

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 66/05

TRENT GORE FRASER

Applicant

versus

ABSA BANK LIMITED

Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Amicus Curiae

Heard on : 23 May 2006

Decided on : 15 December 2006

JUDGMENT

VAN DER WESTHUIZEN J:

[1] The Prevention of Organized Crime Act 121 of 1998 (POCA) was introduced to combat organised crime, money laundering and criminal gang activities, to prohibit racketeering and to provide for a range of related measures.¹ One of its aims is to prevent criminals benefiting from the proceeds of their crimes. Consistent with that objective, Chapter 5 of POCA provides for the restraint,² confiscation³ and realisation⁴ of property.

¹ See the long title of POCA. The relevant provisions of POCA are quoted or referred to in paras 11-16 below.

² Part 3 of chapter 5 of POCA.

³ Part 2 of chapter 5 of POCA.

[2] The National Director of Public Prosecutions (NDPP) may apply on an ex parte⁵ basis for a restraint order against the property of a “defendant”, who would be an accused in criminal proceedings.⁶ The question central to this application is whether a creditor of a defendant may join the proceedings when the defendant applies to a court to provide in a restraint order for reasonable legal expenses connected to his criminal trial. The Durban High Court ruled against intervention by a creditor. The Supreme Court of Appeal interpreted POCA differently and ruled in favour of the intervention. The applicant’s primary contention is that the interpretation adopted by the Supreme Court of Appeal violates his right to a fair trial as protected in sections 35(3)(d), (f) and (h) of the Constitution.

Factual Background

[3] The applicant is Mr Trent Gore Fraser, a businessman who is currently incarcerated without bail as a trial awaiting prisoner. He was arrested on 16 November 2003 and has since been indicted on several counts related to racketeering

⁴ Part 4 of chapter 5 of POCA.

⁵ A provisional restraint order may be granted without notice to a defendant. Note that in the case of *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC); 2003 (5) BCLR 476 (CC) this Court considered whether section 38 of POCA infringed the right of access to courts. Section 38, although dealing with preservation orders, is drafted in very similar terms to section 26 in that it allows the NDPP to apply for an order ex parte. In *Mohamed* the court a quo struck down section 38 on the basis that the section made no provision for a rule nisi calling upon interested parties to show cause why a preservation order should not be made. This Court found that the High Court erred in the order it made in that: (a) it had attempted to remedy, by way of a notional severance formulation, a constitutional invalidity caused by an omission. The Court held that the correct procedure would have been to read-in the rule nisi requirement; and (b) section 38 was not specifically challenged in the court a quo. Rather, the whole of chapter 6 was challenged. This Court therefore found that the High Court erred in attempting to decide the matter on the narrow basis it did rather than deciding the constitutionality of chapter 6. No order was therefore made by this Court as to the constitutionality of the ex parte procedure.

⁶ A “defendant” is defined in section 12, Part 1 of Chapter 5 of POCA 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)”.

and money laundering in terms of POCA.⁷ He also faces seven charges under the Drugs and Drug Trafficking Act 140 of 1992. Under the sentencing provisions of POCA⁸ the applicant is potentially liable to a fine not exceeding R1 000 million, or to imprisonment for life.

[4] The applicant is the owner of the entire membership interest in a close corporation called Portion 3 Lavianto CC (the CC). The history of the CC is somewhat dubious: In 2001 the applicant inherited in excess of R1.8 million from a family trust and used the money to acquire immovable residential property in Johannesburg. In 2002 he registered the CC and arranged that it acquire the immovable property. The applicant then arranged for his erstwhile fiancée, Ms Lisa Nicole Zeeman, to hold the membership interest in the CC on his behalf. The record suggests that Mr Fraser devised this scheme so that the property would not fall into the hands of his creditors. In July 2004 the applicant sought an order in the Johannesburg High Court directing Ms Zeeman to transfer – amongst other things – the membership interest in the CC to him on the basis that the original transfer of the membership interest to her was a simulated transaction. Ms Zeeman eventually consented to the order and her membership interest in the CC was transferred to the applicant.

[5] On 26 November 2004 in the High Court, the NDPP obtained a provisional restraint order on the applicant's interest in the CC and the immovable property as

⁷ Sections 2 and 4 of POCA.

⁸ Section 3(1) of POCA.

well as the other movable property in terms of section 26 of POCA.⁹ In terms of the order the applicant's property was placed in the hands of a curator bonis. The provisional restraint order was returnable on 27 January 2005.

[6] On 3 December 2004 the applicant lodged an application for legal expenses in the High Court in terms of section 26(6) of POCA. The applicant sought an order directing the curator to sell the property and pay the proceeds to his attorneys for expenses relating to his criminal trial.

[7] The respondent in this application is ABSA Bank Limited (ABSA), a creditor of the applicant. It had obtained a default judgment in the Cape High Court against the applicant as surety for a debt of R673 281.09 in July 2000. That amount with accumulated interest had grown to R1 028 214.25 by 11 December 2004. The debt is not secured and as a concurrent creditor ABSA enjoys no preference under the Insolvency Act 24 of 1936, or any other law, and has no claim against the CC or its assets. ABSA cannot execute against the applicant's membership interest in the CC by reason of the restraint order.¹⁰

[8] On 20 December 2004 ABSA lodged an application to intervene in the High Court in order to oppose Mr Fraser's application for legal expenses. ABSA's application was based upon the default judgment in its favour. ABSA argued that if Mr Fraser were permitted to deplete the proceeds of the restrained property to pay

⁹ The text of section 26 is quoted in para 11 below.

¹⁰ Section 28 of POCA.

legal expenses, it would be unable to recover its judgment debt – which ABSA would ordinarily have been able to do, absent the restraint order, by writ of execution.

[9] Mr Fraser opposed ABSA's application to intervene. The NDPP opposed Mr Fraser's application for legal expenses. In order to understand the rulings of the High Court and the Supreme Court of Appeal thereafter, it is necessary to look at the structure and some of the contents of POCA.

The structure and contents of POCA

[10] According to its preamble, the purpose of POCA is to combat the rapid growth of organised crime, money laundering and criminal gang activities and to ensure that persons who take part in those activities do not benefit from the proceeds of their crimes. Chapter 2 of POCA outlines offences relating to racketeering activities and sets forth penalties for persons convicted of those crimes.¹¹ Chapter 3 describes the offences relating to the proceeds of unlawful activities and the penalties associated therewith¹² and Chapter 4 deals with the offences and penalties associated with criminal gang activities.¹³

[11] Chapter 5 of POCA, the subject of this application, contains a mechanism for the confiscation by the state of proceeds derived from criminal activity. Part 1 of Chapter 5 deals with the application of the chapter and includes definitions of key

¹¹ See sections 2 and 3. Chapter 1 deals with definitions and interpretation.

¹² Sections 4-8.

¹³ Sections 9-11.

concepts.¹⁴ Part 2 of Chapter 5 provides for a confiscation order against a defendant, who has been convicted of an offence, when the convicting court suspects that the defendant has derived some benefit from criminal or criminal-related activity.¹⁵ Part 3 deals with restraint orders in relation to property which might later be confiscated.¹⁶ Sections 25 and 26 authorise the High Court to issue an order prohibiting a person who has, or will be, charged with an offence¹⁷ from dealing in any manner with any property to which the order relates. Section 26 states as follows:

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

....

(6) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit—

¹⁴ Sections 12-17. Section 13 states that the proceedings are civil, not criminal. Section 17 states that proceedings in terms of the chapter are concluded when—

- “(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.”

¹⁵ Sections 18-24. Section 18(1) states:

“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 that 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.”

¹⁶ Sections 24A-29A.

¹⁷ See subsections 25(1)(a) and (b).

- (a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and
 - (b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,
- if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.

....

- (10) 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; and
 - (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.”

[12] The effect of a restraint order is to place the defendant’s property beyond his or her control and into the hands of a curator bonis pending the outcome of the criminal proceedings.¹⁸ All property held by the defendant may be subject to restraint, in addition to property transferred to him or her after the restraint order is imposed.

[13] Section 26(6) gives a discretion to the High Court which issues a restraint order to make provision for the reasonable living and legal expenses of the defendant, who (as stated earlier) is also an accused. This case is concerned with that discretion. The

¹⁸ Section 28.

court must be satisfied that the defendant has disclosed all of his or her interests in property subject to the restraint order and that he or she cannot meet the expenses out of property which has not been restrained.

[14] Part 4 of Chapter 5 is concerned with the realisation of property for the purposes of satisfying the confiscation order.¹⁹ Section 30(2) authorises the High Court to direct the curator to realise and confiscate the defendant's property. Sections 30(3) and (4) ensure that those who have an interest in the realisable property, who are likely to be affected by the confiscation order, and who have suffered injury as a result of the defendant's criminal activity are provided an opportunity to make representations in connection with the realisation of the property.²⁰ Where the court finds that persons have been affected by the defendant's criminal activity, section 30(5) authorises suspension of the realisation of property so that any judgment obtained, consequent upon certain claims associated with it, can be satisfied.²¹

¹⁹ Sections 30-36.

²⁰ Section 30(3) states:

“A High Court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.”

Section 30(4) states:

“If the court referred to in subsection (2) is satisfied that a person—

- (a) is likely to be directly affected by the confiscation order; or
- (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 18(1) which was committed by the defendant,

the court may allow that person to make representations in connection with the realisation of that property.”

²¹ Section 30(5) states:

“If the court is satisfied that a person who has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 18(1) which was committed by the defendant—

- (a) has instituted civil proceedings, or intends to institute such proceedings within a reasonable time; or
- (b) has obtained a judgment against the defendant,

[15] Section 31 provides that sums of money in the hands of the curator, save for such payments that the High Court has directed, should be applied in satisfaction of the confiscation order.²² Section 33(1) contains a general guideline that powers conferred upon the High Court, or upon the curator, should be exercised with a view to making the value of realisable property available for satisfaction of the confiscation order. This section also provides that any “obligation” of the defendant – except as provided for in sections 20(1) and 26(6) of the Act – “which conflicts with the obligation to satisfy a confiscation order shall be left out of account.”²³

in respect of that damage, loss or injury, the court may order that the curator bonis suspend the realisation of the whole or part of the realisable property concerned for the period that the court deems fit in order to satisfy such a claim or judgment and related legal expenses and may make such ancillary orders as it deems expedient.”

²² Section 31(1) states:

“Application of certain sums of money.–(1) The following sums of money in the hands of a curator bonis appointed under this Chapter, namely–

(a) the proceeds of any realisable property realised by virtue of section 30; and
 (b) any other sums of money, being property of the defendant concerned,
 shall, after such payment as the High Court may direct have been made out of such sums of money, be applied on that defendant’s behalf in satisfaction of the confiscation order made against him or her: Provided that where the High Court may direct payment out of such sums of money, the State shall not have a preferential claim: Provided further that, if sums of money remain in the hands of the curator bonis after the amount payable under such confiscation order has been fully paid, the curator bonis shall distribute those sums of money–

(i) among such persons who held realisable property which has been realised by virtue of section 30; and

(ii) in such proportions,

as that court may, after affording such persons an opportunity to make representations to it in connection with the distribution of those sums of money, direct.”

Section 31(2) states:

“Without limiting the generality of subsection (1) such payment as the High Court may direct shall, for the purposes of that subsection, include any payment in respect of an obligation which was found to have priority in terms of section 20.”

Section 32(2) deals with the functions of the curator, and states:

“Save as is otherwise provided in this Chapter, the provisions of the Administration of Estates Act, 1965 (Act No 66 of 1965), shall with the necessary changes apply in respect of a curator bonis appointed under this Chapter.”

²³ Section 33(1) states:

“Exercise of powers by High Court and curator bonis.–(1) The powers conferred upon a High Court by sections 26 to 31, or upon a curator bonis appointed under this Chapter, shall–

[16] The remainder of Chapter 5 addresses the variation of confiscation orders,²⁴ the effect of sequestration of estates on realisable property²⁵ and the effect of winding-up of companies or other juristic persons on realisable property.²⁶ Chapter 6 provides for the civil forfeiture of the proceeds of crimes and the instrumentalities used in the commission of crime. Unlike Chapter 5, however, Chapter 6 is not conviction-based and may be invoked even when there is no criminal prosecution.

[17] It might be observed that the provisions relating to the realisation of property and related issues are complex and not always easy to understand.

The High Court

[18] As stated earlier, ABSA lodged an application in the High Court to intervene and oppose Mr Fraser's section 26(6) application for legal expenses. On 8 April 2005 the High Court confirmed the rule nisi, dismissed ABSA's application to intervene and granted the application for legal expenses. Olsen J held that the effect of a

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- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realisable property for satisfying any confiscation order made or which might be made against the defendant;
 - (b) in the case of realisable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realising not more than the current value of such gift;
 - (c) be exercised with a view to allowing any person other than that defendant or the recipient of such gift to retain or recover the current value of any property held by him or her,
- and, except as provided in sections 20(1) and 26(6), any obligation of that defendant or the recipient of such gift which conflicts with the obligation to satisfy a confiscation order shall be left out of account."

²⁴ Section 34.

²⁵ Section 35.

²⁶ Section 36.

restraint order was to protect defendants against the claims of creditors and to provide defendants the right to have first call upon their property in order to meet legal expenses. This conclusion was based upon the High Court's construction of section 33(1) of POCA. The Court found that claims of concurrent creditors, such as ABSA, were "obligations" of the applicant that "conflict with the obligation to satisfy a confiscation order" within the meaning of section 33(1). The High Court thus concluded that such claims must be left out of account. It interpreted section 33(1) in the light of the primary objective of confiscation orders, namely to deprive a convicted person of ill-gotten gains, and stated that the aim was not to enrich the state. It observed that the forthcoming criminal trial was anticipated to be arduous and long, and emphasised the need for reasonable legal expenses to be provided for as a fair trial requirement.

[19] The High Court stated that an order regarding legal expenses does not amount to allowing a convicted person to retain ill-gotten gains. A fair criminal trial is required by the Bill of Rights and is not only advantageous to the accused, but also to the state. The High Court thus held that concurrent creditors have no standing to intervene in section 26(6) proceedings.

[20] The High Court granted ABSA leave to appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal

[21] The Supreme Court of Appeal, in a judgment by Mlambo JA (with whom Mpati DP, Cameron JA, Nugent JA, and Nkabinde AJA agreed), upheld the appeal against the dismissal of ABSA's application to intervene. It also upheld ABSA's appeal against the order providing for Mr Fraser's reasonable legal expenses in terms of section 26(6).

[22] The Supreme Court of Appeal found that the construction given to section 33(1) by the High Court would have the result of elevating the applicant's legal expenses and his obligation to satisfy a confiscation order to a status similar to his secured and preferent obligations, while downgrading his concurrent obligations below those. That effect would be at odds with the concurrent creditor's common-law entitlement to execution against a debtor's property. The Court found that the legislature could not have intended that a concurrent creditor, who had pursued a claim and obtained a judgment prior to the issuance of a restraint order, would be prevented from satisfying that judgment simply because the debtor's assets had been restrained.

[23] In interpreting section 26 of POCA, the Supreme Court of Appeal mentioned that the section was silent regarding the rights of concurrent creditors and other third parties. The Court relied primarily on sections 30(5) and 31(1) of POCA in holding that ABSA could intervene in section 26(6) proceedings in order to oppose Mr Fraser's request for legal expenses. The Supreme Court of Appeal reasoned that section 30(5) provides a mechanism for the claims of concurrent creditors to be taken

into account, because the section authorises the High Court to delay the realisation of a defendant's restrained property so as to enable victims of the defendant's crime to obtain and satisfy a judgment against such property. Once the defendant's property has been realised, section 31(1) authorises the High Court to direct that "payment" be made from the proceeds before the satisfaction of a confiscation order. According to the Supreme Court of Appeal, section 31(1) is the key to the resolution of the issue at stake here. It found that the term "payment" as contemplated in section 33(1) includes payment in discharge of a defendant's concurrent obligations.

[24] The Supreme Court of Appeal dismissed the applicant's contention that a construction of POCA denying him access to legal expenses would violate his right to a fair trial under the provisions of section 35(3) of the Constitution. The Court reasoned that he had a constitutional right to legal representation at the state's expense in terms of section 35(3)(g) of the Constitution if substantial injustice would otherwise result.

[25] The Supreme Court of Appeal concluded that ABSA's concurrent claim did not fall to be "left out of account" in terms of section 33(1) (as found by the High Court), that ABSA could intervene to oppose the applicant's section 26(6) application for legal expenses and that the applicant could not utilise his restrained property for purposes of legal representation because those assets should be made available in discharge of his concurrent obligations. According to the Supreme Court of Appeal,

the High Court's decision would have the consequence of allowing Mr Fraser to profit from his illegal actions and to frustrate ABSA's claim.

[26] Based on this reasoning, the Supreme Court of Appeal concluded that ABSA had to be permitted to intervene in the section 26(6) proceedings and furthermore that ABSA's appeal against the provision for Mr Fraser's legal expenses had to be upheld, with the consequence that ABSA's claim be secured.

[27] Mr Fraser applied for leave to appeal to this Court against the judgment and order of the Supreme Court of Appeal.

Submissions by the applicant and the respondent

[28] The applicant contends that the interpretation of POCA adopted by the Supreme Court of Appeal violates his right to a fair trial protected by sections 35(3)(d), (f) and (h)²⁷ as well as his right not to be arbitrarily deprived of his property in terms of section 25(1)²⁸ of the Constitution. He also submitted for the first time in oral argument that this case relates to the nature and ambit of the Supreme Court of

²⁷ Sections 35(3)(d), (f), (g) and (h) of the Constitution state:

“Every accused person has a right to a fair trial, which includes the right–

- ...
 - (d) to have their trial begin and conclude without reasonable delay;
 - ...
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings”.

²⁸ Section 25(1) of the Constitution states:

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

Appeal's powers as a court, because the Court incorrectly interpreted POCA and permitted ABSA to intervene.

[29] As far as the interpretation of POCA is concerned, the applicant argues that an obligation to pay a concurrent creditor is an obligation that “conflicts with the obligation to satisfy a confiscation order” within the meaning of section 33(1) of POCA, and therefore must be excluded from account. Under this interpretation, ABSA's judgment debt cannot be considered by the High Court during section 26(6) proceedings for legal expenses. He also suggests that the Supreme Court of Appeal's interpretation of section 33(1) – that an obligation to pay a concurrent creditor is *not* an obligation that conflicts with the obligation to satisfy a confiscation order – strips the provision of all meaning, because it allows the claims of all creditors to be taken into account. This, he argues, would have the untenable result of providing standing to all creditors whenever a defendant initiates section 26(6) proceedings for living and/or legal expenses.

[30] ABSA opposes the application for leave to appeal on two grounds, namely that no constitutional matter of substance has been raised and that it would not be in the interests of justice to grant leave to appeal because there are no prospects of success. They emphasise that the applicant has not challenged the constitutionality of any of the specific provisions of POCA, or of the restraint order itself. ABSA stresses that it would have satisfied its judgment debt against the applicant long ago, had he not concealed his assets.

[31] ABSA adopts both the reasoning and the interpretation of POCA espoused by the Supreme Court of Appeal. In addition, ABSA offers an alternative statutory construction not addressed by the Supreme Court of Appeal: Section 20(1) of POCA – which sets out one exception to section 31(1)’s general rule that “conflicting obligations” of the defendant be left out of account – must be read with, and is subject to, section 20(5).²⁹ Section 20(5) directs the High Court to take into account “all persons holding any interest in the property concerned” when determining the amount to be realised at the time of making the confiscation order. Under this reading of POCA, ABSA argues, the claims of concurrent creditors are protected and it was therefore appropriate for the Supreme Court of Appeal to consider ABSA’s judgment debt in denying the applicant’s section 26(6) application for legal expenses.

Submissions by the NDPP as amicus curiae

[32] The NDPP applied to be admitted to these proceedings as amicus curiae, as it administers and applies POCA and prosecutes accused persons. The application was granted.

[33] The NDPP’s main concern is not whether creditors who apply to intervene in section 26(6) applications should be allowed to do so. The NDPP contends that the Supreme Court of Appeal’s judgment does not provide adequate guidelines

²⁹ Section 20(5) states:

“A court shall not determine the amounts which might be realised as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.”

concerning two issues. First, the Court did not outline the circumstances in which concurrent creditors can intervene in section 26(6) proceedings in order to oppose a defendant's request for living and/or legal expenses. If every creditor is entitled to join such proceedings, the NDPP urges, section 26(6) applications (and even criminal proceedings) will be delayed, unless specific guidelines are provided. The NDPP maintains that ABSA was entitled to intervene in this case, but proposes that creditors should ordinarily be entitled to intervene only when restrained property is being dissipated for the benefit of the accused and to the detriment of the creditor.

[34] Second, the NDPP complains that the Supreme Court of Appeal did not specify which party bears the burden of notifying creditors as to the initiation of section 26(6) proceedings. The NDPP submits that it could not be expected to bear the burden. According to the NDPP, the defendant is in a better position to demonstrate that the estate will not be depleted and is required in any case to fully disclose his or her liabilities.

Is there a constitutional matter to be decided?

[35] The threshold enquiry in an application for leave to appeal relates to jurisdiction. This Court's jurisdiction is governed by section 167(3) of the Constitution.³⁰ Section 167(3)(b) limits its jurisdiction to constitutional matters, and

³⁰ Section 167(3) of the Constitution provides:

“The Constitutional Court—

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.”

issues connected with decisions on constitutional matters. In matters other than constitutional matters the Supreme Court of Appeal is the highest court in our land.³¹

[36] To attempt to define the limits of the term “constitutional matter” rigidly is neither necessary nor desirable.³² Philosophically and conceptually it is difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy. All law is after all subject to the Constitution and law inconsistent with the Constitution is invalid.³³ Nevertheless the jurisdiction of this Court is expressly restricted to only those matters outlined in section 167(3)(b).

[37] In a system of constitutional supremacy it is inappropriate to construe the term “constitutional matter” narrowly. In *Pharmaceutical Manufacturers Association* this Court held that “[t]he exercise of all public power must comply with the Constitution,

³¹ Section 168(3) of the Constitution provides:

“The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters . . .”.

³² *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14.

³³ Section 2 of the Constitution provides:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

Supreme Court of Appeal Judge, Carole Lewis, addressed the question of when a matter has a constitutional dimension in Lewis “Reaching the pinnacle: principles, policies and people for a single apex court in South Africa” (2005) 21 *SA Journal on Human Rights* 509 at 519:

“The truth is that in a unitary system – in which the principles of law as well as its application must be constitutionally coherent – there is no such distinction. What should distinguish cases from one another is only their relative importance for the development of the law – which itself constitutes good grounds for limiting appeals in some cases and not in others.

. . . the Constitution and its values do permeate every aspect of the law, and . . . the distinction between constitutional and other matters is often incoherent. It exposes the illusory quality of the supposed divide, and I suggest that it is futile to persist in the charade of divining what is constitutional and what is not.”

which is the supreme law, and the doctrine of legality, which is part of that law.”³⁴ In

Boesak the Court recognised:

“If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.” (footnotes omitted)³⁵

[38] This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state;³⁶ (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights;³⁷ (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport

³⁴ *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20.

³⁵ Above n 32 at para 14.

³⁶ See for example *Boesak* above n 32, with reference to sections 167(4)(a) and 172(1)(a) of the Constitution.

³⁷ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC); *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2002 (10) BCLR 1100 (CC); *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 9.

and objects of the Bill of Rights (or the failure to do so);³⁸ (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities;³⁹ or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.⁴⁰

[39] While the conception of a constitutional matter is broad, the term is of course not completely open. The fact that section 167(3)(b) of the Constitution limits this Court's jurisdiction to constitutional matters presupposes that a meaningful line must be drawn between constitutional and non-constitutional matters and it is the responsibility of this Court to do so. The decisions of the Court have recognised the distinction.⁴¹

³⁸ See for example *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 23; *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at paras 40, 109, 113 and 114; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 16.

³⁹ See for example *National Education Health and Allied Workers Union* id; *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); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25; *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 20.

⁴⁰ See for example *President, Republic of South Africa, and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Pharmaceutical Manufacturers Association* above n 34.

⁴¹ See for example *Boesak* above n 32; *S v Basson* 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 91; *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC); *Phoebus Appollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC). Also see *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 22;. In *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 4 it was stated:

“The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that s 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.”

[40] A contention that a lower court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question.⁴² An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgement by this Court that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.

[41] The applicant has not challenged the constitutional validity of any of the provisions of POCA itself, or of the restraint order. Rather, he claims that the Supreme Court of Appeal's interpretation of POCA is constitutionally problematic. It is not necessary to deal with all of the applicant's submissions, which were summarised in paragraphs 28 and 29 above.

[42] Whether this case raises a constitutional matter depends on the nature of the issue before this Court. We are concerned with an interpretation of section 26(6) of

⁴² See *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 51; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 20; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 44.

POCA. That section confers a discretion upon the court to allow the payment of reasonable legal expenses for a criminal trial and related matters out of restrained property. This Court must decide the nature of this discretion. The way in which the discretion is exercised will determine how much of the restrained property is available for legal fees in the criminal trial and could have an effect on how speedily the trial is conducted.

[43] When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution.⁴³ This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation.⁴⁴

[44] As to an accused person's right to a fair criminal trial, the applicant invokes section 35(3)(d), which prohibits an unreasonable delay in trial proceedings, section 35(3)(f) concerning the right to legal representation and section 35(3)(h), which

⁴³ Section 39(2) of the Constitution states:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

⁴⁴ In *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 para 21 it was stated that “[Section 39(2)] means that all statutes must be interpreted through the prism of the Bill of Rights”. In *First National Bank of South Africa Ltd t/a Wesbank* above n 38 at para 31 the following was said:

“[E]ven fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.

. . . In the *Carmichele* case this Court held that the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation – including fiscal legislation – to promote those objectives.” (footnotes omitted)

guarantees the right to be presumed innocent.⁴⁵ The applicant's submissions regarding this last-mentioned aspect appears to be an attack on the legislation as such, rather than on the Supreme Court of Appeal's interpretation, and does not have to be dealt with. The first two aspects are relevant though.

[45] It is clear that the right to have a criminal trial begin and conclude without unreasonable delay and the right to legal representation, as aspects of the right to a fair trial, may not be ignored in the interpretation of section 26(6) of POCA. Section 26(6) indeed recognises the right to legal representation in so far as it allows for a restraint order to provide for reasonable legal expenses. The NDPP furthermore pointed out that the joining of creditors could under certain circumstances cause delay in the section 26, as well as the criminal, proceedings. The interpretation of section 26(6) could well have consequences for an accused person's right to a criminal trial free of unreasonable delays.

[46] The interpretation of POCA by the Supreme Court of Appeal is therefore attacked on the basis that it is not in accordance with the Constitution. There is an alternative interpretation before this Court, namely that of the High Court. POCA plays a legitimate and important role in combating crime. It could however also have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in the Constitution. Moreover, it is

⁴⁵ The relevant parts of section 35(3) of the Constitution are quoted above at n 27.

relatively new on the statute book and there is not an abundance of jurisprudence to enlighten and guide its interpretation and application.

[47] The question raised by this application is whether the Supreme Court of Appeal’s interpretation of section 26 has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2). This differs from an attack on an allegedly wrong factual finding or incorrect interpretation or application of the law, as in the cases referred to earlier. Section 39(2) requires more from a court than to avoid an interpretation which conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in section 35(3), which is fundamental to any system of criminal justice, and of which the rights to legal representation and against unreasonable delays are components. The spirit, purport and objects of the protection of the right to a fair trial therefore have to be considered. A constitutional matter has thus been raised, and this Court accordingly has jurisdiction to hear the matter.

Interests of justice and prospects of success

[48] Section 167(6) of the Constitution provides for appeals from another court “when it is in the interests of justice and with leave of the Constitutional Court”.⁴⁶

⁴⁶ The whole of section 167(6) reads:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
(a) to bring a matter directly to the Constitutional Court; or

This Court determines whether it is in the interests of justice to grant leave to appeal through a careful and balanced weighing up of a number of factors.⁴⁷

[49] The considerable importance of the constitutional matter raised in this application is highly relevant for the interests of justice enquiry.⁴⁸ So is its complexity.

[50] The prospects of success are important in determining whether to grant leave to appeal.⁴⁹ As the rest of this judgment shows, it cannot be said that there are no prospects of success.

[51] Leave to appeal therefore has to be granted.

Merits of the appeal

(b) to appeal directly to the Constitutional Court from any other court.”

See *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 17-18; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 29-30; *Radio Pretoria* above n 39 at para 19; *Khumalo* above n 37 at paras 6-8; *S v Bierman* 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC) at paras 7-9; *S v Boesak* above n 32 at paras 10-12; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

⁴⁷ See *Radio Pretoria* above n 39 at para 19; *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 17-20; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

⁴⁸ *Member of the Executive Council for Development Planning* id; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3. See also *Khumalo* above n 37 at para 14; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-16; *National Education Health and Allied Workers* above n 38 at para 28; *Ingledeu* above n 39.

⁴⁹ See for example *Fraser* above n 46; *Brummer* above n 46; *Boesak* above n 32 at para 12; *Ingledeu* above n 39 at para 31; *De Reuck* id at para 3; *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 16; *Bierman* above n 46 at para 9.

[52] As indicated earlier, the Supreme Court of Appeal upheld ABSA's appeal against the High Court's dismissal of ABSA's application to intervene in Mr Fraser's section 26(6) application for reasonable legal expenses. It granted ABSA leave to intervene. It furthermore upheld ABSA's appeal against the High Court order providing for Mr Fraser's legal expenses. It consequently ordered that "no moneys for payment of [his] legal expenses shall be advanced in excess of an amount that results in the moneys being retained by the curator falling below the sum of R1 028 214", being the amount owed to ABSA by December 2004. The Supreme Court of Appeal thus 'ring-fenced' ABSA's claim from the applicant's competing demand for legal expenses.

[53] The first question is whether a concurrent creditor of a defendant has standing to intervene, or whether a court has a discretion to allow it to intervene, in an application by a defendant in terms of section 26(6) to provide in a restraint order for reasonable legal expenses. If the interpretation of the wording of POCA, within the context of the Bill of Rights, results in a conclusion that a court has a discretion to permit intervention, the next enquiry would be into the nature and extent of the discretion conferred by section 26(6). Thereafter, the exercise of the discretion in the case before us requires attention.

May a creditor intervene?

[54] As outlined above in paragraphs 21 to 24, the main reason for the Supreme Court of Appeal's overturning of the decision of the High Court, is the interpretation

of sections 26(6), 30(5), 31(1) and 33(1) of Chapter 5 of POCA.⁵⁰ The wording of POCA may be open to more than one interpretation. The interpretation of the provisions gave rise to difficulties in both the High Court and the Supreme Court of Appeal, particularly in the light of the Bill of Rights. Indeed the provisions are not easy to harmonise as will appear from the discussion below. The Supreme Court of Appeal also referred to the purpose and contextual scheme of the provisions of POCA relating to confiscation orders and pointed out the undesirable consequences of the High Court's interpretation.

[55] A defendant who applies to the High Court in terms of section 26(6) to make provision for reasonable living and/or legal expenses must satisfy the Court that he or she has disclosed under oath all his or her interests in property subject to the restraint order and that he or she cannot meet the expenses for which an allowance is sought out of the unrestrained property. If the court is satisfied in this regard, section 26(6) gives a court a discretion: it may "make such provision as the High Court may think fit" for the reasonable living and/or legal expenses.

[56] The Supreme Court of Appeal is correct in its criticism of the High Court's construction of section 33(1) and in concluding that a claim such as ABSA's does not fall to be "left out of account". An obligation to satisfy a judgment debt is a relevant consideration to be taken into account in the exercise of the section 26(6) discretion and section 33(1) is no warrant for the contrary proposition. Section 33(1) comes into

⁵⁰ See sections 26(6), 30(3), 31(1) and 33(1) of POCA above in para 11 and n 20-23.

consideration primarily when property is being realised. Section 30(5) supports a conclusion that concurrent debts are not irrelevant to what constitutes realisable property, and therefore section 26(6) should not be interpreted as impeding the exercise of the discretion by a court.

[57] However, the relevant provisions of POCA cannot mean that all concurrent creditors must under all circumstances be allowed to intervene. Nor even if permitted to intervene, may they automatically be treated as if they were preferential creditors, in a manner that prevents a defendant from using his or her funds for reasonable legal expenses in the criminal trial or in forfeiture proceedings in terms of POCA.

[58] The NDPP has illustrated in its submissions the circumstances under which, and the reasons why, a creditor would wish to intervene. The purpose of a creditor's intervention would probably be to influence the court in the exercise of its discretion, for example to persuade it not to make an allowance for the defendant's legal expenses, or to limit the allowance to preserve as much of the defendant's estate as possible for the creditor's ultimate benefit. There are a variety of circumstances in which a creditor may participate in the distribution of a defendant's estate subject to a restraint order. They include the following:

- (a) The purpose of a restraint order is to preserve the defendant's assets pending the ultimate determination of the NDPP's application for a confiscation order in terms of section 18 of POCA. The court may ultimately not make a

confiscation order, because the defendant is acquitted, because the NDPP does not meet the requirements of a confiscation order, or because the court decides in the exercise of its discretion not to make one. The restraint order must then be rescinded in terms of section 26(10)(b),⁵¹ read with section 17.⁵² The defendant's assets would be returned to him or her, and are again available to creditors for execution of their claims. The section 26(6) discretion may not be exercised on the basis that a confiscation order will inevitably be made.

- (b) If a prosecutor applies for a confiscation order in terms of section 18(1)⁵³ of POCA and discharges the requirements for such an order, the court still retains a discretion. It “may” make a confiscation order for “any amount it considers appropriate”. It may in other words decline to make a confiscation order at all, or make one for an amount less than the value of the defendant's assets subject to restraint. In either event, the effect is that all or some of the defendant's assets are returned to him or her and again become available to creditors for the execution of their claims. The court may even in a worthy case deliberately make a confiscation order in a reduced amount to ensure that the claim of a worthy creditor is not defeated.
- (c) The value of the defendant's property may in any event be more than the amount required to satisfy the confiscation order against him or her. In terms

⁵¹ See section 26(10)(b) in para 11 above.

⁵² See section 17 above n 14.

⁵³ See section 18(1) above n 15.

of section 31(1) the excess is then restored to the defendant and again becomes available to creditors for execution of their claims.

- (d) When a confiscation order is made, the defendant's assets under restraint are realised in terms of section 30 and the proceeds are distributed in terms of section 31. The first charge on the proceeds is "such payment as the High Court may direct".⁵⁴ The payment must be made from the proceeds even before the confiscation order is paid. The section does not restrict the High Court in the exercise of its power. Section 31(2) makes it clear that it is not restricted to the payment of claims which enjoy priority in terms of section 20(4). The High Court may accordingly, in an appropriate case, direct that a worthy creditor's claim be paid before the proceeds are used to satisfy the confiscation order.

[59] These possibilities should be taken into account when construing section 33(1)(a). It provides that, subject to certain exceptions, the High Court must exercise its powers in terms of sections 26 to 31 "with a view to making available the current value of realisable property for satisfying any confiscation order" and says that any obligation of the defendant which conflicts with the obligation to satisfy a confiscation order must be left out of account.

⁵⁴ Section 31(2) above n 22.

[60] In the first, second and third scenarios, the defendant's assets under restraint become available to his or her creditors for execution of their claims, either because no confiscation order is made, or because there is a balance of assets under restraint after the confiscation order has been fully paid. When a court is exercising its section 26(6) discretion, it will be a matter of conjecture,⁵⁵ therefore, whether a confiscation order will be made and accordingly which of the defendant's obligations would be inconsistent with the obligation to satisfy any confiscation order in the future.

[61] Section 33(1)(a) should not be applied in a rigid manner as the High Court did in this case. It could not have been intended and must not be understood to limit the section 26(6) discretion. Its purpose is merely to lay down a principle to guide the High Court in the exercise of its powers. The section does not controvert the express provision in section 31(1), read with section 31(2), which empowers the High Court to direct that payments be made from the proceeds of the defendant's estate under restraint before any of it is used to pay the confiscation order.

[62] When a defendant's estate is under a restraint order and thus beyond the reach of creditors, it remains in their interest that as much of the estate as possible be preserved, because part or all of it might still become available to them for the satisfaction of their claims. If the defendant is paid a living and/or legal expense allowance from his or her estate while it is under restraint, the effect is to dissipate the

⁵⁵ A confiscation order may be made only after conviction (section 18 of POCA) and may be satisfied only after the property has been realised in terms of section 30(1). A section 26(6) application for reasonable legal expenses will ordinarily be made before conviction.

estate and so reduce or even destroy creditors' prospects of recovery. It is accordingly usually in their interest to oppose any application in terms of section 26(6) to persuade the court not to allow the defendant to draw a legal expense allowance.

[63] It is therefore clear that on the wording of POCA the High Court has a discretion to allow a creditor to intervene. This interpretation is not at odds with the obligation to promote the spirit, purport and objects of the Bill of Rights.

[64] The applicant argued that this interpretation of the section would be in conflict with his right to a trial without unreasonable delay. The right of an accused person to have their trial begin and conclude without unreasonable delay is of great importance as an aspect of the fundamental right to a fair trial.⁵⁶ Not only can the violation of this right result in a trial being unfair, but section 35(3)(d) of the Constitution also states a value, which should guide the administration of criminal justice. The interests of complainants, accused persons and the public require that criminal trials be concluded as speedily as reasonably possible.

[65] However, it is an unfortunate fact that the wheels of justice often turn slowly and that delays occur in criminal trials. This reality is recognised in section 35(3)(d) and in the jurisprudence of this Court. The right of an accused person is one against "unreasonable delay". In *Sanderson* the Court held that the amount of time that has

⁵⁶ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at paras 22-24 and 37; *S v Dzukuda* above n 42 at paras 9 and 52; *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC) at paras 4-7 and 11; *Mills v The Queen* (1986) 21 CRR 76 at 143 as quoted with approval in *Sanderson* at para 23. See also section 342A of the Criminal Procedure Act 51 of 1977, inserted by Act 86 of 1996 and Act 55 of 2003.

lapsed is central to the enquiry whether there has been an unreasonable delay in criminal proceedings.⁵⁷ The most important factors bearing on that question are the nature of the prejudice suffered by the accused, the nature of the case, and whether the delay is systemic.⁵⁸ The role of the accused in causing the delay is also relevant. Kriegler J stated:

“[I]f an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under s 25(3)(a) [of the interim Constitution]. The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal.”⁵⁹

[66] Whether the intervention of a creditor could result in a situation where a criminal trial is unreasonably delayed is therefore an important factor to be considered by a court when exercising its discretion.

[67] The applicant also argued that the interpretation of section 26(6) would conflict with his right to legal representation in his criminal trial. Section 35(3)(f) of the Constitution guarantees the right “to choose, and be represented by, a legal practitioner”. For obvious reasons the right to legal representation is an important aspect of the right to a fair trial.⁶⁰

⁵⁷ *Sanderson* id at para 28. In *Sanderson* the Court was concerned with section 25(3)(a) of the interim Constitution.

⁵⁸ Id at paras 31-35.

⁵⁹ Id at para 33.

⁶⁰ See for example *S v Rudman and Another*; *S v Mthwana* 1992 (1) SACR 70 (A); *S v Du Toit and Others* (2) 2005 (2) SACR 411 (T) at 426A-D; *S v Lusu* 2005 (2) SACR 538 (E) at paras 11-15; *S v Manuel* 2001 (4) SA 1351 (W) at paras 6-7; *S v Manguanyana* 1996 (2) SACR 283 (E) at 287D-E; *S v Melani and Others* 1996 (1) SACR 335 (E) at 348I-349B; *S v Oakers* 1990 (1) SACR 147 (C); *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 193G; *S v Khanyile and Another* 1988 (3) SA 795 (N); *Gideon v Wainwright* 372 US 335, 344 (1963).

[68] Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation.⁶¹ Financial constraints necessarily play a role and competing needs and demands have to be balanced. An accused also has the right to have a legal practitioner assigned at the state's expense in terms of section 35(3)(g) where substantial injustice would otherwise result,⁶² as acknowledged by the Supreme Court of Appeal. The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges.

[69] A defendant's need to access funds for reasonable legal expenses is an important factor to be taken into account by a High Court faced with an application to

⁶¹ See *S v Halgryn* 2002 (2) SACR 211 (SCA) at para 11:

“Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations. It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer. . . . An accused cannot, through the choice of any particular counsel, ignore all other considerations” (footnotes omitted)

See also *S and Others v Swanepoel* 2000 (7) BCLR 818 (O), in which the court held that an accused, who declined to be defended by counsel directed by the Legal Aid Board, must accept that the range of choice of legal representation is constrained by his or her financial means.

⁶² Section 35(3)(g) of the Constitution guarantees every accused person the right “to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result”. The constitutional right to legal representation is also reflected in sections 73(1) and (2) of the Criminal Procedure Act 51 of 1977, which provides:

“Accused entitled to assistance after arrest and at criminal proceedings.—

- (1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.
- (2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.”

intervene. The High Court is to be commended for interpreting POCA in the light of constitutionally protected fair trial rights. However, the Supreme Court of Appeal is correct in its view that the relevant provisions of POCA could not be understood to mean that a restraint order could necessarily elevate a defendant's legal expenses to a status similar to that of secured or preferent obligations.

[70] The Supreme Court of Appeal correctly overturned the High Court's decision in so far as the High Court's interpretation resulted in a conclusion that it did not have a discretion to permit a concurrent creditor in the position of ABSA to intervene.⁶³ The conclusion that a concurrent creditor may under certain circumstances intervene is justifiable on the wording of POCA and does not in itself militate against the fair trial rights to a trial free of unreasonable delay and legal representation. The exercise of the High Court's discretion in every particular case is important though.

The nature and exercise of the discretion

[71] The discretion of a High Court hearing an application of a creditor to intervene in section 26(6) proceedings is one with which a court of appeal will only interfere in limited circumstances. As a court of first instance the High Court will necessarily have to take a somewhat robust approach, based on the facts before it. Provision for reasonable legal expenses in a restraint order is not a final determination of the fate of

⁶³ The High Court found that "in the circumstances" ABSA did not have the right to intervene in the application, but its interpretation of POCA did not allow a discretion to permit a creditor to intervene.

the defendant's property. An appellate court will not question whether the decision reached by the court of first instance was the correct one.⁶⁴

[72] The circumstances of each case have to be considered in order to reach a determination which is fair and just in view of the objects and wording of POCA, together with an accused person's constitutionally protected fair trial rights, existing rules and principles of the law of insolvency and other relevant areas of law. The High Court should seek as best as possible to ensure that a defendant neither benefits unduly from the terms of a restraint order, nor is prejudiced as far as reasonable legal and/or living expenses are concerned. Circumstances to be considered in the case of legal expenses would include: (a) the seriousness and complexity of the charges against the defendant or of the civil proceedings in which he or she may be involved; (b) the conduct of the defendant, preceding, and in, the section 26(6) application proceedings (including whether a full disclosure of all his or her interests in the restraint property has taken place and whether the defendant is attempting to benefit from a restraint order, or has acted fraudulently); (c) the value of his or her assets; (d) the number and amount of known creditor's claims; and (e) the history of the specific claim of the creditor who seeks intervention.

⁶⁴ See *Trevor B Giddey NO v JC Barnard and Partners* CCT65/05, 1 September 2006, as yet unreported, at para 19:

"The ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in a strict sense. The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principle of law. Even where the discretion is not a discretion in a strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above." (footnotes omitted)

[73] In an appropriate case the High Court should ask for a current report from the curator bonis on the value and use of the property and any mortgage bonds or other claims against it. In considering these, a court should bear in mind that the rights of concurrent creditors are ordinarily less weighty than the rights of preferential or secured creditors.

[74] It is therefore clear that all of a defendant's creditors do not have a right to be joined in a section 26(6) application. There can also not be a duty on the NDPP to give notice to creditors. Bearing in mind the requirement of full disclosure in section 26(6), the defendant would have more knowledge of claims and creditors than the NDPP. The most practical approach however, appears to be that any creditor who wishes to intervene has to approach the court as soon as it becomes aware of section 26(6) proceedings, and that the court has to exercise its discretion as to whether to admit the creditor.

The facts of this case

[75] ABSA's intervention does not seem to be the only factor limiting Mr Fraser's ability to pay for the legal defence of his choice. His apparently unsound financial position is surely relevant. It bears repeating that but for the lengths to which he went to hide his assets, ABSA might well have satisfied its judgment debt long before the imposition of the restraint order.

[76] There is no evidence that the applicant experienced any delay at all as a consequence of ABSA's attempt to intervene in the section 26(6) proceedings. To the extent that ABSA's desire to intervene is a direct result of the applicant's effort to conceal his assets from his creditors, and then liquidate those assets in order to secure legal expenses in terms of section 26(6) of POCA, the earlier quoted statement by Kriegler J in *Sanderson* is relevant.⁶⁵ Mr Fraser's own role in any delay which might result from ABSA's intervention must be taken into account.

[77] The decision of the Supreme Court of Appeal to allow ABSA to intervene in this case cannot be faulted. However, the Supreme Court of Appeal was incorrect in proceeding to order that ABSA's claim against the applicant must practically be secured against the provision of his reasonable legal expenses. The decision is based on the notion that ABSA's claim as a concurrent claim must automatically take priority over an applicant's legal expenses. A decision by a court in terms of section 26(6) to allow a creditor to intervene does not automatically result in an order that 'ring-fences' its claim against the applicant's right to use funds to meet legal expenses. Whether it does, will depend on the circumstances of each case which the court will take into account when exercising its discretion. Where possible a defendant will be neither unduly prejudiced nor advantaged by the fact that his or her property has been restrained.

⁶⁵ Above para 65.

[78] The Supreme Court of Appeal's judgment on ABSA's appeal against the High Court order is brief, consisting of four paragraphs. The statement in paragraph 32 that no proper grounds have been shown why Mr Fraser should be permitted to expend moneys on legal expenses that would ordinarily have been available to creditors suggests that the court assumed that the applicant bore an onus to justify his claim to reasonable legal expenses over the claims of concurrent creditors. This approach is incorrect. The defendant does not bear an onus of this sort. Instead, as stated above, the defendant's request to use his property to cover reasonable legal expenses – given that the defendant has a constitutional right to legal representation – must be carefully weighed by the Court against both the state's interest in securing the defendant's property for possible confiscation later, as well as the claims of the defendant's creditors. The discretion conferred on a court by section 26(6) must be exercised in the light of all relevant circumstances and based on the best available evidence. The conclusion reached by the Supreme Court of Appeal to 'ring-fence' ABSA's claim might well be correct in the circumstances of the present case, not because concurrent claims automatically take precedence over legal expenses, but because of the particular circumstances of this case, where it appears that Mr Fraser sought to evade his legal obligations to ABSA by hiding his assets in a close corporation and only taking possession of them again once the restraint was in operation. On the facts, it seems that Mr Fraser is seeking to benefit from the restraint order, something Parliament could not have intended.

[79] Given that the Supreme Court of Appeal decided to ‘ring-fence’ ABSA’s claim on the basis that concurrent claims should be protected in circumstances where a defendant seeks to use his property to obtain legal representation, the exercise of its discretion was based on an incorrect legal principle and should be set aside. The question is what should then happen. The information at this Court’s disposal is at this stage quite dated. For example, under normal circumstances the value of fixed property in Johannesburg would have increased significantly over a few years. Furthermore, the amount of R1 028 214.25 owed to ABSA in December 2004, would also have accrued interest. The possibility that ABSA’s claim could be preserved, as well as Mr Fraser’s legal expenses provided for, calls for investigation. This could be best achieved by requesting a further report from the curator.

[80] Under the circumstances it would be fair as well as practical to refer the matter back to the High Court to exercise its discretion in terms of section 26(6) of POCA in the light of this judgment. It could then properly determine the exact terms of an order allowing ABSA’s interests to be considered, together with the applicant’s reasonable needs related to his right to a fair trial, and of course the state’s interest in the property. In so doing, the High Court would have to consider and weigh a range of factors, including those mentioned in paragraphs 72 and 73 above, in so far as they are applicable to this case.

[81] In view of the above-mentioned, the judgment and order of the Supreme Court of Appeal has to be partly upheld and partly overturned. The appeal succeeds in part.

Costs

[82] In this Court the applicant was partly successful. His success is substantial in that the Supreme Court of Appeal's order securing ABSA's claim at the cost of his reasonable legal expenses is set aside, and that the matter is referred back to the High Court. On the other hand, ABSA has also succeeded significantly in that it has obtained leave to intervene in the section 26(6) proceedings. The applicant's previous conduct is also a factor. It is just and equitable that all parties bear their own costs in this Court and the Supreme Court of Appeal. The costs related to ABSA's application to intervene in the High Court would best be determined by the outcome of the High Court proceedings and are therefore to be costs in the cause.

Order

[83] The following is therefore ordered:

- (1) The application for leave to appeal is granted.
- (2) The appeal is upheld in part.
- (3) The order of the Supreme Court of Appeal is set aside.
- (4) ABSA is granted leave to intervene in the section 26(6) proceedings.
- (5) The matter is referred back to the High Court for it to determine the section 26(6) application in the light of this judgment.
- (6) No order is made with regard to the costs of the proceedings in this Court and in the Supreme Court of Appeal.

(7) The costs of ABSA's application in the High Court to intervene in the section 26(6) proceedings are to be costs in the cause of that application.

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

For the applicant: M Pillemer SC and A Annandale instructed by Padayachee and Partners.

For the respondent: RS van Riet SC and P de B Vivier instructed by Heyns and Partners Inc.

For the amicus curiae: W Trengrove SC and GM Ameer instructed by the State Attorney, Johannesburg.