

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 95/10  
[2011] ZACC 26

In the matter between:

ALEXANDER GERHARD FALK

First Applicant

FALK REAL ESTATE SA (PTY) LTD

Second Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Heard on : 8 March 2011

Decided on : 16 August 2011

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JUDGMENT

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VAN DER WESTHUIZEN J:

*Introduction*

[1] Combating crime poses a huge challenge to South Africa and the rest of the world. The globalised nature of organised crime adds to the difficulty. Legislation aimed at the prevention of organised crime and at the recovery of assets relating to criminal activities

exists in several jurisdictions.<sup>1</sup> International co-operation is essential for the effective implementation of the legislation.

[2] This case is about the interpretation of and relationship between two South African statutes that deal with restraint orders in criminal matters. The one, the Prevention of Organised Crime Act<sup>2</sup> (POCA), provides for the issue of restraint orders by South African courts regarding the property of persons against whom criminal proceedings are pending or about to be instituted. The other, the International Co-operation in Criminal Matters Act<sup>3</sup> (ICCMA), provides for the enforcement in South Africa of restraint orders that have been issued in the course of criminal proceedings in foreign states.

[3] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal.<sup>4</sup> The Supreme Court of Appeal dismissed with costs an appeal against a judgment of the Western Cape High Court, Cape Town (High Court).<sup>5</sup>

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<sup>1</sup> See for example: the Proceeds of Serious Crime Act 19 of 1990 in Botswana; the Prevention of Organised Crimes Act 5 of 2010 in Kenya; the Prevention of Organised Crime Act 29 of 2004 in Namibia; the Serious Offences (Confiscation of Proceeds) Act 8 of 2001 in Swaziland; the Proceeds of Crime Act 25 of 1991 in Tanzania; section 981(a)(1)(C) of 18 USC 1996 (as amended by the Civil Asset Forfeiture Reform Act of 2000) in the United States; the Proceeds of Crime Act 2002 in the United Kingdom; section 462.33 of the Criminal Code RSC 1985 c C-46 in Canada; the Proceeds of Crime Act 85 of 2002 in Australia; the Criminal Proceeds (Recovery) Act 8 of 2009 in New Zealand; the Karnataka Control of Organised Crime Act 1 of 2000 in the Karnataka State of India; and the Maharashtra Control of Organised Crime Act 30 of 1999 in the Maharashtra State of India.

<sup>2</sup> 121 of 1998.

<sup>3</sup> 75 of 1996.

<sup>4</sup> *Falk and Another v National Director of Public Prosecutions*, Supreme Court of Appeal, Case No 689/09, 23 September 2010, as yet unreported (SCA judgment).

<sup>5</sup> *Falk and Another v National Director of Public Prosecutions*, Western Cape High Court, Cape Town, Case No 8420/03, 10 July 2009, unreported (High Court judgment).

[4] The applicants are Mr Alexander Gerhard Falk – a German businessman – and Falk Real Estate SA (Pty) Ltd (FRSA), a South African company in which he is the sole shareholder. The respondent is the National Director of Public Prosecutions (NDPP).

[5] A restraint order granted in the course of criminal proceedings against Mr Falk by a court in Hamburg, Germany, was registered in South Africa by the Registrar of the High Court (Registrar). The High Court subsequently issued an order interdicting the applicants from dealing with assets in South Africa. The applicants have unsuccessfully attempted to set aside the registration of the German order and the subsequent interdictory order.<sup>6</sup>

[6] The core issues to be addressed are—

- (a) whether the registration of the foreign restraint order should be set aside; and
- (b) whether the interdictory order should be rescinded.

[7] These issues raise questions about which of the two statutes – ICCMA or POCA – is applicable to the registration and to the interdictory order and whether the requirements in the relevant statute for setting aside the registration and the interdictory order have been met. Some preliminary questions also require attention, namely whether a

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<sup>6</sup> A more detailed factual and litigation background is provided below at [21] – [39].

constitutional matter is raised, whether leave to appeal should be granted and whether new evidence should be admitted.

[8] With these questions in mind, an overview of the constitutional and statutory framework, an account of the factual and litigation background and a summary of the parties' submissions in this Court are provided. These show how the approach to the issues raised has evolved since the beginning of the litigation. Thereafter an analysis and conclusions follow.

*Constitutional and statutory framework*

[9] The determination of this case relies on the interpretation of several provisions of two complex statutes against the background of the Constitution. Thus it is convenient first to set out the applicable constitutional and statutory framework.

[10] In South Africa, POCA is the statutory instrument that addresses organised crime. Its preamble specifies its objectives, namely to combat the "rapid growth of organised crime, money laundering and criminal gang activities" and to ensure that "no person should benefit from the fruits of unlawful activities".

[11] POCA sets forth a scheme for confiscation orders in Chapter 5. This Chapter provides for the restraint of the benefits derived from crime where criminal proceedings are pending or about to be instituted. It also provides for confiscation after a conviction

has occurred. A confiscation order under Chapter 5 is a civil judgment for the payment of an amount of money based on the value of the benefit that the defendant derived from the crime.

[12] Part 3 of Chapter 5 of POCA deals with restraint orders. According to section 26(1) a restraint order is “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.” Under section 26(1) the NDPP may apply *ex parte* to a High Court for such an order. Section 26(2) stipulates the kind of property in respect of which a restraint order may be made.<sup>7</sup> Section 25 outlines when a restraint order may be made.<sup>8</sup>

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<sup>7</sup> Section 26(1) and (2) provides:

- “(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.
- (2) 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.”

<sup>8</sup> Section 25 provides:

- “(1) A High Court may exercise the powers conferred on it by section 26(1)—
  - (a) when—
    - (i) a prosecution for an offence has been instituted against the defendant concerned;
    - (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and

[13] Section 26(8) provides that a High Court making a restraint order “shall”, at the same time, make an order authorising the seizure of the movable property concerned. It also provides for “ancillary orders”.<sup>9</sup>

[14] The rescission of a restraint order is provided for in section 26(10).<sup>10</sup> In terms of section 26(10)(a)(i), the High Court may vary or rescind a restraint order if it will cause undue hardship to the applicant.<sup>11</sup> Section 26(10)(b) states that the High Court which

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- (iii) the proceedings against that defendant have not been concluded; or
  - (b) when—
    - (i) that court is satisfied that a person is to be charged with an offence; and
    - (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.
  - (2) Where the High Court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.”

<sup>9</sup> Section 26(8) provides:

“A High Court making a restraint order shall at the same time make an order authorising the seizure of all movable property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.”

<sup>10</sup> Section 26(10) provides:

“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.”

<sup>11</sup> Id.

made the order must rescind the order when the proceedings against the defendant are concluded.<sup>12</sup> Section 17 details when proceedings in terms of this Chapter are “concluded”<sup>13</sup> and section 24A provides that a restraint order remains in force pending appeal.<sup>14</sup>

[15] This Court has had to interpret POCA on a number of occasions. The primary purpose of Chapter 5 of POCA is not punitive, but to ensure that no person benefits from his or her wrongdoing. Its secondary purpose is to promote general crime deterrence and prevention by depriving people of “ill-gotten gains”.<sup>15</sup>

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<sup>12</sup> This provision was added by section 4(d) of the Prevention of Organised Crime Second Amendment Act 38 of 1999 (POCA Amendment Act). See above n 10 for the text of section 26(10)(b).

<sup>13</sup> Section 17 provides:

“For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be 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.”

<sup>14</sup> Section 24A was inserted by section 3 of the POCA Amendment Act. It provides:

“A restraint order and an order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned.”

<sup>15</sup> *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC) at paras 50-8. See also *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) (*Mohunram*); *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*); *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) (*Prophet*); *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); and *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC).

[16] ICCMA is the South African statute used to facilitate co-operation with foreign States<sup>16</sup> in matters relating to the provision of evidence, the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime.<sup>17</sup> It specifically deals with the registration and enforcement of foreign restraint orders.

[17] Chapter 4 of ICCMA deals with confiscation and transfer of the proceeds of crime and operates both inwardly and outwardly, facilitating the enforcement of restraint orders made abroad in South Africa and vice versa. Section 24 provides for the registration of foreign restraint orders. When a request for assistance is lodged with the Director-General of the Department of Justice and Constitutional Development (Director-General), he or she lodges the order with the Registrar who then registers the order.<sup>18</sup> Section 25

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<sup>16</sup> The long title of ICCMA states its purpose:

“To facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States; and to provide for matters connected therewith.”

<sup>17</sup> See for example Chapter 2 on the mutual provision of evidence and Chapter 3 on the mutual execution of sentences and compensatory orders.

<sup>18</sup> Section 24 provides:

- “(1) When the Director-General receives a request for assistance in enforcing a foreign restraint order in the Republic, he or she may lodge with the registrar of a division of the Supreme Court a certified copy of such order if he or she is satisfied that the order is not subject to any review or appeal.
- (2) The registrar with whom a certified copy of a foreign restraint order is lodged in terms of subsection (1), shall register such order in respect of the property which is specified therein.
- (3) The registrar registering a foreign restraint order shall forthwith give notice in writing to the person against whom the order has been made—
  - (a) that the order has been registered at the division of the Supreme Court concerned; and
  - (b) that the said person may within the prescribed period and in terms of the rules of court apply to that court for the setting aside of the registration of the order.



states that once a foreign restraint order is registered, it has the effect of a restraint order made by the High Court at which it has been registered.<sup>19</sup> A restraint order is defined as an order that has been “made under [POCA]” and a foreign restraint order as “any order issued by a court or tribunal in a foreign State in respect of an offence under the law of that State, aimed at restraining any person from dealing with any property”.<sup>20</sup>

[18] Section 26(1) outlines the circumstances in which the registration of a foreign restraint order can be set aside by the court at which it has been registered, on the application of the person against whom the order operates. These are if: the order was registered contrary to a provision of ICCMA; the court of the requesting State had no jurisdiction; the order is subject to review or appeal; the enforcement of the order would be contrary to the interests of justice; or the sentence or order in support of which the foreign restraint order was made, has been fully satisfied.<sup>21</sup>

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| (4) | (a) | Where the person against whom the foreign restraint order has been made is present in the Republic, the notice contemplated in subsection (3) shall be served on such person in the prescribed manner. |
|     | (b) | Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign restraint order.”  |

<sup>19</sup> Section 25 provides:

“When any foreign restraint order has been registered in terms of section 24, that order shall have the effect of a restraint order made by the division of the Supreme Court at which it has been registered.”

<sup>20</sup> Section 1 of ICCMA.

<sup>21</sup> Section 26(1) provides:

“The registration of a foreign restraint order in terms of section 24 shall, on the application of the person against whom the order has been made, be set aside if the court at which the order was registered is satisfied—

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| (a) | that the order was registered contrary to a provision of this Act;        |
| (b) | that the court of the requesting State had no jurisdiction in the matter; |

[19] ICCMA and POCA deal to some extent with the same subject matter, but in different contexts. ICCMA was enacted two years before POCA. As shown above, ICCMA refers to POCA by defining a restraint order as an order made under POCA. One of the points of contention in this matter is how the interrelation between them works.

[20] Two constitutional provisions are especially relevant. Section 39(2) of the Constitution demands that the interpretation of legislation must promote the spirit, purport and objects of the Bill of Rights.<sup>22</sup> A constitutionally sound interpretation of the two statutes must avoid an outcome that would amount to arbitrary deprivation of property, in contravention of section 25(1).<sup>23</sup>

*Factual and litigation background*

[21] Mr Falk was arrested in Germany on 6 June 2003 on charges relating to the manipulation of the share prices of a German corporation. One day before his arrest, the

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- (c) that the order is subject to review or appeal;
  - (d) that the enforcement of the order would be contrary to the interests of justice; or
  - (e) that the sentence or order in support of which the foreign restraint order was made, has been satisfied in full.”

<sup>22</sup> Section 39(2) of the Constitution of the Republic of South Africa, 1996 provides:

“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.”

<sup>23</sup> Section 25(1) provides:

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

Hamburg Regional Court issued a restraint order against him.<sup>24</sup> The German Federal Constitutional Court subsequently found this order to be unconstitutional on procedural grounds and because there was insufficient evidence to justify the quantum of the order. The Court referred the matter back to the Regional Court. On 25 August 2004 the Regional Court issued a second restraint order, authorising the attachment of assets in the amount of €31 645 413,34. This amount represented what, at that stage, was considered to be the gains made by Mr Falk from his alleged criminal actions.

[22] The German authorities submitted a request to the Director-General for assistance by South Africa to enforce the German restraint order. The order was accordingly registered by the Registrar on 13 September 2004, in terms of section 24(1) of ICCMA.<sup>25</sup>

[23] The NDPP furthermore applied to the High Court for interdictory relief, in terms of section 26(8) of POCA – the “ancillary order” provision – to prevent Mr Falk and FRSA from disposing of the assets. On 16 August 2005 Veldhuizen J granted the interdictory order.<sup>26</sup> Mr Falk was interdicted, in other words restrained, from dealing in any way with

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<sup>24</sup> In the Federal Republic of Germany prevention of organised crime and criminal recovery of assets are not governed by one piece of legislation, but are rather found in separate pieces of legislation. For the purposes of this case the relevant legislation is: the Code of Criminal Procedure (*Strafprozessordnung* or *StPO*), the Criminal Code (*Strafgesetzbuch* or *StGB*), and the Code of Civil Procedure (*Zivilprozessordnung* or *ZPO*). The Criminal Code deals with the offences related to organised crime, among other things, and forfeiture. This case engages sections 73 and 73a. The Code of Criminal Procedure deals with the procedural rules. This case engages sections 111b(2) and (5), 111d and 111e(1). The relevant provisions of the Code of Civil Procedure are sections 917, 920(1), 923, 928, 930-2 and 934(1).

<sup>25</sup> See above n 18 for the text of section 24(1).

<sup>26</sup> Two further ancillary orders were issued subsequent to the order issued by Veldhuizen J. The first was issued on 26 June 2009 by Desai J who allowed funds to be released for operational expenses. The second was issued on 11 September 2009 by Louw J in terms of section 28(1) of POCA to appoint a *curator bonis*.

his shares in FRSA, then being held in trust by an attorney in Cape Town. Mr Falk and FRSA were also restrained from dealing with €5.22 million being held in an account at Standard Bank of South Africa and with any of FRSA's other assets, except in the ordinary course of business.

[24] Meanwhile, Mr Falk's criminal trial commenced in the Hamburg Regional Court on 3 December 2004. On 9 May 2008 the Court convicted him of attempted fraud, conspiracy to misrepresent the financial position of a corporation and misstating information of a corporation in its annual financial statements.<sup>27</sup> He was sentenced to four years' imprisonment. However, the Court declined to grant a confiscation order against him. The prosecution as well as Mr Falk appealed to the German Federal High Court of Justice (Federal Court); the prosecutors against the refusal to grant the requested confiscation order and Mr Falk against his conviction and sentence.

[25] Back in South Africa, on 2 June 2008, the applicants approached the High Court to set aside the registration of the German restraint order as well as the order granted by Veldhuizen J and for their restrained assets to be released. They submitted that the criminal proceedings in Germany had been concluded, as the trial court had decided not

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<sup>27</sup> More specifically, according to the translation of the judgment of the Regional Court, Mr Falk was convicted of "conspiracy to attempt to commit fraud coinciding with the offence of conspiracy to misrepresent the financial affairs of a company in terms of § 400 par. 1 No. 1 Companies Act, as well as conspiracy to misstate information relating to a company in its annual financial statement". The Federal Court, in its reasons, described the offence as "attempted fraud in coincidence with false representations in accordance with § 400 par. 1 of the German Stock Corporation Act and with aiding and abetting false representations of the circumstances of a company limited by shares in its annual financial statement (§ 331 par. 1 no. 1 of the Code of Commercial Law)."

to grant a confiscation order against them. The chapter on criminal prosecutions in Germany had effectively been closed, they argued. Thus the registration of the German restraint order, upon which the interdictory relief had been granted, should be rescinded in terms of section 26(10)(b) read with section 17(b) of POCA.<sup>28</sup>

[26] Opposing the application, the NDPP contended that the proceedings had not been concluded. The pending appeals meant that Mr Falk had not been finally convicted or acquitted and a confiscation order had not been finally granted or refused.

[27] The NDPP submitted that ICCMA, rather than POCA, was applicable as the German restraint order had been registered under ICCMA. The question would therefore be whether it was contrary to the interests of justice to enforce the order under section 26(1)(d) of ICCMA.<sup>29</sup> Because of the real likelihood that the applicants would dissipate the assets, it would not be in the interests of justice to release the assets, the NDPP argued.

[28] The High Court (Louw J) stated that although the applicants sought that the registration of the German restraint order as well as the subsequent interdictory relief be set aside, their main focus was on the latter. The Court found it unnecessary to reach a firm conclusion on whether POCA or ICCMA applied. Even if section 26(10)(b) of

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<sup>28</sup> See above n 10 and n 13 for the text of section 26(10)(b) and section 17(b) respectively.

<sup>29</sup> See above n 21 for the text of section 26(1)(d).

POCA were applicable, as the applicants argued, the interdictory order could not be set aside, in view of section 24A of POCA, which states that a restraint order remains in place, pending the outcome of an appeal.<sup>30</sup> The High Court held that the purpose of the legislation was that the status quo be maintained pending the finalisation of an appeal against the refusal to make a confiscation order. If that were not so, the outcome of the appeal could be rendered nugatory.

[29] The High Court further found that, on an application of ICCMA, the registration of the foreign restraint order could in any event not be set aside because it was not in the interests of justice in terms of section 26(1)(d). To do so would allow the applicants to hide or dissipate the assets.

[30] Thus, the application was dismissed with costs.

[31] When the application was heard in the High Court, on 29 and 30 October 2008, the appeals to the Federal Court had not yet been determined. On 14 July 2010 the Federal Court dismissed Mr Falk's appeal against his conviction and sentence. On 29 July 2010 the Federal Court upheld the prosecutor's appeal and referred the question, whether a confiscation order should have been granted, back to a differently constituted chamber of the Hamburg Regional Court.

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<sup>30</sup> See above n 14 for the text of section 24A.

[32] In South Africa the applicants approached the Supreme Court of Appeal. The matter was heard on 9 September 2010, after the German appeal proceedings.<sup>31</sup>

[33] The applicants contended that the High Court had erred in its interpretation of sections 17, 24A and 26(10)(b) of POCA and specifically that its interpretation of section 24A was in conflict with section 26(10)(b).<sup>32</sup> They submitted that the High Court had ignored the wording of section 17(b) and (c) of POCA, which provides an accused with the benefit of an appeal, but not the State.<sup>33</sup> The proceedings in Germany were indeed concluded, they argued. The applicants contended that the continued operation of the registration of the German order was also contrary to the interests of justice under section 26(1)(d) of ICCMA.<sup>34</sup>

[34] The High Court's interpretation was unconstitutional under section 25(1) of the Constitution,<sup>35</sup> they argued. It prevents an accused from using his or her property even though the trial court has not granted a confiscation order and thus it authorises the arbitrary deprivation of property.

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<sup>31</sup> SCA judgment above n 4 at para 9.

<sup>32</sup> See above n 10 and n 14 for the full text of sections 26(10)(b) and 24A respectively.

<sup>33</sup> See above n 13 for the full text of section 17(b).

<sup>34</sup> See above n 21 for the full text of section 26(1)(d).

<sup>35</sup> See above n 23.

[35] The applicants raised a new point in their application for leave to appeal. The German restraint order should only have been registered for €4.2 million, instead of the full amount in the order granted in Hamburg, as this is the only amount connected to the proceeds of the crime. This point related to the specificity of the registered order, they argued.

[36] The Supreme Court of Appeal<sup>36</sup> declined to set aside either the registration of the German order or the interdictory order and dismissed the appeal, but advanced reasons different from those of the High Court. It distinguished between the registration of the German order and the interdictory order. The registration of a foreign restraint order does not convert it into an order of a South African court. It remains a foreign order and not all of the provisions of Chapter 5 of POCA apply to it. The Supreme Court of Appeal stated that section 26(8)<sup>37</sup> of POCA – the ancillary order provision – applied “with the necessary changes”. The words “‘a high court making a restraint order shall at the same time make an order authorising the seizure of all moveable property concerned’ must be read as meaning ‘the registration of a foreign restraint order under the ICCMA requires the high court at which it is registered to make an order authorising the seizure’”.<sup>38</sup> An application by the NDPP would trigger the making of such an order.

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<sup>36</sup> Cloete JA, with whom Mpati P, Cachalia, Bosielo and Tshiqi JJA agreed.

<sup>37</sup> See above n 9 for the text of section 26(8).

<sup>38</sup> SCA judgment above n 4 at para 12.



[37] The High Court held under POCA that a registered foreign restraint order remains in force pending an appeal in the foreign jurisdiction. The Supreme Court of Appeal found that this interpretation of section 24A of POCA was incorrect. The concern in South Africa is not with the foreign order, but with its registration which can be set aside only under ICCMA, not POCA.<sup>39</sup>

[38] A South African court does not have the jurisdiction to rescind an order of a foreign court. Under POCA a High Court can vary or rescind the seizure order or the ancillary order made by it in terms of section 26(8), but if a defendant wishes to undo the effect of the registered foreign restraint order altogether, the remedy lies not in POCA but in section 26 of ICCMA. That section is definitive of the grounds upon which the registration of the foreign restraint order can be set aside.<sup>40</sup>

[39] The Supreme Court of Appeal concluded that the question of whether the proceedings in Germany were concluded is not dispositive to the interests of justice analysis under section 26(1)(d) of ICCMA. The interests of justice test requires a broader enquiry.<sup>41</sup> In any event, to find that section 17(b) of POCA meant that no appeal by the State was possible would lead to an absurdity. As in civil proceedings, an appeal by the State concerning the making of a confiscation order was possible<sup>42</sup> and thus the State was

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<sup>39</sup> Id at para 13.

<sup>40</sup> Id at para 14.

<sup>41</sup> Id at paras 15-6.

<sup>42</sup> Section 13(1) of POCA provides:

not precluded from appealing. The Court concluded that it was necessary to maintain the restraint order, as the protection it afforded would otherwise be lost.<sup>43</sup>

*Submissions before this Court*

[40] The applicants' attack on the registration of the German order and the interdictory relief has been changing throughout the litigation. Focussing on the rescission of the interdictory order, they submit that only the court that issues an order in terms of section 26(1) of POCA is competent to make a section 26(8) ancillary order because the provision specifies that ancillary orders must be made "at the same time" by the High Court issuing the restraint order.<sup>44</sup> Therefore the interdictory order was a "fresh" order in respect of new property that exactly followed the wording of section 26(1) of POCA. They conceded that their submission that the interdictory order was a section 26(1) order was a new argument not raised before the High Court.

[41] The applicants argue that the interdictory order should be set aside on a proper interpretation of section 26(10)(b) of POCA, read with section 17(b).<sup>45</sup> The proceedings in Germany were concluded once the Hamburg Regional Court refused to make a confiscation order.

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"For the purposes of this Chapter proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings."

<sup>43</sup> SCA judgment above n 4 at para 16.

<sup>44</sup> See above n 9 for the text of section 26(8).

<sup>45</sup> See above n 10 and n 13 for the text of sections 26(10)(b) and 17 respectively.

[42] In the alternative, they contend that the registration of the German restraint order should be set aside under ICCMA. On this point the applicants, in oral argument, challenged the registration on two grounds by relying on section 24(2) of ICCMA.<sup>46</sup> For a foreign restraint order to be registered, the property must be “specified”. The German restraint order does not specify any South African assets, because it does not mention assets that can be traced to South Africa. The order specifically mentions German bailiffs attaching assets *in rem*. From the reasons given by the Hamburg Regional Court one can furthermore draw the inference that South African assets are excluded, because the order in Germany was made specifically to prevent further assets from being moved outside of that jurisdiction.<sup>47</sup>

[43] They also argue that the NDPP had not discharged its burden to prove that the amount had not already been collected fully in Germany. They conceded, during oral

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<sup>46</sup> See above n 18 for the text of section 24(2).

<sup>47</sup> Under the heading “Reasons” the Hamburg Regional Court stated:

“VI. The *in rem* attachment is necessary for the preparation of the forfeiture of assets for (*the purpose of*) compensation, or the safeguarding of claims of damaged parties, as the case may be, as it is otherwise to be feared that the enactment at a later date of the demand for payment by the Free and Hanse City of Hamburg, which is derived from the forfeiture order, or the claims of the damaged parties, as the case may be, could be thwarted or seriously impeded (§ 917 ZPO).

On [4 and 5 June 2003] the accused had already, according to present findings, transferred 12.472 Millions of Euro from his bank to South Africa, to extricate them from the seizure by the criminal prosecution authority and the alleged damaged parties. On [23 June 2004], the day the decisions of the constitutional court in this matter were proclaimed, moreover, he had assigned all claims that he holds against the Free and Hanse City of Hamburg to his father-in-law Axel Schroeder.

There is concern that the accused will continue to strive to stash away or to assign to Third Parties assets to which he is entitled, in order to thwart the execution of the claims which the state or the damaged parties have on him.” (Certified translation.)

argument, that this also was a new argument, but stated that it was linked to the specificity argument which had been raised in their written submissions in this Court and in their papers before the Supreme Court of Appeal.

[44] The NDPP submits that the registration of the German restraint order and the interdictory order made pursuant to it can only be set aside under ICCMA. As found by the Supreme Court of Appeal, a foreign restraint order registered in terms of section 24 of ICCMA merely has the effect of a restraint order under section 25 of POCA, but does not become a domestic restraint order.

[45] The NDPP argues that the provisions of ICCMA and of Chapter 5 of POCA must be harmonised. ICCMA modifies Chapter 5 of POCA to the following extent: first, there is no need for a judge of the South African High Court to make a section 26(1) order because of the provisions of sections 24 and 25 of ICCMA; second, one of the effects of registration under ICCMA is that a section 26(8) ancillary order can be made under POCA. The NDPP concedes that the applicants' argument on the wording of section 26(8) and specifically the phrase "at the same time" is semantically correct, but submits that one has to be practical in order to bring about a workable interaction between the two statutes.

[46] The interests of justice test set out in section 26(1)(d) of ICCMA has to be applied. It is not in the interests of justice to set aside the registration of the restraint order,

because the applicant admitted that he will dissipate the assets. Even if this Court is inclined to apply POCA, the NDPP submits, the applicants would still not be entitled to the relief they seek, because their interpretation of POCA is wrong. As section 24A qualifies sections 26(10)(b) and 17(b) of POCA, an order remains in force pending an appeal. The proceedings in Germany had yet to be concluded. The NDPP points out that as the POCA Amendment Act introduced both sections 26(10)(b) and 24A, it would make sense for these provisions to be read in concert.

*A constitutional matter?*

[47] The questions posed in [6] and [7] above are now addressed. I therefore consider, first, whether a constitutional matter has been raised. Then the questions whether leave to appeal should be granted and whether new evidence should be admitted are addressed. Thereafter the questions whether the registration of the foreign order and the subsequent interdictory order should be set aside are dealt with.

[48] This case concerns the proper interpretation of ICCMA and POCA. This Court has previously held that the interpretation of POCA raises a constitutional issue.<sup>48</sup> The same must apply to ICCMA, as it too has the potential to infringe rights, and must be interpreted in the light of the Constitution. A constitutional issue is raised.<sup>49</sup>

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<sup>48</sup> *Mohunram* above n 15 at para 9; *Fraser* above n 15 at para 47; and *Prophet* above n 15 at para 46.

<sup>49</sup> Section 167(3)(b) of the Constitution states that this Court has jurisdiction to hear only constitutional matters, and issues connected with decisions on constitutional matters. What constitutes a constitutional issue must be construed broadly and not unnecessarily restrict this Court's jurisdiction. See *Fraser* above n 15 at paras 35-6.

*Should leave to appeal be granted?*

[49] Whether it is in the interests of justice for this Court to grant leave to appeal depends on a number of factors.<sup>50</sup> Two of the most important ones are the significance of interpreting the relevant provisions of the legislation and the prospects of success.

[50] There is a live dispute between the parties. Its resolution requires interpretation of the two statutes in the light of the Constitution. The issues raised are arguable. It is in the interests of justice that this Court expresses itself on the matter. Leave to appeal must be granted.

*Should the new evidence be admitted?*

[51] In its written submissions before this Court the NDPP also seeks the admission of further evidence. The NDPP submits that one part comprises papers that formed part of the record before Louw J in the High Court which the applicants did not include in the record before this Court.<sup>51</sup> The rest comprises several supplementary affidavits setting out facts and clarifying the events that arose after the delivery of the High Court

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<sup>50</sup> See *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 20 and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 24.

<sup>51</sup> The papers in question are: a founding affidavit by Mr Bruce Gaye Morrison, dated 13 November 2003 by means of which the NDPP first instituted the proceedings for an interdictory order; a supplementary affidavit by Mr Uwe Hitziger, dated 1 December 2003 on which the NDPP based their application to amend their original notice of motion to amend the preservation of property order to be applicable to €4.2 million of the €5.22 million in the Standard Bank account; the English translation of the second German restraint order; the notice from the Registrar notifying the applicants of the registration of the foreign restraint order made in terms of section 24 of ICCMA on 13 September 2004; the English translations of the relevant statutory provisions of the relevant German statutes; and the applicants' notice of leave to appeal in the Supreme Court of Appeal.

judgment on 10 July 2009.<sup>52</sup> The NDPP sought admission of these papers before the Supreme Court of Appeal. The Supreme Court of Appeal provisionally admitted the papers, but finally declined to admit them as it decided to adjudicate the appeal on the basis of the factual situation that existed when the matter was determined in the High Court.<sup>53</sup>

[52] The applicants ultimately did not resist the admission of the further evidence. It should be admitted because there is neither opposition nor prejudice.

*The registration of the foreign restraint order*

[53] Under this heading, I address three issues: Which statute applies to the registration? Was the registration of the German order valid? And, should the registration be set aside?

*Which statute – ICCMA or POCA?*

[54] The applicants' primary objective is to have the interdictory order set aside. However, they also attack the registration of the German restraint order, because if they succeed and the registration falls away, the rest will follow. For the purpose of a proper

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<sup>52</sup> The NDPP states that the papers concern: “an attempt by FRSA’s farm manager Mr Louw to have FRSA wound up by the [High Court]; the appointment by the [High Court] of a *curator bonis* for the South African property of [Mr] Falk; the purported cession by [Mr] Falk of his loan account in FRSA to a Panamanian company; the further orders made by the [High Court] in connection with the curatorship and the assets under curatorship; and the outcome of the appeals to the German Federal Court (*Bundesgerichtshof*) by the Hamburg prosecutors and [Mr] Falk against the decisions taken by the Hamburg Regional Court on 8 May 2008 at the conclusion of the criminal trial in the latter court.”

<sup>53</sup> Above n 4 at para 9.

analysis, however, three things must be clearly distinguished. These are the restraint order made in Germany under German legislation, the registration of the German restraint order in South Africa in terms of ICCMA and the order subsequently granted under POCA by the High Court.

[55] The registration of the German restraint order took place in terms of section 24 of ICCMA. ICCMA is therefore applicable to the registration.

[56] As held by the Supreme Court of Appeal, the fact that the German restraint order was registered in South Africa does not make it a South African order. It remains a foreign order. A South African court has no jurisdiction to alter or rescind it. But the registration of the order by the Registrar in the High Court is a South African event, under South African law, which can be set aside by a South African court. In spite of the somewhat loose terminology used, I do not understand the applicants to ask for the German restraint order to be set aside. Their target is the registration of that order in the High Court. The registration could only be set aside under ICCMA.

*Was the registration valid?*

[57] In attacking the validity of the registration of the order, the applicants argue in this Court that the restrained property was not “specified”, as required by section 24(2) of ICCMA, that the German order did not relate to assets in South Africa and that it has not been shown that the amount stated in it had not been satisfied in Germany.



[58] The order, as translated into English, does not expressly refer to South African assets, but rather orders the “attachment *in rem* of the assets of the accused.” It provides neither a specific location of these assets, nor a definition of the term “*in rem*”.<sup>54</sup> The order directs German officials to take certain steps to enforce the order. That is understandable, since it was made by a court in Germany. This does not raise doubt about whether it is applicable in South Africa, though.

[59] The order itself sets out the reasons why it was granted. These include a reference to the fact that approximately €12 million has already been transferred to South Africa. The applicants claim that this indicates that the order applies not to South African assets, but only to assets remaining in Germany. However, the reasons point to the opposite, namely the fact that assets have already been moved to South Africa indicates Mr Falk’s willingness to dissipate assets and thus the order must apply to all of his assets, wherever they may be.

[60] These arguments on the validity of the registration of the German order were not canvassed in the applicants’ founding papers, but only in their written and oral argument

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<sup>54</sup> In South Africa, “*in rem*” means “an act or proceeding, as it were, directed against ‘all the world’ or against whom so ever it might concern”, according to *Dictionary of Legal Words and Phrases* (looseleaf) vol 2 (Butterworths, Durban 2010) at I-41. See also Du Bois (ed) *Wille’s Principles of South African Law* 9 ed (Juta, Cape Town 2007) at 428-34 with reference to Grotius 2.1.58. In English law, “*in rem*” is described as “an act, proceeding or right available against the world at large, as opposed to *in personam*”, and also “a right of property”, according to *Osborn’s Concise Law Dictionary* 9 ed (Sweet & Maxwell, London 2001) at 202. In the United States, according to *Black’s Law Dictionary* 8 ed (West, St Paul 2004) at 809, “*in rem*” means “[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing”.

before this Court. Their counsel asserted that they were also raised orally in the Supreme Court of Appeal. It is essentially a new attack. This Court is not the appropriate forum to decide it, as it would require us to act as a court of both first and last instance and to make a factual determination. The NDPP did not have the opportunity to reply properly to the allegation.

[61] The validity of the registration was not attacked until long after the interdictory order had been granted.<sup>55</sup> Section 26(1)(a) of ICCMA requires the court at which a foreign order is registered to set the registration aside, if it is satisfied that the order was registered contrary to a provision of ICCMA. The applicants never approached that court with an application to set aside the registration.

[62] The applicants should have raised their objections to the validity of the registration much earlier. As stated in the Notice of Registration of a Foreign Restraint Order, dated 13 September 2004, the applicants had 20 court days from the date on which the registration came to their knowledge to apply to the High Court to set it aside.<sup>56</sup> The applicants' submission that the German order was not validly registered must fail.

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<sup>55</sup> The registration of the foreign restraint order took place in September 2004, the interdictory order was granted in August 2005, the applicants initiated their application to challenge the interdictory order in June 2008 and the applicants challenged the validity of the registration of the foreign restraint order only in their written argument in this Court.

<sup>56</sup> Regulation 16 of the International Co-operation in Criminal Matters Act Regulations, *Government Gazette* 18556 GN R6062, 19 December 1997.

*Should the registration be set aside?*

[63] As the Supreme Court of Appeal found, the only way in which the registration of the foreign restraint order can be set aside is on application to the High Court under section 26(1) of ICCMA.

[64] This provision mentions five situations in which registration can be set aside.<sup>57</sup> Leaving aside the possibility that the order was registered contrary to the provisions of ICCMA,<sup>58</sup> discussed earlier, the only question applicable to this case is whether the enforcement of the order would be contrary to the interests of justice.<sup>59</sup>

[65] The flip side of the question whether the enforcement of the order would be contrary to the interests of justice is how the interests of justice would be affected by the setting aside of the registration of the order. The probable dissipation of assets is essential to this enquiry. The applicants conceded before the Supreme Court of Appeal that, but for the restraint, there is a real possibility that Mr Falk may dispose of the South African assets in question, as they maintain he is entitled to do. There was ample reason, in the interests of justice, for the registration of the German restraint order to stay in place while appeal proceedings were pending in Germany. To hold differently would defeat the very purpose of a restraint order.

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<sup>57</sup> See above n 21 for the text of section 26(1).

<sup>58</sup> Section 26(1)(a).

<sup>59</sup> Section 26(1)(d).

[66] The question whether the proceedings against the applicants were concluded in Germany – raised with reference to section 26(10)(b) of POCA – is also relevant to the interests of justice enquiry under section 26(1)(d) of ICCMA. It is arguable that it would not be in the interests of justice for the registration of the German restraint order to remain in place after the conclusion of the proceedings.

[67] When the decision of the Hamburg Regional Court was taken on appeal to the Federal Court, the German proceedings were clearly not concluded. A confiscation order could still be granted. This necessarily flows from the nature of the appeal. The subsequent referral back to the Regional Court by the Federal Court to decide on a confiscation order confirms this.

[68] POCA is of course a South African statute, based on South African law regarding appeals and reviews and the conclusion of proceedings. Appeal proceedings in another country may differ from those of South Africa. For instance, if an accused is acquitted in South African criminal proceedings, the State can only appeal in very limited circumstances.<sup>60</sup> If in another country, the State could appeal in wider or different circumstances, it may be difficult to apply the law of that country to a statute that clearly has South African criminal procedure in mind.

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<sup>60</sup> Generally, the State can appeal in criminal proceedings on questions of law, inadequate sentences and the granting of bail. The State cannot appeal on the merits of an acquittal. See Chapters 9 and 30-1 of the Criminal Procedure Act 51 of 1977.

[69] This, however, is not a question that one needs to grapple with in this case as the prosecution in Germany appealed not against an acquittal, but against the Hamburg Regional Court's refusal to grant a confiscation order. An appeal also lies in South Africa against a refusal to grant a confiscation order. The granting of an order amounts to civil proceedings which can be appealed by both parties if it is granted or refused.<sup>61</sup>

[70] Section 17(b) of POCA, which states that proceedings are concluded when the court convicting the defendant of an offence sentences the defendant without making a confiscation order, does not assist the applicants. As the Supreme Court of Appeal stated, section 17(b) could not apply only to a court of first instance. Section 13(1) of POCA allows for an appeal by the NDPP.<sup>62</sup> This is further demonstrated by section 24A of POCA, which was inserted later by the POCA Amendment Act. It states that a restraint order or ancillary order which "is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the

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<sup>61</sup> See section 13 of POCA, which provides in the relevant part:

- “(1) For the purposes of this Chapter [5] proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.
- (2) The rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order.
- (3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.
- (4) No rule of construction applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.”

On the ability to appeal by both parties in civil proceedings, see generally Joubert et al (eds) *The Law of South Africa* (reissue) vol 3(1) at paras 355-8.

<sup>62</sup> See the SCA judgment above n 4 at para 16.

outcome of any appeal against the decision concerned.”<sup>63</sup> The applicants’ argument that the proceedings have been concluded would elevate form above substance, an approach that our courts have not endorsed.<sup>64</sup>

[71] The applicants have not shown that the enforcement of the registered order would be contrary to the interests of justice, as required by section 26(1)(d) of ICCMA. The application to set aside the registration cannot succeed. The Supreme Court of Appeal cannot be faulted for its finding in this regard.

*What does “having the effect” of a domestic order mean?*

[72] Before the claim for rescission of the interdictory order is dealt with, a question relating to the registration of both the German order and the interdictory order requires attention: what does section 25 of ICCMA mean by stating that when a foreign restraint order has been registered, it shall have the effect of a restraint order made by the division of the High Court at which it has been registered?

[73] The dictionary meaning of “effect” is, inter alia, “[t]he state or fact of being operative” or “to come into force.”<sup>65</sup> This would imply that once a foreign restraint order

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<sup>63</sup> See above n 14 for the text of section 24A.

<sup>64</sup> See for example *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97; *Theart and Another v Minnaar NO*; *Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) at para 14; *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para 26; and *Shaikh v Standard Bank of SA Ltd and Another* 2008 (2) SA 622 (SCA) at para 18.

is registered it operates as if it were, for all intents and purposes, a domestic restraint order.

[74] If registration gave the German order the effect of a domestic order, why did the NDPP obtain the ancillary interdictory order? Could the German order, once registered, not have been enforced in South Africa?

[75] It might well be that a registered foreign restraint order could, as a self-standing order, have the effect of a domestic order and could indeed be enforced as such. Thus, it would not always be necessary to obtain an interdict from the High Court, before the registration of a foreign restraint order could have practical effect in South Africa. It is not necessary to reach a conclusion on this possibility, though, given the facts of this case.

[76] Section 25 of ICCMA provides a link between ICCMA and POCA. Once a foreign order is registered and has the effect of a domestic order, it is for the purposes of POCA an order under section 26(1) of POCA. Section 26(8) serves to make the section 26(1) order more effective. This may be required where the restraint order itself is not enough, or requires that the property be seized. It might also be necessary that some other kind of ancillary order – for example the interdictory order in this case – be granted

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<sup>65</sup> See for example *Oxford English Dictionary* (2 ed reprinted with corrections) vol 5 (Oxford University Press, Oxford 1991) at 78-9.

that “the court considers appropriate for the proper, fair and effective execution” of the section 26(1) order.<sup>66</sup> So, if registration of a foreign restraint order gives it the effect of a section 26(1) order, section 26(8) empowers the court to grant ancillary orders that render the registration more effective.

[77] The NDPP argued that while the registration of the German restraint order aimed to secure assets in this jurisdiction, it had no practical effect until an order was made by the High Court to ensure that specific assets were restrained. The German restraint order does not specify any actual assets in South Africa, but rather talks more generally about a lump sum that the accused owes as a result of his criminal dealings. In contrast, the order issued by the High Court specifies the assets. Thus, the registration of the German restraint order provided the jurisdictional basis upon which an application could be made by the NDPP to restrain specific assets in South Africa.

[78] On the facts of this case, it is quite clear that the interdictory relief was essential to the efficacy of the original restraint order. This is how ICCMA and POCA interact in the circumstances of this matter.

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<sup>66</sup> See above n 9 for the text of section 26(8) of POCA.



*Should the interdictory order be rescinded?*

[79] The NDPP brought the application in the High Court for the interdictory order under section 26(8) of POCA.<sup>67</sup> It was common cause in the High Court and the Supreme Court of Appeal that the interdictory order was granted as an “ancillary order” in terms of section 26(8).<sup>68</sup>

[80] The applicants contend in this Court though that the order cannot be an “ancillary order” under section 26(8) of POCA. The language of section 26(8) requires that ancillary orders be made “at the same time” and by the “High Court making a restraint order” under section 26(1).<sup>69</sup> The order was granted pursuant to the registration of a foreign restraint order and not pursuant to a POCA section 26(1) order, and in any event was not granted at the same time as the registration of the German restraint order, so they argue.

[81] The interdictory order itself does not specifically state under which provision it was made. Interim relief granted by agreement against the applicants after a hearing on the semi-urgent roll on 16 August 2005, however, did state that it was granted in terms of section 26(8) of POCA.<sup>70</sup>

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<sup>67</sup> Id.

<sup>68</sup> See the SCA judgment above n 4 at para 5.

<sup>69</sup> See above n 9 for the text of section 26(8).

<sup>70</sup> See the High Court judgment above n 5 at para 20.

[82] Orders ancillary to the registration of a foreign restraint order will by necessity not be made at the same time and by the same High Court that made the main order, as envisaged in the wording of section 26(8). It is practically impossible. The registration of a foreign order by the Registrar is clearly not the same as the granting of an order by a court. The original order was made in another country. POCA was drafted with the practical workings of domestic restraint orders in mind. Because ICCMA relies on POCA, the wording of section 26(8) has to be interpreted to allow POCA and ICCMA to be implemented together.

[83] It is so that section 26(8) requires that a High Court making a restraint order “shall at the same time” make an order authorising the seizure of moveable property concerned. However, this does not mean that ancillary orders can never be made after a section 26(1) order has been made. To construe section 26(8) in this way would be too narrow and render the provision practically meaningless, especially within the context of the interaction between ICCMA and POCA. It is well known that the term “shall”, in legislation, could mean “must”, but also sometimes “may”.<sup>71</sup> In this case the latter applies. The court granting the section 26(1) order is empowered to grant ancillary relief at the same time, but is not prohibited from doing so at a later stage.

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<sup>71</sup> This Court has held that the word “shall” when used in legislation is not always peremptory. See for example *Mohunram* above n 15 at para 121. Additionally, the Supreme Court of Appeal has held that the word “must” is predominately peremptory. See for example *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister for Environmental Affairs and Others v Smith (Pty) Ltd* 2004 (1) SA 308 (SCA) at para 32.

[84] The requirement in section 26(8) that the same court that granted the restraint order has to grant ancillary relief does not pose a problem. Because the foreign order was registered by the Registrar, and section 25 of ICCMA states that the registration gives the order the effect of a domestic order, the court where the foreign order is registered is necessarily the court that may grant ancillary relief.

[85] The Supreme Court of Appeal interpreted section 26(8) in a flexible manner, in order to render it practically workable as far as registered foreign orders are concerned, in accordance with the objects of ICCMA and POCA. It is however not necessary to unduly stretch or alter the wording of the provision. A proper contextual interpretation of the wording allows for the granting of ancillary relief subsequent to the registration of a foreign order.

[86] The ancillary order is not a section 26(1) order. Indeed, the registration of the foreign restraint order has the effect of a section 26(1) order. All that needs to be done is to apply for an ancillary order under section 26(8) should that be necessary to render the section 26(1) order, or the registration, more effective. The question then is how the ancillary order could be rescinded.

[87] The applicants argued that the interdictory order must be rescinded under section 26(10)(b).<sup>72</sup> This section provides that the High Court that made the restraint order must rescind the order when the proceedings against the defendant are concluded.<sup>73</sup>

[88] Section 26(10)(b) cannot be applied to an ancillary order granted under section 26(8) though. The wording of section 26(10)(b) clearly refers to restraint orders only. It can only apply to a section 26(1) order.

[89] As indicated above, whether the proceedings in Germany had indeed been concluded – argued by the applicants as a section 26(10)(b) consideration – is relevant to the interests of justice enquiry regarding whether the registration should be set aside under section 26(1) of ICCMA. It is not relevant to the rescission of the interdictory order under section 26(10).

[90] Only section 26(10)(a) is in principle applicable to the rescission of a section 26(8) order. It applies both to restraint orders and ancillary orders. It provides for the rescission of an order if “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 if “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,

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<sup>72</sup> See above n 10 for the text of section 26(10)(b) of POCA.

<sup>73</sup> Id.

concealed or transferred”. This finds no application in this case and has not been argued to do so.

[91] A case has therefore not been made to rescind the interdictory order in terms of section 26(10) of POCA. To get rid of the ancillary relief, the applicants have to set aside the registration of the foreign order under ICCMA, which would necessarily have the effect of nullifying the ancillary order. As indicated, they failed to do so.

*The interpretation of the statutes and the Constitution*

[92] The interpretation of ICCMA and POCA must promote the values that underlie an open and democratic society based on human dignity, equality and freedom in terms of section 39(2) of the Constitution and it may not allow for the arbitrary deprivation of property in contravention of section 25(1). The above interpretation represents a meaningful and workable way of giving effect to POCA and to ICCMA, within the context of the objects of the two statutes. It does not offend the spirit, purport and objects of the Bill of Rights. International co-operation in combating crime to protect society is a legitimate constitutional objective. The order granted in this case also does not allow for the arbitrary deprivation of property. By their very nature, restraint orders restrain the use of property.

*Conclusion*

[93] In summary, the German restraint order was registered in the High Court in terms of section 24 of ICCMA. Only ICCMA is applicable to the setting aside of the registration of a foreign order. The applicants never approached the High Court where it was registered to set it aside on the basis that the registration was not in accordance with ICCMA, in terms of section 26(1)(a) of ICCMA. The registration can also not be set aside in terms of section 26(1)(d) of ICCMA because the requirements of that section have not been met. The applicants have not shown that the enforcement of the order would be contrary to the interests of justice. In fact, to set aside the registration would be contrary to the interests of justice.

[94] The interdictory relief ordered by the High Court was granted under section 26(8) of POCA as an ancillary order to the registered German order, which had the effect of a South African order, in terms of section 25 of ICCMA. Section 26(10)(a) of POCA is not applicable to the circumstances of this case and section 26(10)(b) does not apply to ancillary orders.

[95] The Supreme Court of Appeal therefore correctly dismissed the appeal against the High Court's refusal to set aside the registration of the German restraint order and to rescind the interdictory order granted by the High Court. The appeal must be dismissed.

*Costs*

[96] Although the appeal has failed and the applicants have not been successful in this Court, they have raised a constitutional issue of considerable import. Each party should pay its own costs in this Court.<sup>74</sup> There is no reason to interfere with the costs orders made by the High Court and the Supreme Court of Appeal.

*Order*

[97] The following order is made:

1. The application for the admission of further evidence on affidavit is granted.
2. The application for leave to appeal is granted.
3. The appeal is dismissed.
4. No costs order is made.

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

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<sup>74</sup> See for example *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC); *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 143; *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138; and *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at paras 30-2.

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