



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/27377

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
	DATE
	SIGNATURE

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
KISHAN JAWAHARLAL	First Defendant
KISH GAS (PTY) LTD	Second Defendant
DIMPHO MAFU	Third Defendant
ITUMELENG MOEMA	Fourth Defendant
NOMAWETHU KUNENE	Fifth Defendant
LELANI AGLIOTTI	First Respondent
PARCHMENT TRADING 22 (PTY) LTD	Second Respondent
NEENA JAWAHARLAL	Third Respondent
LINDELO PRECIOUS MNGOMEZULU	Fourth Respondent
GLENN AGLIOTTI	Fifth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Restraint order in terms of sections 25 and 26 of the Prevention of Organised Crime Act, 121 of 1998 – Reasonable possibility that a confiscation order may eventually be made – Restraint order granted

Order

[1] In this matter I made the following order on 2 February 2023:

1. *The provisional restraint order (rule nisi) granted by the Honourable Siwendu J on 22 July 2021 in this matter:*

1.1. *is hereby confirmed in respect of the first, third, fourth and fifth defendants as well as the first, second, third, fourth and fifth respondents, save that the schedule of assets referred to in paragraph 1.1.1 of the rule nisi and attached thereto as Annexure A, is hereby amended as follows:*

1.1.1. *By deleting and replacing the contents of paragraph 3.1 thereof with the following:*

“All proceeds, not exceeding the amount of R5 million, of investments held by the Third Defendant with the following institutions:

3.1.1 *Assupol with reference number Y0136745002770301;*

3.1.2 *Sanlam with reference number 043945612; and*

3.1.3 *Liberty with reference number 0027857610.”*

- 1.2. *is further extended to Wednesday, 8 March 2023 on the unopposed roll in respect of the second defendant.*
2. *There is no order as to costs in respect of the third, fourth, fifth defendants and the first, second, third, fourth and fifth respondents.*
3. *Costs are reserved in respect of the second defendant.*
4. *The first defendant is ordered to pay the applicant's costs occasioned by the hearing of the opposed application on 24 January 2023*

[2] The reasons for the order follow below.

Introduction

[3] On 22 July 2021 Siwendu J granted a provisional restraint order in terms of section 26 of the Prevention of Organised Crime Act, 121 of 1998 (“the Act”).

[4] The provisional order was extended on a number of occasions and the matter was then argued on 24 January 2023. I reserved judgment and an order was made on 2 February 2023 at which time this typed judgment was not to hand.

[5] The relief sought was initially opposed by the first, second and third defendants. However, the second defendant is being wound up¹ and Mr Skhosana appeared for only the first defendant when the matter was argued.² There was no appearance on

¹ It is common cause that a winding up order was granted on 21 June 2021. The winding up order was subsequently rescinded and the order in the rescission application is the subject of an application for leave to appeal. In the order I make the rule is extended to 8 March 2023 and it is not necessary or appropriate to deal with the status of the winding up order in this judgment.

² I am indebted to Mr Skhosana for referring me, with a copy to his opponent, to the judgment in *Bester NO & Another v National Director of Public Prosecutions* [2011] ZASCA 234, [2012] 2 All SA 453 (SCA). Without finally deciding the question I am satisfied that, *prima facie*, the order granted by me in respect of the second defendant is not impacted by the judgment in the Supreme Court of Appeal. I ordered that the rule be extended in respect of

behalf of the third defendant and I am informed that the third defendant's attorneys were furnished with all correspondence and notices, and invited on CaseLines.

[6] The applicant brought a striking-out application but did not pursue the application, save for the application to strike paragraph 18 of the answering affidavit on the basis that it refers to an annexure that is in fact not attached. I deal with the annexure below. I conclude however that the applicant is not prejudiced by the paragraph and its striking is not warranted. Rather, the matter must be considered without the annexure (an affidavit filed by the first defendant in another matter) as the evidence is simply not before Court.

[7] The defendants are facing prosecution in the Randfontein Magistrates' Court on charges of fraud, theft, and statutory offences relating to money laundering and the acquisition, possession or use of the proceeds of unlawful activities.

[8] Section 26 of the Act enables the applicant to apply for an *ex parte* restraint order prohibiting any person, subject if need be to appropriate conditions and exceptions, from dealing in any manner with any property to which the order relates. The court may make a provisional restraint order having immediate effect and may simultaneously grant a rule *nisi* calling on the defendant and other interested parties to show cause on a return day why a final order should not be made.

[9] Section 25(1)(a) and (b) stipulates the circumstances under which the Court may make such an order: Paragraph (a) is applicable in the present matter. The order may be made –

9.1 when a prosecution for an offence has been instituted against the

the second defendant to 8 March 2023. The liquidators of the second defendant should be in a position to consider their attitude to the application in due course.

defendant concerned,

9.2 a confiscation order has been made against the defendant or there are reasonable grounds for believing that a confiscation order may be made, and

9.3 the proceedings against the defendant have not been concluded.³

[10] Paragraph (b) of section 25(1) is not relevant to the present matter.

[11] There are reasonable grounds for so believing when a Court is satisfied that the Court in the pending criminal trial *may* make such an order. The Court need not find that the Court seized with the criminal trial *will* make such an order. In *National Director of Public Prosecutions v Kyriacou*,⁴ Mlambo AJA said:

“[5] Sections 25 and 26 (which fall within Part 3 of Chapter 5) allow for a “restraint order” to be made in anticipation of the granting of a confiscation order. The purpose of a restraint order is to preserve property so that it may in due course be realised in satisfaction of a confiscation order. Section 26(1) authorises the National Director of Public Prosecutions to apply to a High Court, ex parte, for an order “prohibiting any person from dealing in any manner with any property to which the order relates”. The remaining provisions of Part 3 confer wide powers upon the court as to the terms of a restraint order. In particular, it may appoint a curator bonis to take charge of the property that has been placed under restraint, order any person to surrender the property to the curator, authorise the police to seize the property and place restrictions upon

³ See also section 17 of the Act.

⁴ *National Director of Public Prosecutions v Kyriacou* [2003] 4 All SA 153 (SCA). Also reported at 2004 (1) SA 379 (SCA).

encumbering or transferring immovable property. It may also make a provisional restraint order having immediate effect and simultaneously grant a rule nisi calling upon the defendant to show cause why the order should not be made final. National Director of Public Prosecutions v Rebuzzi 2002 (2) SA 1 (SCA).

...

[10] ... 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 (*National Director of Public Prosecutions v Basson*⁵ 2002 (1) SA 419 (SCA) at 428 B–C) on the other hand the appellant is not 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 a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.

[11] A court that convicts an offender is not restricted to making a confiscation order in relation only to the offences of which the offender has been convicted. Section 18(1) of the Act authorises a court to make a confiscation order once it has found that the offender has benefited either from the offence of which he has been convicted, or from any other offence of which he has been convicted at the same trial, or from any criminal activity which the court finds to be sufficiently related to those offences. A finding that the offender has benefited

⁵ Also reported at 2002 (2) All SA 255 (A).

in any of those respects constitutes the jurisdictional fact that is necessary for a court to exercise its discretion to make a confiscation order. Whether the court exercises that discretion, and the extent to which it does so, will depend upon the extent to which the offender is found to have benefited from either the crime concerned, or from other offences of which he was convicted, or from related criminal activity”

[12] The Plascon-Evans Rule⁶ is not without more applicable to an application for a restraint order.⁷ Like any rule, the Plascon-Evans rule must above applied with reference to context. There may very well be disputes of fact on the papers, but the disputes of fact do not of and by themselves preclude an order. The applicant will be entitled to the order even though there are disputes of facts but despite those disputes of fact there is a reasonable possibility that a confiscation order may eventually be made.

[13] Disputes of fact do not arise out of bald denials. It is not acceptable for a respondent in application proceedings to merely deny the evidence presented by the applicant without dealing with the substance of the averments made.

[14] For ease of reading I refer to the individual defendants and respondents by their surnames. I refer to second defendant as ‘Kish Gas’ and to the second respondent as ‘Parchment Trading.’

[15] The application had its genesis in an agreement between the Gauteng Department of Social Services (“the Department”) and a non-profit organisation known as Re Ageng. In terms of the agreement A Re Ageng would act as a conduit for

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634.

⁷ *National Director of Public Prosecutions v Kyriacou* [2003] 4 All SA 153 (SCA) paragraphs 9 to 11.

payment by the Department to Life Resources Centre because the latter was not registered on the Government payment system.

[16] The Department's first payment to A Re Ageng was duly paid over to the Life Resources Centre in accordance with the conduit agreement but in respect of the second payment a dispute arose between the Department and A Re Ageng concerning the source of the money. A Re Ageng did not make payment of R5 000 000 to the Life Resources Centre.

[17] Mafu, Moema and Kunene were employees of A Re Ageng.

[18] The applicant alleges that the defendants acting in concert devised a fraudulent scheme to access A Re Ageng's bank account and to steal the money.

18.1 Mafu and Kunene unlawfully accessed A Re Ageng's bank account and increased the transfer limit on the Internet banking facility;

18.2 They added Kish Gas as a beneficiary;

18.3 They illegally transferred the cell phone number of the director of A Re Ageng from one cellular phone company to another, to enable them to retrieve the OTP's⁸ send to the phone for the purpose of authorising transactions using a PIN;⁹

18.4 Jawaharlal, the sole shareholder and director of Kish Gas, created fictitious invoices for the sale of fuel and the payment into A Re Ageng's account would then be transferred to Kish Gas and the money shared

⁸ One Time Password.

⁹ Personal identification number.

between the defendants.

18.5 The amount of R5 000 000 was so transferred on 10 November 2018. The payment was followed with the creation of a *pro forma* invoice.¹⁰

18.6 Jawaharlal paid the R5 000 000 to various parties, including L Agliottii, her husband G Agliotti, and Parchment Trading, L Agliotti was the sole shareholder and director of Parchment Trading. The applicant alleges that these payments were made to launder the money and to then pay the defendants their share in the illicit transaction through legitimate sales by Kish Gas.

18.7 Various payments were made also to Moema and Kunene. Jawaharlal later assisted the Police and Kunene was arrested on corruption charges.

[19] It is not disputed that Kish Gas received the R5 000 000 and that it was not entitled thereto. The inference that the money ended up with Kish Gas through the machinations of the defendants is for present purposes irresistible. It can hardly be disputed that they had no right to the money and no right to take steps to have the funds transferred from A Re Ageng to Kish Gas, and to further distribute the money after payment into the Kish Gas bank account.

[20] In paragraph 18 of his answering affidavit Rawaharlal seeks to rely on an affidavit he deposed to in an earlier application involving different parties and he purports to attach it to the answering affidavit. It is however common cause that it was never attached. Jawaharlal's counsel has not had sight of the affidavit and did not seek to rely

¹⁰ One would expect an invoice to precede a payment and not the other way around.

on it.¹¹

[21] The affidavit by Mafu does not place the facts as alleged by the applicant in dispute but states that he sold the Toyota Yaris motor car listed in the order to a third party. The applicant does not pursue a final order in respect of the car. In his answering affidavit¹² Mafu discloses three investments with Assupol, Sanlam and Liberty. These investments are reflected in paragraph 1.1.1 of the order above.

[22] I am satisfied that there is a reasonable possibility that a confiscation order may be made.

[23] I therefore make the order as set out above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 FEBRUARY 2023**.

COUNSEL FOR THE APPLICANT:	MS A JANSE VAN VUUREN
INSTRUCTED BY:	STATE ATTORNEY
COUNSEL FOR FIRST RESPONDENT:	MG SKHOSANA
INSTRUCTED BY:	FORBAY ATTORNEYS

¹¹ The applicant's counsel did have sight of the earlier affidavit.

¹² Paragraph 8 of the affidavit.

DATE OF THE HEARING:

24 JANUARY 2023

DATE OF ORDER:

2 FEBRUARY 2023

DATE OF JUDGMENT:

8 FEBRUARY 2023