order, the NDPP must show that there are “*reasonable grounds for believing that a **confiscation order may be made against the defendant***”¹⁰. (own emphasis)
13. The Supreme Court of Appeal, articulated in *Kyriacou*,¹¹ that what is required of the NDPP to show that there are “reasonable grounds for believing that a confiscation order may be made against the defendant.” The test, Mlambo AJA stated was:

“Section 25(1)(a) confers a discretion upon a court to make a restraint order if, *inter alia*, ‘there are reasonable grounds for believing that a confiscation order may be made...’ While a mere assertion to that effect by the appellant will not suffice ... on the other hand the NDPP is not

⁹ *NDPP v Kyriacou* 2014 (1) SA 379 (SCA)

¹⁰ s25(1)(a)(ii) of POCA

¹¹ *Kyriacou*, *supra* at para [10] fn 18

*required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room in determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is **no more than evidence that satisfies the court** that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.” (own emphasis)*

14. The Supreme Court of Appeal (Nugent JA) in *Rautenbach* elaborated on the requirements of the test as:¹²

*“It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is **required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order**. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant’s opinion ... it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only **whether there is evidence that might reasonably support a conviction and a consequent confiscation order** (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. That will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true.”¹³ (own emphasis)*

¹² *The National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA)

¹³ Quoted with approval in *National Director of Public Prosecutions v Wood and Others* [2020] 3 All SA 179 (GJ) per Keightley J for the Full Bench at paras [32] and [33]

15. Consequently, the two elements that the NDPP must satisfy to obtain confirmation of a preservation order, is that firstly there is evidence that might reasonably support a conviction and secondly that the evidence might reasonably be believed. The critical aspect is that there is evidence to **secure a conviction**.
16. Underlying these elements is the nature of the property that the NDPP may restrain, pending the finalization of the criminal proceedings. The NDPP is authorised by s26 of POCA to obtain an order “*prohibiting any person ... from dealing in any manner with **property** to which the order relates*”.
17. The term “*property*” is defined specifically, s26(2) which details the type of property in respect of which the restraint order may be made.

“A restraint order may be made -

- (a) in respect of such **realisable property** as may be specified in the restraint order or which is held by the person against whom the restraint order is made;*
- (b) in respect of all **realisable property** held by such person, whether it is specified in the restraint order or not;*
- (c) in respect of all property which, if it is transferred to such person after the making of a restraint order, would be **realisable property**.”*

18. Common to each of these categories of properties, is the term “*realisable property*” which itself is define in s14 of POCA , as:

“The following property shall be realisable in terms of this chapter:

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

19. Realisable property includes an *affected gift*, which is defined in s12 of POCA as:

“(a) Made by the defendant concerned not more than seven years before the fixed date; or

(b) made by the defendant concerned at any time if it was a gift –

(i) of property received by that defendant in connection with an offence committed by him or her in any person; or

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant’s hands property received by him or her in that connection, whether any such gift was made before or after the commencement of this Act.”

20. Critical to both the definitions of what constitutes *realisable property* and an *affected gift* is that a *defendant*, either *directly or indirectly*, gave or transferred or made the *affected gift or property* available to the recipient.

21. A *defendant* is defined in s12 of POCA to mean:

“A person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not including a person referred to in s25 (1)(b).”

22. A person who is connected to all the respondent entities, either as a director and/or a shareholder and/ or a beneficiary of a shareholder, is the fourteenth respondent, who is not defendant. Neither are any of the respondent entities.

23. No criminal proceedings have been instituted against the respondent entities. The founding affidavits deposed to in support of the restraint order contain no allegation that any of the respondent entities will be prosecuted. Similarly, there are no contentions in the founding affidavit that the fourteenth respondent will be prosecuted.

24. The facts in this matter are distinguishable from those in the matter of *National Director of Public Prosecutors v Wood* decision where the case of the NDPP was that there were reasonable grounds for believing that the *Wood* respondents would be prosecuted, at least for crimes of *inter alia* corruption, fraud, and money laundering.¹⁴

25. The only remaining issue, which is determinant of this application, is whether any of the respondent entities holds *realisable property* received as an *affected gift* from any of the defendants. The NDPP bears the onus to show, on a balance of probabilities, that respondents received realisable property.¹⁵

¹⁴ *Wood (supra)* at para [5] and [92]. In this matter the NDPP relied on s25(1)(b) of POCA

¹⁵ *NDPP v Procopos*, 2009 (1) SACR 468 (SCA) at para [35]

26. Counsel for the respondent entities argued that any property the respondent entities received from the fourteenth respondent is not realisable property subject to restraint, as the fourteenth respondent is not a defendant. Absent the fourteenth respondent being a defendant, counsel for the respondent entities argued, the requisite causal connection required by POCA to confirm the restrain order, is severed. Consequently, the provisional restraint order against all the respondent entities should be discharged.
27. This is the point of departure between the parties. Counsel for the NDDP, argued that the fourteenth respondent is not an ordinary respondent. The fourteenth respondent is a director of the eighth defendant, who is a defendant. Thus, counsel for the NDPP argued, though the fourteenth respondent is not himself a defendant, the definition of “*defendant*” ought to be interpreted broadly in favour of the State.
28. The NDPP argues that the definition of “*defendant*” should be interpreted to include a person who was aware of the unlawful activities. I highlight below the extended definition proposed by the NDPP:
- “means a person against whom a prosecution for the 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) **and any person who was reasonably aware of the unlawful activities and who has benefited from the fruits of the unlawful activities.**”*
29. The NDPP’s rationale for the proposed extended interpretation of “defendant” is that in the NDPP’s view, the fourteenth respondent was clearly a party to or

directly involved in the organised crime which forms the subject matter of the pending criminal proceedings, against the defendants.

30. The difficulties I have with the proposed extended interpretation of the word “*defendant*,” is firstly, the NDPP concedes that the fourteenth respondent is not a defendant. There is no explanation in the papers why the fourteenth respondent as one of two directors of the eighth defendant (the other being the seventh defendant), was not prosecuted. There is no assertion in the papers that there is an intention by the NDPP to institute charges against the fourteenth respondent. Given that it is the NDPP herself who is in charge of the National Prosecuting Authority, who is authorised by the Constitution to institute criminal proceedings¹⁶, such deafening silence is inexcusable.
31. Secondly, it is clear from the reading of the definition, specifically with its reference to s25(1)(b), that the word *defendant* is limited to a person who has been charged or will be charged. Applying such contextual interpretation complies with the approach elucidated by the Supreme Court of Appeal in *Endumeni*¹⁷.
32. There are no facts before me to consider an extended interpretation for the definition of the word *defendant*. The failure by the NDPP to prosecute the fourteen respondent, when it lies within her authority to do so, cannot be rectified by an extended definition of the word “*defendant*”, particularly when the NDPP’s own indictment, contends that the eighth defendant (whose

¹⁶ Section 179 of Act 106 of 1996

¹⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

directors are the seventh defendant and fourteenth respondent) benefited by a sum of approximately R33 million of the R100 million loss sustained by the State.

33. Thirdly, the proposed extended interpretation contradicts the Constitutional Court's interpretation of the intention of POCA. In *NDPP and Another v Mohamed and Others*,¹⁸ Ackerman J stated:

"It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.

34. In *Mohamed*, the Constitutional Court clearly identified that that it is *criminals* (namely those persons charged, prosecuted, and found guilty of offences within the confines of a criminal justice system) who must be stripped of their ill-gotten gains.
35. The proposed extended definition of the word *defendant* is at odds with principles of the rule of law.

¹⁸ 2002 (2) SACR 196 (CC) at paras [15] and [16]

DO THE RESPONDENTS HOLD REALIZABLE PROPERTY?

36. This question is answered if any property held by the respondent entities was an *affected gift* received from any of the defendants directly or indirectly.
37. On an analysis of the facts set out below, none of the respondent entities received *affected gifts* from any of the defendants or hold *realisable assets*.

THE EIGHTH RESPONDENT

38. The eighth respondent was incorporated as a close corporation in June 1994. The fourteenth respondent acquired the entire members' interest on 23 February 2006.
39. On 24 May 2007, the fourteenth respondent transferred 50% of his member's interest to the seventh defendant at no cost to the seventh defendant.
40. On 30 October 2007, the eighth respondent was converted from a close corporation to a private company.
41. On 19 December 2014, the fourteenth respondent transferred 50% of his shares in the eighth respondent to the Abraham le Roux Family Trust and the seventh defendant transferred 50% of his shares in the eighth respondent to the Le Roux Investment Trust. The fourteenth respondent and seventh defendant are both trustees of each of the Abraham le Roux Family Trust and the Le Roux Investment Trust. Both the Abraham le Roux Family Trust and

the Le Roux Investment Trust acquired their shareholding in the eighth respondent, at par value of R1.00 per share. Each of the Abraham le Roux Family Trust and the Le Roux Investment Trust acquired 50 shares.

42. The eighth respondent produces “*as evidence of payment for the shares for value*” the return for securities transfer tax. This contention is a fallacy. Securities transfer tax is payable by the company, whose shares are sold or issued.¹⁹ The securities transfer tax return does not evidence a transfer of the shareholding for value. The facts do not evidence that the shareholding was transferred for value.
43. The eighth respondent does not take the court into its confidence as to how its shareholding was valued at R100.00 in 2014. There is no evidence from the company’s auditor, Trevor Wait, as to the basis for the determination of the value of the shares. There is no account in the “*value of the shares*” in the sum of R100 of the underlying asset held by the eighth respondent, namely, an immovable property which has an income stream, monthly rental income received from the eighth defendant.
44. The immovable property itself (absent the income stream) was valued at R1.6 million on 28 April 2015. This, four months after the seventh defendant and fourteenth respondent had transferred their 50% shareholding to their respective family trusts. Even were the current value of the mortgage bond of approximately R500 000.00 is set off against the 2015 value of the immovable

¹⁹ s6 of the Securities Transfer Act 26 of 2007 states
“the amount **or market value of the consideration given** or, where **no consideration is given** or the consideration given is less than the market value of that security, **the market value of that security**;

property, the underlying value of the shares in the company was at least in excess of R1 million.²⁰ This rough calculation excludes the value of the income stream the eighth respondent received from the eighth defendant.

45. That said, the fourteenth respondent is not a defendant. The transfer by the fourteenth respondent of his fifty percent (50%) shareholding in the eighth respondent, to the Abraham le Roux Family Trust represented in these proceedings by the ninth and tenth respondents, does not constitute an *affected gift*. It is not *realisable property*.
46. The transfer by the 14th respondent of his fifty percent (50%) shareholding in the eighth respondent to the seventh defendant does not constitute an *affected gift*. It is not *realisable property*.
47. While the seventh defendant transferred his fifty percent (50%) shareholding in the eighth respondent to the Le Roux Investment Trust, the Le Roux Investment trust, it is not a respondent. Consequently, this transfer of the seventh defendant's shareholding in the eighth respondent, neither constitutes an *affected gift* nor is it *realisable property*.
48. Inasmuch as the eighth defendant pays monthly rental income to the eighth respondent, there is no evidence before me, that the defendant pays the eighth respondent an amount below market value. I find that the NDPP has

²⁰ s15(1) of POCA states that: "*The value of property ... in relation to any person holding the property shall be –*
(a) *where any other person holds an interest in the property –*
(i) *the market value of property less*
(ii) *the amount required to discharge any encumbrance on the property*"

failed to prove on a balance of probabilities, that the rental income the eighth respondent receives from the eighth defendant, is realisable property.

49. In the result, there is no factual basis for the assets of the eighth respondent to be subject to the restraint order.

NINTH AND TENTH RESPONDENTS IN THEIR CAPACITIES AS TRUSTEES OF THE ABRAHAM LE ROUX FAMILY TRUST (“the Trust”)

50. The Trust was registered, and letters of executorship issued to the 7th Defendant and the 14th Respondent in 2014. The Trust acquired 50% shareholding in Woodland Safari, the eighth respondent, in December 2014; 50% shareholding in Vindex Advisory, the thirteenth respondent, in February 2018; the 100% shareholding in Furnix, the sixteenth respondent, in May 2020; furniture, paintings and six consecutive annual donations of R100 000.00 in the period 2015 to 2020 from the fourteenth respondent.
51. The fourteenth respondent is not a defendant. The transfers and/ or disposals and/or donations the fourteenth respondent made to the Trust are not *affected gifts*. The property the Trust acquired from the fourteenth respondent does not constitute *realisable property*.
52. There is no factual basis for me to confirm the provisional restraint order against the ninth and tenth respondents in their capacity as trustees of the Trust.

THE TWELFTH RESPONDENT

53. The twelfth respondent was incorporated on 19 August 2020, with the entire shareholding held by Southern Ferries and Salvage (Pty) Ltd. The seventh defendant was appointed as a director.
54. On 18 March 2021, Southern Ferries and Salvage (Pty) Ltd transferred 50% of its shareholding to Woodland Safari (Pty) Ltd, the eighth respondent, for no value. The reason for this transfer (at no value) advanced by the seventh defendant, is that the twelfth respondent had no assets or liabilities.
55. The twelfth respondent holds a licence to search for and salvage abandoned shipwrecks. To acquire this licence the twelfth respondent was required to provide South African Revenue Service (“SARS”) with a security bond to the value of R5 000.00. Nedbank Limited issued a security bond on behalf of the twelfth respondent to the satisfaction of SARS, which security bond is secured by a R5 000.00 investment made by its 50% shareholder, Southern Ferries and Salvage (Pty) Ltd.
56. The twelfth respondent is not a defendant. The twelfth respondent has not received an *affected gift* from any defendant. The twelfth respondent holds no *realisable property*.
57. There are no facts alleged by the NDPP, to justify confirmation of the provisional restraint order..

THIRTEETH RESPONDENT

58. The thirteenth respondent was incorporated in January 2017 with the fourteenth respondent was the sole shareholder and director.
59. In February 2018, the fourteenth respondent appointed the seventh defendant as a director; transferred 50% of his shareholding to the Abraham le Roux Family Trust and remaining 50% of his shareholding to the Le Roux Family Investment Trust, for no value.
60. As the fourteenth respondent is not a defendant, the transfer by the fourteenth respondent of his shareholding to the Abraham le Roux Family Trust and to the Le Roux Family Investment Trust, does not constitute an *affected gift*. Consequently, the property held by the Le Roux Family Investment Trust and the Abraham le Roux Family Trust, being the shareholding in the thirteenth respondent, and the assets of the thirteenth respondent do not constitute *realisable property*.
61. The NDPP has failed to discharge its onus on a balance of probabilities that the thirteenth respondent holds realisable property. There are no facts before me to support the confirmation of the restraint order as against the thirteenth respondent.

THE SIXTEENTH RESPONDENT

62. The fourteenth respondent acquired the sixteenth respondent, which was incorporated in November 2019, as a shelf company in May 2020. The fourteenth respondent registered the Abraham le Roux Family Trust, as its sole shareholder.
63. In November 2020, the fourteenth respondent sold a property, Erf 22707 Kariega, registered in his name, to the sixteenth respondent for the sum of R900 000.00. The property is currently leased to Volkswagen South Africa. The sixteenth respondent is paying the fourteenth respondent the purchase consideration from the monthly rental income it receives.
64. Whilst the fourteenth respondent contends that the sixteenth respondent is paying off the purchase consideration to the fourteenth respondent from the rental it receives on a monthly basis, the deed of transfer indicates otherwise. The title deed is in the name of the sixteenth respondent,²¹ consequently, the sixteenth respondent is the legal owner. The title deed records that that the purchase price has been paid.
65. The sixteenth respondent has not put up any evidence of the purchase of immovable property from the fourteenth respondent on “*periodic payments*.”²² The deed of transfer is not in the name of the fourteenth respondent,

²¹ The transfer of ownership of immovable property is recorded by the registration of the title deed in the name of purchaser.

²² s6(1)(s) and (3) of the Alienation of Land Act 68 of 1981, requires the term of payment to be recorded. If there are instalment payments for the purchase of the land, registration of the agreement is required by s20 of the Alienation of Land Act 68 of 1981 to make the instalment payments due and payable

endorsed as sold to the sixteenth respondent, subject to periodic payment. It is only when the periodic payment sale agreement, is recorded at the Deed's Office, that the periodic payments become due and payable.²³

66. Irrespective of the modalities that the sixteenth respondent utilised to settle its indebtedness to the fourteenth respondent, if any, these are inconsequential to the issues in dispute. The fourteenth respondent is not a defendant. The "sale" by the fourteenth respondent to the sixteenth respondent, does not constitute an *affected gift*. The sixteenth respondent's immovable property, Erf 22707 Kariega, is not *realisable property*.
67. The fourteenth respondent donated R100 000.00 to the sixteenth respondent in each of the 2021 and 2022 financial years. As the fourteenth respondent is not a defendant, and the donations made by the fourteenth respondent to the sixteenth respondent do not constitute *affected gifts*, the donations the sixteenth respondent received are not *realisable property*.
68. The NDPP has failed to prove on a balance of probabilities that the sixteenth respondent holds realisable assets. There are no facts before me to confirm the provisional restraint order in respect of the property of the sixteenth respondent.

²³ *Amardian and Others v Registrar of Deeds and Others* 2019 (3) SA 341 (CC)

THE EIGHTEENTH RESPONDENT

69. The fourteenth respondent was a director of the eighteenth respondent from 2007 until 15 August 2022, shortly after the granting of the provisional restraint order. The fourteenth respondent was not a shareholder of the eighteenth respondent.
70. Novara Investment Trust is the eighteenth respondent's sole shareholder. In the answering affidavit filed by Gerhardus Muller, a director of the eighteenth respondent and a trustee and beneficiary of the Novara Investment Trust, Muller contends that the Novara Investment Trust acquired the shareholding in the eighteenth respondent on 25 October 2013.²⁴ However, this contention is contrary to both the letters of authority appointing the trustees of the Novara Investment Trust and the Deed of Trust.²⁵ The letters of authority were only issued by the Master on 24 July 2019²⁶ and the Deed of Trust concluded in August 2019. There is no explanation in the papers for this discrepancy.
71. Notwithstanding the discrepancies in the response provided by the eighteenth respondent, the NDPP has failed to show on a balance of probabilities that the eighteenth respondent received an *affected gift* from any of the defendants. holds *realisable property*.

²⁴ Court bundle vol 8 p 2757 The Novara Investment Trust acquired the shareholding in the eighteenth respondent from the Matisse Trust, which had itself acquired the shareholding from the Vera Trust. There is no explanation in the papers of the relationship between these entities.

²⁵ A trust is created by the deed of trust. It is not a separate legal entity. It is represented by its trustees. A trust has no separate existence absent a deed of trust and appointment of trustees.

²⁶ Court bundle vol 8 p 2761

72. The eighteen respondent is not itself a defendant. The NDPP advances no reasons in reply for the confirmation of the provisional restraint order.
73. Consequently, there is no justification on the facts before me for the confirmation of the restraint order as against the eighteenth respondent.

THE NINETEENTH RESPONDENT

74. Thangana le Roux Inc, the nineteenth respondent, is a law firm. The fourteenth respondent holds forty nine percent (49%) of the shareholding, the majority shareholding, balance of fifty-one percent (51%) is held by Vuyolwethu Thangana. The nineteenth respondent was incorporated in October 2017. The nineteenth respondent is not a defendant.
75. The NDPP has failed to show on a balance of probabilities that the nineteenth respondent received an *affected gift* from any defendant or that it holds *realisable property*. There is no evidence on the papers to justify the confirmation of the restraint order as against the nineteenth respondent.
76. In reply and in the report of the curator, the NDPP argue that the directors' fees paid or to be paid to directors of the respondent entities fall to constitute *realisable property*. The respondent sought leave to respond in a fourth set of papers to the new material set forth in the replying affidavit and curator's report. I granted the application and admitted the further set of papers in the record.

77. As I have stated above, the fourteenth respondent is not a defendant nor does the NDPP intend to charge the fourteenth respondent. In such circumstances, as I have found above, the casual connection required by POCA between the fourteenth respondent and the respondent entities for the confirmation of the restraint order, severed. It follows therefor that any directors' fees paid to or, to be paid to the directors of the respondent entities do not constitute *realisable property*.
78. From an analysis of the facts above, none of the respondent entities received *affected gifts* from any of the defendants. None of the respondent entities hold *realisable property*. There is no factual or legal basis to confirm the provisional restraint order as against the respondent entities.
79. In the result I make the following order
- 79.1 The rule nisi against the respondent entities is discharged.
- 79.2 The provisional restraint order against the property of the respondent entities is discharged.
- 79.3 The applicant is ordered to pay the costs of the respondent entities, occasioned by the application.

ACTING JUDGE OF THE HIGH COURT**Representation for Applicant:**

Counsel: Mr W Myburgh
Instructed by: State Attorney, Gqeberha

Representation for 8th, 9th, 10th, 12th, 13th, 16th, 18th, and 19th Respondents:

Counsel: Adv F Van Zyl SC
Instructed by: Meyer Inc, Gqeberha

Date Heard: 26 April 2023

Supplementary heads

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