THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 419/09

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

and

RAJAN NAIDOO **First Respondent**

ZAKHELE SITHOLE NO **Second Respondent**

DOLLY NAIDOO **Third Respondent**

TWO LINE TRADING 87 (PTY) LTD **Fourth Respondent**

YAMANI PROPERTIES 1015 (PTY) LTD **Fifth Respondent**

Neutral citation: **National Director of Public Prosecutions v Naidoo & Others (419/09) [2010] ZASCA 143 (25 November 2010)**

Coram: MPATI P, CLOETE, PONNAN, BOSIELO and TSHIQI JJA

Heard: **25 August 2010**

Delivered: **25 November 2010**

Summary: Section 26(6) of the Prevention of Organised Crime Act 121 of 1998 – exercise of a court's discretion in terms of s 26(6)(a) and (b) – does this envisage an order for payment of legal expenses of a defendant from property subject to restraint order but held by another person or entity.

ORDER

On appeal from: North Gauteng High Court, Pretoria. (Poswa J sitting as court of first instance):

1. Leave to appeal is granted.

2. The appeal is upheld with costs including the costs of two counsel.

3. The order of the court below is set aside and is substituted with the following:

'The application is dismissed with costs including the costs of two counsel where two counsel were employed.'

JUDGMENT

MPATI P et TSHIQI JA (Cloete, Ponnan and Bosielo JJA concurring)

[1] The first respondent, 'Mr Naidoo', is an accused in a pending criminal matter in the South Gauteng High Court, Johannesburg. He has been indicted, together with a number of co-accused, on 119 charges of alleged illegal dealing in unwrought precious metals – ranging from theft of platinum, falsification of documents, mining rights and exchange control irregularities. The docket consists of approximately 250 000 pages both in electronic form and hard copy.

[2] On 1 October 2004, the appellant, the National Director of Public Prosecutions ('NDPP') obtained, ex-parte, a provisional restraint order[1]

[1]Para 1.38 of the order states as follows:

'1.38 If any Defendant or Respondent satisfies the Court on oath that:

1.38.1 He/she has made full disclosure under oath of all his/her interests in the property subject to the restraint; and

1.38.2 He/she cannot meet the expenses concerned out of his/her unrestrained property,

the *Curatores bonis* may, upon the request of such person, release such of the realisable property within their control as may be sufficient to meet:

against Mr Naidoo in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). On 1 September 2005, the provisional order was confirmed and was extended, by agreement, to include all property owned by Mrs Naidoo, the third respondent, Two Line Trading 87 (Pty) Ltd ('Two Line') and Yamani Properties ('Yamani'), the fourth and fifth respondents respectively. Mrs Naidoo is Mr Naidoo's ex-wife. They still live together at the same address. She exercises control over Two Line and Yamani. The extension of the order to the property of Two line and Yamani was based on a contention by the NDPP that they had received affected gifts from Mr Naidoo in an amount of R1,5m.[2] Whether the property constitutes an affected gift in terms of POCA will be determined by the trial court and is not a subject of the present enquiry. The second respondent was appointed as one of the two curatores bonis in respect of all the property under restraint (s 28). The other has since passed away.

[3] On 26 July 2007, Mr Naidoo brought an urgent application in the North Gauteng High Court for an order directing the curator to pay to his attorneys of record a sum of R2 million towards his legal expenses, alternatively an order varying the restraint order against him to the effect that his reasonable legal expenses in the pending criminal matter be paid out of the funds standing to the credit of Two Line and Yamani upon presentation of an account. Mrs Naidoo has consented to the relief sought. The application was opposed by the NDPP primarily on the basis that s 26(6) of POCA does not envisage payment of legal expenses of a defendant[3] from the property of a

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1.38.3 The reasonable current and prospective living expenses of such person and his/her family or household; and

The reasonable current and prospective legal expenses of such person in connection with any proceedings instituted against him/her in terms of chapter 5 of the Act or any criminal proceedings to which such proceedings relate.'

[2]Section 12 of POCA defines affected gifts as 'any gift -

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

(b) made by the defendant concerned at any time, if it was a gift –

(i) of property received by that defendant in connection with an offence committed by him or her or any other person; or

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection,

whether any such gift was made before or after the commencement of this Act.'

[3]'Defendant' (see s 12) is defined as 'a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a

person or entity other than the defendant because, so the NDPP argued, the other entities have not made full disclosure of their assets as required in terms of s 26(6)(a) and (b) of POCA.

[4] The application was granted and the NDPP was ordered by Poswa J, on 26 July 2007, to pay an amount of R1 915 000 from the property held by the curator in terms of the restraint order. Only brief reasons were given for the order and Poswa J undertook to furnish further reasons if called upon to do so. The matter came to this court as an application for leave to appeal against the order of the court below on grounds of constructive refusal of leave by that court. The circumstances that led to the application to this court are the following:

[5] On 3 August 2007, the attorney representing the NDPP addressed a letter to Poswa J requesting full reasons for his order and stating that 'upon consideration of the full reasons client shall decide on whether to approach the honourable court for leave to appeal or not'. On 13 September 2007, the secretary to the judge wrote a letter to the attorneys referring to another letter from them dated 11 September 2007. The secretary stated that he had been asked by the judge to confirm that the latter had been approached by Mr Masilo (the attorney dealing with the matter) a few days after the matter was finalised, requesting reasons for the judgment. The rest of the letter proceeds:

'His Lordship informed him that furnishing reasons will be tantamount to writing a full reasoned judgment and that he is in no position to do so in the near future. What his Lordship did not tell Mr Masilo was that he hoped to write the judgment during the coming short recess. However, there is no longer such a hope because his Lordship will be doing his recess duty during that week.

Whilst the reason for your wanting the reasons for judgment is understandable, there is no chance that his Lordship will write the judgment before the long recess.'

[6] It seems that the letter dated 11 September was either copied to the Judge President of the court or a separate letter was sent to him because on 18 October 2007, the Judge President addressed a letter to the attorneys acknowledging their letter of 11 September and undertaking to revert once he

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person referred to in section 25(1)(b)'.

had received a response to his letter of enquiry addressed to the judge concerned. The Judge President further requested the attorneys to update him once the reasons had been given. In the meantime and on 27 October, the NDPP filed an application for leave to appeal in terms of Rule 49(1)(b) of the Uniform Rules.[4]

[7] On 31 October, three months after the order was given, the judge responded to the enquiry raised by the Judge President. Paragraphs two to three of the letter state the following:

'I do not know when your letter reached my chambers but I became aware of it only after 22 October, 2007, when I was browsing through my mail, whilst being on sick leave. It may be that it arrived whilst my current registrar was out writing examinations and that my attention was not, therefore, timeously drawn to its existence. My apologies.

This case was before me during the urgent court proceedings, at the end of July, 2007. I gave brief reasons indicating that I expected that I might be called upon to give more detailed reasons, in the future. A week or so – or even less – after 26 July, 2007, Mr Masilo was in my chambers, asking for full reasons. I did not chastise him for approaching me, a judge, for that purpose and in that fashion. You know, JP, that is unprofessional. I told him that full reasons are – as I had said in court – tantamount to a full judgment, that I did not have time to attend to it before the short recess, as I had other judgments that took precedence to it. It surprises me that Mr Masilo wrote this letter – which, by the way, reached me shortly after 11 September, 2007. Incidentally, something I had forgotten when I spoke to Mr Masilo – I had no short recess, having been in the unopposed motion roll. So, regrettably I cannot touch that judgment before January, 2008. I attach a copy of a letter I wrote on 13 September 2007, in reply to Mr Masilo's letter. My registrar (Francois) and I are uncertain as to whether it was, indeed, forwarded to Mr Masilo, as Francois went for study leave in about that time.'

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[4] Rule 49(1):

'(b) When leave to appeal is required and it has not been requested at the time of the judgement or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.'

[8] The contents of the letter show that despite a lapse of a period of three months and despite the fact that the application had been heard in the urgent court, the matter would remain outstanding for another two to three months. Another aspect worth noting is that the letters from the office of the judge show that he was annoyed by the attorney's persistent requests. One such letter, signed by the secretary of the judge, is dated 14 December 2007. It reads:

'The copy of the letter you wrote to the Judge President, which you brought to my office today, at about 11:00 on Friday 14 December 2007, refers.

I communicated with his Lordship Mr Justice Poswa who is on leave in Durban and reported to him what happened today, including your reluctance to wait for me to refer to correspondence. I have now gone through the correspondence and read it to His Lordship. He has instructed me to enclose copies of some of the correspondence to you, which is really what I meant to read to you while you were here.

Herewith faxed are the following letters, from which you ought to have a full picture of the history of this case and its future:

(1) a letter to your office dated 13 September, 2007; and

(2) a letter addressed to the Judge President dated 31 October, 2007.

You will realise, from the second letter, that His Lordship and I were uncertain as to whether or not you received the first of these two letters, which is why it was attached to the second one.

His Lordship has requested me to convey to you his displeasure with your attitude, if you received the two letters, because there is nothing more he can explain to you in this regard, neither is there anything he can do pertaining the situation.

In the interim, we are unable to find the file up to now, and wonder whether you have not, per chance, removed it. We only raised this with you because it cannot be found. His Lordship has the transcript of proceedings with him and that of his ex tempore judgment. He does, however, require the file.'

[9] On 24 March 2008, a period of eight months after the order was granted, the attorneys for the NDPP addressed yet another letter to the judge persisting with the request for the full reasons. On 14 April, the judge responded, again showing that he was annoyed by the request:

'Your letter of 28 March, 2008, which was placed on my desk at about 10:30 today – shortly after your clerk delivered it – refers.

Since my letter of 31 October, 2007, I have not had opportunity to write full reasons in this matter, simply because of other judgments – ahead of yours – that I have been dealing with. I have requested one month's leave, in advance of my leave period, to deal with my judgments. This is in view of special circumstances that relate to me only, including my history of periods of sick-leave. Your judgment may be dealt with during that period. Beyond what I am doing, there is nothing I can do to appease you, I find it difficult to keep writing letters about a judgment in respect of which I have already gone out of my way to make written explanations. I suggest you start trusting that I am not simply idling – doing nothing to get to your matter.'

[10] Persistent requests for reasons for an order should not be a source of irritation for a judge. This much was made clear by this court in *Pharmaceutical Society of South Africa (Pty) Ltd v Tshabalala-Msimang NO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 260G to 261H, where the following dictum appears:

'One does sense that the Court below was irritated because the applicants had the temerity to ask for a quick disposition of the applications for leave. There are some who believe that requests for "hurried justice" should not only be met with judicial displeasure and castigation but the severest censure and that any demand for quick rendition of reserved judgments is tantamount to interference with the independence of judicial office and disrespect for the Judge concerned. They are seriously mistaken on both counts. First, parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain. The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that Judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on Judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible'. (The footnotes have been omitted.)

[11] There was no further exchange of correspondence for two months. Ten months later, on 28 May 2008 and again on 17 June, the attorneys wrote further letters to the judge enquiring about progress. Copies of the letters were sent to the Judge President. On 17 June, the Judge President

responded and informed the attorneys that he had referred their letter to the judge with a request that the Judge President's office and the parties be informed when judgment would be delivered. It appears that none of these letters elicited any response from the judge.

[12] On 9 September, after a period of another two months, and a period of close to 13 months after the order, the attorneys again addressed a letter to the judge enquiring about progress. A copy was sent to the Judge President. It appears that after the exchange of this correspondence the application for leave to appeal was set down for 23 October 2007. This is evident from the following letter from the attorneys to the Judge President dated 28 October 2008:

'The above matter has reference specifically the attached letter dated 9th September 2008 from our office.

On the 23 October 2007 we made an application for leave to appeal in terms of Rule 49(1)(b) see annexure "A". However the application was never proceeded with because of the long awaited response for judgment from the Honourable Justice Poswa.

It is our client's instructions to request the honourable Judge President to place the matter on the roll before a new judge because the delay by Justice Poswa has adversely affected the criminal prosecution in this matter.

Your urgent attention to this matter will be appreciated.'

[13] It is difficult to understand why the judge failed to deal with the application for leave to appeal at that stage. The reasons he had undertaken to furnish had not been forthcoming for a period of approximately 15 months and the parties were suffering prejudice. What was required of him was simply to make a decision as to whether or not he believed there was a reasonable prospect that another court would come to a different conclusion.[5] The failure to deal with the application for leave was in itself another regrettable omission by the judge.

[5]A judge is not obliged to furnish reasons for such an order. In certain circumstances it may be necessary and certainly helpful to do so. (*Botes v Nedbank Ltd* 1983 (3) SA 27 (A) at 28E-F).

[14] On 12 November 2008, the Judge President acknowledged the letter and attached his own letter of even date addressed to the judge. He further requested the attorneys to inform him if reasons were not furnished by the end of November. The letter (dated 12 November from the Judge President) to the judge informed him that if the reasons were not forthcoming by the end of November, he would unfortunately submit the query to the Judicial Service Commission ('JSC'). Clearly (in this letter), the Judge President was conveying his own frustration about the sequence of events. Even after this, the judge did not seize the opportunity because, on 1 December, the attorneys addressed yet another letter to the Judge President informing him that they were disappointed to inform him that the judge had failed to furnish the reasons by the end of November. They further requested the Judge President to refer the matter to the JSC as stated in his letter of 12 November. On 14 January 2009, the Judge President addressed a letter to the attorneys informing them that the matter had been reported to the JSC by his letter dated 10 December and requested them to inform him when the reasons had been furnished. On 3 March, the attorneys addressed a letter to the Judge President highlighting the prejudice suffered by their client as a result of the delay, and in doing so motivated their request for the matter to be enrolled afresh before another judge in terms of Rule 49(1)(e) of the Uniform Rules of Court.[6]

[15] On 18 March 2009, the Judge President responded, stating that it would not be possible to place the matter on the roll as suggested and reiterated that the matter had been reported to the JSC and that he expected the JSC to respond in due course. On 7 May, the attorneys, as a last resort, addressed a letter to the judge outlining the history of the matter and informing him that they had instructions to approach this court directly for an application for leave to appeal on the basis that the failure to furnish reasons should be treated as a refusal of leave. In the alternative they enquired

[6]Rule 49(1)(e) provides that leave to appeal 'shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member'.

whether the judge was willing to permit them to argue the application for leave without his full reasons. There was no response to this letter.

[16] It is against this background that an application, in terms of s 20(4)(b) of the Supreme Court Act 59 of 1959[7], was brought directly to this court for leave to appeal on the basis that the delay in furnishing the reasons and the failure to deal with the application for leave amounted to a constructive refusal of leave to appeal. This Court, on 11 September 2009, referred the application for oral argument in terms of s 21(3)(c)(ii),[8] with a further direction that the parties be prepared to argue the merits of the appeal if called upon to do so.

[17] At the outset of the application, counsel for the respondents readily conceded that the delay, coupled with the failure to deal with the application for leave to appeal, amounted to a constructive refusal to grant leave. This was a sensible concession by counsel.

[18] The importance of furnishing reasons for a judgment is a salutary practice. Judicial officers express the basis for their decisions through reasoned judgments. A statement of reasons gives assurance to the parties and to any other interested member of the public that the court gave due consideration to the matter, thereby ensuring public confidence in the administration of justice.

[19] In *Botes v Nedbank Ltd* (supra) this court remarked that a reasoned judgment may well discourage an appeal by the loser and that the failure to state reasons may have the effect of encouraging an ill-founded appeal. Coincidentally, in their first letter dated 3 August 2007, the attorneys for the NDPP stated that they required the full reasons in order to decide whether or not to apply for leave to appeal – clearly showing that the reasons would help

[7] Section 20(4)(b) of the Supreme Court Act provides that 'in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division'.

[8] Section 21(3)(c)(ii) provides: 'The judges considering the petition may order that the application be argued before them at a time and place appointed, and may, whether or not they have so ordered - … (ii) refer the application to the appellate division for consideration, whether upon argument or otherwise, and where an application has been so referred to the appellate division, that division may thereupon grant or refuse the application'.

inform the future conduct of the matter. The delay in furnishing the reasons deprived them of the opportunity to exercise their options. The importance of furnishing reasons for a judgment was again stressed by Navsa JA at para 32 of his judgment in *Road Accident Fund v Marunga,*[9] where the learned judge of appeal referred with approval to an extract from an article by the former Chief Justice of the High Court of Australia, the Rt Honourable Sir Harry Gibbs.[10]

[20] There may be instances where it is unavoidable to give brief reasons with an undertaking to provide full reasons later or when requested to do so. Because of the several complications which may arise if this practice is adopted, it should be utilised sparingly. Such complications were highlighted by the Hon MM Corbett in the following manner:[11]

'The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn from the evidence are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on. The practice referred to (that is, an immediate order, reasons later) leaves no room for afterthought or changing one's mind about the case. You should follow it only when you are convinced that no amount of subsequent consideration or research, and more particularly the actual writing of the reasons, can possibly lead one to a different conclusion.

Another disadvantage of the practice of giving an order, reasons later, is the delay which often occurs in the furnishing of those reasons. I think that sometimes there is a feeling that the parties have their order and there is no urgency about the reasons. This is the first step down that slippery slope of procrastination, which is part of the law's notorious delay. My advice is that you treat such reasons with the same

[9] 2003 (5) SA 164 (SCA).

[10] 'The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.' *Australian Law Journal* (vol 67A) (1993) at 494-502.

[11] The Hon MM Corbett 'Writing a Judgment' (1998) 115 *SALJ* 116 p 118.

urgency and expedition as you devote to your ordinary reserved judgment. If anything, they should enjoy priority. There is nothing worse than allowing a matter to become stale; to lose one's grasp of the case and one's recollection of the reasons which prompted the order. Moreover, the parties are still just as interested in the reasons despite the order having been granted; and further proceedings may be contemplated, which could depend on the reasons and the way in which they are formulated.'

[21] The delay and the 'slippery slope of procrastination' against which the former Chief Justice cautioned, patently characterised the present matter. It is regrettable that no positive response was forthcoming even after the intervention of the Judge President who was clearly placed in a very compromising position.

[22] In approaching this court for leave to appeal, the NDPP did so as a last resort. There was clearly nothing more that could be done. The unreasonable delay in dealing with the application for leave to appeal was prejudicial to the parties. During a meeting held between the prosecutors and the legal representatives of Mr Naidoo's co-accused, it transpired that the outcome of the appeal was awaited by the other accused who would decide whether to bring similar applications or utilise the services of the Legal Aid Board for their legal expenses.

[23] This court has on occasion granted leave on the basis of a constructive refusal by a trial court to grant leave. In *Minister of Health NO v New Clicks South Africa (Pty) Ltd* (*Treatment Campaign as amici curiae*)[12] the court stated:

'It must be accepted, however, that there may come a time when a delay in resolving an application for leave to appeal amounts to a constructive refusal of the application, entitling the aggrieved litigant to apply to the Appeal Court to grant leave itself. What constitutes an unreasonable delay will depend on the circumstances of the case.'

[12]2006 (2) SA 311 (CC) p 317.

[24] We now consider whether leave in the present matter should be granted. This entails a consideration of the applicant's prospects of success on appeal.

[25] The issue on the merits is whether the provisions of POCA confer upon a high court the power to provide for the payment of a defendant's reasonable legal expenses from a source other than the restrained assets held by that defendant. It is convenient to set out the provisions of POCA which, in our view, have a bearing on this issue.

[26] Section 14:

'(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely -

(a) any property held by the defendant concerned; and

(b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

(2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.'

Section 26(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.'

Section 26(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 a person after the making of the restraint order, would be realisable property.'

Section 26(6):

‘(6) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit -

(a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and

(b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,

if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.’

[27] There is an obvious tension between the need to prevent the dissipation of assets held by an accused person that allegedly constitute the proceeds of crime and the need to ensure that that person’s fair trial rights, particularly the presumption of innocence, are not imperilled. It is the reconciling of this tension that is sought to be achieved by s 26(6). In the normal course, but for the restraint order, Mrs Naidoo, Two Line and Yamani would have been free to provide Mr Naidoo with such funds as they saw fit to enable him to fund his criminal defence. In effect what we are called upon to decide is whether anything contained in s 26 precludes them from now doing so.

[28] The appellant submitted that Mr Naidoo could only approach the court for the relief that he sought in terms of s 26(6)(b). In terms of that subsection, so the submission went, the court may only make provision for legal expenses out of his own property and not property in the hands of one or more of the other respondents.

[29] Poswa J understood Mr Naidoo’s counsel to be submitting, in essence, that because the property concerned constitutes affected property it belongs to Mr Naidoo. In accepting this argument the learned judge said –

'The effect of the provisional order is, therefore, that all the property restrained belongs to the applicant [Mr Naidoo], until such time that the criminal action or the contemplated civil action is finalised. That is an order sought and obtained by the first respondent [the NDPP]. In the circumstances, I do not understand how the first and second respondents [the NDPP and the *curator bonis*] can claim that the property that the applicant [Mr Naidoo] has identified, for purposes of the present application, is the third respondent's [Mrs Naidoo's]. It is true that the applicant [Mr Naidoo], in the current application, described the property as the third respondent's [Mrs Naidoo's]. That does not, however, alter its current legal status in terms of the restraint order, in my view.'

In our view, this process of reasoning by the court a quo was incorrect.

[30] POCA does not provide that once property held by a person to whom a gift was made becomes the subject of a restraint order on the grounds that it constitutes an 'affected gift', it is deemed to be the property of the defendant who made the gift. It was suggested before us that one could possibly come to this conclusion on the basis of the meaning of the words 'realisable property' in ss 14 and 26(2) of POCA. We disagree. 'Realisable property' is defined in s 14 as '(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'. The aim of the definition is therefore to spread the net wider so as to cover not only property held by a defendant but also property held by someone to whom such defendant has made a gift. The definition does not alter the law as to ownership.

[31] The purpose of POCA is, inter alia, to 'introduce measures to combat organised crime,' and 'to provide for the recovery of the proceeds of unlawful activity'. A restraint order cannot be made in respect of any property. Section 26(1) of POCA confers on a high court the power to make an order prohibiting any person 'from dealing in any manner with any property to which the order relates'. That order is termed a 'restraint order'.[13] Its ambit is regulated by s 26(2), which provides that it (the restraint order) may be made in respect of realisable property 'which is held by the person against whom the restraint

[13] Restraint order is defined in Chapter 5 of POCA as 'an order referred to in section 26(1)'.

order is being made' (s 26(2)(a)). (Our underlining.) So, the person who is prohibited from 'dealing in any manner with any property', ie the person against whom the restraint order is made, is the person who holds the property that is the subject of the restraint order. It follows that a restraint order can only be made, in terms of POCA, against a person who is the holder of property alleged to be realisable property (s 26(2)(a) and (b)), or becomes the holder after the restraint order is made (s 26(2)(c)).

[32] The plain grammatical meaning of s 26(6)(b) read with s 26(6)(a) is that a restraint order may make provision for the legal expenses of 'a person against whom the restraint order is being made' – not for the legal expenses of a third person against whom a restraint order is also being made at the same time, and which must, for the reasons given in the previous paragraph, be in respect of property held by the latter. So the restraint order against Mr Naidoo may make provision for his legal expenses. But the restraint orders made against Mrs Naidoo and the companies she controls cannot make provision for Mr Naidoo's legal expenses as he is not the person against whom those restraint orders were made.

[33] A defendant who wishes property under restraint to be released for his or her reasonable legal expenses in connection with the proceedings instituted against him or her in terms of POCA, is required to satisfy the court that he or she has disclosed under oath all his or her interest in such property (s 26(6)). But the 'interest' to be disclosed is the interest in realisable property under restraint 'which is held by the person against whom the restraint order is being made' (s 26(2)(a)).

[34] It is common cause that the property which Mr Naidoo seeks to be released for his reasonable legal expenses is not subject to a restraint order against him. The provisional restraint order granted by De Villiers J in October 2004 states that it relates to realisable property 'so far as it remains property held by the Defendants and any of the Respondents' (paragraph 1.1.1). (Our underlining.) The relevant provisions of the order granted by Rabie J on 1 September 2005 by agreement pursuant to an application by

nine applicants, to which Mrs Naidoo, Two Line and Yamani were party, following the grant of the provisional restraint order, state that –

'1. It is declared that the assets of the First [Mrs Naidoo], Second, Fourth [Two Line], Fifth [Yamani] . . . Applicants are subject to the provisional restraint order granted by De Villiers J . . . on 1 October 2004;

. . .'

'5. The First [Mrs Naidoo], Second, Fourth [Two Line], Fifth [Yamani] . . . Applicants undertake not to utilise the property subject to restraint in terms of this order in a manner that would dissipate, encumber or diminish in any way the value of the said property;

. . .'[14]

Clearly, therefore, the assets of Mrs Naidoo and of Two Line and Yamani, which would include affected gifts, became the subject of a restraint order against them and not against Mr Naidoo. It follows that Mr Naidoo cannot invoke the provisions of s 26(6) to obtain the release, for his legal expenses, of assets which are the subject of a restraint order made against Mrs Naidoo, Two Line and Yamani.

[35] The following order is accordingly made:

1. Leave to appeal is granted.

2. The appeal is upheld with costs including the costs of two counsel.

3. The order of the court below is set aside and is substituted with the following:

'The application is dismissed with costs including the costs of two counsel where two counsel were employed.'

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[14]The First, Fourth and Fifth applicants referred to in the order are the third, fourth and fifth respondents in this appeal.

PRESIDENT

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES

APPELLANT:	E C LABUSCHAGNE SC (with him E NDALA) Instructed by Masilo Inc, Pretoria; Naudes Attorneys, Bloemfontein.
RESPONDENTS:	W VERMEULEN SC (with him N REDMAN) Instructed by Yusuf Ismail Attorneys, Pretoria; Rossouws Attorneys, Bloemfontein.