



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: D8053/2019

In the matter between:

THE NATIONAL DIRECTOR

**OF
APPLICANT**

PUBLIC

PROSECUTIONS

and

**ROBERT ABBU
/RESPONDENT**

1st DEFENDANT

**SANDILE CHARLES NGCOBO
RESPONDENT**

2nd DEFENDANT /

**ILANGA LAMAHLASE PROJECTS (PTY) LIMITED
RESPONDENT**

3rd DEFENDANT /

**MZWANDILE F. DLUDLA
/RESPONDENT**

4th DEFENDANT

**HLENGA SIBISI
/RESPONDENT**

5th DEFENDANT

**UZUZINEKELA TRADING 31 CC
/RESPONDENT**

6th DEFENDANT

ZITHULELE A. MKHIZE /RESPONDENT	7th DEFENDANT
OMPHILETHABANG CC /RESPONDENT	8th DEFENDANT
BONGANI P DLOMO /RESPONDENT	9th DEFENDANT
KHOBOSO J DLOMO /RESPONDENT	10th DEFENDANT
EL SHADDAI HOLDING GROUP CC /RESPONDENT	11th DEFENDANT
PRABAGARAN PARIAH /RESPONDENT	12th DEFENDANT
SINTHAMONE PONNAN /RESPONDENT	13th DEFENDANT
CRAIG PONNAN /RESPONDENT	14th DEFENDANT
MONDLI MICHAEL MTHEMBU /RESPONDENT	15th DEFENDANT
ZANDILE RUTH THELMA GUMEDE /RESPONDENT	16th DEFENDANT
NANCY SANDRA ABBU RESPONDENT	17th
VUYISWA VENERY NGCOBO RESPONDENT	18th
LOGAMBAL PARIAH RESPONDENT	19th
CYNTHIA MTHEMBU RESPONDENT	20th
JABEZ MEDIA AND BUSINESS SOLUTIONS CC RESPONDENT	21st

AFRICAN COMPASS TRADING 588 CC RESPONDENT	22nd
AKHONA AMAHLE CONTRACTING PROJECTS CC RESPONDENT	23rd
NTOMBIZETHU TRADING ENTERPRISE CC RESPONDENT	24th
UHLANGA EVENTS MANAGEMENT CC RESPONDENT	25th
UHLANGA TRADING ENTERPRISE CC RESPONDENT	26th
SEKHOPA TRADING 21 CC RESPONDENT	27th
PINETOURS SERVICES AND TRADING CC RESPONDENT	28th
MATHULA LANDSCAPING AND CIVIL CONSTRUCTION CC RESPONDENT	29th
FANTIQUE TRADE 188 CC RESPONDENT	30th
MSUNDUZI CIVILS (PTY) LTD RESPONDENT	31st
SASINANKO PROJECTS CC RESPONDENT	32nd
UMVUYO HOLDINGS CC RESPONDENT	33rd
INTERLLECTUAL SERVICES AND INVESTORS CC RESPONDENT	34th
CYRUS INDUSTRIES CC RESPONDENT	35th

CROWN ENERGY AND RECYCLING GROUP CC RESPONDENT	36th
MMZ MEDIA DISTRIBUTIONS AND SUPPLIES CC RESPONDENT	37th
MALAGAZI TRADING CC RESPONDENT	38th
INANDA DEVELOPMENT SERVICES CC RESPONDENT	39th
SIZISA UKHANYO TRADING 382 CC RESPONDENT	40th
DLOMO BROTHERS CC RESPONDENT	41st
BABUSI TRADING CC RESPONDENT	42nd
BHEKIZIWE ELKANA SIBISI N.O. (In his capacity as trustee of the Elkasi Trust NO. IT872/2009/PMB) RESPONDENT	43rd
THOKO THEMBILE NONSIZI ZONDI N.O RESPONDENT	44th

ORDER

1. The rule nisi issued on 4 October 2019 as against the second defendant and forty-fourth respondent is confirmed.
2. The order of 4 February 2022 is amended to delete the order reserving the costs of the application.
3. The costs occasioned by the hearing of the opposed application on 4 February 2022 are to be borne by the second defendant. Such costs are to include the costs occasioned by the employment of two counsel, where applicable.

JUDGMENT

Henriques J

Introduction

[1] Organised crime refers to those self-perpetuating associations of individuals who operate either domestically or internationally for the purposes of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means by protecting their activities through a pattern of corruption or violence.¹

[2] South Africa in line with international standards has enacted various legislation to combat organised crime and corruption which has become endemic in society.

Nature of the application

[3] This application pertains to the confirmation of the rule nisi effectively against the second defendant and forty-fourth respondent from dealing in any way whatsoever with the property restrained subject to the grant of the provisional restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA').

[4] The first to sixteenth respondents are persons referred to as defendants in s 12 of POCA.² For ease of reference, I adopt that terminology in this judgment.

Background

¹ Paraphrased from the US Department of Justice, General Information Organised Crime and Gang Section.

² Section 12 of POCA defines defendant as 'a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 25 (1) (b)'.

[5] An *ex parte* order was granted on 4 October 2019 in favour of the National Director of Public Prosecutions ('NDPP') in terms of s 26 of POCA against all the defendants and respondents.

[6] In view of the voluminous nature of the application papers, the number of persons cited in the application and the complexity of the issues, a summarised version of the antecedents and background to the matter will be of substantial benefit to the reader.

[7] On 28 January 2020, the rule nisi and restraint order was confirmed against the eighth, ninth and tenth defendants and thirtieth, thirty-first, thirty-second, forty-first and forty-second respondents by consent. By default, confirmation of the rule nisi and restraint order was granted against the fourth defendant and the twentieth, twenty-eighth, twenty-ninth and forty-third respondents on the same date.

[8] On 12 November 2020, the following further orders were granted:

- (a) confirming the rule nisi and restraint order against the sixth, seventh, eleventh, twelfth, thirteenth, fourteenth defendants, nineteenth, twenty-seventh, thirty-third, thirty-fourth, thirty-fifth and thirty-sixth respondents; and
- (b) discharging the rule nisi and restraint order against the eighteenth respondent.

[9] It warrants mentioning that the rule nisi and restraint order was discharged against the eighteenth respondent as a consequence of the change in the matrimonial property regime that existed between the second defendant and the eighteenth respondent, consequentially removing the eighteenth respondent as a co-owner of the immovable property previously jointly owned with the second defendant.³

³ This appears not to have been known to the applicant when the restraint order was sought. Application had been made on 3 April 2019 but not order had been granted. The second defendant, Ngcobo was arrested on 30 April 2019 after criminal investigations had commenced. Affidavit of Meera Ramdeen, page 1329, para 42.

[10] On 4 February 2022, the rule nisi and restraint order was confirmed in terms of a consent order as against the first, third, fifth, fifteenth and sixteenth defendants, seventeenth, twenty-first, twenty-second to twenty-sixth, thirty-seventh, thirty-eighth, thirty-ninth and fortieth respondents, save for costs being reserved.

[11] Effectively the application which serves before me, relates only to the second defendant (who actively opposes the confirmation of the rule nisi and restraint order) and forty-fourth respondent against whom a final order was not previously granted. It is instructive to note that the forty-fourth respondent has not opposed these proceedings and in the absence of any opposition, an order confirming the rule nisi is appropriate.

Criminal Proceedings

[12] It is common cause that the first to sixteenth defendants are subject to criminal proceedings in the high court which are yet to be finalised.

[13] The seventeenth to forty-fourth respondents are enjoined to the first to sixteenth defendants either by virtue of a spousal relationship and/or an association with being either a director or member of the corporate entities. Needless to say, they have an interest in the outcome of the proceedings. The applicant has, annexed to its written argument as annexure "A",⁴ a document setting out the nature of the relationship between the first to sixteenth defendants and the seventeenth to forty-fourth respondents.

The parties against whom the rule nisi has not been confirmed

[14] The second defendant is Sandile Ngcobo ('Ngcobo') who at all material times was the Chairperson of the Bid Adjudication Committee ('BAC') of the Ethekwini Municipality ('the Municipality').

⁴ For ease of reference same will be annexed to the judgment as "A".

[15] The forty-fourth respondent, whilst not being charged criminally, is cited in the proceedings jointly as a co-trustee with the forty-third respondent, Bhekiziziwe Elkana Sibisi of the Elkasi Trust.

[16] As alluded to earlier on in this judgment, the genesis of these proceedings emanated from the criminal investigations against the defendants and the subsequent preferring of criminal charges against the first to sixteenth defendants which criminal proceedings still subsist.

Criminal Investigations

[17] At the instance of the Municipality's City Integrity and Investigations Unit ('CIIU') a forensic investigation was commissioned to investigate irregularities at the Cleaning and Solid Waste Unit, Durban Solid Waste ('DSW') involving the procurement processes used to appoint service providers to render refuse collection, street cleaning services and to attend to illegal dumping in various townships of the Ethekwini district. Such investigation was conducted by Integrity Forensic Solutions ('IFS').

[18] In summary, having regard to the founding affidavits of Kenneth Mark Samuel ('Samuel'), Ngoako Frans Mphaki ('Mphaki') and Leo Lawrence Saunders ('Saunders') of IFS, the allegations are, inter alia, that the ex-Mayor of the Municipality, Zandile Gumede ('Gumede'), the sixteenth defendant, the Chairman of the Human Settlements and Infrastructure Committee, Mondli Mthembu ('Mthembu'), the fifteenth defendant, the Chairman of the Bid Adjudication Committee ('BAC') Sandile Ngcobo ('Ngcobo'), the second defendant, and the Deputy Head: Strategic and New Developments at DSW, Robert Abbu ('Abbu'), the first defendant, acted in concert with each other and the following corporate entities being Uzuzinekela Trading 31 CC ('Uzuzinekela'), the sixth defendant, Ilanga Lamahlase Projects (Pty) Ltd ('Ilanga'), the third defendant, Omphilethabang Projects CC ('Omphile'), the eighth defendant and El Shaddai Holding Group CC ('El Shaddai'), the eleventh

defendant and with the fourth defendant, the fifth defendant, Zithulele A. Mkhize ('Mkhize'), the seventh defendant, Bongani P. Dlomo ('B Dlomo'), the ninth defendant, Khoboso J. Dlomo ('K Dlomo'), the tenth defendant, Prabakaran Pariah ('Pariah'), the twelfth defendant, Sinthamone Ponnann ('S Ponnann'), the thirteenth defendant and Craig Ponnann ('Ponnann'), the fourteenth defendant, to circumvent the processes and protocols of the Supply Chain Management ('SCM') policy and directives of the Municipality and the related statutes including the Public Finance Management Act 1 of 1999 ('PFMA') and Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') thereby manipulating the award of new DSW contracts in favour of Uzuzinekela, Ilanga, Omphile and El Shaddai. The pecuniary benefit to those four corporate entities arising from the award of the DSW contracts is the amount of R230 571 760.96 as at the end of February 2019.

[19] DSW had appointed 27 service providers to render refuse collection to the Municipality for a period of three years. Such contracts were to expire in or around June/July 2016 and the Municipal SCM process to appoint suppliers for a new term had to commence at least one year before the expiry of the existing contracts.

[20] It is alleged that Abbu was designated to commence the process for the appointment of service providers for a new DSW contract in terms of the SCM policy. The allegation is that he deliberately delayed initiating the procurement process and used such delay to constructively misrepresent the fact that there was an emergency and consequently utilised such delay to contract with suppliers on the basis of the emergency provisions in terms of reg 36 to the MFMA.⁵

⁵ Regulation 36 reads as follows:

'Deviation from, and ratification of minor breaches of, procurement processes

(1) A supply chain management policy may allow the accounting officer—

- (a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only—
 - (i) in an emergency;
 - (ii) if such goods or services are produced or available from a single provider only;
 - (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile;
 - (iv) acquisition of animals for zoos; or
 - (v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes; and

[21] The resultant effect of utilising such emergency provisions negated the formal public procurement process of the Municipality which could not be followed in the appointment of service providers and its obligations to comply with s 217(1) of the Constitution, which requires the appointment of service providers in a tender process to be fair, equitable, transparent, competitive and cost-effective.

[22] Accordingly, Abbu sought authority to deviate from the normal SCM processes, which deviation authority was provided by the BAC chaired by Ngcobo, and circumvent the process by seeking a deviation as per reg 36 of the SCM policy and restrict invitations to four service providers being Ilanga, Uzuzinekela, Omphile and El Shaddai. In doing so, the applicant alleges that he disregarded 1 088 bids received by the Municipality from other bidders and abandoned a further 475 bids received in January, April and December 2017 respectively.

[23] The affidavits of Mphaki and Saunders reveals that Abbu and the four service providers conspired during the days leading up to the invitation for quotations to ensure that the award of the tender be restricted to themselves in the absence of competition and in contravention of s 217 of the Constitution. They were thus able to flout and contravene the provisions of s 217, the provisions of the MFMA and the SCM policy of the Municipality.

[24] In addition, the applicant alleges that Abbu further amended the scope of the original tender which related to refuse collection and street cleaning services to include another item, which is illegal dumping. In addition, the budget for illegal

(b) to ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.

(2) The accounting officer must record the reasons for any deviations in terms of subregulation (1)(a) and (b) and report them to the next meeting of the council, or board of directors in the case of a municipal entity, and include as a note to the annual financial statements.

(3) Subregulation (2) does not apply to the procurement of goods and services contemplated in regulation 11(2).'

dumping was R5 million but Abbu did not place any limit on the amount that the four service providers could claim in respect of illegal dumping.

[25] The allegations are that Abbu facilitated and processed recommendations that Ilanga, Uzuzinekela, Omphile and El Shaddai be awarded the contract for refuse collection for a period of three months at a cost of R45 million with an unlimited budget for illegal dumping. The line item relating to illegal dumping was allegedly then used by the four service providers to bill the Municipality with impunity claiming payments totalling more than R130 million within six months despite an approved budget of R5 million for illegal dumping and a total budget of R45 million for the entire refuse collection contract.

[26] It is alleged that Ngcobo assisted Abbu in manipulating the process which enabled the ultimate objective of awarding the contracts to these four service providers. It is further alleged that Ngcobo and Abbu co-signed the documents submitted to the BAC seeking to award the four service providers with contracts. Thereafter, Ngcobo presided as Chairperson in the adjudication process overseeing the same award. Ngcobo is alleged to have thereafter approached an employee of the Municipality within the SCM, whose duty it was to compile award letters following the approval of the award of the tender, for letters of award to be sent. The employee refused to prepare the award letters as instructed by Ngcobo as the award in respect of the DSW contract was deferred by the Executive Acquisition Authority ('EAA') for bench marking to be done.

[27] It is further alleged that Ngcobo, who was aware of the decision by the EAA, nevertheless intimidated the employee into preparing the award letters for the aforementioned four service providers and signed them on 22 and 23 December 2017.

[28] Saunders who was tasked to prepare a preliminary financial report indicated that a total amount of R230 571 760.96 was paid by the Municipality to the successful service providers as follows: Ilanga - R64 648 304.12, Uzuzinekela - R79 524 629.49, Omphile - R48 599 905.36 and El Shaddai - R37 798 921.99.

[29] It is alleged that the bank accounts of these four entities derived their income from the Municipality's DSW contract but there were no apparent operating expenses which a normal bank account would have reflected. In addition, an analysis of their bank accounts demonstrated that as soon as the Municipality transferred funds into the bank accounts of these service providers, large transfers of funds would be done almost immediately to different entities and individuals. In addition, transfers of money between the service providers were also evident. The transfer of money is also alleged to have been made to the daughter of Gumede.

[30] It is further alleged that after the award, letters were issued to the four entities. The four service providers were contacted by Mthembu and Abbu and instructed to subcontract the illegal dumping portion of the refuse collection contracts to various persons or companies. Subcontracting was never part of the procurement process but was a condition imposed *ex post facto* on the four service providers. Because there was no budget for work relating to illegal dumping, these service providers were given a 'blank cheque' to charge the Municipality a total of R77 902 722.04 for illegal dumping for the months of January 2018 to April 2018, a period of approximately four months. This is despite the fact that the budget allocated for such line item was limited to R5 million for the year.

[31] It also emanates from the affidavit of Saunders that the service providers were informed by Mthembu and Abbu that the payments to subcontractors would be funded from the unlimited line item of illegal dumping. Investigations conducted to identify the beneficiaries of the proceeds of payments made by the Municipality in respect of the illegal dumping line item uncovered that the service providers paid

persons whom Mthembu directed them to pay, being individuals, councillors of the Municipality and business fora known to be linked to Gumede.

[32] The affidavits make direct reference to the service providers charging the Municipality for services not rendered. In addition, Saunders' investigations uncovered that funds paid by the Municipality to the four service providers were channelled from some of the service providers to relatives of Gumede and subsequently into the bank account of Gumede. Saunders' preliminary report had not been finalised in this regard at the time of the interim order being obtained.

[33] A relationship mapping exercise was conducted by Saunders who analysed the telephone records of Gumede, Mthembu, Ngcobo, Abbu and the four service providers who were beneficiaries of the DSW contract which revealed that at all material times during and after the award of the tender, Gumede, Mthembu, Ngcobo and the four service providers were in frequent communication with each other. There were further numerous communications between Mthembu, Ngcobo and Abbu over the same period.

[34] It is also alleged that Gumede and Mthembu appointed Abbu as the Head of Special Projects within the administration of the Municipality which obviated the need for Abbu to follow the reporting lines of his employment contract and to perform the tasks without supervision, including the allocation of the new DSW contract to the four service providers.

Criminal charges

[35] It is common cause that the first to sixteenth defendants have been charged and an indictment has been served.⁶ A trial date has been arranged in the matter. They have been charged with, inter alia, conspiracy to commit fraud in contravention of s 18(2) of the Riotous Assemblies Act 17 of 1956 and the State alleges that they

⁶ Since the institution of the application in 2019, the indictment has been amended to add additional counts and has been amplified by various requests for further particulars.

acted in concert with each other in furtherance of a common purpose in that they unlawfully and intentionally conspired with each other either jointly or individually to aid or procure the unlawful awarding of the DSW tender.

[36] They have also been charged with several individual counts of fraud, the State alleging that they acted in common purpose with each other and unlawfully and intentionally misrepresented to the Municipality that:

- (a) Abbu and Ngcobo engaged in a lawful procurement process for refuse collection, street cleaning and illegal dumping for various townships within the Municipality;
- (b) The invitations to the service providers for quotations were in keeping with the principles of a competitive bidding process;
- (c) There was no conflict of interest between the officials of the Municipality and the service providers thereby creating no duty to disclose such conflicts;
- (d) The invoices were lawfully submitted for services rendered to the Municipality as a result of a lawful contract being awarded to the said service providers;
- (e) The Municipality was therefore liable for the amounts invoiced; and
- (f) An emergency situation arose wherein the service providers had to be appointed to render the services.⁷

[37] In addition, Abbu, Ngcobo, Ilanga, Dludla, Sibisi, Uzuzinekela, Mkhize, Omphile, B Dlomo and K Dlomo have been charged with money laundering in contravention of s 4(a) and/or (b) of POCA. Ilanga, Dludla, Sibisi, Uzuzinekela, Mkhize, Omphile, B Dlomo and K Dlomo have also been charged with contravening s 5(a) and/or 5(b) of POCA and s 6(a), (b) and/or (c) of POCA. The first to tenth defendants are further charged with contravening s 21(b) and (c) of the Prevention and Combatting of Corrupt Activities Act 12, 2004 (PRECCA).

[38] It is also common cause that Abbu and Ngcobo have been charged with contravening s 173(5)(F)(i) read together with ss 174, 61(1), 61(2)(b), 11(1)(a)-(j) of

⁷ Founding affidavit, KMSamuel, pages 88 and 89, para 92.2

the MFMA and Mthembu and Gumede have been charged with contravening s 173(4)(a) read with ss 1, 174, 52(a) and 118 of the MFMA read with the Municipal Supply Chain Management Regulations.⁸

The applicant's case

[39] In invoking the provisions of s 26 of POCA the applicant's case is reliant on the criminal and forensic investigations and subsequent criminal charges.

[40] The applicant essentially has utilised the findings in the IFS report and criminal investigations to justify the grant of the *ex parte* order on 4 October 2019 and now seeks confirmation of the order against the second defendant and forty-fourth respondent. The applicant seeks a final restraint order in the full amount of the DSW contract being R230 571 760.96.⁹

[41] The applicant asserts that the first to sixteenth defendants acted in common purpose and consequently the combined value of the proceeds of their unlawful activities is the amount of R230 571 760.96. It is also the applicant's intention to seek a joint and several confiscation order at any confiscation hearing which may take place. It also submits that it may have to invoke the presumptions in terms of s 22 of POCA when it makes any application for a confiscation order.

The opposition to the confirmation of the rule nisi and restraint order

[42] Although the rule nisi was confirmed as against the third and fifth defendant it is necessary to deal with the contents of their answering affidavits to contextualise the relationship between the defendants and respondents specifically their

⁸ The draft charge sheet was attached to Mphaki's affidavit as annexure "NFM6", pages 1293-1317 of the indexed papers.

⁹ In *NDPP v Ramlutchman* 2017 (1) SACR 343 (SCA) at 22 the court held that the value of the proceeds of unlawful activities is the value of the contract. Following the Constitutional Court in *Shaik* benefit in s 18 of POCA is afforded a wide meaning and is not limited to the net contract value or amount.

relationship with the second defendant and Vuyiswa in respect of alleged related criminal activities.

The second defendant, Ngcobo and the former eighteenth respondent, Vuyiswa Ngcobo ('Vuyiswa')

[43] Ngcobo filed an answering affidavit which, in summary, is tantamount to a denial of any miscreant conduct. He admits that he is facing criminal charges and such charges emanated from the forensic investigation conducted by IFS. Aside from the denial, Ngcobo fails to deal directly with the allegations in the applicant's affidavits either by way of explanatory notes or amplification of such denials.

[44] His opposition is primarily focussed on the legal issues relating to the grant or refusal of the interim restraint order, specifically whether the requirements of s 25(1)(a)(ii) of POCA have been met as there are no reasonable grounds to believe that a confiscation order may be granted against him.

[45] It is common cause that the interim restraint order was discharged as against Vuyiswa. Ngcobo indicates that he is aware that the investigations by IFS and Saunders are ongoing. He confirms that there is a related criminal matter in which he and Vuyiswa have been charged in the Regional Court under SCCC Case number RC41/122/2020 on 24 January 2020 for alleged corruption and/or money laundering related to a Jaguar F-Pace motor vehicle.¹⁰

[46] It is common cause that the new criminal matter does not form part of the factual matrix upon which the applicant proceeded and obtained the interim restraint order in October 2019. He confirms that the Jaguar F-Pace was purchased for Vuyiswa and belongs to her and consequently cannot be considered a "benefit" for purposes of the current restraint application or any subsequent confiscation order which may be granted arising from these proceedings.

¹⁰ The vehicle is subject to a preservation order in terms of s 38 of POCA obtained on 28 October 2020. The charges relating to the vehicle arose subsequent to the grant of the interim restraint order.

[47] Similarly, as with the other defendants, Ngcobo disputes the basis upon which the applicant obtained the restraint order and denies all the allegations against him. He contends that the jurisdictional requirements for a restraint order under s 25(1)(a)(ii) of POCA have not been met as there are no reasonable grounds to believe that a confiscation order may be made against him specifically as no benefit has been shown to exist. He concedes however that the other jurisdictional requirements in terms of s 25(1)(a)(i) and (iii) have been satisfied.

[48] The crux of Ngcobo's opposition to the confirmation of the interim restraint order is that the applicant must establish reasonable prospects of securing his conviction in the criminal proceedings under case number 41394/2019¹¹ and establish a benefit, without which, there cannot be a confiscation order. He submits that there is no evidence in the current application which shows that he has benefitted from any of the offences nor has the applicant proved, on a balance of probabilities, that he will be convicted of a criminal offence referred to in the indictment. He submits that the applicant cannot rely on the second criminal matter, being case number RC41/122/2020, for confirmation of the rule nisi as the Jaguar F-Pace belongs to Vuyiswa and she is not a party to the current criminal proceedings.

[49] In summary, he submits that in order for the applicant to succeed in the proceedings for the confirmation of the rule nisi and restraint order, it must show, on a balance of probabilities, that he will be convicted of a criminal offence and that he and Vuyiswa benefitted from that offence or any other criminal activity sufficiently related to the offences, as set out in s 18 of POCA.

[50] He further disputes that the applicant has alleged or will be able to prove in due course that he has benefitted from any of the offences of which he has been charged or from other criminal activity which is sufficiently related to the current

¹¹ The pending proceedings in the High Court initially bore the case number 41/394/2019 before they were transferred to the High Court.

matter. In the absence of any evidence of the benefit to him, the restraint order falls to be discharged.

[51] Ngcobo indicates that he has been employed by the Municipality for the past 12 years as the Deputy Head: Supply Chain Management. He earns a gross monthly salary of approximately R153 000 including benefits and tax. Up until 2019, Vuyiswa was also employed by the Municipality but currently runs her own businesses, namely, a Kids Emporium franchise and an event and catering business.

[52] He indicates that having regard to the bank accounts of both himself and Vuyiswa, the applicant has presented no evidence of any benefit or income or proceeds of unlawful activities or benefits from criminal activities received by himself or Vuyiswa. Apart from their two children he and Vuyiswa support and maintain family members and the only source of income he has is his salary from the Municipality.

[53] He has, through hard work, savings and investments amassed an estate with an approximate value of R7 million including their matrimonial home.¹² Interestingly, he confirms that both he and Vuyiswa have disclosed under oath all their realisable property to the curator bonis in compliance with POCA and the court order.

[54] Apart from the fact that Ngcobo submits that he has suffered undue hardship as a consequence of the interim restraint order, in addition he alleges that the operation of the interim restraint order constitutes a gross violation of his constitutional rights. The applicant, he avers, will only be entitled to a confiscation order limited to the value of the unlawful proceeds or benefit which Vuyiswa or he received from the offences of which they are convicted or similarly related offences. He submits that a benefit in the sum of R7 million will not be proved.

¹² Paragraph 61, page 2488, volume 21 of the indexed papers.

[55] It is common cause that Ngcobo and Vuyiswa changed their matrimonial regime from one in community of property to one out of community of property with the application of the accrual system. Such order was granted for the *ex post facto* registration of an ante-nuptial contract by Gorven J on 17 July 2019 effective from September 2018 being the date of their marriage.¹³

[56] The commencement values in the ante-nuptial contract are reflected as follows: Vuyiswa's commencement value was nil and Ngcobo's commencement value was R19,5 million. In addition, Ngcobo is recorded as being the owner of two immovable properties being Erf 1164 Amanzimtoti and Erf 279 Port Zimbali.

[57] In her confirmatory affidavit Vuyiswa confirms her marriage to Ngcobo out of community of property subject to an accrual and confirms that she is the sole shareholder of Fezela Holdings and Help on Wheels. She confirms that Ngcobo has no interest or claim in her businesses and the companies own motor vehicles which have been disclosed and proof of ownership provided to the curator bonis.

[58] I may also add that Ngcobo and Vuyiswa had instituted interlocutory proceedings in terms of ss 26(6) and (10) of POCA for the release of restrained assets and for the payment of R1 million for reasonable living and legal expenses.

[59] Such opposed application was heard by Marks AJ on 24 November 2021. The application was dismissed on 13 December 2021 on the basis that there was no full and frank disclosure by Ngcobo of his interest in assets subject to restraint under oath nor was he forthcoming with information relating to his assets, monthly expenses and the bank accounts identified by the curator. Marks AJ was of the view that there was no full and frank disclosure as required in terms of ss 26(6) and (10) of POCA and consequently the application fell to be dismissed.¹⁴

¹³ SCN 2, page 2499, volume 21 of the indexed papers. Coincidentally the affidavit in opposition to the confirmation of the interim restraint order was deposed to on 27 August 2020.

¹⁴ *Sandile Ngcobo and National Director of Public Prosecutions* Case Number D8053/2019, delivered 13 December 2021.

[60] As at the date of argument of this opposed application, Ngcobo had failed to disclose under oath to the curator all of his interest in any assets. This is evident from the various reports submitted by the curator bonis in this application and the correspondence exchanged.

[61] As correctly pointed out by the applicant, Ngcobo has failed to deal with the allegations concerning him using his capacity as Chairperson of the BAC to ensure tenders were awarded to Ilanga, and to explain how it is that the fourth and fifth defendants paid R600 000 cash towards the purchase of the Jaguar F-Pace registered in the name of Vuyiswa and which Saunder's indicates was also driven by the second defendant.

[62] In addition, he does not deal with any of the allegations made against him in the applicant's papers and the alleged role he played which ultimately led to the DSW contract being awarded to the four service providers. He fails to deal with any of the circumstantial evidence relating to the telephone records and alleged interaction between himself, Abbu and the service providers. His failure to deal with the criminal case against him and Vuyiswa is noteworthy especially when there is a paper trail corroborating the allegation that the Jaguar F-Pace was paid as a bribe to him and Vuyiswa.

The third defendant, Ilanga

[63] The third defendant has filed an affidavit by its director, Dlodla, in which he aligns himself with the averments contained in the affidavit of the fifth defendant.¹⁵

¹⁵ The registered address of the third defendant is 43 Courtown Avoca Hills which is also the trading address of the twenty-sixth respondent. Dlodla and Sibisi were previously members of the twenty sixth respondent. Affidavit of Leo Saunders, page 210.

[64] He admits that there are criminal proceedings pending in which he has been charged with inter alia contravening s 21 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('PRECCA'), money laundering in contravention of ss 4(a) and (b) of POCA; ss 5(a) and (b) of POCA and ss 6(a), (b) or (c). It is undisputed that the basis of the criminal charges arise from the forensic investigation conducted by IFS summarised in the affidavits of Saunders, Samuels and Mphaki in the restraint application.

[65] He submits, however, that these affidavits do not demonstrate any wrongdoing on his part and there are no direct allegations of wrongdoing personally attributed to him nor is there any connection between the allegations in the affidavits and the offences for which he has been charged. The only link between him and the criminal offences is the fact that he is the director of Ilanga.

[66] Consequently, he admits that the provisions of s 25(a)(i) and (iii) of POCA are met, however, he denies that the requirement of subsection 25(1)(a)(ii) have been met as there are no reasonable grounds to believe that a confiscation order may be made against him.

The fifth defendant, Sibisi

[67] The fifth defendant admits that he is a member and shareholder of the twenty-second to twenty-sixth respondents. From the mapping exercise done by the applicant, he is also linked to the forty-third and forty-fourth respondent.¹⁶ He deals with the averments made in respect of Ilanga and the twenty-second to twenty-sixth respondents. The crux of his opposition to the confirmation of the rule nisi and the restraint order is that the provisions of s 25 of POCA constitute an infringement of his s 25 constitutionally entrenched right not to be arbitrarily deprived of his property.

¹⁶ Sibisi is the founder of the Elkasi Trust and the forty-third respondent is his father.

[68] Similarly, he concedes that the provisions of s 25(1)(a)(i) and (iii) of POCA have been satisfied but denies that the requirement in s 25(1)(a)(ii) has been met. He admits that he has been charged with inter alia contraventions of s 21 of PRECCA and ss 4, 5 and 6 of POCA. Sibisi's admission however, does not extend to the applicant's submission that he is also facing charges of fraud and conspiracy to commit fraud.

[69] In his affidavit despite the reference to the criminal charges and the forensic investigation conducted by IFS as summarised in the affidavits of Saunders, Mphaki and Samuels in the applicants founding affidavit, he restricts himself to dealing with four of the allegations made by Saunders attributing wrongfulness on his part.

[70] These are:

- (a) his involvement in the affairs of Ilanga;
- (b) that Ilanga's quote is dated and submitted prior to the invitation to quote;
- (c) meetings held with Mthembu to sub-contract part of the work; and
- (d) the payment to Gumede's daughter.

[71] The first allegation relates to his involvement in the affairs of Ilanga. He confirms that at an interview with IFS he conceded that he is a mentor of Dlodla who is his nephew and director of Ilanga. As a consequence of their familial relationship, he assisted Dlodla in the running of the affairs of Ilanga. He denies having breached or been aware of any breach of the Municipality's SCM processes or the PFMA and indicates that he has done business on a number of occasions in the past with the Municipality involving a reg 36(1) procurement. He indicates that he was invited to submit a quotation and did so, however, using Ilanga.

[72] Despite the fact that the quotation of Ilanga is dated 15 December 2017 and the invitation to quote was emailed on 18 December 2017, he submits that there is no irregularity in this regard. His explanation is that he was contacted by an

employee of the Municipality on the morning of 15 December 2017 requesting him to submit a quotation for the tender in terms of the reg 36(1) procurement procedures of the Municipality.

[73] He liaised with Dlodla who uplifted the tender documents from the Municipality and during the course of the day prioritised the submission of the documentation and the quotation, which they submitted on 15 December 2017 using Ilanga. It was only on Monday, 18 December 2017, that he received the email from the Municipality inviting him to tender and submit the quotation. He had already submitted his quotation on the Friday, 15 December 2017, and thought that the email which was sent on 18 December 2017 was for record keeping purposes. He avers that there is nothing untoward about this.

[74] His denials also extend to the allegation that subsequent to the award of the tender, meetings were held with Mthembu, the fifteenth defendant, during which meetings, Ilanga was instructed to subcontract part of the tender work. He concedes, however, that the tender document was issued without the provision of subcontractors and had only risen when they moved on site to perform the work.

[75] The explanation for involving subcontractors in the work is due to a group of contractors calling themselves 'Amadelakufa' who cause mayhem on worksites where successful tenderers have been appointed by the Municipality to conduct work. These contractors would take occupation of the site and cause disruption until such time as they are allocated a portion of the work. This transpired in respect of this tender when they commenced the work and to avoid problems on site they engaged the Municipality who, after negotiations with Amadelakufa, then agreed to subcontract part of the work. There was no additional cost to the Municipality. Consequently, there was nothing untoward or illegal in accommodating the members of the Amadelakufa group.

[76] Among the allegations in relation to the corrupt relationships and allegations of fraud and corruption levelled by the applicant, is the payment of R28 000 to Gumede's daughter, Zabanguni Promise Gumede ('Zabanguni'), by Ilanga. The explanation provided by Sibisi was that he did in fact transfer such amount to her but did so as he had been romantically attracted to her and the only reason for doing so was as a consequence of his romantic attraction to her.

[77] In relation to the remainder of the allegations made by the applicant and presumably which will form the subject matter of the criminal trial, Sibisi denies that the payments to Ilanga were irregular and submits that all amounts paid to Ilanga by the Municipality were due for work carried out and services rendered and quotations submitted. As a consequence, he denies that there are reasonable prospects of a conviction leading to a confiscation order.

Applicant's reply

[78] In response to Sibisi and Ilanga's opposition the applicant, in a replying affidavit, has pointed out that Saunders' affidavit deals in detail with the breach of the SCM processes and those of the MFMA and PFMA. The applicant further submits that all Sibisi has done in his affidavit was to deny any knowledge of the deviations or breaches of these processes and has not dealt with the fact that Ilanga was invited to submit a quotation despite not being on the supplier database of the Municipality nor the central supplier database of the National Treasury.

[79] In addition, what is also not dealt with is the telephonic communication between Sibisi and Ngcobo, in his capacity as Chairperson of the BAC, the frequency of those telephone calls during a period within which the tender in respect of the DSW contract was awarded to, inter alia Ilanga, and Ilanga was being administered by him..

[80] The applicant also alludes to a related criminal matter which subsequently came to light but relates to allegations of corruption and bribery involving Ngcobo, Sibisi and Vuyiswa and the acquisition of a Jaguar F-Pace motor vehicle. The applicant additionally submits that Sibisi also does not deal with the nature of his relationship with Ngcobo and Vuyiswa and the telephonic communication between himself and Vuyiswa between January 2017 and March 2019 as well as November 2017 and 31 December 2017, which is a critical period during which the tender in respect of the DSW contract was administered by Ngcobo.

[81] It is not disputed that Ilanga was not registered on the supplier database of either the Municipality or the National Treasury. It is also common cause that Sibisi was not a registered member of Ilanga but Dlodla was. What is not explained as alluded to by the applicant, is how Abbu was aware of the personal telephone numbers of Sibisi and was able to contact him directly to submit a tender and how he knew that Sibisi controlled the affairs of Ilanga and not Dlodla.

[82] Sibisi restricts himself to a bare denial that Ilanga rendered the services in terms of the tender awarded. What he fails to deal with are the allegations in both Mphaki's as well as Saunder's affidavits that the services were not provided by those awarded the tender, including Ilanga. Sibisi neglects addressing aspects of Saunders' affidavit indicating that the service providers, when questioned, informed them that Abbu and Mthembu directed them to fund payments to subcontractors using the unlimited line item of illegal dumping.

[83] The line item of illegal dumping was added by Abbu, as alleged by the applicant, in violation of the tender process and the budget for illegal dumping at DSW was limited to R5 million for the year, yet Ilanga, Uzuzinekela, Omphile and El Shaddai submitted invoices in excess of R70 million for a four month period from January 2018 to April 2018.

[84] The loan which Sibisi indicates he provided to Zabanguni because of his romantic attraction to her is challenged by Gumede, who indicates in her answering affidavit that such amount was a loan from Ilanga.

[85] Sibisi also does not explain the transfer of funds from Ilanga's bank account and interchangeably from Uzuzinekela to Ilanga and other entities to which he, Sibisi is linked.

Related criminal activity

[86] The applicant in its replying affidavit made specific reference to the related criminal activity involving Ngcobo, Dlodla, Sibisi, Vuyiswa and Freedom Nkululeko Blose¹⁷ (Blose) as well as two entities being Sibaya General Business Traders ('Sibaya') of which Dlodla is a director and Jobe and Sons Holding ('Jobe') of which Blose is a director. These related criminal activities involve charges of corruption in contravention of PRECCA, being inter alia giving of a benefit; and accepting a benefit and contravening s 21 of PRECCA involving conspiracy to commit corruption, alternatively contravening s 20 of PRECCA and money laundering. The State alleges common purpose on the part of the accused involving the purchase of a Jaguar F-Pace motor vehicle.¹⁸

[87] In summary, the State in preferring charges against the accused in the respective criminal trials relies on the legal principle of common purpose in that the accused acted in concert, directly or indirectly unlawfully gave and/or agreed to give and/or offered to give Ngcobo and Vuyiswa gratification in the form of R1 million for the purchase of a Jaguar F-Pace. It is alleged that Ngcobo used his position at the Municipality as Deputy Director: Supply Chain Management and Chairperson of the BAC to facilitate the award of tenders and the award of the DSW tender to Ilanga and a stationery tender to Jobe. At the time, Vuyiswa was a Principal Clerk at the

¹⁷ Blose also goes by the surname Sithole.

¹⁸ The charge sheet in respect of related criminal activity is annexed to the replying affidavit, pages 2270 to 2284.

Municipality. There was an obligation on Ngcobo and Vuyiswa to disclose their relationship with Dlodla, Sibisi, Blose and the two entities being Sibaya and Jobe.

[88] The details of the allegations which form the subject matter of these charges is contained in an affidavit deposed to by Saunders in January 2020. It is correct that this did not form the subject matter of the allegations in the initial restraint application and the explanation proffered for this is that this information came to light subsequent to the initial application and during the course of further investigations.¹⁹

[89] Saunders' affidavit deals in detail with the paper trail and the money trail of how the Jaguar F-Pace was acquired by Ngcobo and Vuyiswa. The evidence establishes that an invoice for the purchase of the Jaguar F-Pace was submitted to Dlodla in the sum of R990 539.85. A trade-in of R400 000 was made presumably by Dlodla as a receipt was issued in his favour for an amount of R400 000. A further amount of R200 000 was paid by Dlodla and although the deposit slip bares the reference Dlodla, the depositor is Sibisi. In addition, R600 000 was paid in cash by Sibisi and Dlodla towards the acquisition of the Jaguar F-Pace which ultimately made its way to Ngcobo and Vuyiswa. The balance of the purchase price was secured by a trade-in of a BMW 3 Series owned by Jobe which is directly linked to Blose.

[90] The source documents and bank statements as suggested by the applicant points to the incontrovertible fact that the payment of R1 million for the Jaguar F-Pace that was purchased from Jaguar Umhlanga was paid for by Sibaya, Sibisi and Sithole and purchased in the name of Dlodla. According to the sales person, the vehicle was chosen by and possession thereof was taken by Ngcobo and Vuyiswa. According to Saunders, both Vuyiswa and Ngcobo drove the vehicle.

[91] The vehicle was registered in the name of Dlodla on 13 November 2017 and on 12 December 2017 Ngcobo participated in the processing of the report to the

¹⁹ In the restraint application, the applicant indicated that the investigations were ongoing and that there was a possibility of further information coming to light once the curator had been appointed and IFS's additional investigations.

BAC to deviate from the SCM processes in respect of the DSW contract. It was on 14 December 2017 that Ngcobo presided over the report and approved the deviation as Chairman of the BAC. On 19 December 2017, Ngcobo approved the recommendation of the award of a portion of the DSW contract to Ilanga, which is linked to Dlodla and Sibisi.

[92] At no stage did Ngcobo, Vuyiswa, Sibisi or Dlodla declare their relationship with each other. At the time that Ngcobo presided over the award of the DSW contract to Ilanga, he and Vuyiswa had taken possession of the vehicle and there was no declaration by Ngcobo to the Municipality to the effect that he or Vuyiswa had received the Jaguar from Dlodla, Sibisi and Sithole. These allegations are also corroborated by an analysis of the telephone records of Sibisi, Ngcobo, Vuyiswa, Dlodla and Sithole at the relevant times.

[93] The affidavit of Saunders also alludes to a second tender advertised in January 2017 by the Municipality to appoint service providers to supply stationery for a 24 month period. A tender was submitted for Jobe by Sithole and in response to the tender, Sithole did not disclose whether he had any relationship with any persons in the service of the State and who may be involved with the evaluation and/or adjudication of the stationery tender.

[94] The non-disclosure by Sithole, the applicant submits, is materially established if one has regard to the telephone records which show communication between Ngcobo and Sithole prior to the date of completion of the tender document and recommendation. On 27 September 2017, a recommendation was made to the BAC that a portion of the tender to supply stationery be awarded to Jobe and that the award made to Style Craft Office Design be rescinded. Such recommendation was accepted on 16 October 2017 by the BAC presided over by Ngcobo. In addition, Ngcobo did not disclose his relationship with Sithole at the time he presided over the meeting.

[95] It is for these reasons that the State submits that the conduct of Sithole and Ngcobo constitute fraud and/or corruption in the criminal proceedings.

POCA

[96] POCA is directed at combatting organised crime, money-laundering and criminal gang activity. It prohibits two main money-laundering offences, general money-laundering offences involving the proceeds of any unlawful conduct and offences involving proceeds from a pattern of racketeering activity.²⁰ The preamble also states that it is difficult to prove the direct involvement of organised crime leaders because they do not perform the actual criminal activities themselves.

[97] At this juncture it is perhaps useful to remind oneself of what the preamble to the Act contemplates the overall purpose of POCA to be.

'WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;
AND WHEREAS there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;
AND WHEREAS organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;
AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;
AND WHEREAS organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage;
AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;
AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity;

²⁰ The preamble to POCA.

AND WHEREAS no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence;

AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence;

AND WHEREAS effective legislative measures are necessary to prevent and combat the financing of terrorist and related activities and to effect the preservation, seizure and forfeiture of property owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

AND WHEREAS there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities;

AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities;'

[98] As was held in *S v Shaik and others*²¹ the main purpose of Chapter 5 of POCA is to ensure that no person benefits from their wrongdoing²² by means of the criminal forfeiture of assets. Section 18 of POCA states as follows:

'(1) 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—

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; and
- (c) 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 and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'²³

²¹ *S v Shaik and others* 2008 (5) SA 354 (CC)

²² *Shaik* para 51

²³ See also *National Director of Public Prosecutions v Booyesen and others* 2022 (1) SACR 215 (WCC) para 5.

An overview of Chapter 5: Restraint and Confiscation Orders

Purpose of a restraint order

[99] The purpose of a restraint order is to preserve property pending the finalisation of criminal proceedings against a defendant so that such property is available to be realised in satisfaction of any confiscation order which a court might make. The proceedings are civil in nature and any questions of fact in the application proceedings must be decided on a balance of probabilities.²⁴

[100] A restraint order is granted in circumstances when a court is satisfied that the person who is the subject of such order, is to be charged with an offence or has been charged with an offence and there are reasonable grounds for believing that a confiscation order may be made against such person.²⁵

[101] In this matter, it is common cause that the provisions of s 25 of POCA were met and it would appear that the issue for determination as raised by Ngcobo is whether the applicant has established, on a balance of probabilities, that there are reasonable grounds to believe that a confiscation order may be made against Ngcobo.²⁶ Further, that he has derived any benefit from his alleged unlawful activities which may result in a confiscation order being made,²⁷ it being common cause that he has been criminally charged and the criminal proceedings have not yet been concluded.²⁸

[102] It is common cause that the offences which the first to sixteenth defendants have been indicted on in the High Court and charged with in the Regional Court are referred to in Schedule 1 of POCA. The purpose of the confiscation order would be to deprive the defendant of any benefit/s which he or she may have derived from the

²⁴ Section 13 of POCA.

²⁵ Section 25 of POCA.

²⁶ Section 25 of POCA.

²⁷ Section 18 of POCA.

²⁸ Section 25 of POCA.

offences of which he or she may be convicted or any other criminal activity which the trial court may find to be sufficiently related to those offences. This is in keeping with the principle that “the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains.”²⁹

[103] The Constitutional Court has also acknowledged in *Shaik* that there are two secondary purposes which emanate from the primary object of POCA being “general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes.”³⁰ It is accepted that with this purpose in mind POCA extends the confiscation net widely.³¹

[104] The approach to be adopted by the court in deciding applications for restraint orders under Chapter 5 of POCA was stated by Nugent JA in *National Director of Public Prosecutions v Rautenbach and others*³² as follows:

‘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 benefitted 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 only ask 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. Clearly 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. Moreover, once the criteria laid down in

²⁹ *National Director of Public Prosecutions v Rebuszi* 2002(2) SA 1 (CC) at para 19

³⁰ *Shaik* para 52

³¹ *Booyesen* para 5.

³² *National Director of Public Prosecutions v Rautenbach and others* 2005 (1) SACR 530 (SCA) para 27.

the Act have been met, and the Court is properly seized of its discretion, it is not open to the Court to then frustrate those criteria when it purports to exercise its discretion...'

[104] Similarly, in *National Director of Public Prosecutions v Mokhesi and others*,³³ it was held that a court

'..... in the adjudication of whether to confirm the provisional order or not, is not required to satisfy itself whether a defendant is probably guilty of the offences preferred against him. What is required is that the court must be satisfied on reasonable grounds that later there might be a conviction and a confiscation order made against the defendant concerned. A conviction is thus a sine qua non for a confiscation order.' (Footnote omitted.)

The legal framework for a restraint order

[105] In terms of s 25 of POCA, a High Court may exercise the powers conferred in terms of s 26(1) in respect of such realisable property specified in the restraint order held by a person against whom the restraint order is made³⁴ or all realisable property of such person whether specified in the restraint order or not³⁵ and in respect of all property transferred to such person after the making of a restraint order which would constitute realisable property.³⁶

[106] Section 25 sets out three jurisdictional requirements for the exercise of the discretion by the High Court in terms of s 26 as follows. A High Court may grant a restraint order when a prosecution for an offence has been instituted against a defendant concerned;³⁷ where a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds to believe that a confiscation order may be made against the defendant³⁸ and the proceedings against a defendant have not been concluded.³⁹

³³ *National Director of Public Prosecutions v Mokhesi and others* 2022 (1) SACR 383 (FB) para 24. See also *National Director of Public Prosecutions v Basson* 2001 (2) SACR 712 (SCA) and *National Director of Public Prosecutions v Kyriacou* 2003 (2) SACR 524 (SCA).

³⁴ Section 26(2)(a) of POCA.

³⁵ Section 26(2)(b) of POCA.

³⁶ Section 26(2)(c) of POCA.

³⁷ Section 25(1)(a)(i) of POCA.

³⁸ Section 25(2)(a)(ii) of POCA.

³⁹ Section 25(2)(a)(iii) of POCA.

[107] Property is defined in POCA to mean ‘money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof’. Chapter 5 deals with criminal forfeiture involving restraint and confiscation orders, and s 12 defines a defendant as ‘a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 25(1)(b)’.

Confiscation orders

[108] Unlike Chapter 6 of POCA, Chapter 5 provides for conviction based forfeiture. A confiscation order may be made against a convicted defendant who is found to have benefitted from an offence of which he or she is convicted or a “sufficiently related” offence.⁴⁰ It is thus not restricted only to the offence/s of which a defendant has been convicted.⁴¹

[109] The confiscation inquiry in terms of s 18 follows on a criminal conviction and confers a discretion on the trial court to grant a confiscation order. The use of the word **may** implies a trial court in a criminal matter exercising a discretion.⁴² It is trite that a confiscation order may be made in addition to any sentence imposed in respect of the offence. A criminal court conducting a confiscation inquiry may also elect not to grant a confiscation order.

[110] The restraint provisions in terms of ss 25 and 26 of POCA are inextricably linked to s 18 being the confiscation phase of POCA and it is necessary, having regard to the basis of the opposition proffered by Ngcobo, to deal with the principles applicable to confiscation orders.

[111] A confiscation phase involves a three stage inquiry under s 18 of POCA and it is a precondition for the grant of a confiscation order that a defendant has benefitted from the offence for which he has been convicted. In terms of s 12(3) of POCA, ‘a person has benefitted from unlawful activities if he or she has... received or retained any

⁴⁰ Sections 18(1)(c) of POCA.

⁴¹ *National Director of Public Prosecutions v Kyriacou [2003] 4 All SA 153 (SCA) para 11*

⁴² *National Director of Public Prosecutions v Kyriacou [2003] 4 All SA 153 (SCA) para 11*

proceeds of unlawful activities'. Proceeds of unlawful activities is defined very broadly in s 1 of POCA to include 'any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.'

[112] The Supreme Court of Appeal in *National Director of Public Prosecutions v Gardener and another*,⁴³ dealing with the three stage enquiry, stated:

'Once a defendant's unlawful activities yield proceeds of the kind envisaged in s 12, he or she had derived a benefit as contemplated in s 18(1)(a). This entitles a prosecutor to apply for a confiscation order and triggers a three-stage inquiry by the court. First, the court must be satisfied that the defendant has in fact benefitted from the relevant criminal conduct; second, it must determine the value of the benefit that was obtained; and finally, the sum recoverable from the defendant must be established.' (Footnote omitted.)

[113] The courts inquiry at the confiscation stage is focused on establishing the extent of an offender's benefit rather than toward establishing who has suffered the actual loss.

The confiscation order –the amount, benefit and related criminal activity

[114] This issue received the imprimatur of the Constitutional Court in *S v Shaik and others*⁴⁴ (*Shaik CC*) where it considered and decided certain issues relevant to those which arise in these proceedings, specifically raised by Ngcobo. The first of the issues decided was whether the confiscation order to be made had to have regard to "gross proceeds" or "net proceeds" of a defendant's offences when one determined what a defendant's benefit was.

[115] In *Shaik CC*, the defendant and the companies convicted in the criminal trial submitted that the word 'benefit' in s 18(1) of POCA must be defined to apply only to

⁴³ *National Director of Public Prosecutions v Gardner and another* 2011 (1) SACR 612 (SCA) para 17.

⁴⁴ *S v Shaik and others* 2008 (5) SA 354 (CC).

net proceeds of crime. O'Regan ADCJ rejected this submission and at paragraph 60 of the judgment held the following:

'In my view this submission is based on a misconception of the section. As described in para [25] above, s 12(3) provides that a person will have benefitted from unlawful activities if he or she has received or retained any proceeds of unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes "proceeds of unlawful activities". It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in s 18, for that concept is based on the definition of the "proceeds of unlawful activities". That definition goes far beyond the limited definition proposed by the appellants. "Proceeds" is broadly defined to include any property, advantage or award derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity. A further difficulty with the appellants' argument is to be found in s 18(2). That section expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a net amount. The narrow interpretation of "benefit" proposed by the appellants cannot thus fit with the clear language of s 18 and the definition of "proceeds of unlawful activities". To interpret the section as suggested by the appellants would require giving a meaning to the section which its ordinary wording cannot sustain. In any event, both the dividends and the shares amounted to proceeds that flowed directly from the crime.' (Footnote omitted.)

[116] Having regard to the decision in *Shaik CC* specifically paragraph 69, a broad definition of proceeds of unlawful activities in POCA also makes it possible to confiscate property that has not been directly acquired through the commission of crimes, but also through related criminal activity. The purpose of the broad definition of proceeds of unlawful activities as held in *Shaik CC* is to ensure that 'wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs'.⁴⁵

[117] In determining what constitutes related criminal activity as was held in *Shaik CC*, a court must have regard to the nature of the crimes. In advocating for such a broader interpretation to be applied to the definition of 'proceeds of unlawful activities' one must consider how closely these offences are connected to the purpose of the statute.

⁴⁵ *Shaik* para 70.

[118] In the case of a conviction for an offence involving corruption the court in *Shaik CC* opined that it is one of those offences closely related to the purposes of POCA, and a court ordering a confiscation order should bear this in mind when determining the 'appropriate amount' envisaged in s 18. Given this and following on the decision in *Shaik CC* it would be appropriate for a criminal court to order the confiscation of the full value of the benefit obtained applying the broad definition of proceeds.⁴⁶

[119] The larger the value of the confiscation order, the greater the deterrent effect of such an order. POCA clearly seeks to impose the greatest deterrent effect in the area of organised crime.⁴⁷ Consequently, it is the gross value of all proceeds flowing from the crime that is potentially liable to a confiscation order subject to a criminal court exercising a discretion as to an appropriate amount.

[120] Because the three stage process of confiscation only follows on a criminal conviction at the final stages of a criminal trial, the purpose of a restraint order is an interim measure to preserve property pending the conclusion of a criminal trial in the event of there being a conviction and in the event of the court exercising its discretion to order a confiscation order on application. The restrained property acts as security against the eventual satisfaction of any confiscation order that may be granted.

[121] In practice, the NDPP applies *ex parte* for restraint orders against realisable property pending the finalisation of the criminal proceedings and any application for a confiscation order and does so often by requesting a provisional restraint order with a rule nisi allowing a defendant an opportunity to answer the application for restraint whilst the realisable property is secured. This is what has transpired in the current matter. In order to succeed in an application for confirmation of the rule nisi and

⁴⁶ *Shaik* paras 60 and 75.

⁴⁷ *Shaik* para 71.

provisional restraint order, the applicant must show that ‘there are reasonable grounds for believing that a confiscation order may be made against a respondent’.⁴⁸

[122] In determining the quantum of a restraint order when one is dealing with the confirmation of the rule nisi, the Supreme Court of Appeal noted in *Rautenbach*⁴⁹ that:

‘Where the requirements of the Act have been met a Court is called upon to exercise a discretion as to whether a restraint order should be granted, and if so, as to the scope and terms of the order, and the proper exercise of that discretion will be dictated by the circumstances of the particular case. The Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order might be made must be capable of being ascertained, nor does it require that the value of property that is placed under restraint should not exceed the amount of the anticipated confiscation order. Where there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be granted, then clearly a Court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all), for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved – the absence of an “appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to served” – will render the interference arbitrary and in conflict with the Bill of Rights.’

[123] Consequently, I align myself with the judgment of the full court in *National Director of Public Prosecutions v Wood and others*⁵⁰ that the applicant is:

‘not required to establish a case for the *quantum* of a restraint order with exactitude. In reality, some leeway must be given for reaching a reasonable estimation of an appropriate quantum. At the same time, however, the estimation of benefit and hence *quantum*, is not necessarily determinative. A court is required to exercise its discretion in this regard so as to

⁴⁸ *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA); s 25(1)(a)(ii) of POCA.

⁴⁹ *Rautenbach* ibid para 56.

⁵⁰ *National Director of Public Prosecutions v Wood and others* [2022] 3 All SA 179 (GJ).

ensure that the *quantum* settled upon does not arbitrarily intrude on the defendant's property rights.⁵¹

[124] It is the gross value of the proceeds of a defendant's offences that constitutes his benefit. In addition, the value of the realisable property that is necessary to satisfy an eventual confiscation order must be calculated with a view to a date when the confiscation order may be made.

[125] POCA does not place any limit on the amount for which a court may grant a restraint order which is keeping with the objective of a restraint order being to secure realisable property of sufficient value to satisfy any confiscation order that may ultimately be made.

Issues for determination

[126] The issues for determination are:

- (a) Whether there are reasonable grounds for believing that the defendants may be convicted and that a confiscation order may be made against them; and
- (b) Whether the defendants derived a benefit from the offences of which they have been convicted or related criminal activity.
- (c) Whether or not such benefit can be on the basis of joint and several liability being found in the conduct of the defendants based on common purpose.

Additional submissions

[127] Subsequent to the matter being adjourned and on 5 May 2022, an email was addressed to Ms Gasa, a secretary who is no longer employed in the Office of the Chief Justice and whose email is not accessible, enclosing correspondence as well as the full court judgment of the Gauteng High Court, Johannesburg handed down on 3 May 2022 in the matter of *Wood*.

⁵¹ *Wood* ibid para 36.

[128] Regrettably, this email only came to my attention on 15 June 2022 when correspondence was addressed by Ngcobo's attorney, Calitz Crockart & Associates Inc., sent on the advice of counsel. Additional written submissions were made on behalf of Ngcobo based on the judgment submitted by the applicant.

[129] The presentation of the application in such a prolix manner has regrettably contributed to the delay in the order being handed down. The delivery of the written reasons have equally been delayed by the secretarial difficulties I have experienced.

Analysis

[130] Despite the voluminous nature of the papers in this application, being in excess of 2 500 pages, the succinct issue is whether, on the probabilities, the applicant has established that the provisions of s 25(1)(a)(ii) of POCA have been complied with.

Whether there are reasonable grounds for believing that the defendants may be convicted and that a confiscation order may be made against them

[131] In determining whether there are reasonable grounds to believe a confiscation order may be made, Mlambo AJA explained the test as follows in *Kyriacou*:⁵²

'...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 required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for 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.'⁵³

⁵² *Kyriacou* *ibid* para 10.

⁵³ See *National Director of Public Prosecutions v Rautenbach and others* 2005 (1) SACR 530 (SCA) para 27.

[132] According to the court in *Phillips and others v National Director of Public Prosecutions*.⁵⁴

‘...This involves reasonable grounds for believing that the defendant may be convicted as charged, that the trial court may find that he benefited from the proved offence or related criminal activity and that a confiscation order may be made in that court’s discretion.’

[133] In the exercise of the court’s discretion, I align myself with the sentiments expressed by Binns-Ward J in *National Director of Public Prosecutions v Booyesen and others*⁵⁵ where he held the following:

‘An application for a restraint order is not a preview of or dress rehearsal for the criminal trial. This court does not have to be satisfied that the first defendant will probably be convicted, only that there is apparently cogent evidence upon which he might be convicted. The place for testing such evidence will be in the criminal trial, not in these proceedings. At this stage it is only the alleged existence of the evidence and its apparent cogency that has to be evaluated.’

[134] The evidence placed before this court by the applicant has been evaluated not as a court would in a criminal trial being mindful that those proceedings are still pending. This court is cognisant that it cannot usurp the function of the criminal court in evaluating the evidence and making findings on the value of the evidence and the test to be applied in criminal matters being that of ‘proof beyond a reasonable doubt’ and the onus on the applicant in these proceedings being ‘on a balance of probability’.

[135] That a court must be mindful when evaluating the evidence in restraint applications was also emphasized by the concurring judgment in *Rautenbach*⁵⁶ as follows:

‘Every effort should be made to place sufficient information before the Court to enable it to properly engage in the judicial function envisaged in that section. Courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem*. On the other hand,

⁵⁴ *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 37.

⁵⁵ *National Director of Public Prosecutions v Booyesen and others* 2022 (1) SACR 215 (WCC) para 11.

⁵⁶ *Rautenbach* para 88.

to insist at the provisional stage on a precise correlation between the value of property restrained and the value of the alleged proceeds of criminal activity would be to render a vital part of the scheme of the Act unworkable.’

[136] The first to sixteenth defendants, inter alia, have been indicted on numerous charges including corruption and contravention of the MFMA and PFMA and these charges both in the high court and the regional court have been referred to in the founding papers, In addition, copies of the indictment and charge sheet have been annexed thereto. The applicant, in obtaining the interim order with the available evidence, has set out, in my view, a clear and concise recordal of the defendants alleged involvement in the corrupt activities corroborated by documentary evidence, including cell phone records, personal interviews and financial records. The applicant in support of its allegations has placed reliance on the legal principles of common purpose and joint benefit allegedly derived by the defendants which submissions are supported by the principles enunciated in the decisions of *Shaik* (both in the Supreme Court of Appeal and Constitutional court) and *Wood*.

[137] On a conspectus of the applicant’s evidence it is clear, without the need for repetition that at this stage of the proceedings, in my view, there is cogent evidence upon which the defendants might be convicted. It would axiomatically follow that upon such conviction, a criminal court may consider granting a confiscation order as the applicant has demonstrated the enrichment of the defendants allegedly from their corrupt activities.

[138] By way of illustration, the irresistible inference in my view regarding the ante-nuptial contract concluded between Ngcobo and Vuyiswa, the erstwhile eighteenth respondent, was that same was designed to obscure, if not defeat, the very objects of POCA. The unchallenged finding of Marks AJ against Ngcobo as alluded to has been replicated in this matter in that Ngcobo has failed to make frank disclosure regarding the asset base of R19,5 million⁵⁷ reflected in the ante-nuptial contract nor of the assets subject to the restraint order.

⁵⁷ Annexure SCN1 page 2495

[139] Ngcobo has rather chosen to obfuscate the issue regarding his financial affairs by distancing himself from the other defendants and any other unlawful activities.

[140] In such circumstances, the court is constrained to prefer the applicant's version which is further supported by additional criminal proceedings relating to the Jaguar F-pace. Ngcobo's failure to deal with the specific allegations, specifically documentary evidence and cell phone evidence, is confounding as such issues must of necessity be within his knowledge. Ngcobo's fundamental opposition that the applicant's founding papers do not prove at any level that he benefited from any offences in both criminal proceedings is devoid of merit, regard being had to the factual matrix as set out by the applicant both in its founding affidavit and replying affidavit.

[141] In making these findings the court is alive to the dictum expressed in *Booyesen* as follows:

'[10] The concurring judgment in *Rautenbach* acknowledged, with reference to the observations of Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 78, that, realistically, it will often not be possible at the restraint stage for the NDPP to predict or place before the court more than a limited portion of the material that is likely to influence the court faced with the confiscation application. It might also be difficult at the restraint stage for the NDPP to be able to identify the "related criminal activities" referred to in s18 (1)(c) of POCA, which can have a bearing on the determination of the extent of a confiscation order. The appeal court has indicated that a court seized of an application for a restraint order should take these difficulties into account in making its decision. The objects of the legislation, and the place of restraint and confiscation orders in the statutory scheme, must be kept in mind. A court should not approach an application for a restraint order in a way that thwarts or undermines those objects.'

[142] The criticism against the applicant's case by counsel for Ngcobo, in my view, sets the bar too high. It is unlikely that at the restraint stage, the applicant will be in a

position to place all the material before the court or will be in a position to identify the 'related criminal activities' as envisaged by s 18(1)(c) of POCA. Courts should be cognisant of these difficulties when making its decision.⁵⁸

[143] An analysis of the legal authorities makes it clear that it does not fall within the purview of this court to determine the truth of the allegations or the merits of the pending criminal charges at the level of constraining a criminal court where the defendant's guilt will have to be established beyond a reasonable doubt.⁵⁹

[144] In regard to the third and fifth defendants, twenty-second to twenty-sixth respondents and forty-fourth respondent and specifically the answering affidavit filed by the third and fifth defendants, same can only be described as laconic responses to the applicant's allegations. Similarly to Ngcobo, they have adopted the approach of simply denying any wrongful conduct and further denying that a criminal court will grant a confiscation order. On careful analysis, the court is constrained to conclude that such written austerity in circumstances where the facts fall within their knowledge, one would expect otherwise. The defendants' abject failure to deal with specific allegations (and the fifth defendant's election to deal only with four) particularly relating to their impropriety, the monetary amount involved and the documentary evidence submitted by the applicant, does not hold the defendants in good stead.

[145] The court is also cognisant of the probabilities of the defendants acting with common purpose for their joint benefit and deriving a mutual benefit. The applicant, with the evidence at its disposal, has made out a compelling case in recording the actions and associations of the defendants in the alleged corrupt activities. The coordination of the main role players (the first to sixteenth defendants), the planning

⁵⁸ *Booyesen* para 10.

⁵⁹ See *Rautenbach* para 51, where the court stated: '...we are not called upon to decide whether the offences were indeed committed, nor even whether they were probably committed, but only whether there are reasonable grounds for believing that a Court might find that they were. In the absence of rather more convincing explanations for the discrepancy, in my view, the evidence adduced by the appellant indeed provides reasonable grounds for believing that there might have been a scheme in operation from the outset to reduce the customs value of the goods and thereby defraud the customs authorities.'

and execution of the corrupt activities and the circumvention of the Municipality's SCM processes and PFMA has, in my view, been adequately set out by the applicant to discharge the onus for the grant of a final restraint order.

[146] The evidence falls to be evaluated as a whole and the weight to be attached to it determined accordingly. It is not incumbent on the applicant in the current proceedings to adduce the evidence that will be led at the criminal trial or to attempt to prove the charges. It is sufficient to indicate what evidence is available and to give this court adequate insight into its nature for an evaluation to be made that a reasonable possibility exists that the defendants may be convicted at a criminal trial in due course and the possibility of a confiscation order being granted. As previously surmised, the criticism of the applicant's founding papers by Ngcobo and the raising of allegations in a replying affidavit, in my view, is misplaced.

[147] As alluded to in the cases referred to above⁶⁰ a court has to be cognisant of the fact that the available evidence to the applicant in matters of this nature are invariably far from complete, a 'work in progress'. Further evidence implicating, alternatively exculpating accused persons are established in the course of criminal investigations. To exclude and disregard the contents of the replying affidavit would in my view be tantamount to a miscarriage of justice.⁶¹

[148] A further issue that was exhaustively debated at the hearing of the application was whether the applicant had established or presented evidence that each individual defendant or respondent benefited. The judgment of *Wood* considered this in much detail and I align myself with the findings of the court. The requirement of POCA at this stage of the proceedings, being the restraint stage, is that reasonable grounds must be established to believe a criminal court **may** find that the defendant benefited and **may** subsequently grant a confiscation order.

⁶⁰ *Rautenbach and Booysen*.

⁶¹ In any event it was Ngcobo himself who made reference to the criminal charges relating to the Jaguar F-Pace in the answering affidavit filed.

[149] At paragraph 188 of *Wood* the court held the following:

'It was not necessary, as was suggested by counsel for Mr Pillay and Mr Nyhonyha in argument, for the NDPP to provide evidence in its founding affidavit as to how much each individual Director defendant benefited. At this stage of the inquiry POCA does not require a calculation of the actual amount in which each defendant benefited. All that must be established is that there are reasonable grounds to believe that a criminal court may find that they benefited. On the evidence before us this jurisdictional requirement is established.'

[150] In *Shaik*⁶² O'Regan ADCJ observed at paragraph 69 as follows:

'...that criminals will frequently seek to evade POCA's statutory purposes through a 'clever restructuring of the affairs'.

[151] As was noted in *Wood*⁶³ "...It is rarely the defendants in their personal capacity who formally benefit from the offence, or who formally own the realisable assets. POCA recognises this, and casts its net widely to answer the two questions - (1) did the defendants benefit; and (2) and do the defendants hold the realisable property?'

[152] The Constitutional Court in *Shaik* observed that POCA applied 'to benefits which a defendant obtained indirectly from her crimes through entities in which she has an interest, in proportion to that interest, and that such a wide interpretation flows not only from the wording of the statute but also its purpose'.

[153] In *NDPP v Phillips*,⁶⁴ Phillips submitted that the NDPP would have to pierce the veil of corporate personality or show that a respondent company received affected gifts in order that corporate property may be restrained. Heher J dismissed this contention in *Phillips* and found the following: ⁶⁵

⁶² *National Director of Public Prosecutions v Shaik and others* 2008 (5) SA 354 (CC) at para 70

⁶³ At para 207 to 210

⁶⁴ *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W).

⁶⁵ *Ibid* para 81.

‘Without attempting to place strict limits on the expression, I have no doubt that when a person exercises a power of disposal over property... or has the exclusive use of or control over the properties... and is the real beneficiary (albeit through his shareholding) of the income from those properties or any proceeds of disposal of them, then he “holds” such properties within the meaning of s 14(1) of the Act and it is unnecessary to invoke the doctrine of “lifting the veil”.’

[154] I align myself with the sentiments expressed by the court in *Wood* para 210 that:

‘The material question in determining whether the property is “held” by the defendant is therefore not who formally owns it, but who controls it or has its use or benefit. To hold otherwise would frustrate the purpose of POCA.’

[155] It is important to bear in mind that the interpretation which has been followed in several decisions both in the Supreme Court of Appeal and the Constitutional Court is to extend the restraint net wide.

The benefit – whether the applicant has to prove a benefit at restraint stage?

[156] This formed the subject of a debate between myself and Mr *Howse* SC during the course of the oral hearing of the matter. Mr *Howse*, for Ngcobo, contended that at this stage of the proceedings the applicant had to show a benefit in order for the jurisdictional requirements of s 25(1)(a)(ii) of POCA to be satisfied before the rule nisi could be confirmed. In *Phillips v NDPP*⁶⁶ it was stated that ‘[p]lainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount.’

[157] Further, in *Kockjeu v National Director of Public Prosecutions*,⁶⁷ it was held that:

‘At the stage of a restraint-order application the court is not concerned with either the guilt of the defendant or whether the defendant in fact derived a benefit from the offence. Since the

⁶⁶ *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 20.

⁶⁷ *Kockjeu v National Director of Public Prosecutions* 2013 (1) SACR 170 (ECG) para 28.

proceedings are in their nature preliminary and designed solely to preserve the status quo, the court is concerned only with establishing whether there is a reasonable possibility that the defendant will be convicted and that a confiscation order will be made.'

[158] In *Shaik*, the Constitutional Court confirmed that the definition of 'proceeds of unlawful activity' makes it clear that the proceeds of crime will constitute proceeds even if indirectly obtained. In terms of POCA, it is not necessary for the applicant to provide evidence in its founding affidavit as to how much each individual defendant benefited.

[159] The fallacy in the defendants' contentions, particularly Ngcobo, is that the applicant must at this stage of the proceedings establish the nature of the benefit derived by Ngcobo from the alleged unlawful activity. Mr *Howse* was at pains to argue that an actual benefit to Ngcobo must be established and denoted a substantial portion of the supplementary heads of argument in substantiating such argument. Unfortunately, Ngcobo's submissions has conflated the distinction between restraint orders and confiscation orders and the distinctive judicial tests that apply at these two stages of the proceedings. The acceptance of Ngcobo's submissions would clearly negate the intention of the legislature as it is not a natural consequence that a confiscation order must be granted if a defendant is convicted.

[160] Such submission is clearly untenable particularly if one considers that most of the averments and evidence submitted by the applicant is either not disputed or disputed only by means of the defendants' denials. In ordinary motion proceedings, which this is not, the evidence would satisfy the standard of the *Plascon-Evans* test.

[161] As elaborated by the Supreme Court of Appeal in *JW Wightman t/a JW Construction v Headfour (Pty) Ltd and another*⁶⁸ the court held the following:

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

⁶⁸ *JW Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.

addressed the fact said to be disputed... 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.'

[162] A further factor to be considered is whether the benefit derived by all the defendants/respondents should be treated as collective culminating in the granting of a joint and several restraint order and subsequent confiscation order. To this end, the submissions of the applicant that the principle of common purpose will be advanced in criminal proceedings cannot be disregarded.

[163] The full court in *Wood* had cause to consider joint and several restraint orders and joint and several confiscation orders. Similarly, as in this matter, the defendants contended that it was not a general principle of POCA that multiple defendants could be visited with a joint and several restraint order. The court in *Wood* was of the view that whether an order of that nature was appropriate would depend on the facts. Consequently, the question of proportionality was considered in determining the quantum of a restraint order.

[164] In *Rautenbach*,⁶⁹ the Supreme Court of Appeal considered the principles applicable to questions of proportionality when determining the quantum of a restraint order. In both *Shaik* and *Wood* as well as in *Mokhabukhi and another v State*,⁷⁰ the court was of the view that there was legal precedent for orders under Chapter 5 of POCA to be made on a joint and several basis. In *Shaik*, a joint and several confiscation order was made against multiple accused in the criminal court. Neither the Supreme Court of Appeal nor the Constitutional Court interfered with the judgment in relation to the confiscation order in that regard.

⁶⁹ *Rautenbach* para 56.

⁷⁰ *Mokhabukhi and another v State*. Unreported decision of the Transvaal Provincial Division dated 11 September 2006 under case no A156603.

[165] In *Mokhabukhi*, the magistrate's court imposed joint and several liability under a confiscation order on co-accused. On appeal, the court found that an order of that nature was appropriate as the accused had 'acted in collaboration with each other with a common purpose'.⁷¹ In addition, the court found that it was 'impossible to say what specific benefit was enjoyed by each of the appellants'.⁷² In *Shaik* each of the second and third defendants were ordered to pay the full amount of the confiscation order jointly and severally.

[166] In *Shaik and others v S*,⁷³ in the Supreme Court of Appeal, it was contended by the defendants that because the proceeds passed through different hands it could not constitute the proceeds of criminal activity in the hands of each intermediary. Consequently, there could not be confiscation orders against each of the defendants. The Supreme Court of Appeal in paragraph 25 dismissed this contention saying as follows:

'We do not agree. The movement of funds through different hands is essential to the concealment of crime and the success or manipulation of its benefits. Multiple orders are necessary as a deterrent not only to the principal actors in the criminal activity but to all those who facilitate such concealment and manipulation. To uphold the appellant's submission would therefore serve to frustrate the aims of POCA.'

[167] In *Shaik*, the Supreme Court of Appeal recognised that a way to alleviate this would be to cap the total which the State was entitled to recover which the high court did, although the order was made joint and several against a number of defendants.

[168] As mentioned previously, the Supreme Court of Appeal did not interfere with the approach adopted by the High court. Consequently, the Supreme Court of Appeal has recognised that joint and several confiscation orders may be an effective means of achieving the purposes of POCA while at the same time avoiding an arbitrary deprivation of property by making such order with an overall cap on the total amount recoverable. *Shaik* affirms the view that multiple orders against several

⁷¹ *Mokhabukhi* *ibid* at 21.

⁷² *Mokhabukhi* *ibid* at 20.

⁷³ *Shaik and others v S* [2007] 2 All SA 150 (SCA).

defendants serves a legitimate deterrent purpose. It is important for me not to lose sight of this.

[169] As repeatedly referred to in this judgment the defendants, particularly Ngcobo, denies having benefited at all. At this stage it is indeterminable to assess the actual benefit received by the individual defendants which task would be best served by the court hearing the criminal proceedings and which court would ultimately consider any confiscation application. Although the cases which I have referred to concerned confiscation orders and those relied on by Mr *Howse* also concerned confiscation orders as opposed to a restraint order which I am tasked with now, the same principles apply. This must follow bearing in mind the purpose of restraint orders which is to secure and restrain as much realisable property as may be necessary to satisfy a confiscation order which may be granted once defendants are convicted. The deterrent effect of confiscation orders as envisaged in POCA will be served by allowing the applicant to place as much property under restraint from each defendant to reach the upper limit of the cap.

[170] As noted in my analysis of the applicable principles, the bar in applications for a restraint order is very much lower. The question is whether there is evidence that might reasonably support a conviction and subsequent confiscation order and whether that evidence might reasonably be believed.

[171] A detailed and cautious assessment of the evidence before me leads to the logical conclusion that there are reasonable grounds for believing a criminal court may convict the defendants and a confiscation order may be made individually or jointly and severally. It defies logic that a convoluted scheme compromising numerous individuals and corporate entities could have been successfully conducted to the detriment of the Municipality, tax payer and society at large without the direct participation of the individual defendants who for their efforts (albeit corrupt) undoubtedly would have benefited.

[172] Those defendants, who held influential positions in the Municipality and in the corporate entities, denial of involvement or benefit in corrupt activities judged against the prima facie evidence submitted by the applicant is, in my view, improbable. The dictates of logic mean that any court convicting the defendants may make confiscation orders against them as it is enjoined to do so by the provisions of POCA.

Erroneous order

[173] In preparing this judgment a patent error relating to the consent order granted on 4 February 2022 was apparent in that costs were reserved notwithstanding the confirmation of the rule nisi. I was advised that such reservation of costs was agreed to enable the parties to re-enrol the matter depending on the outcome of the criminal proceedings.

[174] The criminal proceedings are a separate matter from the current one and no purpose will be served by reserving the costs of this application. I accordingly rescind the costs order and direct that the amended consent order be rectified to read the 'rule *nisi* of 4 October 2019 is confirmed'.

Conclusion

[175] It was for the reasons aforementioned that the following orders were granted:

1. The rule nisi issued on 4 October 2019 as against the second defendant and forty-fourth respondent is confirmed.
2. The order of 4 February 2022 is amended to delete the order reserving the costs of the application.
3. The costs occasioned by the hearing of the opposed application on 4 February 2022 are to be borne by the second defendant. Such costs are to include the costs occasioned by the employment of two counsel, where applicable.

Henriques J

Th reasons for judgment were handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 31 October 2022.

Case Information

Date of Argument : 04 February 2022

Date of further written submissions: 05 May 2022 & 15 June 2022

Date of Orders : 11 August 2022

Date of Witten reasons : 31 October 2022

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