REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

10314/2008

SOUTH AFRICAN INLAND LOGISTICS CC	**First Applicant**
SOOBRAMONEY NAIDOO	**Second Applicant**
RUMBA NAIDOO	**Third Applicant**

versus

CAMILLA SINGH of KPMG SERVICES (PTY) LIMITED	**First Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS KZN	**Second Respondent**
THE MASTER OF THE HIGH COURT	**Third Respondent**

Judgment

Delivered on 10 June 2010

Steyn J

[1] The factual background that emerges from the founding affidavit is that all the applicants were charged with various

offences by the second respondent. A restraint order in the form of a rule *nisi* was obtained under case number 8820/2005 on 14 July 2006 by the Deputy Director of Public Prosecutions, attached to the Asset Forfeiture Unit of KwaZulu-Natal. The order was granted in terms of s 26 of the Prevention of Organised Crime Act,[1] and confirmed on 28 September 2005, by consent.

Subsequent to this the second applicant, Soobramoney Naidoo, entered into a "plea arrangement"[2] on 15 December 2007.

The papers reveal that the arrangement reached was that Naidoo would make the necessary formal admissions, which he did, and which resulted in his conviction. The admissions related to charges of fraud whereby misrepresentations were made to Railroad Africa (Pty) Ltd. The other applicants and one other accused who is not cited as a party in these proceedings, were acquitted on all the charges before the court. I shall return

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1 Act 121 of 1998, hereinafter referred to as 'POCA'.

2 An analysis of this arrangement shows that procedurally the arrangement occurred after the pleas of all the accused were tendered. Following upon the negotiations formal admissions were then made by Mr Naidoo, so it should not have been referred to as a 'plea arrangement'.

to the effect of this acquittal when I deal with the respondents' counter-application.

[2] Based on the aforementioned proceedings the state applied for a confiscation order under POCA against Naidoo, which was granted in terms of section 18 on 15 December 2007, by the regional court magistrate. It is trite that the regional magistrate had no jurisdiction to make a confiscation order against those who were acquitted. In terms of the order the second applicant was directed to pay monies to the complainant and to the asset forfeiture unit respectively. In addition the second applicant was directed to pay the fees in terms of the regulations.

The relevant part of the regulations reads as follows:

> *"2. (1) A curator bonis appointed under the Act is entitled to a fee which must be assessed according to the following tariff:*
>
> *(a) On income collected during the existence of the curatorship: six per cent;*
> *(b) on the value of property, other than money, realised on completion of his or her curatorship: two per cent;*
> *(c) on the value of money realized on completion of his or her curatorship: one per cent;*

(d) on the value of property, other than money, subject to a restraint order where no confiscation order is made: two per cent;

(e) on the value of money subject to a restraint order where no confiscation order is made: one per cent.

(2) Despite sub-regulation (1), the Master may –

(a) if in any particular case there are special reasons for doing so, reduce or increase any such fee; or

(b) if the curator bonis has failed to discharge his or her duties or has discharged them in an unsatisfactory manner, disallow any such fee, either wholly or in part."

[3] The first respondent (the curator) presented an account on 23 February 2007, whereby the curator claimed fees and disbursements of R1 715 488,58 (one million seven hundred and fifteen thousand four hundred and eighty eight rand and fifty eight cents) for the period of curatorship. Applicants made representations to the Master of the High Court objecting to the fees levied by the first respondent and requesting the Master to exercise his discretion in terms of regulation 2.

[4] Respondents contend that paragraph 6 of the confiscation order constitutes an acknowledgement by the second applicant to pay all of the fees of the first respondent, subject only to the

third respondent's oversight role in approving the accounts submitted.

[5] What has to be decided in my view is whether paragraph 6 of the confiscation order imposed an obligation on the second applicant to pay the fees of the *curator bonis* for work done in respect of the restrained assets of the defendant only, or, also the fees in respect of the restrained assets of the other respondents listed in the restraint order. Paragraph 6 of the order provides as follows:

> *"The fees, disbursements and expenses of the* curator bonis*, Camilla Singh of KPMG Services (Pty) Ltd, Durban in terms of the regulations promulgated in terms of the Act as approved by the Master of the High Court shall be paid by the Defendant on or before 28 February 2007. The Defendant shall deliver to the Applicant proof of payment to the said curator bonis by delivering a copy of proof of such payment to* "The Senior Finance Officer, Asset Forfeiture Unit KZN" *at 12th Floor Southern Life Building 88 Field Street Durban or by faxing a copy to 031-3073992."*

[6] On behalf of the applicants, Mr Kemp SC assisted by Mr K Govender, submitted that the State should be responsible for the curatorship fees levied by the first respondent in respect of the first and third applicants' assets and hence the relief sought should be granted with costs. Mr Vahed SC, acting on behalf of

the respondents, opposed and argued that in light of all the facts a dispute remains which could only be resolved by referring the matter to oral evidence on the following pertinent issues:

> *"1. Whether, during the discussions and negotiations on 14 and 15 December 2006, the applicants agreed that the second applicant would be liable for all of the first applicant's* (sic) *fees, charges and disbursements relating to her curatorship and control and administration of all assets of the applicants.*
>
> *2. Whether, during those discussions and negotiations, the applicants' sole concern was the interpretation of the word "income" as it appears in the Regulations promulgated in terms of Act 121 of 1998.*
>
> *3. To the extent that evidence of a factual or expert nature is required, the meaning to be ascribed to "income". "*[3]

Based on the perceived factual disputes, Mr Vahed SC, submitted that pending the outcome of the evidence adduced on these issues, these proceedings, coupled with the second respondent's conditional counter-application, ought to stand over.

[3] See written heads filed by first and second respondents.

[7] At this juncture it is necessary to refer to the second respondent's conditional counter-application that was lodged for an order to be made in the following terms:

> *"1. That the proceedings are stayed pending the final determination of the application referred to in paragraph 2 below.*
> *2. That the second respondent shall, within one month of the date of this order, commence proceedings in the Specialised Commercial Crime Court Durban in the Regional Division of KwaZulu-Natal in terms of which the second respondent shall seek relief as it may be entitled to with regard to the variation of or correction or substitution of paragraph 6 of the order of that court made under case number 41/1675/05 on 15 December 2005.*
> *3. That the second respondent shall be entitled to deliver any documents or process in those proceedings upon the second applicant by service thereof upon his attorneys, V Chetty & Co, 206 Moore Road, Glenwood, Durban.*
> *4. That it is declared that for the purposes of Regulation 2(1)(a) of the Regulations made in terms of section 77 of the Prevention of Organised Crime Act, No. 121 of 1998, the word "income" as appearing therein means gross income.*
> *5. That the costs of the matter are reserved for determination by this count after the proceedings referred to in paragraph 2 hereof have been finalised."*

I shall deal with the counter application after consideration of the main application.

[8] **<u>Legal framework</u>**

Section 18 of POCA, regulates the terms of the order in which the Regional Court declared the goods so described confiscated to the State.[4]

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[4] Section 18 reads 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-*
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> *(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.*
>
> *(2) The amount which a court may order the defendant to pay to the State under subsection (1)-*
>
> *(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or*
>
> *(b) if the court is satisfied that the amount which might be realised as contemplated in section 20 (1) is less than the value referred to in paragraph (a), shall, not exceed an amount which in the opinion of the court might be so realised.*
>
> *(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if-*
>
> *(a) it is satisfied that such enquiry will unreasonably delay the proceedings in sentencing the defendant; or*
>
> *(b) the public prosecutor applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.*
>
> *(4) If the judicial officer who convicted the defendant is absent or for any other reason not available, any judicial officer of the same*

Section 28 of POCA regulates the appointment of a *curator bonis* in terms of property subject to a restraint order.[5]

It is the restraint order that deals with the appointment of Ms Singh as the *curator bonis* and it stipulates in terms of paragraph 1.6 as follows:

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court may consider an application referred to in subsection (1) and hold an enquiry referred to in that subsection and he or she may in such proceedings take such steps as the judicial officer who is absent or not available could lawfully have taken.

(5) No application referred to in subsection (1) shall be made without the written authority of the National Director.

(6) A court before which proceedings under this section are pending, may-

(a) in considering an application under subsection (1)-

(i) refer to the evidence and proceedings at the trial;

(ii) hear such further oral evidence as the court may deem fit;

(iii) direct the public prosecutor to tender to the court a statement referred to in section 21 (1) (a); and

(iv) direct a defendant to tender to the court a statement referred to in subsection (3) (a) of that section;

(b) subject to subsection (1) (b) or (3) (b) of section 21, adjourn such proceedings to any day on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act 51 of 1977), as the court may deem fit."

[5] Section 28 reads:

"Appointment of curator bonis *in respect of property subject to restraint order*

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

(a) appoint a curator bonis *to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely-*

(i) to perform any particular act in respect of any of or all the property to which the restraint order relates;

(ii) to take care of the said property;

(iii) to administer the said property; and

(iv) where the said property is a business or undertaking, to carry on, with due regard to any law

"After obtaining letters of curatorship in terms of section 30(1) of the Act the curator bonis *is hereby authorised and required to take the property included in paragraph 1.1 into her possession or under her control, to take care of such property and to administer it whether such property is situated inside or outside the Republic."*

(My emphasis)

Paragraph 1.1 provides:

"1.1 This Order relates to realisable property as defined in sections 12 and 14 of the Act and extends to:

1.1.1 The property specified in the Schedule of Assets (Annexure "B") attached hereto, so far as it remains property held by the Respondents;

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which may be applicable, the business or undertaking;

(b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a curator bonis *has been appointed under paragraph (a), into the custody of that* curator bonis.

(2) Any person affected by an order contemplated in subsection (1) (b) may at any time apply-

(a) for the variation or rescission of the order; or

(b) for the variation of the terms of the appointment of the curator bonis *concerned or for the discharge of that* curator bonis.

(3) The High Court which made an order contemplated in subsection (1) (b)-

(a) may at any time-

(i) vary or rescind the order; or

(ii) vary the terms of the appointment of the curator bonis *concerned or discharge that* curator bonis;

(b) shall rescind the order and discharge the curator bonis *concerned if the relevant restraint order is rescinded;*

(c) may make such order relating to the fees and expenditure of the curator bonis *as it deems fit, including an order for the payment of the fees of the* curator bonis-

(i) from the confiscated proceeds if a confiscation order is made; or

(ii) by the State if no confiscation order is made."

1.1.2 All other property held by the Respondents at any time before or after the granting of this order whether in their name or not, including all property held for or on behalf of the said Respondent by any person or entity,

1.1.3 All property which would be realisable property, if transferred to the Respondents or to any third party at any time after the granting of this order."

Section 17 of POCA provides:

> *"**17. Conclusion of proceedings against defendant.** – For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when –*
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> *(a) the defendant is acquitted or found not guilty of an offence;*
> *(b) subject to section 18(2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her;*
> *(c) the conviction in respect of an offence is set aside on review or appeal; or*
> *(d) the defendant satisfies the confiscation order made against him or her."*

[9] In my view the primary object of any confiscation order is to deprive the convicted person of his or her ill-gotten gains.[6] What makes a forfeiture order in terms of s 48 of POCA also distinguishable from a confiscation order, is that it is not

[6] See *National Director of Public Prosecutions v Tam and Others* 2004 (2) SA 500 (W) at 502E-F. Also see *National Director of Public Prosecutions v Phillips* 2005 (5) SA 265 (SCA) at 266H-I for the primary purpose of a restraint order.

dependent upon a successful prosecution as is an order in terms of s 18 of the Act.

The nature of a confiscation has been dealt with by Heher J (as he then was) in *National Director of Public Prosecutions v Phillips and Others*,[7] when he stated:

> *"The mere fact that an application for a confiscation order follows upon a criminal conviction and culminates in a judgment against a defendant for payment to the State of an amount based on the benefit he has derived from his crimes is not sufficient in itself to constitute the proceedings criminal and render the confiscation order criminal punishment. In a recent judgment of the House of Lords,* Government of the United States of America v Montgomery and Another *[2001] 2 WLR 779 (PC), Lord Hoffmann made this point in relation to a comparable remedy under Part VI of the Criminal Justice Act of 1988:*
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> > *'Modern legislation, of which Part VI of the 1988 Act is a good example, confers powers upon criminal courts to make orders which may affect rights of property, create civil debts or disqualify people from pursuing occupations or holding office. Such orders may affect the property or obligations not only of the person against whom they are made but of third parties as well. Thus the consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. There is no reason why the nature of the order which gave rise to the claim or dispute should necessarily determine the nature of the proceedings in which the claim is enforced or the dispute determined.'"*[8]

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7 2002 (4) SA 60 (W).

8 *Ibid* at 108C-G.

In *S v Shaik and Others*,[9] confiscation orders as mechanisms to forfeit property obtained through the commission of crime, is described by O'Regan ADCJ, in the following way:

> *"[22] It will be useful at this stage briefly to describe the scheme of criminal confiscation contemplated by the Act. Chapter 5 of the Act confers a power on a criminal court to make a confiscation order against a person who has been convicted of a crime where the court has found that the person has benefited from the crime.*
>
> *[23] Once a person has been convicted, the prosecutor may apply for a confiscation order. In order for a confiscation order to be made, the court must find that the person convicted of the offence has derived a benefit from the offence of which he or she has been convicted or of any offence. The court may then make an order that the person pay to the State 'any amount it considers appropriate'."*

(Original footnotes omitted)

In *Phillips and Others v NDPP*[10] Howie P stated that proceedings for a confiscation order, and for a restraint order are in material respects civil proceedings. The statement is however qualified by the learned President of the Court in the following terms:

> *"Although I refer to "the trial court" for convenience, it is made clear in section 13 that proceedings for a confiscation order and for a restraint order are in all material respects*

[9] 2008 (5) SA 354 (CC).

[10] [2003] 4 All SA 16 (SCA).

> *civil proceedings,* inter alia*, in regard to the rules of evidence and the requirement that facts be established only on a balance of probabilities."*[11]

Soon after *Phillips* the SCA in *NDPP v RO Cook Properties (Pty) Ltd*; *NDPP v 37 Gillespie Street Durban (Pty) Ltd and another*, *NDPP v Seevnarayan*[12] referred to an earlier distinction made by Ackerman J in *NDPP v Mohamed NO and others*[13] regarding forfeiture mechanisms:

> *"Chapter 5 provides for the forfeiture of the benefits derived from crime but as confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based, it may be invoked even when there is no prosecution."*[14]

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11 *Supra* at para 8.

12 [2004] 2 All SA 491 (SCA).

13 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC).

14 See *RO Cook Properties* at para 7 and *Mohamed* at para 16. Also see *Prophet v NDPP* 2007 (2) BCLR 140 (CC) at para 60, where the mechanisms were re-affirmed by Nkabinde J, stating:

> *"[60] The POCA uses two mechanisms to ensure that property derived from an offence or used in the commission of an offence is forfeited to the State. The mechanisms are set out in Chapter 5 and 6. Chapter 5, in sections 12-36, provides for the forfeiture of the benefits derived from the commission of an offence but its confiscation machinery may only be invoked once a defendant has been convicted, while Chapter 6, in sections 37-62, provides for forfeiture of the proceeds of and properties used in the commission of crime. This case involves the mechanism set out in Chapter 6."*

The close connection[15] that exists between the second applicant's conviction and the confiscation order that followed thereupon cannot be overlooked, since it is evident that it should have a bearing on the outcome of this case.

[10] It is common cause that the confiscation order granted has not been amended. Despite the clear wording of the order Mr Vahed SC, has urged me to consider that the order was granted as a result of pre-trial negotiations between the parties.

In my view this argument is erroneously based on the earlier authorities that deal with the nature of the proceedings relating to restraint and confiscation orders. The mere fact that legislature decided in his wisdom to apply a civil burden of proof and apply rules of evidence applicable to civil proceedings does not mean that these proceedings are subjected to the uniform rules of court nor that they are entirely civil in nature. In my view the legislation was drafted in this form to introduce the civil standard of proof on a balance of probability into the Act, so as

[15] See *S v Shaik and Others* 2008 (2) SACR 165 (CC) at para 67.

to divorce the proceedings from being criminal where of course a different standard of proof is required. The order should still be in compliance with the Act, and that means that it can only be granted against a defendant that was convicted. So simply put it cannot be equated to an order that had been obtained by consent between the parties. Consent orders are the result of negotiations between parties, who need not be dictated to by legislation.

I have serious reservations with the argument that the order should be amended. The order is not unlawful, as it stands and nothing disqualifies it from being executed in its present form. There is no ambiguity at all in the order and therefore no evidence of surrounding circumstances would be admissible.

Without digressing too much I am of the view that the second respondent would not have been in the current predicament had they used s 105A of the Criminal Procedure Act[16] at the commencement of the trial. The procedure is a transparent

[16] No. 51 of 1977.

process and this case would not have surfaced in court. Negotiations behind closed doors adds to the suspicion of scholars, like Burchell, who labels such bargaining as morally suspect, unethical and offensive to the principles of justice.[17]

[11] The approach of Scott JA, as stated in *Phillips*,[18] is also apposite:

> *"[21] It is a well-established principle that a Court may always set aside its own final judgment in certain limited circumstances. These include, situations where the judgment is founded upon fraud, common mistake and the doctrine of instrumentum noviter repertum (the coming to light of as yet unknown documents). See generally* Van Winsen The Civil Practice of the Supreme Court of South Africa *4th ed at 690-8. The principle, however, has no application to the circumstances relied upon by counsel. As observed by Trengove AJA in* Swadif (Pty) Ltd v Dyke *No. 1978 (1) SA 928 (A) at 939D-E:*
>
> > *'I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment must have existed at the date of the final judgment.'"*

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17 See J Burchell 'Principles of Criminal Law' Juta 3ed (2005) at 16 and E Steyn 'Plea-bargaining in SA: current concerns and future prospects' *SACJ* (2007) 206-219.

18 See *supra* (n5) at 274C-F.

It is trite that in motion proceedings, like the present application, the parties' affidavits constitute both their pleadings and their evidence[19] and this is how this matter will be decided.

[12] The provisions of the Act correctly applied also means that the confiscation order could not provide for an amount that exceeds the proceeds deriving from any benefit based on the criminal offence committed by the defendant.[20] As a matter of course, the curator's fees in respect of the present matter could only relate to the estate of Soobramoney Naidoo, the second applicant, in these motion proceedings and the defendant in case no. 41/695/05.

In my view it is not legally competent for the first respondent to have claimed fees relating to the assets of those applicants that were acquitted. The assets of the first and third applicants were not part of the confiscation order and legally the fees of the

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19 See *Triomf Kunsmis (Edms) Bpk v AE en CI Beperk en Andere* 1984 (2) SA 261 (W) at 269; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793; *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 848; *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 106C-D.

20 In terms of s 18(2)(a) the amount of the confiscation order may not exceed the value of the benefit derived from the defendant's crimes.

curator pertaining to the aforementioned applicants should be paid for by the State.[21] As a result there is no authorising provision that allows the curator to claim a percentage of income collected in the absence of a confiscation order specifying such claim.

[13] This court is bound to give effect to the Act, the Regulations, and the order granted. In my view the confiscation order was granted by the regional court based on the material before the court and that would have been the restraint order and the proposed confiscation order. The confiscation order, as granted, is the document that is definitive of this dispute. To go beyond it, as Respondents suggest, would be a misdirection on fact and law. This is not an ordinary contract, it is regulated by statute. Effect must be given to the specific terms of the order until such order has been set aside. In doing so the fee of the curator must relate to those assets of the second applicant, against whom the order was granted. Respondents expect the Master to provide for the recovery of seized assets, not of the

[21] See s 17 of POCA that provides for the conclusion of proceedings against a particular defendant.

defendant only, but of the accused who were acquitted. Correctly, in my view, the Master, in correspondence stated as early as 25 April 2008 that in terms of paragraph 1.20 of the order, dated 14 July 2005, "the state must pay the curators (*sic)* fees should no confiscation order be made over the assets under the restraining order."[22]

In a proper interpretation of the order, the second applicant must pay the curator's fees due in terms of the regulations. As directed these fees could only relate to the property of Mr Subramoney Naidoo, restrained and administered by the curator.

[14] I am not persuaded either on the papers or by the submissions made by Mr Vahed SC that there is any merit in granting the relief sought by the second respondent in its conditional counter-application. As stated earlier in this judgment, the order granted on 15 December 2006 is in accordance with the law and executable. In my view it cannot be said that any of the

[22] See page 88.

parties were misdirected. The order remains to be a product of the negotiations between the parties and their intentions, provided that such intentions are in accordance with the law. What was stated in *Van der Westhuizen v Seide (2)*[23] is still applicable today:

> *"Once a party has sought and obtained relief from the Court, he cannot have the Court's order rescinded merely because he has misconceived the legal effect such order would have. (See Joseph v Joseph, 1951 (3) SA 776 (N), and other authorities therein discussed.) Whatever understanding the parties may have reached prior to the final order, it is clear that it was not specifically incorporated in the final order. Even if such an agreement had been reached and even if it is granted for argument's sake that the plaintiff did appear to waive her rights before the order was granted, the fact remains that an unambiguous order was, after due notice to the defendant, applied for by the plaintiff and granted by the Court."*[24]

It is not the case of the second respondent that the parties were mistaken in respect of the requirements of the Act or the regulations when the application was lodged for the confiscation order. The order relates to the defendant, Mr Naidoo, and is capable of being lawfully executed.

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[23] 1957 (4) SA 360 (SWA).

[24] At 363E-F.

The counter-application is also flawed, having due regard to what is asked in terms of prayer 2, namely a variation of the confiscation order. In my view the acquitted respondents' restrained assets cannot feature in the curator's calculation of Mr Soobramoney Naidoo's liability. The making of such an order would be *ultra vires* the Act and the regulations because what would be asked of the regional magistrate is to order Mr Soobramoney Naidoo to pay the curator's fees relating to property that could never form the subject matter of the confiscation order.

There is, however, another procedural issue that impedes on the second respondent's intended application to amend the order and that is that the first and third applicant were acquitted on the charges before court. There is a substantial difference between a matter wherein charges are withdrawn by the prosecution and matters wherein accused persons are acquitted. The second respondent is no longer in a position to obtain a conviction against first and third applicant.[25] A

[25] See section 106 of the Criminal Procedure Act, No. 51 of 1977, more specifically s 106(1)(d).

conviction in my view is a pre-requisite for a variation of the confiscation order to include the assets of other applicants.

[15] I am not persuaded that there is any legal basis for a variation of the confiscation order since every court's jurisdiction is dependant on section 18 of POCA. I agree with Mr Kemp SC, that the order as granted cannot be divorced from either the provisions of POCA or from the regulations.

Accordingly, the counter-application cannot succeed, even in its conditional form. The counter-application is dismissed.

[16] In the result the following order is made in the main application:

1. That it is declared that the first respondent be held to have failed to comply with the rulings and findings of the Master as contained in letters dated the 21st November 2007 and 25th of April 2008.

2. That the first respondent be and is hereby directed to pay the amount of R1 606 535-01 immediately into the

curatorship account, Curator Bonis Soobramoney No. 1, Account Number 05 026 084 7 held at Standard Bank, Greyville Branch, together with any interest that would have accrued had this amount not been deducted from the account on the 25th of January 2008.

3. That the first respondent be and is hereby directed to render a true and proper statement of account with substantiating documents to the third respondent within 14 days of the date of this order reflecting the fees, disbursements and expenses incurred as a consequence of acting as curator in respect of the second applicant.

4. That the second applicant be ordered to debate that said statement of account with the third respondent within 14 days from the date it was rendered in terms of 3 of this order.

5. That the first respondent be and is hereby directed after debate of the account, to deduct the amount which

appears due, referred to in 3 above, from the amounts held in the curatorship account, with leave to the applicant to approach the court in respect of any disputed items.

6. That the first respondent be and is hereby directed to pay whatever amount remains in the curatorship account, after deducting the amounts referred to in paragraph 5 of this order, to the Applicants together with interest.

7. First respondent and second respondent are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved. Costs to include the costs of two counsel.

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Steyn J

Date of Hearing:	11 November 2009
Date of Judgment:	10 June 2010
Counsel for the applicants:	Adv KJ Kemp SC with Mr K Govender
Instructed by:	V Chetty & Company c/o Pranesh Indrajith Attorneys
Counsel for the respondents: For the first respondent	Adv RAK Vahed SC
Instructed by:	Garlicke & Bousfield c/o Tatham Wilkes & Co.
For the second respondent	
Instructed by:	State Attorney, KZN c/o Cajee Setsubi & Chetty Inc