# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No:
689/09

In the matter between:

**ALEXANDER GERHARD FALK** First Appellant

**FALK REAL ESTATE SA (PTY) LTD** Second Appellant

and

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Respondent

**Neutral citation:** *Falk v NDPP*(689/09) [2010] ZASCA 117 (23 September 2010).

**Coram:** MPATI P, CLOETE, CACHALIA, BOSIELO and TSHIQI JJA

**Heard:** **9 September 2010**

**Delivered:** **23 September 2010**

**Summary:** International Co-operation in Criminal Matters Act 75 of 1966; Prevention of Organised Crime Act 121 of 1998; effect of foreign restraint order registered in South Africa.

## ORDER

**On appeal from:** Western Cape High Court (Cape Town) (Louw J sitting as court of first instance):

The appeal is dismissed with costs. The costs shall include the costs of two counsel and the costs occasioned by the applications by both sides to place further evidence before this court.

## JUDGMENT

CLOETE JA (MPATI P, CLOETE, CACHALIA, BOSIELO and TSHIQI JJA concurring):

[1] This appeal concerns the interface between two statutes, the International Co-operation in Criminal Matters Act[1] (the ICCMA) and the Prevention of Organised Crime Act[2] (POCA). The first and second appellants are respectively Mr Alexander Gerhard Falk and Falk Real Estate SA (Pty) Ltd (FRS). The respondent is the National Director of Public Prosecutions (NDPP). The appellants appeal against the dismissal by Louw J in the Western Cape High Court of their application for the setting aside of:

(a) the registration on 13 September 2004 of a foreign restraint order against Falk by the registrar of the Western Cape High Court in terms of s 24 of the ICCMA; and
(b) interdicts granted on 16 August 2005 by Veldhuizen J at the suit of the NDPP against Falk and FRS in terms of chapter 5 of POCA.

The appeal is with the leave of the court a quo.

[2] The essential facts are uncomplicated and common cause. Falk was arrested in Germany on 6 June 2003 on various charges. The charges include allegations that he had manipulated the share price of a German corporation

1 75 of 1996.
2 121 of 1998.

by making intentional misstatements, with a view to obtaining an unlawful gain for himself and others to the detriment of third parties who purchased shares in the corporation. On 25 August 2004 the Hamburg Regional Court (Landgericht) issued an order authorising the attachment of assets in Falk's estate to the value of at least €31 635 413,34. The purpose of the attachment was to secure this amount against the eventuality of Falk being convicted of the crimes with which he was charged and the court ordering forfeiture of the amount specified. The German authorities requested assistance in enforcing the order. Pursuant to this request the Director-General: Justice lodged a copy of the order with the registrar of the Western Cape High Court and it was registered in that court on 13 September 2004 in terms of the provisions of s 24 of the ICCMA. It is against the registration of this order that the first part of the leave sought by the appellants is directed.

[3] The relevant sections of the ICCMA are the following:

'**24. Registration of foreign restraint order**

(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.

(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.'

'Restraint order' is defined in s 1 of the ICCMA as 'a restraint order or preservation of property order made under' POCA. A restraint order as envisaged in POCA would be issued under the criminal forfeiture provisions of chapter 5 and a preservation of property order, under the civil forfeiture provisions of chapter 6. The present case falls under chapter 5.

**'25. Effect of registration of foreign restraint order**

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.

**26. Setting aside of registration of foreign restraint order**

(1) 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—

(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;
(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.

(2) The court hearing an application referred to in subsection (1) may at any time postpone the hearing of the application to such date as it may determine.'

[4] On 16 August 2006 Veldhuizen J in the Western Cape High Court granted interdicts at the suit of the NDPP against Falk and FRS. Falk was interdicted from dealing in any way with his shares in FRS (which by then were being held in trust by an attorney in Cape Town); and both Falk and FRS were interdicted from dealing with the sum of €5,22 million held in a bank account, and from dealing in any way, other than in the ordinary course of business, with any of the other assets of FRS. It is against the refusal by the court a quo to set aside these interdicts that the second part of this appeal is directed.

[5] It is convenient at this stage, before continuing with the chronology of relevant facts, to deal with an argument advanced on behalf of the appellants in regard to the interdicts granted by Veldhuizen J which I have just mentioned. It was common cause in the court a quo that in granting the interdicts, the learned judge acted under the 'ancillary orders' provision in s 26(8) of POCA. That section 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.'

The appellants' counsel submitted on appeal, however, that an order in terms of s 26(8) was not competent in law inasmuch as there was no restraint order against FRS — the order of the German court related only to the property of

Falk.

[6] I reject this argument. Falk is the sole shareholder of FRS. The founding affidavit of the NDPP put before Veldhuizen J contained the following paragraph:

'The Applicant [the NDPP] also applies in terms of section 26(8) of the POCA for an order interdicting the Second Respondent [FRS] from dealing in any way with the 5 220 000 Euros currently in the Standard Bank's *nostro* account of the Standard Bank of South Africa pursuant to the SWIFT transfers to the Second Respondent [by Falk and a German company controlled by him] on 5 June 2003 and interdicting the Second Respondent from dealing in any way, other than any ordinary course of business, with any of its other assets. These orders are sought to preserve the value of the underlying assets held by the First Respondent [Falk] through his shareholding in the Second Respondent pending the final determination of the proceedings in Germany, which I submit the South African authorities are clearly entitled and obliged to do pursuant to the registration of the foreign restraint order. The Respondents' efforts in the recent past to gain access to the money, coupled with the earlier payments out of the nostro account at the instance of Mr Louw [the general manager of FRS], show that the Applicant reasonably apprehends that if the interdict is not granted the underlying assets held by the Second Respondent may be dissipated.'

In my view it was competent in the light of these allegations for Veldhuizen J to have granted the interdicts against FRS which he did in terms of the 'ancillary orders' provision of s 26(8) of POCA.

[7] I continue with the chronology. Falk's criminal trial commenced in the Hamburg Regional Court on 3 December 2004. Some three-and-a-half years later, on 9 May 2008, that court found Falk guilty of conspiracy to attempt to commit fraud, of conspiracy to misrepresent the financial position of a corporation and of misstating information of a corporation in its annual financial statements. Falk was sentenced to imprisonment for four years and (together with the other defendants) he was ordered to pay the costs of the proceedings. But the court refused to grant the forfeiture order against Falk that had been sought by the Hamburg prosecutors. Both the latter and Falk noted appeals to the Federal Court (Bundesgerichtshof). The prosecutors contended inter alia that Falk should have been convicted of fraud and that in any event a forfeiture order should have been granted against him; and Falk contended that he had been wrongly convicted.

[8] According to the undisputed evidence of Dr Winter, a public prosecutor

who is the head of the Financial Investigations Unit of the Public Prosecutors Department in Hamburg, the noting of the appeals against the order of the regional court automatically suspended its operation. Furthermore, according to Dr Winter:

'The Federal Court has a wide discretion to grant relief on appeal. It may overturn the judgment of the Regional Court in its entirety or it may interfere with specific findings, for example relating to the severity of the sentence imposed. However, wherever possible the Federal Court will remit the matter to the Regional Court for further determination rather than substituting its decision for that of the Regional Court. If the Federal Court makes a finding that a conviction for fraud is supported by the evidence, or if the Federal Court makes a finding that forfeiture is appropriate in the circumstances, it will remit the matter to a different chamber of the Regional Court for re-assessment. It is only in rare instances that the Federal Court imposes a harsher or lighter sentence without remitting the matter to the Regional Court.'

[9] Further evidence was tendered on appeal by both sides as to the outcome of the appeal before the German Federal Court which made an order on 29 July this year, ie after the present appeal had been set down for hearing by this court. The evidence was admitted provisionally. In view of the conclusion I have reached, it is not necessary to have regard thereto. It suffices to say that it is common cause between the parties that the order of the German Federal Court does not mean that the order sought in this appeal will have no practical effect or result, as contemplated in s 21A of the Supreme Court Act.[3] I accordingly decline to admit the evidence tendered; but it would be fair if the costs incurred on both sides in the applications to adduce such evidence on appeal were to be treated as costs in the appeal. I shall accordingly deal with the appeal on the basis of the factual situation which prevailed when the matter was adjudicated upon by the court a quo, ie that it was possible for the German Federal Court to refer the matter back to the Hamburg Regional Court to decide whether to make a forfeiture order against Falk.

[10] The court quo in refusing the relief sought by the appellants relied on

3 59 of 1959: '21A(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

s 24A of POCA, which provides:

'**24A Order to remain in force pending appeal** ─ 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.'

The court reasoned:

'In my view the decision by a trial court, in this case the Hamburg Regional Court, not to make a confiscation order pursuant to the conviction of a defendant is indeed one of the decisions the legislator had in mind when it referred in wide terms to *any decision by the court in relation to the making of a confiscation order*. The decision in this case not to make a confiscation order which order was specifically requested by the Hamburg prosecutors certainly is in my view a decision in relation to the making of a confiscation order. There is no reason to read the wide words *"any decision in relation to the making of a confiscation order"* to be confined to decisions in regard to the making or orders ancillary the confiscation order. In my view the legislator had intended the *status quo* regarding the restraint to continue pending the outcome of an appeal against the refusal to make the order of confiscation. To do otherwise might very well render the outcome of the appeal, if successful, nugatory.' (Emphasis in the original judgment.)

[11] The principal submission of the appellants' counsel on appeal was that in terms of s 26(10)(b) of POCA a high court which made a restraint order is obliged to rescind the order when the proceedings against the defendant concerned are concluded; that it is s 17 (which together with s 26(10) forms part of chapter 5 of POCA) that prescribes when proceedings against a defendant are concluded for the purposes of s 26(10)(b); and that this matter falls within s 17(b) because the Hamburg Regional Court did not make a confiscation order against Falk. It is convenient to quote ss 26(10) and 17 in full at this juncture:

'26(10) A High Court which made a restraint order─

(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied─

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.'

'17. 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.'

[12] I shall have to deal in more detail with the argument by the appellants' counsel at a later stage in the judgment as it arises in a different context. In the present context, the argument falls to be rejected because it rests upon the same fundamental fallacy as the judgment of the court a quo. The fallacy is this. Section 25 of the ICCMA, in providing that a foreign restraint order shall have the effect of a restraint order made by the division of the high court at which it has been registered, does not convert the foreign restraint order into an order of the South African High Court. It remains a foreign order and not all of the provisions of chapter 5 of POCA apply to it. Section 26(8) applies, with the necessary changes, so that the introductory 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' etc. Obviously, the making of such an order would be triggered by an application brought by the NDPP.

[13] On the other hand, it is incorrect to interpret s 24A, the section on which the court a quo relied, as meaning that a foreign restraint order which is in force at the time of any decision by a foreign court in relation to a confiscation order, shall remain in force pending the outcome of any appeal in the foreign jurisdiction in relation to the confiscation order. The position is not governed by s 24A of POCA but by s 26 of the ICCMA. If an appeal is pending

or could still be noted in a foreign court against the grant or refusal of a confiscation order, a South African court hearing an application for the setting aside of the registration of the foreign restraint order in terms of s 26 of the ICCMA might well have regard to the terms of subsection (2) and postpone the hearing until the fate of the appeal in the foreign court became known.

[14] Section 26(10)(b), the section relied upon by the appellants' counsel, also does not apply to a registered foreign restraint order. A South African high court cannot, in the terms of the section, 'rescind the restraint order when the proceedings against the defendant concerned are concluded' for the simple reason that a domestic court lacks jurisdiction to rescind the order of a foreign court. What a South African high court can do in terms of POCA is to vary or rescind the seizure order or the ancillary order made by it in terms of s 26(8), in the circumstances set out in s 26(10)(a); but if a defendant wishes to undo the effect of the registered foreign restraint order altogether, the remedy lies not in POCA but in s 26 of the ICCMA. That section is definitive of the grounds upon which the registration of a restraint order can be set aside. I should perhaps emphasise that the fact that s 24(3)(b) of the ICCMA contemplates a period within which a person against whom a foreign restraint order has been made, may apply for the setting aside of the registration of the order, must not be interpreted as preventing the making of such an application after the prescribed period, if the application is based on facts or circumstances which arose after that period: the provisions of s 26(1)(e) militate against such an interpretation, and in any event the provisions of s 26(1)(d) must, in the circumstances postulated, continue to be available to the person concerned. The principal argument advanced on behalf of the appellants must therefore fail.

[15] The appellants' counsel sought in the alternative to mount an attack based on s 26(1)(d) of the ICCMA, which obliges a South African high court to set the registration of the foreign restraint order aside at the suit of the person against whom it has been made, if the enforcement of the order would be contrary to the interests of justice. The submission was that because in South Africa, POCA (in s 26(10)(b) read with s 17(b)) requires a restraint order to be set aside if the court convicting the defendant ─ which counsel submitted meant only the court of first instance ─ sentences the defendant without making a confiscation order against him or her, the South African legislature has determined what the interests of justice require; and therefore, so the submission went, because the Hamburg Regional Court did indeed sentence Falk without making a confiscation order, the registration of the German restraint order has to be set aside. What may happen on appeal, submitted counsel, was irrelevant; it was the submission that the legislature must be taken as having intended that the draconian effects of a restraint order and the impairment of the defendant's constitutional right to property would endure only until the trial court exercised the discretion whether or not to grant a confiscation order.

[16] There are two answers to this argument. The first is that it does not follow that because South African municipal law would require a South African restraint order to be discharged by a South African court in given circumstances, the continued registration of a foreign restraint order would in those same circumstances necessarily be contrary to the interests of justice. The essential question ─ what would be contrary to the interests of justice ─ requires a broader enquiry. But in any event, the interpretation of s 17(b) of POCA advanced by counsel leads to an absurdity. The whole purpose of a restraint order is to preserve property pending the possible making of a confiscation order. There is simply no warrant for interpreting the phrase 'the court convicting the defendant of an offence' in s 17(b) as meaning a court of first instance only. An appeal by the NDPP is possible ─ according to s 13(1) of POCA,[4] proceedings for a confiscation order are civil proceedings; in civil proceedings, either party may appeal with the necessary leave; and there is no indication in the Act why the ordinary position should not obtain. In this latter regard I reject the argument by the appellants' counsel that ss 17(a) and (c) require s 17(b) to be interpreted as excluding an appeal by the NDPP against the refusal of a confiscation order. If such an appeal were to be upheld, the order of the court a quo would be set aside and replaced with the order that the appellate court considers should have been given in the first place, and that order would become the order of the court a quo. On counsel's argument, if the NDPP were to appeal against the refusal of a confiscation order, the protection afforded by the restraint order would be lost ─ no matter how egregious the refusal of the court of first instance to grant a confiscation order might have been and irrespective of the prospects of success on appeal. That simply cannot be the law. The appellants' argument based on s 26(d) of the ICCMA is accordingly rejected.

[17] Cost of two counsel were sought by the respondent. There was no opposition on behalf of the appellants. In my view the issues raised were of sufficient complexity and importance to warrant the briefing of two counsel.

[18] The following order is made:

The appeal is dismissed with costs. The costs shall include the costs of two

4 '13(1) 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.'

counsel and the costs occasioned by the applications by both sides to place further evidence before this court.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS: R S van Riet SC

Instructed by Van der Spuy & Partners, Cape Town
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RESPONDENTS: A Breitenbach SC (with him Ms K S Saller)

Instructed by The State Attorney, Cape Town