

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 112/10
[2011] ZACC 24

In the matter between:

RAJAN NAIDOO

First Applicant

DOLLY NAIDOO

Second Applicant

TWOLINE TRADING 87 (PTY) LTD

Third Applicant

YAMANI PROPERTIES 1015 (PTY) LTD

Fourth Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

ZAKHELE SITHOLE N.O.

Second Respondent

Heard on : 24 May 2011

Decided on : 10 August 2011

JUDGMENT

CAMERON J:

Introduction

[1] The Prevention of Organised Crime Act (POCA)¹ permits a court that issues an order restraining an accused defendant² from dealing with assets held by him or her³ to make provision for the reasonable legal expenses of that defendant.⁴ The question before us is whether the court may permit those expenses to be incurred from assets held by a person other than the defendant.

[2] Mr Rajan Naidoo, the first applicant, is charged with 119 counts of dealing in unwrought metals. In October 2004 the National Director of Public Prosecutions (NDPP), the first respondent, obtained a provisional restraint order against him. At the same time, the NDPP obtained a provisional restraint order against his former spouse, Mrs Dolly Naidoo, with whom Mr Naidoo still shares a house. The order against Mrs Naidoo was obtained on the basis that specified assets constituted an “affected gift”⁵ to her by Mr Naidoo. Later, when the provisional order was confirmed, it was extended to cover two companies in which Mrs Naidoo is the sole director and shareholder.

¹ 121 of 1998.

² Section 12(1) of POCA provides that a defendant “means a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not” and that it includes a person whom a court is satisfied is to be charged with an offence and it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against the person.

³ Section 26(2) of POCA is set out below in n 27.

⁴ See section 26(6) of POCA, set out in [5] below.

⁵ Under section 12(1) of POCA “affected gift” includes any gift “made by the defendant concerned not more than seven years before” the prosecution was instituted or the restraint order was obtained.

[3] Mrs Naidoo and these companies, Twoline Trading 87 (Pty) Ltd (Twoline) and Yamani Properties 1015 (Pty) Ltd (Yamani), are the second, third and fourth applicants before us. In the North Gauteng High Court, Pretoria (High Court) and the Supreme Court of Appeal, they were nominally respondents. But they made common cause with Mr Naidoo, and before this Court they join him as applicants for leave to appeal, claiming that their own constitutional rights, specifically their property rights, are imperilled.

[4] The second respondent, Mr Zakhele Sithole, is the curator the High Court appointed to administer the applicants' restrained assets.⁶ Though in the High Court he filed an affidavit opposing the relief sought, he plays no part in the proceedings before us.

[5] After being charged,⁷ Mr Naidoo applied to the High Court for an order that his reasonable legal expenses be paid from the restrained assets held by Mrs Naidoo and the

⁶ Section 28(1) of POCA provides that a court making a restraint order may order the person against whom the restraint order has been made to surrender any property in respect of which a *curator bonis* has been appointed into the custody of the curator.

⁷ The criminal process against Mr Naidoo has stalled, in part because of the present proceedings. A chronology of the much-delayed process is:

- i. On 15 October 2004 a joint search-and-seizure operation was conducted in the United Kingdom and in South Africa. The homes and business premises of a number of defendants were searched and documents were seized.
- ii. The NDPP alleges the investigation uncovered syndicates involved in illegal smuggling of stolen unwrought precious metals.
- iii. Two indictments flowed from the investigation – WLD 134/06, in which Mr Naidoo's brother, Mr Kevin Naidoo, was being prosecuted, and WLD 135/06, in which Mr Naidoo himself is being prosecuted.
- iv. Most of the accused in these two cases were arrested on 15 October 2004 and restraint orders were obtained against them.

two companies. Pivotal to his application are the provisions of section 26 of POCA.

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.”

Section 26(6) provides:

“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—

- (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.”

In the High Court

[6] On 26 July 2007 the High Court (Poswa J) granted Mr Naidoo the order he sought.

On 30 July 2007, before the NDPP noted an appeal, Mr Naidoo’s attorneys informed the

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- v. On 30 January 2006 the indictments in the two criminal matters were served on the accused, and the matters were referred to the South Gauteng High Court, Johannesburg for hearing.
 - vi. The trial in Mr Naidoo’s case (WLD 135/06) was due to start on the first day of the third term in 2006. The trial in Mr Kevin Naidoo’s case (WLD 134/06) was due to start on 1 October 2006.
 - vii. As the parties were not ready to start, the trials were postponed to 30 July 2007 and 1 October 2007 respectively.

NDPP that the order had been executed. Hence, an amount of R1.915 million for legal expenses was paid out to Mr Naidoo.

[7] In reasons filed later, the High Court concluded that the property held by Mrs Naidoo and the two companies, restrained as an “affected gift”, belonged to Mr Naidoo. This, it considered, was the logical conclusion of the restraint order, whose purpose was to restrain property held by Mr Naidoo. The property held by Mrs Naidoo and the companies was restrained only because it constituted an “affected gift” under POCA from Mr Naidoo. Hence its legal status was that it belonged to Mr Naidoo. Consequently, the funds could be released to pay for his legal expenses.⁸

In the Supreme Court of Appeal

[8] The NDPP appealed to the Supreme Court of Appeal, which delineated the issue before it as whether POCA granted power to the High Court “to provide for the payment of a defendant’s reasonable legal expenses from a source other than the restrained assets held by that defendant.”⁹ The Court recognised “an obvious tension between the need to prevent the dissipation of assets held by an accused person that allegedly constitute the proceeds of crime and the need to ensure that that person’s fair trial rights, particularly

⁸ The High Court’s reasons were delivered only 27 months after its order of 26 July 2007, on 28 October 2009, after much pressure and a complaint to the Judicial Service Commission. By then the Supreme Court of Appeal had already by default granted the NDPP leave to appeal to it.

⁹ *National Director of Public Prosecutions v Naidoo and Others* [2011] 2 All SA 410 (SCA) (Mpati P and Tshiqi JA; Cloete JA, Ponnann JA and Bosielo JA concurring) (SCA judgment) at para 25.

the presumption of innocence, are not imperilled.”¹⁰ It is the reconciling of this tension, it held, “that is sought to be achieved by section 26(6).”¹¹ The Court held that the fact that Mrs Naidoo’s and the companies’ property was an “affected gift” did not mean it was Mr Naidoo’s property.¹² POCA spread the net wide, but its definition of realisable property¹³ “does not alter the law as to ownership.”¹⁴

[9] The Supreme Court of Appeal held that “[t]he plain grammatical meaning of section 26(6)(b) read with section 26(6)(a) is that a restraint order may make provision for the legal expenses of [only] ‘a person against whom the restraint order is being made’ – not for the legal expenses of a third person against whom a restraint order is also being made at the same time”.¹⁵ So, it held, “the restraint orders made against Mrs Naidoo and the companies she controls cannot make provision for Mr Naidoo’s legal expenses as he is not the person against whom those restraint orders were made.”¹⁶

¹⁰ Id at para 27.

¹¹ Id.

¹² Id at para 30.

¹³ Section 14 of POCA, headed “Realisable property”, provides:

- “(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely—
 - (a) any property held by the defendant concerned; and
 - (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.
- (2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.”

¹⁴ SCA judgment above n 9 at para 30.

¹⁵ Id at para 32.

¹⁶ Id.

[10] The NDPP's appeal was therefore upheld with costs, and the order in the High Court changed to dismiss Mr Naidoo's application with costs.

In this Court

[11] The applicants submit that the Supreme Court of Appeal erred in not giving effect to the Bill of Rights. That Court's interpretation denied Mr Naidoo the right to employ legal representatives of his choice. And that its approach was wrong because section 26(6)(b) can, without causing offence to the words, be interpreted broadly to give greater effect to Mr Naidoo's right to a fair trial. By contrast, the High Court's interpretation of section 26(6) rightly affirmed the right to a fair trial.

[12] The applicants contend that property restrained as an "affected gift" should in any event be treated as held by the defendant who made the gift. Under the common law, if the object of an underlying contract is illegal or unlawful the transfer of the ownership will be void. Affected gifts are against public policy, and in terms of the common law, the transfer of the ownership of the assets is invalid. The applicants argue that the assets therefore remain property held by Mr Naidoo, which he can access under section 26(6).

[13] The applicants alternatively contend that if the restrained property was in fact property held by Mrs Naidoo and her two companies, the provisions can still yield an interpretation that favours them. The phrase "against whom the restraint order is made" does not appear in section 26(6)(b) or the general paragraph below it. In the paragraph

that follows it, the requirement is that the one who should disclose under oath “all his or her interests in property subject to a restraint order” is the person whose expenses must be provided for.¹⁷ It is common cause that that person is Mr Naidoo, and he has made the necessary disclosure. The disclosure requirement is not limited by the phrase “against whom the restraint order is made” – hence, they submit, the second and other applicants do not have to make disclosure.

[14] In addition, the second to fourth applicants argued that the Supreme Court of Appeal’s narrow interpretation of section 26(6) of POCA infringes upon their constitutional right to property. This submission was not pressed during oral argument, and correctly so. It requires no further consideration.

[15] The NDPP submits that the High Court erred by conflating the restraint orders against Mr Naidoo with those against Mrs Naidoo and the companies. Mrs Naidoo and the companies had not even been charged with criminal offences; nor had they made the disclosure of assets section 26(6) requires. The High Court order creates the possibility of abuse by accused persons seeking a subsidy for their legal expenses from restrained assets held by others, and may frustrate the very purpose of restraint proceedings, which is to prevent offenders from reaping the benefits of their crimes. Counsel submitted that the scheme of the statute envisages an “individualisation” of restraint orders. The

¹⁷ See [5] above for the full text of section 26(6).

Supreme Court of Appeal, the NDPP contends, struck the correct balance between the fair trial rights of the defendant and the interests of the state.

[16] The NDPP counters the contention that the property held by Mrs Naidoo and the companies remained that of Mr Naidoo by pointing out that Mrs Naidoo and the companies vehemently deny that their assets are “affected gifts”. Further, POCA’s definition of an “affected gift” does not require that the underlying transaction be void.

Constitutional issue and leave to appeal

[17] A contention that an interpretation of POCA fails to promote the spirit, purport and objects of the Bill of Rights¹⁸ raises a constitutional issue.¹⁹ Whether leave to appeal to this Court on a constitutional issue should be granted depends in part on prospects of success. I turn to those without ado.

Interpretation of section 26(1) and section 26(6)

[18] The judgment of the Supreme Court of Appeal has been reported. It is necessary, and almost sufficient, to say that I agree fully with its exposition and conclusion. As that Court rightly noted, the nub of the matter is that section 26(6) does create a mechanism through which an unconvicted accused may access restrained assets held by him or her

¹⁸ Section 39(2) of the Constitution provides that when interpreting any legislation, a court “must promote the spirit, purport and objects of the Bill of Rights.”

¹⁹ *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser*) at paras 42-7.

for reasonable legal expenses.²⁰ This Court in *National Director of Public Prosecutions v Mohamed*²¹ gave its imprimatur to the purpose of POCA. That is to strip criminals of the proceeds of their crimes, thus removing the incentive for crime, and not to punish them.²²

[19] The statute's objective is however attained through complex machinery, whose operation and effect must be carefully calibrated. Indeed, this Court has also noted that, had the statute not granted the defendant access to restrained assets for reasonable living expenses and legal fees "the scheme of restraint embodied in POCA might well have been unconstitutional."²³

[20] Yet the express terms of section 26(6) make allowance for reasonable living and legal expenses only on limited terms. First, the access is granted only for the legal expenses of "a person against whom the restraint order" was made. Second, it is conditional on full disclosure. Third, the person must not be able to meet the expenses concerned out of his or her unrestrained property. Given these conditions, it is not a plausible interpretation that access can be given to property held by a person other than the person against whom the restraint order has been made.

²⁰ SCA judgment above n 9 at para 32.

²¹ *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC).

²² *Id* at para 15.

²³ *Fraser* above n 19 at para 68.

[21] Realisable property under section 14 includes property held by the defendant concerned, as well as “any property held by a person to whom that defendant has directly or indirectly made any affected gift.”²⁴ Section 12 defines “affected gift” widely as including any gift made within seven years of the prosecution being instituted or the restraint order being granted, or a gift of property received from a crime or in connection with crime.²⁵

[22] The question whether the restrained property held by Mrs Naidoo, Twoline and Yamani is an “affected gift” was decided in the proceedings when that restraint order was granted. It is not a question that is before us now. The argument that the property remains the realisable property of Mr Naidoo, because the Act encompasses gifts he made of his property, is not tenable. Statutorily, property restrained as an “affected gift” remains property held by the person against whom the restraint order in respect of that property was made. It is not transferred by any process to any other person.

[23] As the Supreme Court of Appeal noted, the provisions of the statute, particularly section 26(1), read with section 12 and section 14, permit restraint orders to be made only against realisable property held by the person against whom the order is made, and not against realisable property held by any other person.²⁶ In my view, the reading the

²⁴ The provisions of section 14 are set out above in n 13.

²⁵ The definition of “affected gift” in section 12 must be read with the definition of “fixed date”.

²⁶ SCA judgment above n 9.

Supreme Court of Appeal gave to section 26 struck the correct legislative and constitutional balance.

[24] The scheme of the statute does indeed envisage individualised restraint orders. It follows that although “realisable property” encompasses property held both by a defendant and by those to whom he has made affected gifts, a separate restraint order has to be obtained in respect of each individual, and the kind of property the individual holds.

[25] That is what happened in this case. The first restraint order of 1 October 2004 differentiated between defendants and others against whom restraint orders were granted. The order was directed to Mr Naidoo and his fellow accused as defendants. And it was directed separately to Mrs Naidoo and others, as respondents. The status of the two classes of property-holders against whom POCA licenses restraint orders was clearly delineated in the order. It has not become muddled since.

[26] It follows that section 26(6) empowers a court to grant provision for reasonable living and legal expenses only in respect of a person against whom the restraint order is made, and only in respect of the property held by that person. This emerges from section 26(2)(a). This permits a restraint order to be made in respect of property held by the

person “against whom the restraint order is being made”.²⁷ Each restraint order, in other words, must be individualised.

[27] Does section 26(1) create a pathway around the constrictions that section 26(6) imposes? In my view, the answer is No. It is true that section 26(6) expressly states that it does not derogate “from the generality of the powers conferred by subsection (1)”. Section 26(1) empowers the NDPP to apply to the High Court for an order prohibiting dealing with any property to which the order relates. And the provision empowers the Court, in wide terms, to grant the order subject to conditions and exceptions “as may be specified”.

[28] This is indeed an ample power. It is so wide that it seems conceivable that a court could stipulate a condition or exception that permits the person restrained to deal with the restrained property by making a loan to, or funding the living or legal expenses of, some other person. If that were so, the preconditions expressly stipulated in section 26(6) could be degutted by using the wide powers in section 26(1).

²⁷ Section 26(2) provides that a restraint order may be made—

- “(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
- (b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;
- (c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.”

[29] But, even though section 26(6) does not derogate from the general powers granted by section 26(1), the two provisions should be read together. The question is whether a condition or exception of this kind could be permitted under section 26(1) bearing in mind the three conditions set out in section 26(6). First, it expressly ties provision for these expenses to the person against whom the restraint order is made. Second, it requires full disclosure by that person as a precondition for access to the funds. Third, it requires inability to meet the expenses concerned out of unrestrained property.

[30] To interpret the wide discretion conferred by section 26(1) as permitting an override of the preconditions expressly set in section 26(6) would run counter to the scheme of the provisions as a whole. The provision for reasonable legal and living expenses in section 26(6) is narrowly and finely crafted. Its careful mechanism should not readily be overridden. And its overall legislative purpose must be borne in mind. It is to discourage defendants who face criminal prosecution from hiding their assets. If a defendant retains the alleged proceeds of crime, they remain available for living and legal expenses. But if these assets are donated away, they become unavailable for this purpose.

[31] This is a legitimate statutory objective. And our construction of the provisions should recognise it.

Conclusion

[32] The prospect that an appeal against the judgment of the Supreme Court of Appeal can succeed is not reasonable. The application for leave to appeal should therefore be refused. However, the applicants' constitutional argument is not frivolous. And they sought to make it against a public entity, the NDPP. On the accepted approach of this Court,²⁸ there should be no order as to costs in this Court.

Order

[33] The following order is made:

The application for leave to appeal is dismissed.

Ngcobo CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J, Yacoob J concur in the judgment of Cameron J.

²⁸ *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 28.

For the Applicants:

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