THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 146/2003

In the matter between :

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

MULLER CONRAD RAUTENBACH First Respondent

WESSEL HENDRICK MOOLMAN RAUTENBACH Second Respondent

Before: **MPATI DP, NAVSA, NUGENT JJA, ERASMUS & PONNAN AJJA**

Heard: **19 AUGUST 2004**

Delivered: **22 NOVEMBER 2004**

Summary: Prevention of Organised Crime Act 121 of 1998. Two separate appeals: (1) Ancillary appeal - provisional restraint order - effect of noting of appeal against order setting it aside (2) Main appeal - restraint order - requirements for grant of – relationship between restraint order and anticipated confiscation order. **The orders in the two appeals are contained in paragraph 58.**

J U D G M E N T

(Dissenting in part pp 30-42)

(Concurring pp 42-45)

NUGENT JA

<u>NUGENT JA</u>:

[1] There are two appeals before us, both of which originate from a provisional restraint order that was made by the Johannesburg High Court (Blieden J) in the exercise of the powers conferred upon it by s 26 of the Prevention of Organised Crime Act 121 of 1998. The provisional order is lengthy and its detailed provisions are not material for present purposes. It is sufficient to say that the order placed under restraint, and appointed a curator *bonis* to take charge of, certain property, excluding 'such realisable property as the Curator, after determining the value that the property disclosed to him is likely to yield when realised, may certify in writing that he considers to be in excess of the value of R60 million.' The property that was encompassed by the order included property held by the first respondent (who I will refer to as Rautenbach) or by relatives to whom he allegedly made affected gifts, which in turn included a house and six flats in Sandhurst, a farm in KwaZulu-Natal, a farm in the Western Cape, a Falcon Jet aircraft, a Bell Ranger helicopter, and furniture, fittings, equipment and other moveable items (subject to certain exclusions) that were in or on the properties. The order was later extended to include moneys held in certain bank accounts. The only property that was taken into the control of the curator pursuant to the order was the specified property to which I have referred and there is no indication that any other property exists that might also be subject to the terms of the order. The

value of that property does not appear from the evidence but we were told from the bar that it amounts to about R20 million.

[2] Another twenty-two respondents were cited in the proceedings but only one of them (Rautenbach's father, who was cited as the third respondent) has joined with Rautenbach to oppose these appeals.

[3] The provisional restraint order was discharged by Rabie J on the return day and the main appeal, which is before us with the leave of the court *a quo*, is against that decision. The ancillary appeal raises the question whether the initiation of the main appeal had the effect of keeping the provisional restraint order in place. In separate proceedings that were brought by the two respondents Rabie J declared that it did not have that effect and he ordered the curator to return the property that had been placed under restraint. The appellant appeals against that decision with leave granted by this court.

[4] Before turning to the merits of the appeals there are certain preliminary matters that need to be dealt with. The prosecution of the appeals was irregular in three respects – the notice of appeal in both cases, and the appellant's heads of argument, were all filed out of time – for which the appellant sought condonation. Those applications were opposed but the explanation that was tendered by the State Attorney, the importance of the issues that arise in these appeals, and the lack of material prejudice that was caused to the respondents, together provide sufficient grounds for condoning the irregularities. Furthermore, the respondents launched an

application to submit further evidence to this court, but that application has now been abandoned and I need say no more about it. I will deal with the costs relating to those matters later in this judgment.

THE ANCILLARY APPEAL

[5] The provisional restraint order was made on 18 September 2000 on the *ex parte* application of the appellant. In due course Rautenbach filed answering affidavits, which were replied to by the appellant, and Rautenbach filed a further affidavit and applied to strike out portions of the replying affidavits. On the extended return day the matter came before Heher J who struck out some of the material that had been objected to and extended the return day. Further affidavits were then filed by Rautenbach and replied to by the appellant.

[6] On the extended return day the matter came before Rabie J, who discharged the provisional order with costs. (That order is the subject of the main appeal.) Shortly after the provisional order was discharged the appellant lodged an application for leave to appeal. The appellant took the view that the effect of that application was to revive the provisional restraint order until the outcome of the application for leave to appeal (and any consequent appeal) and the restrained property was not released. That prompted the respondents to apply to the High Court, as a matter of urgency, for an order compelling the curator to secure the release of the property. The appellant opposed the application and applied in the same proceedings, conditionally upon it being found that the restraint order was

no longer in force, for an order permitting the curator to remain in possession of the property pending the outcome of the main appeal.

[7] Rabie J found in the respondents' favour and issued an order declaring that the lodging of the application for leave to appeal did not revive the provisional order and that the property concerned was accordingly not subject to any restraint, directing the curator to release the property, and dismissing the counter-application for conditional relief. Leave to appeal against the whole of that order was refused by the court *a quo* but was granted by this court.

[8] The appeal against the dismissal of the counter-application has been abandoned by the appellant. Thus the only issue that arises in this appeal is whether the court *a quo* correctly found that the provisional restraint order was not revived by the lodgement of the application for leave to appeal in the main proceedings.

[9] Because the ancillary appeal concerns the status of the provisional restraint order only until such time as the main appeal is disposed of it will be apparent that, as between the parties, the outcome of the ancillary appeal will have no practical effect or result. Section 21A(1) of the Supreme Court Act 59 of 1959 gives this court a discretion, in those circumstances, to dismiss the appeal on those grounds alone. While this court will generally not entertain appeals that do not concern concrete controversies (*Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA)) the issue that arises in this appeal

nevertheless relates to an important question of law that is not only the subject of some uncertainty[1] but it also arises frequently in practice and in my view we should exercise our discretion to resolve it (cf *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) para 4).

[10] Rule 49(11) of the Uniform Rules provides that

‘where an appeal has been noted or an application for leave to appeal against … an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.’

[11] The appellant submitted that in the present case two separate orders were made – first, the provisional order that was made by Blieden J and secondly, the order by Rabie J discharging it – and that the effect of initiating an appeal against the second order was to suspend only that order, with the logical result that the first order remained extant.

[12] That is to misconstrue the true nature of the orders. As pointed out by Goldblatt J in *Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc & Another* 2000 (2) SA 188 (W) at 190 B-E orders of this kind are not independent of one another. An interim order that is made *ex parte* is by its nature provisional – it is ‘conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side’ (per Harms JA in *MV Snow Delta: Serva Ship*

[1]Cf *Du Randt v Du Randt* 1992 (3) SA 281 (E); *MV Triena: Haji-Iannou and Others v MV Triena and Another* 1998 (2) SA 938 (D); *The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1996 (4) SA 1234 (C) and cases there cited.

Ltd v Discount Tonnage Ltd 2000 (4) 746 (SCA) para 6), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) para 45). It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order was made in the first place.

[13] The appellant submitted that even if that is so in relation to ordinary civil practice a distinction should be made in relation to an order of the kind that is now before us otherwise the purpose and intent of the Act will be undermined. I see no grounds upon which to make that distinction. The reason for permitting restraint orders to be sought *ex parte* is not to ease the burden upon the appellant by ensuring that he can obtain such orders without opposition: it is to ensure that the property concerned is not disposed of or concealed in anticipation of such proceedings. The Act contemplates that such an order is only provisional until it is confirmed on the return day (s 26(3)(a)) and in that respect it is no different to an order made in ordinary civil proceedings. If that means that property will not be under restraint where a court erroneously refuses to make such an order (either provisionally at the outset or finally on the return day) – and in my view it does – that is the inevitable consequence of insisting upon an order of a court before property is placed under restraint.

[14] For those reasons the ancillary appeal must fail. I have considered apportioning the costs between the two appeals but on reflection that is best left to the discretion of the taxing master. For the guidance of the taxing master I record that the time that was taken up before us with the ancillary appeal was minimal.

THE MAIN APPEAL

[15] Before turning to the true issues in the appeal it is necessary to deal with various matters that were raised by Rautenbach.

[16] Much of his evidence was devoted to matters that do not bear directly on the case that was advanced by the appellant but was directed rather at supporting a submission that the appellant brought these proceedings with an ulterior motive and that the provisional order fell to be discharged on those grounds alone.

[17] At one point in his affidavit Rautenbach seemed to suggest that the proceedings were a further step in a campaign that was allegedly waged against him by the motor manufacturing industry because of the success of his business. (The business entailed the importation of Hyundai motor vehicles.) In support of that suggestion he alleged that in May 1997 the Minister of Trade and Industry, acting in response to representations made to him by the motor industry, threatened to take 'tough action' against the companies with which he was associated for allegedly breaching customs legislation. Shortly thereafter the customs authorities impounded all Hyundai vehicles at dealer outlets throughout the country. Litigation

ensued and the vehicles were released but an enquiry was launched by the customs authorities to establish whether customs duties had been evaded. No action was taken by the authorities as a result of that investigation, but the following year tax assessments were received by the companies in the group and by Rautenbach and a relative reflecting that R100 million in total was payable by them. Further litigation followed with the result that most of the claim was abandoned and only an amount of R5 million remained in dispute. Then in November 1999 all the documents of the group were seized by the Investigating Directorate for Serious Economic Offences and allegations, purporting to have emanated from, amongst others, the appellant and a member of his staff, appeared in the press, to the effect that Rautenbach had committed serious offences.[2] The business collapsed and further litigation ensued.

[18] At another point in his affidavit Rautenbach seemed to suggest that the appellant acted against him because his activities in the Democratic Republic of Congo had made him a thorn in the side of the South African government. In support of that allegation he pointed out that it had repeatedly been reported in the press that he was responsible for propping up the governing regime of that country and that at one stage enquiries were made of him by representatives of the appellant and the National Intelligence Service concerning, amongst other things, a mining venture in

[2] I have not dealt in detail with those events, which are traversed more fully in *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (2) SA 934 (T) and *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).

that country in which Rautenbach had an interest. All this, Rautenbach said, 'demonstrates unequivocally that political and strategic considerations constitute the 'raison d'etre' for these proceedings'.

[19] Various other disparate facts and events were attested to by Rautenbach to support his allegation that the appellant has acted in pursuit of one or other or both of those motives or perhaps even another. I do not think it is necessary to burden this judgment any further with those allegations. It is sufficient to say that in my view the evidence to which I have referred goes no way to establishing that the appellant has acted improperly or unlawfully in commencing these proceedings and there can be no criticism of the appellant for not having been enticed down the byways along which he was beckoned by this evidence.

[20] It was also submitted that until such time as the appellant has produced a charge sheet it cannot be said that Rautenbach is to be charged with an offence – which is one of the prerequisites for the exercise of the powers conferred upon a court by s 25(1)(b) – and support was sought for that submission in an unreported decision of the Pretoria High Court.[3] The section requires a court to be satisfied that the person concerned is to be charged with an offence and not that the prosecution is imminent and the decision to which we were referred does not purport to hold otherwise. In my view that requires a court only to be satisfied that a prosecution is seriously intended and not that a charge sheet has already been drawn. I see

[3] *National Director of Public Prosecutions v Alexander*, unreported, dated 7 February 2000.

no reason to doubt that the appellant's expressed intention in the present case is serious. While Rautenbach remains outside the jurisdiction of the South African courts (he is resident in Zimbabwe) it is clearly not possible for effect to be given to that intention but I do not think that precludes the appellant in the interim from utilizing the remedy provided for in the Act.

[21] Allied to that earlier contention was also a submission that the appellant's case is vague and inconsistent and has varied over time with consequent uncertainty for Rautenbach of the case that he was called upon to meet. The appellant must set out his case in such a manner that the respondent is fairly informed of the case that he or she is called upon to meet (cf *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* et al)[4] but that does not mean that it must be presented in any particular form. What is required is only that the case that is sought to be made out by the appellant is articulated with sufficient clarity to reasonably inform the respondent of the case against him or her. But when evaluating whether that has been done it can be assumed that a respondent is not obtuse and will draw those inferences that fairly present themselves from the allegations, in much the same way as an accused person is expected to do when confronted with an indictment.[5] In my view the case that the appellant sought to make out in the founding affidavits is reasonably clear and it is also apparent from Rautenbach's evidence that he was well aware of the case that he was called upon to meet. Moreover, I do not share the

[4]2004 (8) BCLR 844 (SCA).
[5] See, for example, *R v Preller* 1952 (4) SA 452 (A) 460F-461B, *R v Sachs* 1953 (1) SA 392 (A) 399D-F.

view of the learned judge *a quo* that the appellant's case – at least that part of it that is material to this judgment – has shifted over time. In one respect a new case was sought to be made in reply, but that was permitted by Heher J who heard the application to strike out, and Rautenbach had ample opportunity to answer the new allegations.

[22] Finally it was submitted that the appellant failed to make material disclosures when he applied for the provisional order and that on those grounds alone the order was properly discharged. If there were material non-disclosures – and in my view there were not – it was for the court *a quo* to exercise the discretion that it had to discharge the order on those grounds and no case has been made out for interference by this court if the court *a quo* chose not to do so.

[23] I turn now to the case that the appellant advanced.

[24] The nature of a restraint order, and the circumstances in which such an order might be granted, have been considered in various decisions of this court, and I need not repeat what was said in those cases.[6] It is sufficient to say that a court that convicts a person of an offence is entitled, in certain circumstances, to make an order (referred to as a 'confiscation order') that such person pay to the state the value of the proceeds of the offence or of related criminal activity. The purpose of a restraint order is to

[6]*National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA); *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA); *Phillips & Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA); *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA).

preserve property in the interim so that it will be available to be realized in satisfaction of such an order.

[25] A court from which such an order is sought is called upon to assess what might occur in the future. Where it is 'satisfied that a person is to be charged with an offence' and that there are 'reasonable grounds for believing that a confiscation order may be made against such person' (s 25(1)) it has a discretion to make a restraint order.

[26] The court *a quo* approached the matter as follows:

> 'The Act requires that it must be shown that "grounds" exist which grounds appear to a court to be of such a nature that they would support a future confiscation order. This means that, as a first requirement, the Applicant has to prove the existence of such "grounds". That is a factual question and according to section 13(5) of the Act, the onus of proving such facts must be discharged by the Applicant on a balance of probabilities.'

[27] In my view that is not correct. It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (*National Director of Public Prosecutions v Basson* 2002 (1) SA 419

(SCA) para 19) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act have been met, and the court is properly seized of its discretion, it is not open to the court to then frustrate those criteria when it purports to exercise its discretion (cf *Kyriacou*, footnote 1, paras 9 and 10). The misdirection by the court *a quo* pervaded all its reasoning and was instrumental to the conclusion to which it came and I have approached the matter afresh.

[28] The principal accusation made against Rautenbach was that he was a party to defrauding the South African Revenue Service in the course of operating a business that imported vehicles into southern Africa and into South Africa in particular. Rautenbach was also accused of having stolen money from one of the companies with which he was associated, and of contravening s 86(e) of the Customs and Excise Act 91 of 1964. For reasons that will become apparent I have found it necessary to deal only with the principal accusation.

[29] It is implicit in the principal accusation, when seen against the nature of the business that was conducted, that the fraud of which Rautenbach stands accused was allegedly perpetrated when vehicles were imported into this country, though that is not expressly stated. The only real dispute in this matter, however, relates to events that preceded the entry of the vehicles into South Africa, and most of the evidence is devoted to that issue. But what occurred at that stage is not to be seen in isolation for it was but a step in a process that had as its ultimate aim the sale of at least most of the vehicles in South Africa.

[30] The territories of Botswana, South Africa, Lesotho, Namibia and Swaziland together form a common customs area that is governed by uniform customs legislation and tariffs. Within the common customs area there is free trade in goods. Customs and excise duties are collected at the first point of entry of goods into the common customs area. According to the evidence the duties are paid into a common fund for appropriation to the relevant state to which the duty accrues.

[31] In about 1993 a group of three companies with which Rautenbach was associated commenced business importing Hyundai motor vehicles from Korea into southern Africa for sale mainly in South Africa. The vehicles were imported into Botswana in partially disassembled form. The components were reassembled in Botswana and most of the reassembled vehicles then made their way to South Africa where they were sold through a network of distributors.

[32] The companies in the group were Hyundai Motor Distributors Limited – a company incorporated in the British Virgin Islands ('Hyundai BVI') – which had the sole right to distribute Hyundai vehicles in southern Africa; Hyundai Motor Distributors Botswana (Pty) Ltd – a company incorporated in Botswana ('Hyundai Botswana') – which imported the vehicle components into Botswana where they were assembled; and Hyundai Motor Distributors (Pty) Ltd – a company incorporated in South Africa ('Hyundai SA') – which distributed the vehicles, mainly in South Africa.

[33] Rautenbach and Mr Nissim Franco were the beneficial owners, in equal shares, of Hyundai Botswana. It is alleged that the registered shareholders of the other two companies were nominees for Rautenbach and Franco but that has been denied. However it is clear from Rautenbach's own evidence that he was able to exercise control over the affairs of these companies and did so.

[34] The vehicles were imported into Botswana in partially disassembled form in order to take advantage of the considerable customs duty rebate that was allowed when 'components' of motor vehicles were imported. To secure that advantage the vehicles were purchased from the manufacturer in Korea but were then partially disassembled after they came off the production line (initially the vehicles were disassembled by the manufacturer in Korea but from about the middle of 1997 they were

disassembled in Mozambique) and the partially disassembled components were then imported into Botswana where they were reassembled.

[35] Whether partially disassembled vehicles properly constituted 'components' for customs purposes, thus attracting the rebate, was somewhat controversial, and that seems to have prompted the enquiry that I referred to in paragraph [17] above. But whether or not those rebates were legitimate is immaterial to this appeal because the conduct that is said to have been fraudulent was quite unrelated to that question.

[36] Duties that are payable in the motor industry are derived from a complex structure that altered with effect from 1 September 1995. In short, before that date, the business attracted liability for payment of excise duty, the amount of which was indirectly affected by the value that was attributed to the imported goods. After that date *ad valorem* customs duty was payable on the value of the imported goods. Thus both before and after 1 September 1995 the declared value of the goods, which was required to be supported by commercial invoices, determined, directly or indirectly, the amount of duty that became payable by Hyundai Botswana. It fell to the customs and excise authorities in Botswana, where the goods entered the common customs area, to levy and collect the relevant duties, but when vehicles were brought to South Africa the relevant duties that had been collected and paid into a common fund accrued to the South African Revenue Service.

[37] The value of imported goods for customs purposes is, broadly speaking, their market value, which, in the case of goods that are purchased at arms length, is the price that was paid or became payable when the goods were sold for export. The legislation also allows for the deduction from that price of amounts that might be included in the price for the costs of such things as transportation, handling, insurance, and expenditure incurred for the 'maintenance of the goods after they are imported.'

[38] When vehicles were purchased from Hyundai Korea by Hyundai BVI (whether in disassembled form until early 1997 or in assembled form thereafter) an invoice was issued by Hyundai Korea reflecting the price of the goods and a separate charge for freight. The vehicles or the disassembled components, as the case may be, were then sold to Hyundai Botswana by Hyundai BVI (with a qualification that I will come to) which would issue its own invoice. It is not disputed that the price of the goods reflected on that invoice was invariably substantially less (the reduction varied at times between 20% and 30% but may have been as high as 35%) than the price that had been paid to Hyundai Korea. It was that lesser amount that was declared to the authorities in Botswana as the value of the goods for the purpose of calculating duties and the Hyundai BVI invoices were used to substantiate the claims.

[39] Documentation relating to a transaction for the acquisition of thirteen vehicles in about May 1998 illustrates more clearly what occurred. The invoice issued by Hyundai Korea reflects the purchase of thirteen vehicles

by Hyundai BVI for a unit price of US $5 435 (the total is US $70 655) and an additional charge of US $6 678.93) for freight, giving a total invoice amount of US $77 333.93. The invoice issued by Hyundai BVI for what appears to be the same vehicles reflects their sale to Hyundai Botswana for a unit price of US $4 222 (the total is US $54 886). It reflects an additional charge of US $33 813 for what is apparently meant to encompass non-dutiable costs that are described as 'packing, inland road freight, in-Africa shipping, insurance, clearing, port charges, handling, transshipment, inspection road/rail, warranty, forward cover, marketing, finance cost' thus bringing the total to US $88 699. The same principles are evident from the documentation relating to a series of transactions between 1996 and 1997 in which the purchase price of goods as reflected on the Korean invoices totalling US $5 420 406 translated into a purchase price as reflected on the Hyundai BVI invoices of US $3 814 721 (a reduction of almost 30%).

[40] In each case the Hyundai BVI invoices were submitted to the Botswana authorities in support of declarations that the unit prices reflected on the invoices constituted the value of the goods for customs purposes. The appellant's case, put simply, is that the Hyundai BVI invoices were interposed, and the prices reflected on those invoices were fraudulently reduced, in order to reduce the liability for duty.

[41] The allegation is not confined to the particular transactions to which I have referred, which are said to be exemplary of how the business was conducted from its inception. There is also support for the contention that

the documentation reflects an ongoing course of conduct in the evidence of a former employee, Mr Watson, who was employed in the business when it first started and for some years thereafter, and to a lesser degree in the evidence of other former employees who became involved in the business at a later date. Moreover, Rautenbach does not suggest that the transactions I have referred to were somehow unique or unrepresentative of the manner in which the business was ordinarily conducted.

[42] Watson's evidence also provides support for the allegation that the price differential was artificially reduced and was not the product of legitimate commercial considerations. He said that when the business first commenced he was instructed by Rautenbach to look for ways to reduce the customs value of the imported goods. He said that after studying the customs legislation he concluded that 10% might be deducted from the Korean price of the goods to account for costs that were legitimately non-dutiable, but that when he was preparing the format and pricing for the Hyundai BVI invoices he was told by Rautenbach to make that deduction and more and to reflect the amount deducted as non-dutiable charges, but without identifying each charge separately so that the legitimacy of the deduction would be more difficult to query. He said that Mr van Biljon, the financial manager, who was aware of this arrangement, thereafter attended to the management of the pricing. From March 1997 Ms de Buys was responsible for creating the Hyundai BVI invoices, from information supplied to her by Van Biljon. The information in the invoices was

reflected in a pricing schedule that Rautenbach approved, which reflected, amongst other things, the Korean price of the particular vehicles, the price to be used in the Hyundai invoice, and the percentage differential.

[43] When Van Biljon died in 1998 responsibility for maintaining the pricing schedule passed to Mr van der Walt. He said that Rautenbach told him what ratio the Hyundai BVI invoice price should bear to the price paid to Hyundai Korea – the difference varied for the various vehicles between about 70 and 80% – but that there was no apparent method in arriving at that ratio. Responsibility for the pricing schedule passed to Mr Wolmarans in December 1998 when Van der Walt resigned and he, too, was reliant upon Rautenbach for determining the prices to be used in the Hyundai BVI invoices.

[44] That evidence indicating that the prices were arbitrarily reduced was disputed by Rautenbach, who advanced three explanations for the discrepancy. He said that the goods reflected on the two invoices did not coincide and that to compare the two invoices was not to compare like with like. He pointed out that the Korean invoices related to the full complement of components for the particular vehicles but he said that some of the specialized components (the air-conditioning compressors, for example), which attracted a low rate of customs duty, were not sold direct to Hyundai Botswana by Hyundai BVI, but were instead sold to another company in South Africa. Those components were directed to Hyundai Botswana

through South Africa, and thus did not form part of the goods that were reflected on the Hyundai BVI invoice.

[45] According to Watson, to the extent that components were removed and routed through South Africa, that occurred only after about the middle of 1997, when the disassembling of vehicles commenced in Mozambique, and that was not disputed. There is also evidence that the removal and routing of such components was by no means a consistent practice.

[46] The second explanation advanced by Rautenbach relates to the manufacturer's warranty that accompanied each vehicle. The price that was paid to Hyundai Korea for each vehicle incorporated an amount to cover the anticipated cost to it of meeting that obligation. That portion of the Korean price, said Rautenbach, was properly non-dutiable in terms of the legislation because it represented expenditure incurred for the 'maintenance of the goods after they were imported' and its deduction accounts for part of the discrepancy between the unit values reflected on the Hyundai Korea and Hyundai BVI invoices respectively.

[47] The Botswana authorities indeed authorized a 10% deduction from the price paid to Hyundai Korea to account for the cost attributed to the warranty but that occurred only on 1 September 1997. (A refund of duties that until then had been paid on that portion of the price of the vehicles was also approved.) It thus explains portion of the discrepancy after that date but not any discrepancy that might have occurred before then.

[48] Thirdly, he said that he had been led to believe by Van Biljon that a deduction was permissible for what he called ‘marketing assistance’ that was built into the Korean price of the goods. It is difficult to see how it could have been genuinely believed that a deduction of that nature was permissible, and extraordinary that it could have been believed that a deduction of that nature could be made without pertinent disclosure to the customs authorities, bearing in mind that permission was sought to deduct the costs associated with the warranty. It is also significant that Rautenbach made no attempt to quantify the amount that was deducted.

[49] The court *a quo* concluded, after reviewing the evidence, that it was improbable that the customs and excise authorities in Botswana were defrauded in the manner alleged by the appellant. That seems to me to be a bold finding to have made on this evidence and it is one with which I do not agree. While it is true that portion of the discrepancy can be accounted for by the allowance that was permitted for the cost of the warranty after 1 September 1997, and that in some cases after about the middle of 1997 portion of the discrepancy might be accounted for by the removal of specialized components, that does not seem to fully account for the discrepancy. It also would not explain any discrepancy that existed before mid-1997. (I have already pointed out that the appellant alleges that the scheme was in operation from the outset and there is no suggestion by Rautenbach that the exemplary transactions referred to in the evidence were somehow unique). Moreover, there is no indication of how the

deduction allegedly made for 'marketing expenses' might bridge the shortfall, and there is no apparent corroboration for Rautenbach’s assertion that he genuinely believed this was deductible.

[50] But apart from those reservations there is a central consideration that casts considerable doubt upon Rautenbach's explanations for the discrepancy. If the discrepancy is indeed accounted for by the three factors to which he refers it would be expected that the process by which the Hyundai BVI prices were arrived at would have entailed no more than simple arithmetic subtractions of readily ascertainable amounts from the Korean price. Yet the former employees describe a more complex process by which those prices were arrived at, involving the application of ratios that were determined by Rautenbach without any apparent basis. Moreover, the pricing schedule included in the evidence, which was a product of that process, gives no indication that the prices were arrived at by simple arithmetic subtraction.

[51] But I pointed out earlier that we are not called upon to decide whether the offences were indeed committed, nor even whether they were probably committed, but only whether there are reasonable grounds for believing that a court might find that they were. In the absence of rather more convincing explanations for the discrepancy in my view the evidence adduced by the appellant indeed provides reasonable grounds for believing that there might have been a scheme in operation from the outset to reduce the customs value of the goods and thereby defraud the customs authorities.

And if the Botswana customs authorities were indeed defrauded the fraud did not end there, as suggested Rautenbach, for the ultimate purpose of the fraud was to enable most of the vehicles to enter South Africa where the benefits of the fraud would be reaped when the vehicles were sold. The free entry of the vehicles into this country was dependant upon the South African authorities believing that customs duties had been properly paid at the point of entry into the common customs area, and it follows that a court might also find that the failure to disclose to the South African customs authorities at the time the vehicles were brought into this country that duties had not been paid by itself constituted fraud (*S v Heller & Another(1)* 1964 (1) SA 520 (W) 536F-537E) or that the presentation of the vehicles for free entry into this country constituted a fraudulent representation that duties had been properly paid (*South African Criminal Law and Procedure Vol 11* 3 ed by JRL Milton 708-710). Presumably that is what the appellant had in mind when he submitted that the fraud 'continued' in this country, for what continued was the intent ultimately to defraud the South African Revenue Service of the duties that would ordinarily have accrued to it when the vehicles were imported into this country.

[52] A court that convicts a person of an offence that was committed after the Act took effect, and that finds that he or she has benefited from the offence or from any criminal activity that is found to be sufficiently related to the offence, may make an order against that person ‘for the payment to

the State of any amount it considers appropriate' (s 18(1)). Such an order is referred to in the Act as a 'confiscation order' but the name might be misleading. Such an order is directed at confiscating the benefit that accrued to the offender whether or not the offender is still in possession of the particular proceeds. Once it is shown that a material benefit accrued the offender may be ordered to pay to the state the monetary equivalent of that benefit even if that means that it must be paid from assets that were legitimately acquired. Thus the fact that some of Rautenbach's assets were acquired before the offences were committed, and were not themselves acquired from the proceeds of unlawful activity, is immaterial when determining whether a confiscation order might be granted.

[53] Section 12(3) provides that a person has benefited from unlawful activities 'if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities.' The amount for which a confiscation order may be made is restricted to the lesser of (a) the monetary value of the proceeds of the offences or related criminal activity or (b) the net value of the sum of the defendant's property and certain defined gifts (s 18(2)).

[54] The immediate beneficiary of the alleged unlawful activity in the present case would have been Hyundai Botswana, whose assets were inflated by the amount of any duty that it failed to pay. The company, however, was little more than the vehicle through which Rautenbach and

Franco conducted the business, and it was to them that the benefit accrued in truth, even if only indirectly.

[55] I do not think it is possible, on the material before us, to determine what amount of duty was avoided and any attempt to do so would be guesswork. Various calculations have been advanced in the affidavits and in argument but the assumption underlying them all is that the true customs value of the goods concerned was the price paid to Hyundai Korea and that assumption is not necessarily correct. I have already pointed out that from September 1997 a 10% deduction from that price was permitted by the Botswana authorities, and that from about the middle of 1997, in some cases at least, specialized components might have been removed before the goods arrived in Botswana. But though the benefit is not capable of being determined with any accuracy it is likely that it runs into many millions of rand bearing in mind the scale of the business.

[56] Where the requirements of the Act have been met a court is called upon to exercise a discretion as to whether a restraint order should be granted, and if so, as to the scope and terms of the order, and the proper exercise of that discretion will be dictated by the circumstances of the particular case. The Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order might be made must be capable of being ascertained, not does it require that the value of property that is placed under restraint should not exceed the amount of the anticipated confiscation order. Where there is good

reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be granted then clearly a court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all) for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved – the absence of an 'appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to serve'[7] – will render the interference arbitrary and in conflict with the Bill of Rights. To the extent that the decision in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 78A-B might suggest that a restraint order is permissible even where it is apparent that there is no such relationship in my view that is not correct. But in the absence of any indication of the lack of such connection I do not think the purported exercise of a court's discretion can import requirements for the grant of such an order that the Act does not contain. It must also be borne in mind, when considering the grant of such an order, that once it is found that a person has benefited from an offence, and that he or she held property at any time, a court that conducts the enquiry contemplated by s 18(1), is required by s 26(2) to presume until the contrary is shown that the property was received by him

[7]Per Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 97. See too *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd,* footnote 4, para 15.

or her as an advantage, payment, service or reward in connection with the offences or related activities referred to in s 18 (1) (see *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA) para 13).

[57] I have already expressed the view that there are reasonable grounds for believing that Rautenbach might be convicted of fraud and that a confiscation order might be made against him in a substantial amount. There is also no indication that the presumption to which I have referred will be rebutted in relation to all of the property that is now in issue. There is no reason to believe that any confiscation order that might be made will be restricted to an amount that is less than the value of the property that is now sought to be placed under restraint and it thus cannot be said that the order that is sought is inappropriate to the ends that the Act seeks to achieve. For these reasons in my view the provisional order should have been confirmed.

(58) The following orders are made:

1. The applications for condonation are granted. The appellant is to pay the costs occasioned by those applications.
2. The respondents are to pay the costs occasioned by the application to lead further evidence in this appeal.
3. The ancillary appeal is dismissed with costs.
4. The main appeal is upheld with costs. The order of the court a quo is set aside and the following order is substituted:

‘The provisional order is confirmed. The first and third respondents are ordered to pay the costs occasioned by their opposition to the proceedings jointly and severally including the costs occasioned by the employment of two counsel.’

4. The orders above relating to costs are to be construed to include the costs occasioned by the employment of two counsel.
5. Insofar as the orders above require costs to be paid by the respondents their liability for such costs shall be joint and several.

R W NUGENT
JUDGE OF APPEAL

NAVSA JA)
PONNAN AJA) CONCUR

AR ERASMUS AJA

[59] I have enjoyed the privilege of reading the judgment of my colleague Nugent. I am in agreement with most of his reasoning, but must respectfully disagree with one aspect thereof, which leads me to a finding different to his in regard to the order to be made in the appeal.

[60] I agree that the ancillary appeal must be dismissed, for the reasons set out by Nugent JA. I furthermore agree that the court *a quo* misdirected itself on the question of onus, again for the reasons set out by Nugent JA. What Rabie J lost sight of in his full analysis of the issues, with respect, was that the explanations advanced by Rautenbach could well disintegrate

in the intense light of a full-scale criminal trial. I, further, agree with my colleague's views regarding the nature of the customs fraud within the jurisdiction of these courts (at para [51] above), although I do not thereby prejudge those issues. I associate myself with his judgment up to the point where he declares (at para [55] above) that it is not possible, on the material before court, to determine what amount of duty was avoided and that any attempt to do so would be guesswork. In following up that finding, I respectfully differ from him on the question of the quantification of the order.

[61] A restraint order is issued in anticipation of a trial court later making a confiscation order upon the conviction of the defendant of an offence (*see* respectively s 26(1) and s 18(1) of the Act). The confiscation is ordered 'in addition to any punishment which (the court) may impose in respect of the offence'. It is not itself a punishment, and any order which has that object or effect would to that extent be contrary to the provisions of the law. The sole purpose is to deprive the defendant of the benefits derived by him from his or others' criminal activities. The court orders that the defendant pay an 'amount' (of money) to the State. In regard to that amount, Howie P stated in *Philips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para 9:

> 'In terms of s 18(2) the quantum of a confiscation order may not exceed the lesser of two amounts. One is the value of the benefit which the defendant derived either from the offence or offences of which he is convicted and, according to s 18(1)(c), from

any other criminal activity which the court finds to be "sufficiently related" to those offences.'

(*See* too *National Director of Public Prosecutions v* (1) *RO Cook Properties (Pty) Ltd*, (2) *37 Gillespie Street Durban (Pty) Ltd and another;* (3) *Seevnarayan*, 2004 (8) BCLR 844 (SCA); and *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SA (SCA) para 3). The calculation of the value of the benefit involves a clinical accounting exercise with due regard to all material facts and circumstances.

[62] A restraint order, on the other hand, is not expressed in monetary terms (s 26). It relates to 'realisable property'. The reason for the difference in this respect between a restraint order and a confiscatory order is clear. The confiscatory order is final; a restraint provisional, its purpose being to ensure that the benefits of the offence are not dissipated in the hands of the defendant before the s 18 enquiry is held. It follows that the value of property held under restraint need not be determined with the same exactitude as in the case of the benefits that are confiscated by court order. The Act does not expressly prescribe that the value of the property under restraint shall be equal to the benefit derived by the defendant from the offence (*National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) paras 8-10). Nevertheless, the court acting in terms of s 26 should, where possible, have regard to the amount of the benefit to be confiscated, lest the restraint order be arbitrary and unfair to the defendant. An unlimited order would obviously be improper. An excessive restraint

would constitute an undue infraction of the defendant's fundamental property rights.

[63] The appellant obtained a provisional order prohibiting Rautenbach and two other respondents in the application from dealing with specified assets up to a maximum of R60 000 000. That figure was arrived at by Mr Malan, who was employed by the South African Revenue Service as an investigator in its special investigations unit. His estimate was based on assumptions made, so he indicated, on incomplete information. He moreover worked on the premise that the Korean invoices were reduced on average by 35% during the period beginning 1997 to 1999. On the evidence of the company employees that dealt with the aspect, however, the average reduction was between 20% and 30% increasing at times to a higher percentage. Malan's assumption of 35% reduction for the full period was incorrect. His figure furthermore does not take into account the permissible reductions set out by Nugent JA (paras [49] and [55]). But whatever the savings on import duty for HMD Botswana may have been, that figure does not necessarily constitute the amount of the benefit derived by HMD SA from the alleged customs fraud. The benefit to HMD SA translated into the importation of vehicles into the Republic at a reduced cost price. The link between the savings on import duties and the monetary value of those benefits is indefinite. We do not know how many vehicles were imported into Botswana, nor how many of those vehicles went to the other countries in the customs union.

[64] The problem goes further: the benefits that HMD SA may have derived from the scheme are not necessarily the benefits that accrued to Rautenbach personally. This is so even accepting that Rautenbach and his business partner, Franco, were the beneficial owners of the HMD group of companies, and exerted full control over them. The group initially imported vehicles through Durban in a regular manner, it seems. The customs irregularity apparently developed later (nothing to the contrary has been suggested**)**. No monies actually passed to the companies as a result of the fraud. They enjoyed a savings in costs, which would have enhanced the group's profits, and possibly thereby the equity in the companies. However, the companies in the group were placed under liquidation between December 1999 and January 2000. Any beneficial interest that Rautenbach may have had in the companies thereby became worthless. That interest has now no market value (*see* s 15(1)(b)). There is no suggestion that Rautenbach's personal estate ever derived any benefit from an increase in the companies' equity. Apart from the transactions which I deal with later in the judgment (paras [70] to [73]) the appellant does not point to any drawings by Rautenbach on the companies. It is a further consideration that for purposes of s 18(1) Rautenbach cannot be held to account for the benefits derived from the scheme by Franco.

[65] The following emerges from the aforegoing: (a) Malan's estimate of R60m as the benefit that Rautenbach derived from the alleged customs fraud is substantially excessive; and (b) it is not possible on the information

before court even to estimate the correct figure. The appeal must be decided on that uncertain basis.

[66] The applicant bears the onus of making out a case for a restraint order. When therefore, the value of the property to be placed under restraint is a consideration, the applicant should make some attempt at establishing the quantum of the prospective confiscation order, or place before the court material upon which it can make some reasonable estimate of the value of the goods to be put under restraint. If he is unable to do so, the applicant should at least inform the court of the reasons for his inability to quantify the benefit, so as to enable the court to exercise its discretion whether to grant the order despite the absence of quantification.

[67] Rautenbach set out his defence in full in his answering affidavit. The appellant and his staff are experts in the criminal law. There is no reason why they could not have viewed the evidence and identified the issues as Nugent JA has done. In quantifying the benefits to Rautenbach flowing from those crimes, the appellant had the assistance of the special investigations unit of the SA Revenue Service. The prosecuting authorities moreover had the cooperation of several former employees in the HMD group, including Van der Walt who was second in charge to Rautenbach (*see* para [69] below). They had in their possession all the documentation of the group of companies. With all this information and expertise, the appellant should have been able to advance some acceptable quantification of the benefits derived by Rautenbach from the customs fraud. The court

should be careful to ensure that the appellant's failure to do so does not impact unfairly on the respondents.

[68] The court in issuing a restraint order is required to strike a balance between the (conflicting) interests of the State and the defendant. It could be unfair to society to dismiss the application simply because the applicant – due to the defendant's actions or for some other good reason – is unable to quantify the benefits of the offences. On the other hand, it could be unfair and unreasonable to issue a restraint order substantially in excess of the benefits that the defendant derived from the as yet unproved offences. I find that on the particular facts and circumstances of this matter, viewed in the light of policy, an order placing under restraint property to the value of R60m, would be arbitrary and improper. The appeal can succeed therefore only if the court can arrive at a figure that bears some relation to the benefit derived by Rautenbach from the customs fraud, an aspect I consider later in the judgment (paras [69] to [79]).

[69] In the application, the appellant put forward a separate cause of action based on alleged thefts of companies' monies. In view of his conclusions on the fraud charges, Nugent JA did not have to deal with that aspect. My conclusions however require me to consider the issue. The main witness here was Van der Walt. He joined the HMD group in 1995 as the regional financial accountant. In January 1996, he was promoted to group project manager. In 1997, he was appointed by Rautenbach to be the chief

financial officer of the Southern African operations of the HMD group. He was from then on effectively second in command to Rautenbach.

[70] Van der Walt described the alleged theft scheme. SA Botswana Hauliers (Pty) Ltd (‘SABOT SA’) was a haulage company controlled by Rautenbach as part of a number of companies commonly referred to as the Wheels of Africa (‘WOA’) group. In March 1997, Mrs Walkinshaw, the outgoing financial director of SABOT SA, told Van der Walt that Rautenbach had issued instructions that he was to take over the running of the so-called ‘cash payments’.

[71] The scheme worked as follows. Every month SABOT SA invoiced Hyundai Motor Distribution (Pty) Ltd (‘HMD SA’) and Swedish Truck Distributors (Pty) Ltd (‘STD’) for fictitious transport charges. The payments received from the two companies were deposited into a special bank account held in the name of SABOT SA. Rautenbach gave Van der Walt a list of people who were to receive cash payments. The top half of the list was funded by monies received from HMD SA and STD, the lower half of the list by SABOT SA. Rautenbach then filled in a cash cheque, drawn on the SABOT SA account for the amounts received from HMD SA and STD. A second cheque was made out for the payments to be funded by SABOT SA. Rautenbach signed both of these cheques. A clerk then cashed them and brought the money to Van der Walt’s office where the latter kept it in his safe before distributing it to the persons on Rautenbach’s list. The

beneficiaries (or most of them) signed for the monies in a book kept by his secretary, Ms Beutter.

[72] Franco was one of the chief beneficiaries. Van der Walt estimated that he took about R1.6m in cash. This was on top of the management fees (of US $100 000 per month) that he received from HMD. Rautenbach received fixed payments of R30 000 per month in cash payments from the funds drawn directly from SABOT SA. The cash was received by him on top of his management fee from HMD of US $100 000 per month.

[73] From September 1997 until May 1999, Van der Walt was assisted by Beutter. She stated that she was aware of the cash payments. These payments took place once a month and were on the average between R300 000 and R600 000 in total. She mentioned certain of the beneficiaries. These included members of the Rautenbach family, as well as others, most of whom - as far as I can make out – were not employees of the HMD group.

[74] Rautenbach did not deny these allegations. He stated that none of those acts constituted a crime of theft, as all the participating parties consented to the transactions. In view of his failure to explain the transactions, a court is entitled to have regard to the prima facie inferences justified by the evidence.

[75] It seems that the HMD SA and STD cheques were paid into the special account of SABOT SA, only to be withdrawn in cash for the payments to the various beneficiaries. SABOT SA was merely a conduit.

The cash payments by means of money drawn directly upon the SABOT SA account appear to have been in respect of employees' salaries, including the payment to Rautenbach of R30 000 per month. There is therefore no case made out for theft from that company. However, the other transactions must be viewed in the full context of the evidence, which includes the evidence of the customs fraud. The real possibility then emerges that SABOT SA was used to launder monies from the HMD and WOA groups. Rautenbach does not explain the reason for all the accounting subterfuge, nor does he state on what basis the beneficiaries were entitled to monies from HMD SA. No such reasons are apparent from the papers. The inference is therefore justified that Rautenbach used the benefits of the customs fraud to spread largesse among his family and associates.

[76] The whole operation commencing with the presentation of the HMD invoices to the Botswana Customs and Excise and ending with the cash payments, was controlled by Rautenbach. There is a real possibility that a court could find that the cash payments constituted drawings by Rautenbach against the benefits of the customs fraud. The Act has the object of depriving the defendant of the fruits of his crime or criminal activities, but not necessarily the very same fruits. The confiscation order reduces his estate *pro tanto* those benefits. It does not matter that Rautenbach passed on the benefits to others, nor that the subject matter of the restraint order is property acquired by him from legitimate sources.

[77] I come to the quantification of the benefits. The proceeds of the cheques drawn directly on SABOT SA cannot be taken into account, for the reasons set out above (para [75]). Further, in the absence of any information regarding SDT, it cannot be assumed that its cheques constituted theft, or had any link with the customs fraud. One must therefore work on the basis that only one quarter of the monthly cash payments was linked to the fraud.

[78] At the appeal, counsel for appellant handed to the court a schedule of monetary calculations. It is in three parts. The first section is based on monthly withdrawals of R300 000 for the period of January 1997 to December 1998. The inflation figure is then compounded monthly until August 2004 (*see* s 15(2)(a)). The total figure arrived at in this manner is R12 186 842. The second part of the schedule is calculated on the same basis but on receipts of R600 000 per month, which gives a figure of R24 383 684 at August 2004. In the third part, a similar calculation is made for the period January 1993 to December 1996 on cash receipts of R100 000 per month with inflation compounded until August 2004. This gives a figure of R10 439 685.

[79] I comment on the aforegoing calculations. There is no direct evidence of cash receipts from HMD SA between 1993 and 1996. Mrs Walkinshaw, Rautenbach's aunt, who apparently was in control during this period does not mention such receipts. But on Van der Walt's evidence, the practice of cash payments was well established when he took over from

Walkinshaw in March 1997. Furthermore, the investigation officer stated that the scheme had been running since 1985 (which was not denied by Rautenbach). In the circumstances, counsel's assumptions regarding the R100 000 per month receipts as from January 1993 are sufficiently justified for their calculation. As regard the period 1997 to 1999, a figure of R450 000 per month seems reasonable on the evidence of Beutter. This gives a total figure of about R18m in payments as at August 2004, to which is added the approximate figure of R10m for the previous period. The total figure is R28m. One quarter thereof is R7m, which would constitute the approximate benefit derived by Rautenbach from the customs fraud in drawings out of HMD SA. The calculations were not questioned by counsel for the appellant. My acceptance of the reckoning is not a finding on the correctness of the method of compounding interest. I would add that the fact that I have quantified the order with some degree of precision, does not mean that this exercise is necessary in every case.

[80] The property held under the provisional order exceeds R7 000 000 in value. The evidence as to the holding of that property is complex. Were my judgment that of the majority of the court, the property that would most suitably be seized in order to accommodate my ruling, would have to be identified.

[81] In the result, I concur in the order proposed by Nugent JA, save that I would amend the order to give appropriate effect to my conclusions in paras [79] and [80].

AR ERASMUS
ACTING JUDGE OF APPEAL

CONCURRED:
MPATI AP

NAVSA JA and PONNAN AJA

[82] We have had the benefit of reading the judgments of Nugent JA and Erasmus AJA. We agree with the reasoning and conclusions of Nugent JA and find ourselves in respectful disagreement with Erasmus AJA where he adopts contrary views.

[83] In respect of the question of balancing the value of the alleged proceeds of criminal activity in relation to the value of the property seized in terms of a provisional restraint order we consider it necessary to add brief comments that are set out in the paragraphs that follow.

[84] The purpose of a restraint order in terms of s 25 and s 26 of the Act is to preserve property on the premise that there is a prospect that the property

in question may be realised in satisfaction of a confiscation order in terms of s 18 of the Act.

[85] One of the objects of the Act is to provide for the recovery of the proceeds of unlawful activity. Section 18 quite correctly restricts a confiscation order after conviction to the value of the benefit derived by the convicted person from criminal activity and significantly not necessarily only in respect of the instant offence. See in this regard the provisions of s 18 (1) of the act and the *Kyriacou* judgment at para [11]. There is no statutory or other authority for issuing a confiscation order in broader terms.

[86] In the Act there is no express limitation placed on the extent of a provisional restraint order. Sections 26 (1) and (2) are couched in broad terms, which ultimately leaves it to the discretion of the court to decide the ambit and extent of the restraint order. Section 26 (3) (a) provides for a return day on which an affected person may show cause why the restraint order should be set aside. Furthermore, a person affected by a provisional order is entitled, in terms of s 26 (10) (a) of the Act, to apply to the same High Court that made the initial order to vary or rescind the order on the following bases:

'(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; ...'

[87] There are thus statutory safeguards to prevent overreaching and abuse. However, it would be offensive to justice if the effect of a restraint order was disproportionate to the contemplated future conviction and confiscation order. See in this regard the judgment of Heher J in the *Phillips* case, *supra*, at 78 B-E and the further comments by the learned judge concerning the problems that the prosecuting authority faces at the restraint stage (at 78 F-J).

[88] This judgment should not be construed as an invitation to laxity in the presentation of an application for a provisional restraint order in terms of s 26 of the Act. Every effort should be made to place sufficient information before the court to enable it to properly engage in the judicial function envisaged in that section. Courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem*. On the other hand to insist at the provisional stage on a precise correlation between the value of property restrained and the value of the alleged proceeds of criminal activity would be to render a vital part of the scheme of the Act unworkable.

[89] Erasmus AJA, at para [62] above whilst accepting that the value of property sought to be placed under restraint need not be determined with exactitude, nevertheless embarks on a complex accounting exercise in the

paragraphs that follow. We agree with Nugent JA's conclusion at the end of para [55] above that, even considering legitimate deductions in respect of customs transactions, it is likely that the benefit to Rautenbach runs into many millions of rand bearing in mind the scale of the business. Rautenbach's empire according to the information at hand was built on the back of the Hyundai imports. In our view, having regard to the totality of the evidence presented, the value of the property under restraint is not disproportionate to what a court may in the future hold to be the value of the benefits from the alleged criminal activity by Rautenbach.

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M S NAVSA
JUDGE OF APPEAL

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V M PONNAN
ACTING JUDGE OF APPEAL