HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 8169/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 28/03/2018
SIGNATURE

28/3/18

In the matter between:

SHOAYB JOOSUB — First Applicant (Eighth Defendant)

ANGLO WEALTH SHARIAH (PTY) LTD — Second Applicant (Eighth Respondent)

And

THE NATIONAL DIRECTOR PUBLIC PROSECUTIONS — Respondent

In re: Ex parte application **CASE NO: 8169/2018**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Applicant

and

RIDWAAN MOHAMMED JOOSUB	First Defendant
SHAZIA JOOSUB	Second Defendant
AHMED AMLA	Third Defendant
SALEEM MOHAMED HOOSEN	Fourth Defendant
AHMED MULLA	Fifth Defendant
MOHAMED IGBAL JOOSUB	Sixth Defendant
ADNAN ARCHAD RAVAT	Seventh Defendant
SHOAYB JOOSUB	Eighth Defendant
ZUBER PATEL	Ninth Defendant
SHAZ TRADING CC	Tenth Defendant
A E CONSULTING CC	Eleventh Defendant
EBADSHO JEWELLERS CC	Twelfth Defendant
M BALA TRADING CC	Thirteenth Defendant
NOORJEHAN JOOSUB	First Respondent
MOHAMED IGBAL JOOSUB NO **(in his capacity as trustee of the Noorjehan Family Trust)**	Second Respondent
NOORJEHAN JOOSUB **(in her capacity as trustee of the Noorjehan Family Trust)**	Third Respondent
SHOAYB JOOSUB NO **(in his capacity as trustee of the Capitrade Trust)**	Fourth Respondent
NOORJEHAN JOOSUB **(in her capacity as trustee of the Capitrade Trust)**	Fifth Respondent
RAESSA AMLA	Sixth Respondent
BAM BINO (PTY) LTD	Seventh Respondent
ANGLO WEALTH SHARIAH (PTY) LTD	Eighth Respondent

JUDGMENT

DAVIS, J

[1] Nature of the application.

The issue at hand is a substantive application in terms of Section 26 (3)(c)of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA") to anticipate the return day of a provisional restraint order I granted on 9 February 2018 and a discharge or variation thereof (the "anticipation application").

[2] The parties

The First Applicant in the anticipation application is the eighth accused in a pending criminal trial and was therefore cited as the Eighth Defendant in the main application for the restraint order. He is referred to by his counsel and in the papers as "Shoayb" to distinguish him from the other accused with which he shares a common surname. The Second Applicant is not an accused, but was cited as the Eighth Respondent in the main application. The Second Applicant, Anglo Wealth Shariah (Pty) Ltd is referred to as AWS. The Respondent in the present application was the applicant in the main application and is the National Director Public Prosecutions (the "NDPP").

[3] The provisional restraint order

3.1 The NDPP launched the main application against 13 Defendants and a further eight Respondents;

3.2 The application was launched *ex parte*;

3.3 In the main application the NDPP referred to the fact that thirteen accused (the "Defendants") have been charged with various crimes. It relied on the result of investigations conducted by an Advanced Criminal Investigator employed by the South African Revenue Services;

3.4 The introduction to the provisional indictment describes the crimes as follows: "*The State will allege that accused 1 to 13 are guilty of racketeering, an offence in terms of section 2(1) (e) read with sub-section 1, 2(2) and (3) of the Prevention of Organised Crime Act, No 121 of 1998 (hereinafter referred to as POCA) which act criminalises racketeering in that Accused 1 to 13 whilst managing or employed by or associated with an enterprise as defined in section 1 of POCA, conducted or participated in conduct, directly or indirectly of such enterprises' affairs through a pattern of racketeering activity that was conducted from January 2011 to December 2013 ...*

The State will further allege that the pattern of racketeering activity was constituted by a planned, on-going, continuous or repeated participation or involvement in the commission of the following offences, namely: fraud, forgery, uttering, contravention of section 59 of the Value Added Tax Act No 89 of 1991, contravention of section 75 (1)(a) of the Income Tax Act, No 58 of 1962, contravention of section 235 of the Tax Administration Act, No 28 of 2011 and money laundering ...."

Various definitions contained in the various Acts were then contained in the indictment and the identity and roles of the various

accused were set out. The "pattern" and particulars of the crimes are best described in the charge against the first (and principal) accused as follows:

> *"The accused ... directly or indirectly instructed the bookkeepers and/or accountants from Durban in Kwa-Zulu Natal and Benoni in Gauteng to register fifteen (15) false Value Added Tax Vendors with the South African Revenue Services (SARS).*
>
> *He directly or indirectly provided the bookkeeper/auditors with the necessary fraudulent documentation required to register those 15 VAT vendors [then the list of the fifteen entities are provided]...*
>
> *After the above-mentioned VAT vendors were registered with SARS, he and his associates communicated and transacted electronically with SARS, purporting to be registered vendors.*
>
> *He and/or his associates electronically submitted fraudulent VAT refund claims to the value of R 99 190 298.97, using the above-mentioned fifteen (15) fraudulently registered VAT vendors and they were refunded R30 598 948.42 by SARS.*
>
> *He managed the Nedbank and First National Bank Accounts of the above-mentioned VAT vendors and distributed monies paid by SARS into the bank accounts of these VAT vendors as refunds to disguise their origin through the following entities and/or persons."*

3.4 The indictment then lists some 38 entities, one of which is Shaz Trading CC, a close corporation with which Shoayb had many dealings and of which his father was the sole member. Another of the entities was AWS and yet another was Oakbay Investment (Pty) Ltd, a company which has recently received much local and international media coverage;

3.5 The Second Defendant is the wife of the First Defendant and Shoayb is his brother. The sixth Defendant is his father and the other Defendants have been charged as "associates";

3.6 The Advanced Criminal Investigator stated on oath in his affidavit that, after a long and thorough investigation, the facts and details substantiating the charges listed in the indictment have been established. The NDPP alleged that the Defendants are all jointly and severally liable for the actual losses suffered by SARS. It further alleged that the Respondents have all benefited from the criminal activities of the Defendants and have received "affected gifts" within the meaning of POCA;

3.7 The NDPP has identified a number of realizable properties belonging to the various Defendants and Respondents. These were listed in a schedule of "Known assets" and included various bank accounts, specified immovable properties (both residential and business), jewellery, gold coins, gold bars and various luxury vehicles such as Mercedes-Benz AMG's, Ferrari's, Porche's and Lamborghini's.;

3.8 The NDPP alleged that, upon conviction of the Defendants, a reasonable prospect exists that a consequential confiscation order

in terms of POCA might be issued and therefore sought the provisional preservation order;

3.9 I granted such an order, returnable on 8 May 2018 in terms of which (*inter alia*):

3.9.1 A *curator bonis* was appointed;

3.9.2 The Defendants and Respondents were restrained from dealing in any manner or fashion with the assets mentioned in the order;

3.9.3 The *curator bonis* was authorised to search for and take control of the assets and preserve them in the interim in terms of POCA;

3.9.4 The *curator bonis* was ordered to report to the registrar and all other relevant parties by 18 April 2018 in respect of the manner in which he has dealt with the assets or intends dealing with them, including the description and valuation of the assets;

3.9.5 The extent of the order was, subject to fluctuations and costs as provided for in POCA, limited to R 30 598 948.42.

[4] <u>The anticipation application</u>

4.1 On 6 March 2018 the Eighth Defendant and the Eighth Respondent launched the anticipation application on an urgent basis, seeking an anticipation of the abovementioned return day and a discharge or amendment of the restraint order as far as they are concerned;

4.2 They allege that the main application should not have been brought *ex parte* and no order should ever have been granted against them. They further accuse the NDPP of non-disclosure and breach of the requirement of *uberrima fides* in having failed to place their exculpatory evidence before the court;

4.3 The NDPP opposes the present application and seeks a confirmation of the provisional order as against the Eighth Defendant and the Eighth Respondent;

4.4 The issue of costs is also heavily contested by all the parties;

4.5 Although not sitting in the urgent court, the matter was allocated to me due to my prior familiarity therewith and the congestion in the urgent court. I ruled on the issues of urgency and representation of the parties and proceeded to hear the matter on 20 March 2018 being the date selected by the applicants in the anticipation application. I have received extensive and useful arguments from counsel for the respective parties and I thank them therefor.

[5] Relevant principles: *ex parte* applications

There are two important issues involved in applications which are launched *ex parte*. The first is whether the applicant is entitled to approach the court without notice to "the other side" and the second is that, in doing so, the applicant must display the highest degree of good faith (*uberrima fides*). The relevant principles are as follows:

5.1 It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity

to state their case. See: De Beer NO v North-Central Local Council and others 2002 (1) SA 429 (CC) at [11];

5.2 It is only in exceptional circumstances, that is in the rare cases where a countervailing interest is so compelling as to justify it, that a court will allow a party to proceed without due prior notice to those against whom an order will be sought. See: South African Airways SOC v BDFM Publishers (Pty) Ltd and others 2016 (2) SA 561 (GJ) at [22];

5.3 Certain sections of POCA empowers the NDPP to apply for court orders on an ex parte basis, but then still only when circumstances justify it, such as when the giving of notice would defeat the very object for which the order is sought. See: NDPP v Braun & Another 2007 (1) SACR 326 (C) at [20];

5.4 In all instances the *uberrima fide*-rule applies which dictates as follows:

(a) in *ex parte* applications all material facts which might influence a court to come to a decision must be disclosed;

(b) the non-disclosure of facts need not be willful or mala fide to incur the "penalty" of rescission of the order obtained *ex parte* or interference therewith;

(c) once the court is apprised of all the facts, it has a discretion to set aside the former order or to preserve it (this discretion would also encompass an amendment or variation of the order, if appropriate).

See: Schlesinger v Schlesinger 1974 (4) SA 342 (W) at 349A-B and Cometal-Mometal SARL v Corlana Enterprise (Pty) Ltd 1981 (2) SA 412 (W) at 414E.

[6] Relevant principles: POCA applications for restraint orders

6.1 The sections of POCA invoked by the NDPP in the main application are sections 25, 26 and 28, the relevant portions of which provide as follows:

"*25(1) A High Court may exercise the powers conferred on it by section 26(1) –*

(a) When –

(i) A prosecution for an offence has been instituted against the defendant concerned;

(ii) Either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant and

(iii) The proceedings against that defendant have not been concluded....

26(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.

(2) A restraint order may be made –

(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made,

(b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not ...

(3)(a) A court to which an application is made in terms of subsection (1) may make a provisional order having immediate effect and may simultaneously grant a rule nisi ....

(c) Upon application by the Defendant, the court may anticipate the return day ...

28(1) Where a High Court has made a restraint order, that court may at any time –

(a) Appoint a curator bonis to ... perform any particular act in respect of any of or all the property to which the restraint order relates ..."

6.2 The issue of confiscation orders are dealt with in part 2 of POCA which , in short, provides that "*Whenever a defendant is convicted*

of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from that offence ... and any criminal activity which the court finds to be sufficiently related to those offences and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate ... which ... shall not exceed the value of the defendants' proceeds of the offences or related criminal activities";

6.3 As already mentioned, the empowering provision in section 26(1) allowing for the launch of applications for restraint orders on an *ex parte* basis does not relieve the NDPP from the other requirements permitting such applications. See: NDPP v Braun supra in dealing with similar empowering provisions for preservation of property orders in terms of section 38 of POCA;

6.4 It was held in National Director Public Prosecutions v Rautenbach and others 2005 (1) SACR 530 (SCA) at [24] and [25] that "*The purpose of a restraint order is to preserve property in the interim so that it will be available to be realized in satisfaction of [a confiscation] order. A court from which such an order is sought is called upon to assess what might occur in the future ... a restraint order can only be made if there is indeed a reasonable possibility that both conviction and a confiscation will follow. This requires that the court be satisfied that the nature and tenor of available evidence indicates a reasonable possibility of conviction. It also requires – under separate consideration – that the available*

evidence points to a benefit derived by the defendant from the offence(s) charged or to be charged and that a confiscation order will follow";

6.5 In National Director of Public Prosecutions v Basson 2001(2) SACR 712 (SCA) (2002 (1) SA 419 (SCA)) at [19] the court held that "*the mere summary of the allegations made against the defendant concerned and an expression of an opinion ... that a confiscation order would be made, is not sufficient; it should rather appear to the court itself that there is reasonable grounds for such a belief. This requires at least, that the nature and tenor of the available evidence be disclosed*";

6.6 The Eighth Defendant and Eighth Respondent also relied heavily on the affirmation of the duty of the NDPP to make out a "*coherent, persuasive case that there is evidence on which a court may convict the defendants on the charges against them and on which the court may also grant a confiscation order based on the benefit derived by the defendants from their criminal conduct*" expressed in National Director of Public Prosecution v Mansoor 2011 (1) SACR 292 (ECP) at [17]. One should bear in mind though, without detracting from the generality of the quoted dictum, that it was stated in circumstances where the NDPP had tailored its case on the prior expressed intention of the Defendants in that case to plead guilty to the charges. In the same case the court also referred to National Director of Public Prosecution v Kyriacou 2003 (2) SACR 524 (SCA) wherein it had been held that a mere assertion to the effect that there are reasonable grounds for believing that a confiscation order will be made will not suffice,

but the court then went on to find that "*the applicant is not required to prove as a fact that a confiscation order will be made; 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. The principles applicable and the onus are those applicable in ordinary motion proceedings*".

6.7 The position was stated as follows in NDPP V Rebuzzi 2002 (2) SA 1 SCA (as also referred to in S v Shaik and others 2008 (5) SA 354 (CC)): "*A court is not required to be satisfied of the guilt of the Defendant before a restraint order is granted. What is required inter alia is only that there should be reasonable grounds for believing that the Defendant may be convicted*".

6.8 What this means is that the NDPP must establish such reasonable grounds on a preponderance of probabilities and in accordance with the principles applicable to motion proceedings which may cause a court to believe that a conviction may be secured.

[7] Evaluation of the applications

7.1 The Notice of Motion in the NDPP's application for the restraint order (incorporating a draft order) ran to some 24 pages and the annexures spanned an additional 15 pages. The founding affidavit deposed to by a duly delegated Deputy Director of Public Prosecutions constituted 27 pages and in it, she not only extensively referred to the relevant requirements of POCA and alleged satisfaction thereof, but also relied on a set of documentation indicating the asset network of some of the

defendants via trusts, an affidavit of one of the prosecutors as well as an affidavit by a Senior Special Investigator in the employ of the National Prosecuting Authority stationed at the Asset Forfeiture Unit. His affidavit, together with the principal annexures thereto, spanned 32 pages. The charge sheet in the form of a provisional indictment itself consists of more than 80 pages. The principal affidavit on which the NDPP relied, is that of the Advanced Criminal Investigator employed by SARS, one Guillaume Nel ("Nel"). His affidavit, detailing his investigations, details of all the fraudulent VAT registrations, returns and claims for refunds, bank accounts, entities involved and role players make up an almost another 200 pages. I mention the extent of the affidavits and annexures not to indicate the volume of papers, but to indicate the length and detail to which the NDPP had gone when it approached the court for the provisional restraint order;

7.2 I was at the time when I granted the provisional order satisfied that the NDPP had satisfied all the requirements of POCA and the case law referred to above and I am still so satisfied in respect of all the other Defendants and Respondents. In their papers, the Eighth Defendant and Eighth Respondent also did not seek to either amend, vary or discharge the provisional order in respect of the other Defendants and Respondents. They limited their application to the allegations made against themselves and to a large extent relied on documents which were not before me when I granted the provisional order. In fact, the omission of these documents by the NDPP and in particular, Nel from the initial application, so they say, breached the requirement for *uberrima fides* in *ex parte* applications.

[8] The case against the Eighth Defendant:

8.1 The charge against the Eighth Defendant contained in the provisional indictment reads as follows:

"*Accused 8: Shoayb Joosub*

He is a South African national with the identity number ... he is the brother of Accused 1 ... and he resides at .... He is the owner of Anglo Wealth Shariah.

During August 2013 and June 2014 he received R1 522 400.00 through Anglo Wealth Shariah from Accused 1, Ridwaan Mohammed Joosub through false VAT vendors, who fraudulently got refunds from SARS".

8.2 Under the heading "Roles and Responsibilities" in the indictment, the Eighth Defendant's role is described thus: "*His responsibilities were to assist with the laundering of monies generated from the false VAT vendors through his company Anglo Wealth Shariah (Pty) Ltd*";

8.3 Nel conducted interviews with the Eighth Defendant during the course of his investigations and obtained two affidavits from him. The two affidavits were marked by Nel as A124 and A125 as part of a series of affidavits included in his docket with his own affidavit therein being A1. The list goes up to A142 and includes witnesses, bank officials and SARS employees.

8.4 Nel summarises his conclusion as to the Eighth Defendant's affidavits as follows:

"These affidavits indicate an integral relationship between the bothers and payments were made from Shaz Trading CC to S. Joosub and payments from S. Joosub to Shaz Trading. Millions of rands changed hands between the two brothers as purchases of expensive watches and loans that were used to purchase expensive vehicles ... The common denominator, Mr Ridwaan M Joosub transferred funds from the relevant mentioned entities to purchase expensive vehicles such as Porche's and Lamborghini's which he later sold and distributed the laundered proceeds of crime (VAT Fraud/income) to an entity Styled Shaz Trading CC named after his wife Shazia Joosub". The affidavits further indicated that the Eighth Defendant had in these transactions represented AWS as its director.

8.5 The Eighth Defendant has since resigned as a director of AWS (although there is some doubt as to whether this registration has been registered) and has indicated that he is not the "owner" of AWS.

8.6 Schedule E to the provisional indictment contains a list of 88 transactions whereby R49 028 169, 01 (if calculated correctly) had allegedly been paid by Shaz Trading CC to AWS.

[9] <u>The contentions of the Eighth Defendant and Eighth Respondent:</u>

9.1 The Eighth Defendant deposed to a lengthy affidavit in his personal capacity and on behalf of AWS in support of the anticipation application. In it, he seeks a discharge of the two of them from the restraint order, alternatively a discharge of AWS and a limitation of the restraint in respect of him personally to the

amount of R 1 522 400,00, lastmentioned for which he tenders the furnishing of a guarantee;

9.2 He further states that Nel had misread the schedule of transactions regarding both himself and AWS and that the amount of R 1 522 400, 00 was not an amount received by him from Shaz Trading CC but in fact payments made by him to the said close corporation. Similarly the amounts referred to in the aforementioned Schedule E were monies not received by AWS, but monies paid by it to Shaz Trading CC;

9.3 The Eighth Defendant further alleged that he had furnished this explanation, together with detail of each payment and transaction to Nel prior to Nel deposing to his affidavit in support of the application for the restraint order. In fact, the Eighth Defendant had co-operated with Nel during his investigation since 2011;

9.4 The Eighth Defendant produced two vital sets of documents which did not form part of the NDPP's papers in its application for the restraint order. The first, Annexure SJ 12 to his affidavit, is a request for information issued by Nel on 21 October 2014 in terms of the provisions of Section 46 of the Tax Administration Act, No 28 of 2011. In it Nel asks both the Eighth Defendant and Eighth Respondent to furnish particulars of a list of transaction reflected in Annexure A to the request. Said Annexure A lists transactions relating to a bank account held by Shaz Trading CC at the Wierda Park branch of FNB. As "DEPOSITS" the same set of transactions as listed in Schedule E to the indictment appears with the exact same dates and amounts. As "WITHDRAWALS" transactions

with a lesser amount of R 5 350 034.45 appear with references which may or may not refer to AWS and include other payees as well. In respect of this request the Eighth Defendant says he furnished Nel with all documents and details in respect of each deposit made to Shaz Trading CC by AWS. I interpose to state that AWS was only incorporated in 2013 while the schedule of transactions starts in 2010;

9.5 Similarly, Annexure SJ13 is a request by Nel, also dated 21 October 2014 and also directed to the Eighth Defendant and the Eighth Respondent and also with a schedule of transactions annexed thereto as Annexure A. Annexure A again lists as "DEPOSITS" into the FNB account of Shaz Trading CC transactions totaling R 1 522 460. 00 (which roughly corresponds with the charge against the Eighth Defendant as Accused No 8). As "WITHDRAWALS", transactions relating to "Shoayb Ridz", "Shoayb Aston Shaz Trading" and "Shoayb Joosub" are listed, totaling R 561 100.00. As before, the Eighth Defendant alleged that he had furnished Nel with all the documents and details pertaining to the payments into Shaz Trading CC's account.

[10] Should the restraint orders against the Eighth Defendant and the Eighth Respondent be confirmed, discharged or amended?

10.1 As already pointed out above, there are two enquiries to be considered regarding restraint orders. The first is whether reasonable grounds have been established leading to a belief in a successful conviction and the second is whether, once a conviction

has been secured there is a reasonable prospect that the convicting court may grant a confiscation order;

10.2 Upon a conspectus of the papers (and the allegations made by the NDPP and Nel which were left intact and uncontroverted by the Eighth Defendant) there appears to be a reasonable prospect of success in respect of the conviction of at least the first accused, being the Eight Defendant's brother Ridwaan Mohammed Joosub;

10.3 The NDPP and Nel allege that the First Defendant laundered some of the proceeds of the fraudulently claimed VAT refunds through the close corporation Shaz Trading CC. Payments were made by this CC to the Eighth Defendant personally and to AWS which he managed, controlled or represented. There were also some payments made back to Shaz Trading CC (of different amounts and on different dates). The question now is whether, on the first enquiry, this establishes reasonable grounds on which to conclude that a conviction of the Eight Defendant might follow;

10.4 The assessment of this enquiry will depend on whether the transactions ascribed to the Eighth Defendant and AWS were part of the racketeering scheme or whether they were legitimate transactions having nothing to do with the First Defendant's conduct. This assessment will then in turn depend on the correctness of the explanations furnished to Nel by the Eighth Defendant. Neither party chose to place the details of these explanations before the court but on behalf of the Eighth Defendant it was submitted that the explanations were exculpatory. It was further submitted, supported by direct assertions by the Eighth

Defendant, that Nel got the payments and receipts of moneys by the Eight Defendant the wrong way round;

10.5 The allegations made by the Eighth Defendant regarding these payments, the schedules of transactions and the responses to Annexure SJ 12 and SJ 13 (as well as AWS's role therein) were hardly dealt with by the NDPP in its answering affidavit to the anticipation application. The NDPP contented itself with bald denials and references to what Nel had deposed to in his initial affidavit in support of the application for the restraint order. There was no response from Nel by way of a supporting answering affidavit in opposition to the anticipation application and none of the alleged exculpatory explanations for the transactions were either furnished, questioned or otherwise placed in dispute in any meaningful way. The absence of a response by the NDPP and the investigator on whose investigation it relied, meant that these was no real factual dispute created about the Eighth Defendant's version of the transactions. These circumstances are such that the Eight Defendant's allegations called for a detailed response if the NDPP wanted to persist with its contention of the existence of reasonable grounds for believing in a successful conviction of him;

10.6 The following dictum of the Supreme Court of Appeal in Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at [13] is particularly apposite:

"*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed*

the fact said to the disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred falls purely within the knowledge of the averring party and no basis is laid for disputing the varacity of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied".

10.7 In the present instance, the NDPP and Nel as disputing parties in respect of the Eighth Defendant's averment that the transactions were all above board, should have dealt with his averments. This they failed to do.

10.8 Conversely and, even if one were to view the anticipation application and the Eighth Defendant's affidavit in support thereof as the opposing papers to the NDPP's main application and the affidavits filed in support thereof (including that of Nel) then par [12] of the aforesaid SCA judgment sums up the position:

"*Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or*

clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeech Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-645C. See also the analysis by Davis J in Ripsoll-Dausa v Middleton NO 2005 (3) SA 141 (C) at 151A – 153C".

10.9 So, the position is the following: Nel's averments made in the affidavit in support if the application for the restraint order and in respect of which the NDPP now seeks relief which is final in nature (in the sense that, once the rule nisi is confirmed, it deprives the owners of property of most of the incidences of ownership until a future uncertain date) have been denied in a manner that creates a real factual dispute. Alternatively and if the anticipation application is viewed as a separate substantive application, the Eighth Defendant's averments made in support thereof have not been disputed by the NDPP in a fashion which creates a real dispute. Either way, the reasonable grounds for belief in a conviction of the Eighth Defendant on the papers as they currently stand and with reference to the alleged payments and alleged receipt of R 1 522 460, 00 have sufficiently been placed in dispute to the extent that the NDPP has not satisfied the onus on it justifying a restraint order against either the Eighth Defendant or the Eighth Respondent;

10.10 Even if I were to be wrong in the above conclusion and if it were to be argued that the extent of the payments to and from the implicated Shaz Trading CC (which is, as the tenth accused the Tenth Defendant) sufficiently implicates the Eighth Defendant, then the disputed facts fall short of a reasonable prospect of a

confiscation order being granted for the amount of R 1 522 460, 00. The undisputed facts simply do not indicate any such benefit having been received.

10.11 I am mindful of the fact that, if the Eighth Defendant is correct with his averments that Nel had gotten the "direction" of payments and receipts wrong, and that the "withdrawals" listed in Annexures A to Annexures SJ12 and SJ13 might implicate the Eight Defendant and AWS, then it was correctly argued that those transactions (and lesser amounts) were not what they were charged with or accused of and neither have they, on these papers, been called upon to deal with them in this application. Those transactions have been dealt with in the response to Nel and he has not included them in his present affidavit in support of the application for the restraint order.

10.12 It must follow that the restraint order against the Eight Defendant and AWS cannot on the papers as they currently stand, be confirmed and must be discharged.

[11] Costs

11.1 On behalf of the Eighth Defendant and AWS various accusations with varying degrees of vituperation were levelled at the NDPP and Nel;

11.2 In particular, it was alleged that the NDPP purposely omitted reference to SJ12 and SJ13 and the responses thereto, ignored the tenders of guarantees for the R 1 522 460. 00 made during the preliminary skirmishes in the criminal court and on a *mala fide*

manner ignored invitations for service of the application for the restraint order and elected without proper grounds to proceed therewith on an ex parte basis;

11.3 I do not agree. On a reading of the papers, I detected no malice or *mala fides* on the part of either the NDPP or any of the investigators. They were doing their respective jobs as best they could. The omissions of the annexures do not strike me as having been purposely done. Those documents clearly formed part of an extremely large volume of documents accumulated by the investigations and were overtaken by the affidavits obtained from the Eighth Defendant by Nel, to which he clearly referred and the contents of which he incorporated in his affidavit in similar fashion as he had done with all the other 140 affidavits;

11.4 In my view and, in the circumstances of this case having regard to the close family relationship between many of the accused, the NDPP's fears of having assets disposed of if the Defendants got wind of the restraint order are understandable and the NDPP can hardly be faulted by not having given the Eighth Defendant more notice of the impending request than it had already informally done at his bail hearing. The extent of association between the accused and the allegation that the large volume of transactions and payments of money to and from between many of them as part of money laundering so that the refunds could not easily be traced, justifies the decision to combine the request for a restraint order for all of the accused into a single application. To have given any individual accused prior notice of such intention would or could have given the others also notice who which might than have

frustrated the very object which the order sought to achieve, namely preservation of easily disposable assets. I find that there were sufficient facts which justified such an apprehension;

11.5 The above findings however do not entirely let the NDPP off the hook as it were. The lack of a cogent response to the Eighth Defendant's allegations will result in a discharge of the provisional order against the Eighth Defendant and AWS and they were therefore successful in their anticipation application. In these circumstances, there is no compelling reason why costs should not follow the event, but on a normal party and party scale only.

[12] ORDER

1. The restraint order granted on 9 February 2018 is discharged insofar as it pertains to the Eighth Defendant and the Eighth Respondent.
2. The applicant in the main application is to pay the costs of the anticipation application of the Eighth Defendant and Eighth Respondent.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 20 March 2018

Judgment delivered: 28 March 2018

APPEARANCES:

For the Applicant:	Adv. R Bhana SC (With Adv. S.D Van Niekerk) Instructed by: Knowles Husain Lidnsay Inc., Sandton c/o Friedland Hart Solomon Nicholson, Pretoria
For the Respondent:	Adv. H Creighton (With Adv. P Du Plessis) Instructed by: The State Attorney