REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number 401/07

In the matter between:

ANGELINA PROCOPOS APPELLANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

Neutral citation: This judgment may be referred to as *Angelina Procopos v National Director of Public Prosecutions* (401/07) [2008] ZASCA 124 (29 September 2008).

CORAM: FARLAM, MTHIYANE, PONNAN et MAYA JJA et MHLANTLA AJA

HEARD: 28 AUGUST 2008

DELIVERED: 29 SEPTEMBER 2008

SUMMARY: Prevention of Organised Crime Act 121 of 1998, Chapter 5 – restraint order – whether 'affected gift' shown – whether s 16(1) of Act applicable.

ORDER

On appeal from: High Court, Pretoria (R D Claassen J sitting as court of first instance).

1. Except insofar as the order of the court *a quo* relates to the appellant's banking account at the Sunnyside branch of Absa Bank, the appeal is allowed with costs.

2. The order of the court *a quo* in respect of the appellant insofar as it relates to her assets mentioned in paragraphs 12.2 and 12.3 of the judgment of the court *a quo* is set aside and replaced by an order in the following terms:

   "It is ordered in terms of Rule 6(5)(g) that the defendant and the first respondent are to be subject to cross-examination in respect of the evidence set forth in their affidavits.'

3. The cross appeal is dismissed with costs.

JUDGMENT

FARLAM JA (MTHIYANE, PONNAN, MAYA JJA AND MHLANTLA AJA concurring):

[1] On 24 February 2006 Rabie J, sitting in the Pretoria High Court made a provisional order in chambers against a number of respondents in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (hereinafter called 'the Act'). One of the respondents was the present appellant. In so far as the order related to her it prohibited her from dealing in any manner, except as required or permitted by the order, with certain of her assets which were specified in a schedule attached to the order and all other property of hers 'to the value of R9 700 000, being the value of a known gift'. On 24 May 2007 R D Claassen J confirmed this order with costs in respect of the following assets of the appellant, (i) her 100 per cent interest in a close corporation called Dubec Eiendomme CC, in whose name the house in which she lives is registered; (ii) her 50 per cent interest in another close corporation called Select Bakery & Confectionery CC (the other 50 per cent interest in this close corporation belonging to her husband); and (iii) her banking account at Absa Bank. The effect of the learned judge's order was to release all the other assets of the appellant from the restraint imposed by the provisional order.

[2] The appellant, with leave of the court *a quo,* appealed against the whole of this order, but during argument before this court her counsel conceded (correctly in my view) that the appeal against that part of the order relating to the Absa bank account could not succeed. The

appeal need accordingly only be considered in so far as it relates to the appellant's interests in the two close corporations to which I have referred. The respondent, the National Director of Public Prosecutions, has cross-appealed against the order, contending that the provisional order should have been confirmed, with the property covered thereby not being limited to the assets listed in the order but encompassing all her property up to the value of R9 761 607 (which was the figure referred to in the schedule attached to the provisional order).

[3] Before the facts of this case and the contentions of the parties are summarised it will be convenient if I set out the relevant provisions of Chapter 5 of the Act.

[4] Section 18(1), which deals with confiscation orders, reads as follows:

'Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[5] Section 20 deals with amounts which might be realized when a confiscation order is made. Subsection (1) is in the following terms:

'For the purposes of section 18 (2) *(b)* or 21 (3) *(a),* the amount which might be realised at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of –

(a) the values at that time of all realisable property held by the defendant; and

(b) the values at that time of all affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognise for this purpose.'

[6] Section 13 provides that confiscation proceedings are civil, not criminal. Subsection (1) reads as follows:

'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.'

[7] The topic of realisable property is dealt with in s 14(1), which reads:

' . . . (T)he following property shall be realisable in terms of this Chapter, namely –
(a) any property held by the defendant concerned; and
(b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.'

[8] Section 12(1) contains a definition of the expression 'affected gift', which as far as is material, reads:

'In this Chapter, unless the context indicates otherwise – "affected gift" means any gift –

(a) made by the defendant concerned not more than seven years before the fixed date. . . . .'

[9] Section 12(1) also contains a definition of 'fixed date', which as far as is material reads as follows:

'"fixed date" in relation to a defendant –

(a) if a prosecution for an offence has been instituted against the defendant, means the date on which such prosecution has been instituted . . . .'

[10] The term 'defendant' means a person against whom a prosecution for an offence has been instituted.

[11] Although the Act does not contain a definition of the expression 'gift', it does contain a provision, s 16(1), which deems a transfer of property to be a gift in certain circumstances. It reads as follows:

'For the purposes of this Chapter, a defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the defendant.'

[12] The material portions of s 26, which deals with restraint orders, read as follows:

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

(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

(b) in respect of all realisable property held by such person, whether it is

specified in the restraint order or not;
(c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.
(3) *(a)* A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.'

[13] In the founding affidavit in this matter, which was made by Ms Nomonde Mngqibisa, a deputy director of public prosecutions, it was stated that the respondent's primary objective in seeking the restraint order was to secure and restrain the property of the appellant's daughter and eight other persons. The appellant's daughter had been convicted on 100 charges of fraud, 'to the value', as it was put in the affidavit, of 'R26 500 000' as well as contraventions of the Stock Exchange Act 1 of 1985, the Financial Markets Control Act 55 of 1989, the Harmful Business Practices Act 71 of 1988, the Companies Act 61 of 1973, the Banks Act 94 of 1990 and a section of the Prevention of Organised Crime Act itself. She was 'the defendant' to whom the proceedings related. The property of the eight other persons, one of whom was the appellant, against whom the order was sought, was described as being 'such property as is held by any other person to whom the defendant has directly or indirectly made any affected gifts as defined in section 12 of the Act as is likely to satisfy a confiscation order that has been sought against the defendant in terms of section 18 of the Act'.

[14] Under the heading "PROPERTY TO BE RESTRAINED', Ms Mngqibisa deals first with the realisable property of the the defendant, and thereafter, under the sub-heading 'Realisable property: Affected gifts', with amounts which it appeared from investigations done by Mr Adriaan Prakke, a chartered accountant who investigated a so-called investment scheme operated by the defendant, had been received by the appellant and the seven other respondents in the restraint application. In respect of the appellant it appeared, said Ms Mngqibisa, that she had received R9 761 607 as an affected gift from the defendant. The money was directly deposited by the investors into the appellant's account number 905 108 1634 at the Sunnyside branch of ABSA bank. The averment that the money in question had been received by the appellant as an affected gift was made as a conclusion of law without any supporting factual averments to substantiate the allegation.

[15] It appears from the affidavit made by Mr Prakke that the fraudulent investment scheme in respect of which the defendant was convicted was operated by a close corporation, Two Ferns Financials CC, of which the defendant was the only member. The close corporation never had its own banking account and funds received from the investors totaling R52 947 117,29 were either deposited into the banking account of a business owned by the defendant known as Pronell Computing CC or into the bank account of the appellant at the Sunnyside branch of ABSA bank.

[16] Mr Prakke also stated in his affidavit that of the total of R9.7 million deposited into the appellant's bank account the appellant, according to the bank's records, withdrew R2 343 389,34 in cash on different occasions. At the date of the criminal trial, which took place in November 2004, there was no money left in the account and on 24 November 2005 there was only R10 000 therein.

[17] The appellant opposed the confirmation of the provisional restraint order. In her affidavit she referred to an affidavit made by the defendant and confirmed its contents insofar as they related to her. In this affidavit the defendant denied that any members of her family had benefited, directly or indirectly, at any stage from the offences which she had committed, and to which she had pleaded guilty. As far as the appellant was concerned she said the following:

'I went so far as to use my mother's good faith and belief in me, as her child, to open a bank account in her own name in order for me to do my business. It is thus in the course and scope of my business that I transferred monies to the value of almost ten million rands through this account, and understand that she is now being held liable therefor. My mother had absolutely nothing to do with the monies flowing into and out of her account. My mother merely set this account in place at my request, as I misled her into believing that I was doing honest business and needed an account in order to be able to practise properly.

I reiterate the fact that at no stage whatsoever did my mother ever derive any benefit and/or receive any of the monies which went through her account, as the total amounts were used by myself in the running of my business.

I did however, on various occasions, request my mother to transfer monies from her account to other accounts on my behalf, and at all times furnished her with the necessary information to do so. My mother was never involved in business, and as a result it can not be expected of her to know about any legislation or anything of that type, pertaining to business.'

[18] Later in her affidavit she specifically denied that the appellant (and some of the other respondents in the restraint application) 'received any gifts and/or benefit directly and/or indirectly from [my] dealings'.

[19] In her affidavit the appellant stated that the defendant requested her 'to open an account at the bank in my name, in order for her to do business and have a bank account into which monies could be deposited. At no stage was I aware that the defendant did not run an honest business, as this would not have been tolerated.'

[20] She said that she was requested on various occasions by the defendant to transfer monies from her account to other accounts, and she confirmed what the defendant had said that she did not benefit from any transactions conducted by her.

[21] In reply, affidavits were filed made by Ms Mngqibisa and Mr Prakke. In her affidavit Ms Mngqibisa asked the court to confirm the interim restraint order and to reject the version of the facts put up, *inter alia,* in the affidavits of the appellant and the defendant. She requested the court, if it was not prepared to reject the statements made by the appellant and the defendant as far fetched and highly improbable, to order their cross-examination so that the veracity of their versions could be determined and stated that the grounds for her doubting the truth of their versions were set out more fully in Mr Prakke's affidavit. Mr Prakke attached to his affidavit a schedule of cash withdrawals from the Pronell account at Nedbank and the appellant's ABSA account. He contended that a comparison of the cash withdrawals from these two accounts reveals that in many instances substantial cash withdrawals were made from both accounts on the same day although there was a sufficient balance on the Pronell account after the withdrawal was made for the amount taken from the appellant's account to be withdrawn therefrom. This, he said, rendered the appellant's version suspect because it was reasonable to infer that the appellant's withdrawals were not solely for the defendant's business but for the private purposes of the appellant and her family.

[22] He also referred to the fact that the appellant had no record of the substantial cash withdrawals she made and cannot explain what happened to the amounts withdrawn. This inability to account for the cash withdrawals gives rise, he contended, to a belief that she is concealing affected gifts by feigning ignorance.

[23] Lastly, Mr Prakke made the point that the buying and selling of financial assets and the use of advanced computer technology (about which the defendant, according to her affidavit, told her parents) does not require the withdrawal of large amounts of cash. The large withdrawals of cash should have alerted the appellant to the fact that something was amiss and the fact that she did not question the defendant cannot, so Mr Prakke contended, be believed. He accordingly submitted that the explanation of the transactions on the appellant's bank account given by the defendant and the appellant is implausible and falls to be rejected.

[24] The learned judge in the court *a quo* held that the probabilities were strong that the appellant received 'at least some of the money, no matter how little' for herself, not merely as a conduit. In the light of this finding he found it unnecessary to decide on the correctness of a submission advanced before him on behalf of the appellant to the effect that the appellant 'was [as it was put] purely a conduit and acted solely on the instructions of Defendant.' Stating that it was apparent on the papers that the appellant's assets were a directorship in a company (which it was common cause 'was worth nothing'),and the 100 per cent and 50 per cent interests in the close corporations referred to in para [1] above, he held that the restraint

order had to be confirmed as regards these interests and the ABSA bank account insofar as there was any money left in it.

[25] Counsel for the appellant contended before us that the court *a quo* should have found that the appellant's account at the Sunnyside branch of Absa Bank was used by the defendant as a conduit through which she channelled investments and that she did not receive any 'affected gift' as defined in s 12(1) of the Act. Before a gift can be an 'affected gift', so he contended, it must be a gift. The expression 'gift', he pointed out, is not defined in the Act and should, he submitted, be given its ordinary meaning, which 'denotes permanency'. A conduit, he submitted further, has no intention to keep or hold the object which is channelled through him or her, or, for that matter, his or her savings account. I shall summarise his other contentions after I have set out the submissions advanced on behalf of the respondent.

[26] The respondent's counsel submitted that the court should not accept that the appellant merely acted as a conduit. He submitted that on the probabilities she appropriated for herself at least the total of the amounts withdrawn in cash. He also contended that the amounts paid into the appellant's bank account were at least deemed gifts in terms of s 16(1) of the Act. In this regard he submitted that the appellant provided the defendant with consideration the value of which was significantly less than the amounts paid into her account. He pointed out that on the version of the appellant and the defendant the latter could not obtain access to a bank account and she needed an account into which she could direct the funds of investors. The appellant, he argued, allowed her name, her credit worthiness and her facilities at the bank to be used by the defendant and she paid the bank charges accompanying the management of, the transfer from and the withdrawals from the account. It was contended that by doing so the appellant provided what counsel called 'considerations the value of which was significantly less than the property received'. This property, ie, the amounts paid into the account, amounts to a 'gift'. As the 'gift' was made not more than seven years before the prosecution against the defendant was instituted it amounts to an 'affected gift', as defined.

[27] In the alternative, and on the assumption that the appellant did not receive an affected gift, it was submitted that as the appellant held assets to the value of R9 761 607 on behalf of the defendant. Insofar as this amount represented in the appellant's hands, so it was argued, the benefits arising from the unlawful proceeds of crime, the restraint order against the appellant was appropriate.

[28] In the further alternative it was submitted that the cash withdrawn from the account should be held to be an affected gift and the balance in the account, which was transferred to

other persons, should be held to be property held on behalf of the defendant which constituted the benefits arising from the unlawful proceeds of crime.

[29] Alternately to this argument, respondent's counsel submitted that it was not necessary for the respondent to show on the probabilities that the appellant received an affected gift from the defendant: it was sufficient if he showed, as it was submitted he had done, that there were reasonable grounds for believing that the appellant had received an affected gift.

[30] As far as the cross appeal was concerned counsel for the respondent pointed out that according to the papers the appellant had other assets over and above those referred to in the judgment, some of which were listed in the interview questionnaire completed by her and attached to her affidavit and that the learned judge had not stated in his judgment on what basis those assets were excluded from the order made. Furthermore, he contended, the court *a quo* should have made an order restraining the appellant's assets to the value of R9 761 607. If the court was not prepared to make such an order he asked for an order in terms of Rule 6(5)(g) that the defendant and the appellant should be cross-examined on the veracity of their version.

[31] Counsel for the appellant submitted in reply that the respondent's contention that the appellant is to be regarded as having received a gift by virtue of the operation of s 16(1) was not correct because, so he argued, it could not be held that the defendant had 'transferred' the money paid into the bank account to her because no interest in the money could be said to have been transferred or granted to the appellant if the account was a conduit.

[32] He contended further that the respondent had to show on a balance of probabilities that the appellant had received an affected gift or gifts. In this regard he said that it was clear from s 25(1) that it was in respect of the future making of a confiscation order against the defendant that proof that reasonable grounds existed for believing that such an order might be made sufficed to entitle the respondent to a restraint order either where, as here, the defendant had been prosecuted or the court was satisfied that a person would be prosecuted.

[33] Counsel for the appellant submitted further that the respondent's first alternative argument could not be upheld (except in relation to the money in the ABSA bank account, which on the appellant's version, was money held for and on behalf of the defendant in which she had an interest) because the relief sought against the appellant was premised on the assertion that she had received an affected gift and that therefore property held by her constituted, in terms of s 14(b) of the Act, realisable property which could be used to satisfy a

confiscation order. He submitted that the respondent's alternative arguments are fallacious because they overlook the fact that the appellant is not an accused person. He pointed out that the decisions relied on by the respondent[1] in respect of this part of the case all dealt with confiscation orders and not restraint orders made against persons other than defendants. He conceded that if the court was minded to accept the arguments advanced by him he was not able to resist an order in terms of Rule 6(5)(g).

[34] In my opinion it is clear from what has been said above that the following questions arise for decision in this case:

(a) Must the respondent show on the probabilities that an affected gift was made to the appellant by the defendant or is it sufficient for it to show that there are reasonable grounds for believing that such a gift was made?

(b) If it must be shown on the probabilities that an affected gift was made, did the respondent succeed on the papers in establishing this on the facts?

(c) Does s 16(1) operate with the result that the defendant is to be deemed to have made a gift to the appellant?

(d) If it did not, can its alternative arguments be upheld?

[35] I am satisfied that the applicant in an application for a restraint order has to show that the person against whom the order is to be made received an affected gift. In my view this follows from the wording of s 26(1) and (2). The order clearly must relate to realisable property held by the person who is to be prohibited from dealing with such property. It is clearly a *factum probandum* in such an application that the property in question 'is held by the person against whom the restraint order is being made'. The circumstances in which proof of reasonable grounds for believing a particular fact will suffice are set out in s 25 and do not cover a case such as the present.

[36] I am also satisfied that one cannot say that the version put up in their affidavits by the appellant and the defendant was so improbable and far fetched that it can be rejected out of hand without their being given the opportunity to give *viva voce* evidence and being subjected to cross-examination. Nor was there warrant for holding, as the judge *a quo* did, that a gift of some sort was made by the defendant to the appellant. It will be recalled in this regard that the defendant stated that the account was opened for use by her in conducting a business of hers. No factual basis was adduced for inferring that the appellant and the defendant departed from this and caused money deposited in the account to be paid over as a gift to the

[1] Some of which may in any event require reconsideration in the light of the recent decision of the House of Lords in *R v May* [2008] UKHL 28; [2008] Crim L.R. 737 (H.L.).

appellant.

[37] I am also of the view that s 16(1) of the Act does not assist the respondent. There was no evidence to the effect that the bank charges in respect of the account in question were paid by the appellant from her own funds: the likelihood is that they were deducted by the bank from the funds deposited into the account. Nor does it appear from the evidence of the appellant and the defendant that the appellant allowed what the respondent's counsel called her 'credit worthiness' to be used. It is not suggested that overdraft facilities were available or utilised on the account. I do not think that there is any basis for holding that the appellant supplied any consideration to the defendant.

[38] In my opinion before the deeming provided for in s 16(1) can come about there has to be (a) a transfer of property by the defendant to another person; (b) the supply by such other person of some consideration to the defendant; and (c) proof that such counter-consideration was worth significantly less than the property in respect of which it is transferred. I am accordingly satisfied that it was not shown that s 16(1) came into operation.

[39] As far as the alternative arguments advanced on behalf of the respondent on the assumption that no affected gift was made, I agree with the submissions advanced by the appellant's counsel that, except for whatever money was in the ABSA bank account, which was property held for and therefore by the defendant, it was not shown that any of the assets of the appellant were realisable property as defined and accordingly no basis existed for making a restraint order in respect of them.

[40] It follows that (save for the money in the ABSA bank account) the order made by the court *a quo* must be set aside. It also follows that the cross appeal must be dismissed.

[41] In my view the order that the court *a quo* should have made (which counsel for the appellant does not oppose) is one in terms of Rule 6(5)(g) of the Uniform Rules of court to the effect that the appellant and the defendant be subject to cross-examination in respect of the evidence set forth in their affidavit.

[42] The following order is made:

1. Except insofar as the order of the court *a quo* relates to the appellant's banking account at the Sunnyside branch of Absa Bank, the appeal is allowed with costs.

2. The order of the court *a quo* in respect of the appellant insofar as it relates to her assets mentioned in paragraphs 12.2 and 12.3 of the judgment of the court *a quo* is

set aside and replaced by an order in the following terms:

'It is ordered in terms of Rule 6(5)(g) that the defendant and the first respondent are to be subject to cross-examination in respect of the evidence set forth in their affidavits.'

3. The cross appeal is dismissed with costs.

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IG FARLAM

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	A C Ferreira SC
	Instructed by J W Wessels & Partners Inc, Pretoria Symington & De Kok, Bloemfontein
FOR RESPONDENT:	E Labuschagne SC E Ndala
	Instructed by The State Attorney, Pretoria The State Attorney, Bloemfontein