CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/04

ANDREW LIONEL PHILLIPS	First Applicant
LADDIES LARK (PTY) LTD	Second Applicant
JANVEST CC	Third Applicant
APVEST CC	Fourth Applicant
MAYVEST CC	Fifth Applicant
JUNVEST CC	Sixth Applicant
AUGVEST CC	Seventh Applicant
DECVEST CC	Eighth Applicant
PORTION 1 OF 247 EDENBURG CC	Ninth Applicant
SUSHIMI INVESTMENTS CC	Tenth Applicant
SWINGING TRADING TWISTER CC	Eleventh Applicant
FEBVEST CC	Twelfth Applicant
D MORNINGSIDE INVESTMENTS (PTY) LTD	Thirteenth Applicant
STEPHEN WERNER CC	Fourteenth Applicant
MOONLITE IMPORT & EXPORT CC	Fifteenth Applicant
DOC PROPERTY INVESTMENTS CC	Sixteenth Applicant

versus

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Respondent

Heard on : 12 May 2005

Decided on : 7 October 2005

JUDGMENT

SKWEYIYA J:

[1] This case concerns the nature of a restraint order under section 26[1] of the Prevention of Organised Crime Act 121 of 1998 (the Act) and the circumstances in which it may be varied or rescinded by the court that granted it. It comes to this Court by way of an application for leave to appeal brought by Mr Andrew Lionel Phillips and 15 other applicants against the judgment and order of the Supreme Court of Appeal (SCA). The SCA reversed the decision of the Johannesburg High Court (the High Court) granting the applicants an order rescinding the restraint order made under section 26(1) and (3) of the Act that had been obtained by the National Director of Public Prosecutions (NDPP) against the assets of the applicants.

[2] The primary issue in the case is whether the High Court had the power to rescind the order it had made in terms of section 26 of the Act on grounds other than

[1] Section 26(1) provides:

> "The National Director may by way of an ex parte application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates."

those specified by the Act.[2] The SCA and the High Court differed on this question, with the SCA holding that the High Court did not have such power.

[3] Litigation between the parties started as far back as the year 2000. I therefore consider it necessary to give a brief description of the parties to the litigation and the relevant background. I also set out in some detail the facts giving rise to the High Court application to have the restraint order rescinded and the treatment of that application in the High Court and in the SCA.

Parties to the litigation

[4] The first applicant is Mr Phillips. The second and thirteenth applicants are companies with limited liability, incorporated in terms of the Companies Act.[3] The third to twelfth and fourteenth to sixteenth applicants are close corporations duly registered and incorporated in accordance with the provisions of the Close Corporations Act.[4] Mr Phillips is either the sole shareholder or sole member of the

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[2] Section 26(10)(a) provides that a restraint order granted in terms of section 26(1) may be set aside in certain specified circumstances. It states as follows:

> "A High Court which made a restraint order—
> (a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
> (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
> (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred".

[3] Act 61 of 1973.

[4] Act 69 of 1984.

second to sixteenth applicants. He is in effective control of the assets of the other applicants.

[5] The respondent is the NDPP who in terms of section 179(1) and (2) of the Constitution[5] is head of the prosecuting authority in the country. He has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.

Relevant background to the litigation

[6] Mr Phillips owned and operated a business known as The Ranch which provided a venue and facilities for paying male customers to have sexual intercourse with female prostitutes who were not employees. This business was conducted on premises at 54 Autumn Road, Rivonia, Sandton, owned by the sixteenth applicant. Another business, The Titty Twister, owned by the eleventh applicant was operated on the same premises in tandem with The Ranch. It presented striptease shows. The second applicant (Laddies Lark (Pty) Ltd) and the eleventh applicant (Swinging Trading Twister Close Corporation) were intimately engaged in the operation of the business of The Ranch and The Titty Twister respectively.

[5] Section 179 provides in relevant part that:

> "(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
>
> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[7] On 2 February 2000 law enforcement officers raided and searched the premises on which the two businesses were conducted. Following this raid, on 4 February 2000, the NDPP launched proceedings in respect of the immovable property on which the two businesses were conducted, together with the buildings thereon, and obtained a preservation of property order in terms of section 38 of the Act,[6] prohibiting any person from dealing with them. A curator bonis, Mr Reynolds, was appointed in terms of section 42 of the Act.[7] The NDPP has given notice of its intention to apply for a forfeiture order of the property in terms of section 48 of the Act.[8]

[8] Mr Phillips continued running the businesses on the immovable property despite the existence of two court orders, and the fact that he was charged with various

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[6] Section 38(1) provides:

> "The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property."

[7] Section 42 provides:

> "Appointment of curator bonis in respect of property subject to preservation of property order.—(1) Where a High Court has made a preservation of property order, the High Court shall, if it deems it appropriate, at the time of the making of the order or at a later time—
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> (a) appoint a curator bonis to do, subject to the directions of that High Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely—
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> (i) to assume control over the property:
> (ii) to take care of the said property;
> (iii) to administer the said property and to do any act necessary for that purpose; and
> (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
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> (b) order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the curator bonis."

[8] Section 48 provides:

> "Application for forfeiture order.—(1) If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order."

offences. He faces several charges in terms of the Sexual Offences Act,[9] including the keeping of a brothel,[10] procuring or attempting to procure females to have unlawful sexual intercourse,[11] and living off the proceeds of prostitution.[12] He is also facing charges in terms of the Aliens Control Act[13] relating to the employment of illegal aliens,[14] authorising illegal aliens to conduct business as prostitutes or striptease dancers,[15] and aiding and abetting illegal aliens to remain in this country.[16] The trial on these charges has commenced but has not yet been completed.

[9] On 22 December 2000 the NDPP applied ex parte to the High Court in terms of section 26 of the Act for a restraint order against Mr Phillips and the other applicants, other than the sixteenth applicant, the owner of the property at 54 Autumn Road, Rivonia. The application did not relate to this property but rather to the businesses of The Ranch and The Titty Twister as conducted by Mr Phillips and the eleventh applicant.[17]

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[9] Act 23 of 1957.

[10] Id, section 2 read with sections 1, 3 and 22.

[11] Id, section 10(a) read with sections 1 and 22.

[12] Id, section 20(1)(a) read with sections 1 and 22.

[13] Act 96 of 1991. (This Act has since been repealed in its entirety by section 54 of the Immigration Act 13 of 2002).

[14] Id, section 32(1)(a) read with sections 1 and 58.

[15] Id, section 32(1)(c) read with sections 1 and 58.

[16] Id, section 57(a) read with sections 1 and 58.

[17] It is argued by the respondent that the property at 54 Autumn Road is not subject to the restraint order since the order did not include the sixteenth applicant which is the registered owner of that property. Counsel for the applicant contended, on the other hand, that since para 1.1(b) of the restraint order extended to "all other property held by the first respondent, whether in his name or not", the property held by the sixteenth applicant was subject to the restraint order. I have great doubts as to whether a restraint order can operate against property in circumstances where the registered owner of that property has not been cited in the proceedings involving the restraint order, but that is not a matter that needs to be decided in these proceedings.

[10] The High Court granted a provisional restraint order on 22 December 2000 which was made final on 31 July 2001.[18] The applicants appealed unsuccessfully to the SCA against this order.[19] The order was in respect of all property under the control of Mr Phillips whether in his name or not. The restraint order was made in anticipation of the trial court making a confiscation order in terms of section 18 of the Act[20] in the event of Mr Phillips being convicted in his criminal trial. The purpose of the confiscation would be to deprive Mr Phillips of any benefits which may have been derived by him from the offences upon which he might be convicted or any other

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[18] *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W). The relevant part of the order provides:

> "1.1 The property to be disclosed and surrendered (the property)
> This order relates to realisable property as defined in ss 12 and 14 of the Act and extends to
> (a) the property specified in the schedule of assets attached hereto marked annexure A;
> (b) all other property held by the first [applicant] whether in his name or not;
> (c) all property which, if transferred to first [applicant], or to any third person on behalf of first [applicant],would be realisable property.
> Provided that the following property, although bound to be disclosed and restrained, is excluded from the surrender provisions of this order: such clothing, bedding, ordinary household furniture, kitchen and laundry appliances and utensils and other articles (other than luxuries) as the curator bonis may consider to be reasonably needed for the day-to-day use of the first respondent or pending the return day of this order.
>
> 1.2 Restraint
> Subject to para 2 below the [applicants] and any other person with knowledge of this order are hereby prohibited from dealing in any manner with the property, except as required or permitted by this order."
>
> (For the full text of the order see para 1 of the judgment of the High Court)

[19] *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) (I shall refer to this decision as *Phillips* SCA I).

[20] Section 18 provides:

> "Confiscation orders.—(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."

criminal activity which the trial court might find to be sufficiently related to those offences.

Court proceedings and orders obtained against the curator bonis

[11] Mr van den Heever was appointed as the curator bonis under section 28 of the Act[21] in respect of the assets subject to the restraint order. He was authorised to take possession of the property, care for it and administer it.[22] He duly took charge of the property and not surprisingly, caused the businesses of The Ranch and The Titty Twister to stop operating. The businesses stopped generating income resulting in

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[21] Section 28 provides:

> "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 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."

[22] The relevant part of the order relating to the curator bonis provides:

> "1.3 The curator bonis
> (a) In terms of s 28(1) of the Act, Theodor van den Heever, a partner at Deloitte & Touche is hereby appointed as curator bonis.
> (b) After obtaining letters of curatorship in terms of s 32(1) of the Act, the curator bonis is hereby authorised and required to take the property included in para 1.1 of this order, into his possession or under his control, take care of such property and administer it. He shall have such powers, duties and authority as are provided for in the Act and such further powers as are specified in this order as set out in the paragraphs below:
> (i) The curator shall have the power and authority to act as shareholder, director or member, as the case may be, or in such other capacity as may be required in order for the curator bonis to exercise effective control of the assets of the first respondent, in the place and stead of the first respondent, with regard to :
> (aa) the shareholdings or interests of the first respondent in the second to 15th respondents, or any other shareholdings or interests held by the first respondent;
> (bb) his functions, privileges or duties as director or member as the case may be of the second to twelfth respondents."
>
> (For the full text of the order see n 18 above at para 1.)

there being no funds to pay various charges accruing in respect of rates, electricity, water and other related charges. In the time that followed the properties began to deteriorate and arrear charges accumulated which prompted the applicants to launch a number of applications directed at the curator bonis.

[12] A court order was obtained by the applicants on 23 August 2002 declaring the curator to be responsible for the payment of all arrear and future charges in relation to the properties. Following this, an order was obtained on 21 November 2002 compelling the curator to restore the properties to the condition in which they had been on 22 December 2000 (the date on which the provisional restraint order in terms of section 26(1) was made by the High Court). The curator attempted to obtain the necessary funds which would enable him to maintain the properties by letting them out, but on 6 March 2003 an urgent interdict was obtained by the applicants preventing the curator from letting the properties. The curator failed to restore the properties to the condition in which they had been on 22 December 2000 as directed by the court, and the applicants launched court proceedings to have the curator found to be guilty of contempt of court for failing to comply with the order of 23 August 2002 declaring him to be responsible for payment of charges on the properties.

[13] The application by the applicants was however dismissed by the High Court on 19 March 2003. The curator, in an attempt to ensure that the properties were properly maintained and the charges on the properties were paid, attempted to use some of the applicants' funds in accounts held at financial institutions, but was prevented from

doing so because of yet another court order obtained by the applicants on 23 June 2003 directing that the curator restore the credit balances in the applicants' accounts.

[14] The applicants have relentlessly challenged every aspect of the restraint order, including its nature and everything done under it by the curator bonis. They have made every effort to regain possession and control of the properties affected by the order.

[15] In the proceedings which give rise to the present application, the applicants applied to the High Court to rescind the restraint order.[23]

The High Court application

[16] The main case made out on the papers in that application is that the restraint order should be rescinded because it is impossible for the curator bonis to discharge his duties under it. The contention is that the preservatory purpose of the restraint order is not being served as a result of the deterioration of the immovable properties owned by the applicants and the accumulation of municipal charges, in the form of rates in respect of the immovable properties. This is primarily due to the failure of the curator to have the restraint order implemented. The attitude adopted by him and the NDPP is that he (the curator) is not obliged to pay municipal charges in respect of the properties or to incur the cost of restoring, maintaining and securing them unless there were realisable funds from the properties to do so. According to the applicants, far

[23] *Andrew Lionel Phillips and Others v National Director of Public Prosecutions* Case No. 03/15171, 12 December 2003, as yet unreported at para 1.

from preserving the properties, the effect of the order has in fact been to reduce the value of the properties and thus undermine the prospect of full value being realised in the event of conviction and a confiscation order being made in terms of section 18 of the Act.

[17] Although the restraint order was one granted in terms of section 26(1) and (3) of the Act, the applicants chose not to make out a case for the rescission of the order based on the grounds of rescission contemplated in section 26(10)(a) of the Act nor to seek relief under any of the provisions of the Act. They sought to make out their cause of action for rescission of the order on the basis of the inherent jurisdiction of the High Court, which is now entrenched by section 173 of the Constitution,[24] to protect and regulate its own process, and to develop the common law by taking into account the interests of justice.

[18] The NDPP contended that the only grounds upon which the order could be rescinded were those set out in section 26(10) of the Act and therefore maintained that, as no such case had been made out on the applicants' papers, the application had to fail.

[19] The High Court took the view that the proper approach to the matter was to determine whether it had common law powers to rescind or vary its own order and, if

[24] Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

it had the power and discretion to do so, then to determine whether the legislature intended to limit that power to cases of hardship as provided for under section 26(10)(a).[25] On this approach, it classified the restraint order as "purely interlocutory" akin to an "anti-dissipation order"[26] and concluded that the restraint order was an interim order that was capable of being varied or rescinded by the court in the exercise of its inherent jurisdiction on good cause shown.[27] It accordingly held that upon a proper construction, section 26(10)(a) does not take away the inherent power of the High Court to vary or rescind its order under the common law.

[20] It reasoned that section 26(10)(a) is in effect a standing provision, the sole purpose of which is to enlarge the number of people who may seek the variation or rescission of a restraint order made under section 26 of the Act; that the sole requirement for standing under section 26(10)(a) is hardship resulting from the order and that a person, like Mr Phillips, who suffers hardship, may therefore invoke the provisions of section 26(10)(a); that however, section 26(10)(a) does not prevent the court from rescinding a restraint order on common law grounds at the instance of a person suffering hardship. It found that the grounds set out in section 26(10)(a) were not exhaustive of the grounds upon which the High Court could vary or rescind a restraint order granted under the Act.[28]

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[25] Above n 2. See also n 23 at para 53.

[26] Above n 23 at para 37.

[27] Id at paras 60 - 64.

[28] Id at paras 67 - 68.

[21] It accordingly concluded that a restraint order can be varied or rescinded if good cause is shown and that good cause includes, among other things, the impossibility of performance by a curator bonis appointed under the Act. It granted the order sought by Mr Phillips and the other applicants and rescinded the restraint order that it had previously made.

[22] The NDPP appealed against that decision to the SCA.

In the SCA

[23] In the SCA,[29] both the applicants and the NDPP in essence repeated the arguments that they had advanced in the High Court.

[24] The SCA upheld the appeal and reversed the decision of the High Court. It held that a restraint order may not be varied or rescinded except in the narrow circumstances contemplated in section 26(10) of the Act. In reaching this conclusion, it relied on its earlier decision in *Phillips* SCA I[30] where it had accepted that although a restraint order was only of interim operation, pending the conclusion of criminal proceedings, because it could only be varied or rescinded in the limited circumstances referred to in section 25(2) and section 26(10), it was sufficiently final in effect to render it capable of appeal.[31]

[29] *National Director of Public Prosecutions v Phillips and Others* 2005 (5) SA 265 (SCA) (*Phillips* SCA II).

[30] Above n 19.

[31] Id at paras 18 - 22.

[25] The SCA reasoned that the restraint order is not one that may be granted at common law. It is authorised by the Act and so is the power to vary or rescind it. If there had been no provision for its variation or rescission in the Act, the order would stand until set aside either because the person was not charged,[32] or when the proceedings against the person/s concerned were concluded.[33]

[26] It held that the solution to the problems experienced by the applicants in the present case could be found in section 28 of the Act[34] which permits the variation or rescission of the order by which the curator bonis is appointed. The curator could have been given power to let the properties, or some of them, so as to generate funds to meet his obligations under the order.

[27] The SCA thus reversed the decision of the High Court and held that a court which grants a restraint order in terms of section 26(1) of the Act has no inherent jurisdiction to rescind that order; that in general, its power to do so is circumscribed by the Act and, aside from the common law grounds, is limited to the grounds set forth in section 25(2)[35] and section 26(10)[36] of the Act.[37]

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[32] Section 25(2) of the Act provides:

> "Where the High Court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable."

[33] Section 26(10)(b) of the Act provides:

> "A High Court which made a restraint order—
> (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded."

[34] Above n 21. See also n 29 at para 53.

[35] Above n 32.

[36] Above n 2 and n 33.

Application for leave to appeal to this Court

[28] The applicants seek leave to appeal to this Court on the basis that the High Court decision was correct and that both the first and the second SCA judgments were incorrect.

[29] Applications for leave to appeal to this Court are governed by section 167(6) of the Constitution which provides for appeals from any other court "when it is in the interests of justice and with leave of the Constitutional Court." Rule 19(6)(a) of the rules of this Court provides that "[t]he Court shall decide whether or not to grant the appellant leave to appeal."

[30] It has been held in several decisions of this Court that the decision whether to grant or refuse leave to appeal is a matter for the discretion of the Court,[38] and that it will be granted if the applicant raises a constitutional matter and it is in the interests of justice to grant leave to appeal.

Has a constitutional matter been raised?

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[37] Above n 29 at para 25.

[38] In *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19, this Court said:

"The requirements for an application as the present one for leave to appeal to this Court are now well settled in several decisions of this Court. The application must raise a constitutional matter, in other words an issue which involves the interpretation, protection or enforcement of the Constitution. Further, it must be in the interests of justice to grant leave to appeal. Whether it is in the interests of justice to grant the application involves a careful and balanced weighing-up of all relevant factors. The considerations could be varied and are often case specific but informed by the broad requirement of whether by hearing the case the interests of justice will be advanced." [footnotes omitted.]

[31] The NDPP has argued that no constitutional issue is raised by this matter. This is clearly incorrect. The contention by the applicants raises a constitutional issue of importance which relates to the nature and ambit of the powers of superior courts, in particular the scope of their inherent power. In *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)*[39] this Court held that any issue as to the nature and ambit of the powers of the high court necessarily raises a constitutional issue.[40]

[32] A finding that the application raises a constitutional issue is not however decisive. Leave to appeal may be refused if it is not in the interests of justice that this Court hear the appeal.[41]

Is it in the interests of justice to grant leave to appeal?

[33] The applicants have advanced two reasons as to why they should be granted leave to appeal. Firstly, they contend that their prospects of success in the appeal are good; and secondly, that the nature of the constitutional issues raised by them is substantial. I now consider these two reasons.

[34] The applicants raise two constitutional arguments in this Court: first, they argue that the interpretation of section 26(10) of the Act is inconsistent with the spirit,

[39] 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[40] Id at para 17. See also *S v Basson* 2005 (1) SA 171 (CC) at paras 103 - 111; 2004 (6) BCLR 620 (CC) at paras 103 - 110.

[41] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12, *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25.

purport and objects of the Constitution and is accordingly incorrect;[42] second, they argue that even if that interpretation is correct, the High Court nevertheless had the jurisdiction to rescind the restraint order on the basis of its inherent common law power to regulate its process, as confirmed in section 173 of the Constitution. I will deal with each of these arguments separately.

The proper interpretation of section 26(10)

[35] Both in their heads of argument and before this Court, counsel for the applicants submitted that section 26(10)(a) is capable of two possible constructions, with one being constitutionally compliant and the other not. They contend that the section is capable of a construction that allows the High Court, in the exercise of its inherent power, to set aside a restraint order made under the Act on common law grounds, and indeed this was the interpretation adopted by the High Court. The High Court took the view that it was empowered under common law (without the need to refer to section 173 of the Constitution) to set aside the restraint order on grounds other than those listed in the Act. This is the interpretation favoured by the applicants who contend that it is in line with and does not do violence to the inherent power vested in the high courts by section 173 of the Constitution.

[42] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 72 and 91, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21 - 26, *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35.

[36] The second interpretation is one which holds that the grounds for rescission provided by the Act constitute a closed list and that a high court is not empowered to rescind a restraint order on grounds other than those specified in the Act. This is the interpretation which was adopted by the SCA which, it is contended, is not one that advances the values enshrined in the Bill of Rights.

[37] I do not think that section 26(10) is capable of the construction proffered by the applicants. It is not only about standing;[43] it carefully regulates the substantive circumstances in which rescission of a restraint order made under the Act may be sought. It may be that on the construction adopted by the SCA it is inconsistent with the Constitution, but that case has not been made on the applicants' papers and cannot be decided here. I cannot therefore, in these proceedings, fault the approach of the SCA to section 26(10) of the Act and, given that there is no constitutional challenge to section 26(10), the SCA interpretation must stand.

[38] The constitutional complaints that are made by the applicants in this Court were not made in the SCA. The case in the High Court and in the SCA was neither expressly pleaded nor argued as a constitutional matter. They did not allege that the continued operation of the restraint order violated their constitutional rights or that any restrictions on the court's powers to rescind that order violated those rights. It follows that the NDPP was not afforded an opportunity to deal with the allegation that the continued operation of the restraint order deprived the applicants of their properties, in

[43] See above para 20.

circumstances where such deprivation could not be justified under section 36 of the Constitution.[44]

[39] It is impermissible for a party to rely on a constitutional complaint that was not pleaded. In *Prince v President, Cape Law Society, and Others*,[45] Ngcobo J stated:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."[46] [footnote omitted.]

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[44] Section 36 provides:

> "Limitation of Rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[45] 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[46] Id at para 22.

[40] Accuracy in pleadings in matters where parties place reliance on the Constitution in asserting their rights is of the utmost importance. In *Shaik v Minister of Justice and Constitutional Development and Others*,[47] Ackermann J said:

> "The minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chap 2 right and adduce evidence in support thereof.
>
> It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie."[48] [footnote omitted.]

[41] The constitutionality of the Act has not been attacked. Moreover, the applicants in their heads of argument, and in oral argument conceded that the grant of restraint orders in circumstances contemplated by section 25 of the Act is constitutionally acceptable and, by implication, that there was sufficient reason for the deprivation of property that attached to the granting of the restraint order.

[47] 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

[48] Id at paras 24 - 25.

[42] Their argument in this Court was that they invoked the Constitution as an interpretive tool in respect of section 26(10) of the Act.[49] There was thus no direct challenge to any of the provisions of the Act.

[43] It is not ordinarily permissible to attack statutes collaterally. The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led[50] and that the requirements of the separation of powers are respected.[51]

[44] This is not to say that circumstances could never exist where the interests of justice required that a constitutional matter be raised for the first time on appeal before this Court. They would, however, be rare and the circumstances would have to be exceptional. The present case by no means fulfils these criteria. In any event, the applicants in this case did not seek to launch a direct constitutional challenge to section 26(10).

[45] A further consideration to be taken into account is that the applicants had already applied to and obtained from the SCA an order to the effect that a section 26

[49] They seek to rely on section 25(1) of the Constitution which provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

They contend that the continued operation of the restraint order amounts to arbitrary deprivation of property within the meaning of section 25(1) of the Constitution. They argue that the interpretation placed on section 26(10) of the Act by the SCA leads to a result that violates section 25 of the Constitution.

[50] Above n 47 at paras 23 - 25.

[51] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at footnote 101.

restraint order is final in nature and therefore only appealable. It was only when this no longer suited them that they approached the High Court for an order that the section 26 order was interim in nature and could therefore be varied or rescinded by the court that granted it. It is not in the interests of justice that the type of situation be allowed, whereby a litigant is permitted to pick and choose his remedies as it suits him. An order given by a court on an issue must be considered definitive, unless that ruling is challenged directly. To permit a litigant to behave in this manner would undermine the finality of a court's ruling.

The High Court's inherent jurisdiction to rescind the order

[46] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[47] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, section 171 makes plain that "[a]ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation." On the other hand section 173 of the Constitution preserves the inherent

power of the courts to protect and regulate their own process in the interests of justice. In *S v Pennington and Another*,[52] this Court held that:

> "It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice'[53] which vested in the Appellate Division prior to the passing of the 1996 Constitution.[54] Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power."[55]

[48] In *Parbhoo and Others v Getz NO and Another*[56] too, this Court turned to its "inherent power" to meet an "extraordinary" procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are made that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution.

[49] It may be that the High Court could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory

[52] 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

[53] Per Corbett JA in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.

[54] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E - F.

[55] Above n 52 at para 22.

[56] 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at paras 4 - 5.

procedure such as the one in section 26 of the Act. This can wait for a decision in the future when such a case presents itself.

[50] In the present matter the applicants made no attempt whatsoever to bring their case within the provisions of the Act, which they could have done. The effect of the High Court order rescinding the restraint order was to ignore the statutory provisions of an Act of Parliament.[57]

[51] Whatever the true meaning and ambit of section 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.[58]

[52] I doubt that the inherent jurisdiction of the court under section 173 is such that it empowers a judge of the high court to make orders which negate the unambiguous expression of the legislative will. Moreover, the power that a court has to use its

[57] In *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at paras 23 - 24, Ngcobo J stated:

> "In *NAPTOSA and Others v Minister of Education, Western Cape, and Others* the Cape High Court was concerned with the appropriateness or otherwise of granting relief directly under s 23(1) of the Constitution without a complaint that the Labour Relations Act was constitutionally deficient in the remedy it provides. The High Court held that it could not 'conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes'. In *National Education Health and Allied Workers Union v University of Cape Town and Others*, this Court refrained from expressing any opinion on the correctness of this decision.
> These cases cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned." [footnotes omitted.]

[58] Id.

inherent power is a special and extraordinary power which should be exercised sparingly and only in clear cases. The present case is not such a case.

[53] The applicants argued in this Court that it was essential that the restraint order be rescinded to avoid substantial deterioration in the value of their properties. As the SCA held, however, this is not correct. It is clear that any harm that has occurred has arisen from what the SCA described as a "woeful lack of co-operation" between the applicants and the curator bonis which has prevented the curator bonis from carrying out his tasks. It is clear that the root cause of the difficulties of which the applicants complain lies in the absence of funds to maintain the properties and pay any debts due in respect of the properties. The SCA reasoned that were the curator's powers to be amended in terms of section 28 of the Act[59] to include a power to lease the properties, or at least some of them, sufficient funds could be generated to cover the costs of maintenance.

[54] In this Court, the applicants sought to argue that the problem could not be resolved in the manner suggested by the SCA. In making this argument, they pointed to the terms of the restraint order[60] itself which prohibits any person from "dealing in" the properties subject to the restraint. In my view, although it may be that the restraint order could be read in the wide fashion proposed by the applicants, it is capable of a narrower meaning which would avoid disabling the curator in the manner contended

[59] Above n 21.

[60] Above n 18.

for by the applicants. A narrower meaning of the restraint order is possible. The prohibition on people dealing in the property should be read to refer to selling or encumbering the property. Such a meaning would ensure that the purposes of the Act, which include the need to preserve property subject to a restraint order, are not defeated. If such a meaning is adopted, then the powers of the curator could be amended as suggested by the SCA or in any other suitable manner to ensure that the properties are used in an appropriate manner to guarantee income to cover maintenance and other costs of upkeep of the properties. In the circumstances, the applicants' argument that the powers of the curator bonis could not be amended must fail.

[55] A final comment should be made. Given the limited powers of variation and rescission provided for in section 26(10) of the Act, courts making restraint orders should take care to ensure that their terms are sufficiently flexible to ensure that the preservation of properties subject to restraint orders is not imperilled by the terms of the restraint order. The NDPP, too, in formulating draft orders should bear these considerations in mind.

[56] It is not necessary to consider in what circumstances the High Court has powers under section 173 additional to those provided for in a statute because it is clear that a litigant should not rely on it without first exhausting the remedies under the statute which has not happened in the present case.

[57] However, I would prefer not to decide these issues but to decide the matter on the basis that, even assuming in favour of the applicants that the High Court has such jurisdiction, the applicants have not made out a case on the facts[61] for the relief they seek. In the circumstances the applicants have no prospects of success and the application should be dismissed.

Costs

[58] There is no reason to make any order as to costs.

Order

[59] The application for leave to appeal is dismissed.

Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Skweyiya J.

[61] The applicants sought to have the restraint order rescinded because the effect of it and its implementation has been to reduce the value of the properties to which it relates. The bulk of the evidence relied upon by the applicants relates to a property which is not subject to the restraint order. There is in existence a preservation order in respect of that property (54 Autumn Road). That property falls to be maintained by the curator, Mr Reynolds, who is not a party to these proceedings. (See para 7 above). The impossibility of performance by the curator thus applies substantially in relation to property not covered by the restraint order. See above n 17.

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