

SOUTH AFRICA / JUDGMENT

ABSA Bank Ltd v Fraser and Another (386/2005) [2005] ZASCA 107; [2006] 2 All SA 1 (SCA) (24 November 2005) [2005] ZASCA 107

COURT

Supreme Court of Appeal

BEFORE

Mpati, Cameron, Nugent, Mlambo, Nkabinde

CASE / FILE NUMBER

386/2005

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 386/05REPORTABLE

In the matter between:ABSA BANK LIMITED APPELLANT

andTRENT GORE FRASER FIRST RESPONDENT

PORTION 3 LAVIANTO CC SECOND RESPONDENT

Before: Mpati DP, Cameron, Nugent, Mlambo JJA et Nkabinde AJA Heard: 19 September 2005
Delivered: 24 November 2005 Summary: Criminal law – restraint order in terms of ss 25 and 26 of the Prevention of Organised Crime Act 121 of 1998 – effect on defendant’s concurrent creditors – properly interpreted s 33(1) does not exclude concurrent creditor’s interests in restrained property; defendant’s legal expenses interest in restrained property has no preference over proven concurrent claims.

JUDGMENT

MLAMBO JA

- [1] One of the primary objectives of the Prevention of Organised Crime Act 121 of 1998 (the Act) is to divest criminals of the proceeds of their criminal activities. This object is provided for in chapter 5 which contains provisions for restraining[1] and confiscating[2] property belonging to criminals. This appeal concerns the right, if any, of an ordinary unsecured judgment creditor to intervene in proceedings dealing with a defendant’s property which is under restraint in terms of s 26[3].

- [2] The appellant (ABSA) is a commercial bank. The first respondent (Fraser) is a businessman currently incarcerated without bail at the Durban Central Prison. He was arrested on 16 November 2003 and subsequently indicted on charges relating to racketeering and money laundering under the Act and drug trafficking under the Drugs and Drug Trafficking Act 140 of 1992. Fraser is indicted with eight others including his erstwhile fiancée, Lara Nicole Zeeman (Zeeman).[3] The second respondent is a close corporation (the CC) in which Zeeman once held the membership interest as nominee for Fraser. The membership interest has since been transferred to Fraser pursuant to an application by him seeking that result. The CC owns immovable property at No 3 Lavianto, Robert Bruce Drive, Fourways, Johannesburg (the immovable property). In 2001 Fraser inherited an amount of some R1.8 million from a family trust. In 2002 he caused the CC to be registered and arranged that it acquire the immovable property. He then arranged that Zeeman hold the membership interest in the CC on his behalf. Fraser deliberately devised this scheme to safeguard the property from being attached by ABSA to satisfy a default judgment ABSA had, to his knowledge, obtained against him on 19 July 2000, in the Cape High Court, as surety for a company in liquidation, in an amount of R673 281.[4] The membership interest in the CC and the immovable property, amongst other properties, were placed under restraint by order of the Durban High Court, obtained ex parte on 26 November 2004 by the National Director of Public Prosecutions (NDPP), in terms of s 26(1) of the Act. In terms of the order a rule nisi was issued returnable on 27 January 2005.[5] After the grant of the interim restraint order, and on 3 December 2004, Fraser launched an application in terms of s 26(6)[4] of the Act, seeking an order directing the curator bonis, appointed in terms of the restraint order, to sell the immovable property and/or the membership interest in the CC and pay the proceeds to his attorneys to meet his reasonable legal expenses in his criminal trial. Fraser enrolled this application to be heard on 10 December 2004.[6] On 25 November 2004 the NDPP alerted ABSA to the proceedings and on 9 December Fraser's application was postponed at ABSA's behest. On 20 December ABSA launched a formal application to intervene and oppose Fraser's application. ABSA's quest for intervention and opposition relied on the default judgment it obtained against Fraser. It urged that if Fraser was permitted to dissipate the proceeds of the restrained property to meet his legal expenses it would be deprived of the means for recovering its judgment debt in due course, which it would ordinarily have been entitled to do by a writ of execution. At the time ABSA sought to intervene, the judgment debt, with accrued interest, amounted to R1 028 214. Fraser opposed ABSA's application to intervene, whilst the NDPP elected only to oppose Fraser's application for the release of moneys to meet his reasonable legal expenses.[7] The two applications and the NDPP's application to confirm the rule nisi, were heard together on 1 April 2005. On 8 April the court a quo (Olsen AJ) confirmed the rule nisi, and allowed Fraser's application, but dismissed that of ABSA. On 14 July 2005 the court a quo granted ABSA leave to appeal to this court against the order dismissing its intervention application including the costs order. ABSA also sought to amend its application for leave to appeal to include an appeal against Fraser's successful legal expenses application but that application was refused. The court a quo also refused, with costs, an application by ABSA to suspend the

order granting relief to Fraser. In this court ABSA, apart from appealing against the refusal to allow it to intervene, has also filed an application seeking this court's leave to appeal against the order granting relief to Fraser. The hearing of the appeal was expedited because of the impending trial date.[8] In refusing ABSA's application to intervene and allowing Fraser's reasonable expenses application the court a quo found that the effect of the restraint order was to afford a defendant[5] not only a moratorium against the claims of his creditors, but also a right to have first call upon his property in order to meet his reasonable legal expenses. This finding was based on the court a quo's construction of s 33(1)[6] that claims of so-called concurrent creditors, such as ABSA, were 'obligations'[7] of a defendant which would 'conflict' with his obligation to satisfy a confiscation order. The court a quo found that the effect of s 33(1) read with s 30(3)[8] was that a restraint order deprived third parties of some of their ordinary rights as creditors of a defendant. The court stated that in doing so the legislature intended to achieve the swift implementation of measures designed to prevent criminals from benefiting from, and especially making off with, the proceeds of crime. [9] The court a quo also found: 'One of the ways in which the legislature has disturbed the conventional order of things is by creating what amounts to a preference in respect of reasonable legal fees of the kind identified in s 26(6) of the Act. It seems that the legislature had no alternative but to allow for such a preference if the State was to have the right to seize the estate of an accused person and put it beyond such person's control, until after the conclusion of the criminal proceedings in question.' [10] In this court Fraser's counsel, supporting that reasoning, argued that once a restraint order was granted the State becomes a preferent claimant in the defendant's property over concurrent claims. He argued that a defendant's obligation to pay a concurrent creditor was in conflict with his obligation to satisfy a confiscation order and that it was for that reason that such claims should be left out of reckoning until after a confiscation order is satisfied. Counsel further argued that on this interpretation of s 33(1) the power of a High Court to deal with restrained property was limited to the situations mentioned in s 26(6) – ie a defendant's living and legal expenses as well as his secured and preferent obligations[9].

- [11] Whether that is indeed what s 33(1) means and whether there is warrant for this outcome can best be determined after reviewing the provisions relating to the granting, nature and effect of a restraint and a confiscation order as well as the impact of s 26(6) on these provisions. [12] The meaning given to s 33(1) in the court a quo and by Fraser's counsel has the effect of elevating the defendant's living and legal expenses as well as his obligation to satisfy a confiscation order to a status similar to his secured and preferent obligations whilst relegating his concurrent obligations below these. On the face of it this would be a surprising result, and one at odds with a creditor's common law entitlement to levy execution on a debtor's property. [13] The provisions dealing with restraint, reasonable legal expenses and confiscation orders are found in chapter 5 whose objective is to deprive a convicted person of the proceeds of unlawful activities. A restraint order, though not a prerequisite for the grant of a confiscation order, lays the ground for the satisfaction thereof. The objective of a restraint order is that, once granted, a defendant's control over his

property is removed and the property is preserved under the supervision of a court to satisfy any confiscation order that might be made in due course, unless the defendant is acquitted at the end of the criminal trial.[10][14] Save for s 26(6)[11] and (10)[12], the section is silent regarding the rights, if any, of concurrent creditors and other third parties, who have an interest in restrained property, to intervene in proceedings concerned with such property under the Act. However as I demonstrate hereafter the fate of restrained property is not exhaustively regulated in s 26. In this regard s 31(1)[13] comes into focus and, in my view, holds the key to the resolution of the issue raised in this appeal. It is in terms of this section that the powers of a court are regulated when it deals with restrained property once a confiscation order is made.[15] Properly construed s 31(1) empowers a High Court to apply s 26 with a view to making available the current value of realisable property to satisfy a confiscation order. In this context the purpose of a restraint order is therefore to preserve a defendant's property to facilitate the satisfaction of, amongst others, a confiscation order. [16] The power of a court to make a confiscation order is located in s 18 which is the key provision of chapter 5. This section empowers a court that convicts a defendant to order him or her to pay to the State an amount of money 'that the court considers appropriate'[14]. Such an order is referred to as a 'confiscation order' and its objective is to relieve the defendant of ('confiscate') the value of any benefit that accrued to the defendant from criminal activities.

- [17] It is clear from this section that after a defendant has been convicted, a confiscation order can be made only once a court has established, after an enquiry, that the defendant has derived a benefit from any offence he was convicted of, or criminal activity related to it. This process also applies in a situation where a convicted defendant absconds or dies before a confiscation order is made[15].
- [18] In broad terms, s 20(1) read with s 18(2) provides that the amount a defendant may be ordered to pay to the State may not exceed the value of the benefit that accrued to him from criminal activities, or the combined value of his property together with certain tainted dispositions that he or she might have made, whichever is the lesser. The value of the defendant's property and tainted dispositions is their value after deducting the amount of certain defined obligations, as well as his secured and preferent obligations[16]. [19] Thus assuming, for convenience, that no tainted dispositions were made, the maximum amount in which a confiscation order may be made is the value of the defendant's property less the amount owed to secured and preferent creditors. It follows that the claim of the State pursuant to a confiscation order will never compete with the claims of secured and preferent creditors for the defendant's property (because the value of the property will be at least the sum of the State's claim and the secured and preferent creditors' claims). [20] But it does not follow that claims of concurrent (unsecured) creditors are thereby simply left out of account. The Act provides a mechanism for them to be taken into account, subject to the approval of the court at the time of the realization of the defendant's property but before satisfaction of a confiscation order. In this regard s 30(5) expressly authorizes the High Court to delay the realization of the property so as to enable a victim of the defendant's crimes to

obtain a judgment and to satisfy that judgment from the defendant's property before the property is realised. [21] Once the property has been realised s 31(1) authorizes the High Court to direct that 'payments' be made from the realised proceeds of the defendant's property before the State's claim is satisfied. Clearly the 'payments' that are contemplated by that section include payments in discharge of the defendant's concurrent obligations. [22] I can fathom no reason for this provision, other than that it is intended to provide persons with an 'indirect interest' in the restrained property, such as the defendant's concurrent creditors, to bring their claims to the court's attention to be taken into account for payment, should the court be satisfied of their validity, before satisfaction of the confiscation order. This, in my view, can only mean that the High Court retains the power to entertain applications by persons or entities with claims, concurrent or otherwise, in the restrained property.

- [23] The payments envisaged in s 31(1), as pointed out above, must also be to concurrent creditors – because otherwise it is difficult to see on what grounds such payments fall to be made. It is only after such court-approved payments have been made that the balance of the proceeds of the property is applied in payment of the defendant's obligation under the confiscation order.
- [24] One should not lose sight of the fact that the purpose of the Act is to divest criminals of the proceeds of their criminal activity and to prevent them from deriving benefit from such proceeds. Therefore the 'draconian' provisions of the Act should remain directed at criminals, not innocent third parties such as concurrent creditors. If the Act does indeed take away the common law rights of ordinary concurrent creditors to claim satisfaction of their debts from restrained property, which they would be entitled to do in the ordinary course, it would have to state this very clearly.[17] The Act does no such thing. [25] The notion that a restraint order elevates the defendant's legal expenses claim and the State's claim to a preferent position in restrained property, espoused by the court a quo and in argument before us, is clearly wrong. A restraint order accords the defendant and the state no preferential claim in the restrained property.
- [26] It follows that the State's interest in a confiscation order cannot compete with, but is subordinate to, the defendant's concurrent obligations. After all a confiscation order is not intended to enrich the State[18] but to divest the criminal of the benefit derived from an offence. Furthermore the fact that the Act (in ss 30 and 31) contemplates the payment of the defendant's obligations when the property is realised and distributed is inconsistent with the construction of s 33(1) advanced on behalf of Fraser (ie that claims of creditors are to be 'left out of account' whenever a court exercises powers conferred upon it by ss 26 to 31). [27] Indeed, since the confiscation order is to be met only after other court-approved payments have been made it is doubtful, as a matter of language, whether the defendant's obligation to make such payments can be said to 'conflict with' the defendant's obligation to the State. But even if in isolation the words are capable of that meaning, the context indicates a contrary intention. Moreover, a court will not generally construe an unclear statute so as to take away

vested rights. [28] In my view the court below erred in finding that it was precluded by s 33(1) from taking account of ABSA's claim when exercising the powers conferred upon it by the Act, and in particular the discretion that is conferred upon it by s 26(6). It was also not obliged to do so. The section confers upon the court a wide discretion that is to be exercised in the light of the circumstances with which it is presented. No doubt a court will be influenced when exercising its discretion by the nature of the alleged claim and in particular whether it is satisfied that it is genuine and not merely a means for the defendant to siphon off property. ABSA's claim in the present case is clearly genuine. [29] Once it is found that ABSA's claim did not fall to be 'left out of account' when the court exercised its discretion in terms of s 26(6) then there was no reason why the court below should not have permitted ABSA to intervene to oppose the application, in the exercise of its general powers to hear any person who has an interest in the proceedings. These powers which in my view are not excluded by the Act. [30] The court a quo's decision has the further consequence of allowing Fraser to profit from his illegitimate scheme to frustrate ABSA from attaching his assets. The legislature could never have intended that an ordinary unsecured creditor, who has pursued a claim and has obtained a judgment before a restraint order is granted, should be prevented from satisfying that judgment simply because the assets of the defendant have since become restrained. The dismissal by the court below of ABSA's application to intervene must thus be set aside.[31] We are not called upon to decide whether a court is entitled to release restrained property in order to meet a concurrent claim before a confiscation order is made, because that is not what ABSA has asked for, and I expressly do not make any such finding. ABSA has sought only to prevent Fraser using the moneys to meet his anticipated legal expenses while ABSA's claim remains unpaid.

Application for leave to appeal against reasonable expenses order[32] As stated earlier ABSA also seeks leave to appeal against the order of the court a quo granting Fraser his reasonable expenses in terms of s 26(6). In view of my construction of s 33(1) ABSA ought to be granted leave. The parties were agreed that nothing would be served by referring the matter back to the court a quo for it to exercise its discretion afresh. No proper grounds have been shown why Fraser should be permitted to expend moneys on legal expenses that would ordinarily have been available to his creditors. I have already pointed out that the grant of a restraint order does not purport to confer preferential rights on a defendant. Its effect is only to restrict his or her use of the property, unless a court orders otherwise as provided for in s 26(6). But that assumes that the defendant has the means to meet his or her legal expenses.

[33] It is also incorrect to say that the depletion of a defendant's assets to satisfy concurrent creditors at the expense of his legal expenses interferes with his right to a fair trial. The defendant has a constitutional right to legal representation at State expense if substantial injustice would otherwise result.[19] For all the foregoing reasons the court a quo's order granting relief to Fraser in terms of s 26(6) must also be set aside.[34] At the time the application was heard ABSA's judgment debt amounted to R1 028 214 and in my view it was entitled to ensure that property to that value was not expended by Fraser in payment of new debts. [35] In the circumstances the following orders are made:

1. The appeal against the dismissal of ABSA's application to intervene is upheld.
2. ABSA is granted leave to appeal against the order made by the court a quo in favour of the first respondent. The costs of that application are to be costs in the appeal.
3. The appeal by ABSA against the order granted in favour of the first respondent is upheld to the extent set out below.
4. Paragraph A of the order of the court below is set aside and the following is substituted:
'(a) ABSA is granted leave to intervene in the proceedings. The costs of its application to intervene are to be costs in the main application.'
5. Paragraph 8 of paragraph A of the order of the court below is set aside and the following paragraphs are added to the remainder of paragraph A:
'8. The orders set out above are all subject to the provision that no moneys for payment of the first respondent's legal expenses shall be advanced in excess of an amount that results in the moneys being retained by the curator falling below the sum of R1 028 214.
9. The costs of the application are to be borne by the first respondent.'6. The costs of the appeal are to be borne by the first respondent.

D MLAMBO JUDGE OF APPEAL CONCUR: MPATI DP CAMERON JA NUGENT JA NKABINDE AJA

[1] Sections 25 to 29[2] Sections 18 to 23[3] Section 26 provides:

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

(2) A restraint order may be made –

- (a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
- (b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;
- (c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property. . . . ' []

4 Section 26(6) provides: '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.’ [5] The term ‘defendant’ is used here for convenience and as it is used in the Act to describe someone in Fraser’s position.[6] Section 33(1) ‘The powers conferred upon a High Court by sections 26 to 31, or upon a curator bonis appointed under this Chapter, shall –

- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realisable property for satisfying any confiscation order made or which might be made against the defendant;
- (b) in the case of realisable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realising not more than the current value of such gift;
- (c) be exercised with a view to allowing any person other than that defendant or the recipient of such gift to retain or recover the current value of any property held by him or her,

and, except as provided in sections 20(1) and 26(6), any obligation of that defendant or the recipient of such gift which conflicts with the obligation to satisfy a confiscation order shall be left out of account.’[7] The term ‘obligation’ means, in the context of the Act as a whole, a debt. See in this regard s 20(4)(b).[8] Section 30(3) provides: ‘A High Court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.’[9] Section 20(4) These obligations are defined in the following terms: ‘For the purposes of subsection (1), an obligation has priority at the time of the making of the relevant confiscation order –

- (a) if it is an obligation of the defendant, where he or she has been convicted by a court of any offence –

- (i) to pay a fine imposed before that time by the court; or (ii) to pay any other amount under any resultant order made before that time by the court;

- (b) if it is an obligation which –

- (i) if the estate of the defendant had at that time been sequestrated; or

(ii) where the defendant is a company or other juristic person, if such company or juristic person is at that time being wound up,

would be payable in pursuance of any secured or preferent claim against the insolvent estate or against such company or juristic person, as the case may be.’

- [10] Section 24(A): ‘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.’
- [11] Footnote 4 supra.[12] This section provides: ‘A High Court which made a restraint order –
- (a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied –
 - (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
 - (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
 - (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.’
- [13] Section 31(1): ‘The following sums of money in the hands of a curator bonis appointed under this Chapter, namely – (a) the proceeds of any realisable property realised by virtue of s 30; and(b) any other sums of money, being property of the defendant concerned,shall, after such payment as the High Court may direct have been made out of such sums of money, be applied on that defendant’s behalf in satisfaction of the confiscation order made against him or her: Provided that where the High Court may direct payment out of such sums of money, the State shall not have a preferential claim: Provided further that, if sums of money remain in the hands of the curator bonis after the amount payable under such confiscation order has been fully paid, the curator bonis shall distribute those sums of money – (i) among such persons who held realisable property which has been realised by virtue of s 30; and(ii) in such proportions,as that court may, after affording such persons an opportunity to make representations to it in connection with the distribution of those sums of money, direct.’[14] Section 18(1)[15] Section 24(2)(a) read with s 24(3)(a)[16] Footnote 9 supra. [17] *Casserley v Stubbs* 1916 TPD 310 at 312; *Attorney-General, Transvaal v Botha* [1993] ZASCA 159; 1994 (1) SA 306 (AD) at 330I-J.
- [18] See *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA) at 7 para 19. ‘The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view, it is therefore not significant that in some cases the State might end up receiving nothing. It is because the purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State that the court’s inquiry in terms of s 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss.’
- [19] Section 35(3)(f) of the Constitution.

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