

SOUTH AFRICA / JUDGMENT

Ngcobo v National Director of Public Prosecutions (D8053/2019) [2021] ZAKZDHC 42 (13 December 2021) [2021] ZAKZDHC 42

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Marks

CASE / FILE NUMBER

D8053/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D8053/2019

In

the matter between:

SANDILE

NGCOBO Applicant/Second
Respondent

And

THE

NATIONAL DIRECTOR OF

PUBLIC

PROSECUTIONS Respondent/Applicant

In

re: PUBLIC
PROSECUTIONS Applicant
ROBERT
ABBU First
Respondent
SANDILE
NGCOBO Second
Respondent
ILANGA
LAMAHLASE PROJECTS (PTY) LTD Third
Respondent
MZWANDILE
F
DLUDLA Fourth
Respondent
HLENGA
SIBISI Fifth
Respondent
UZUZINEKELA
TRADING 31
CC Sixth
Respondent
ZITHULELE
A
MKHIZE Seventh
Respondent
OMPHILETHABANG
CC Eighth
Respondent
BONGANI
P
DLOMO Ninth
Respondent
KHOBOSO
J
DLOMO Tenth
Respondent
ELSHADDAI
HOLDING GROUP CC Eleventh
Respondent
PRABAGARAN
PARIAH Twelfth
Respondent
SINTHAMONE
PONNAN Thirteenth
Respondent
CRAIG
PONNAN Fourteenth
Respondent
MONDLI
MICHAEL

MTHEMBU Fifteenth
Respondent
ZANDILE
RUTH THELMA GUMEDE Sixteenth
Respondent
NANCY
SANDRA
ABBU Seventeenth
Respondent
VUYISWA
VENERY
NGCOBO Eighteenth
Respondent
LOGAMBAL
PARIAH Nineteenth
Respondent
CYNTHIA
MTHEMBU Twentieth
Respondent
JABEZ
MEDIA AND BUSINESS SOLUTIONS CC Twenty
First Respondent
AFRICAN
COMPASS TRADING 588 CC Twenty
Second Respondent
AKHONA
AMAHLE CONTRACTING PROJECTS CC Twenty
Third Respondent
NTOMBIZETHU
TRADING ENTERPRISE CC Twenty
Fourth Respondent
UHLANGA
EVENTS MANAGEMENT CC Twenty
Fifth Respondent
UHLANGA
TRADING ENTERPRISE CC Twenty
Sixth Respondent
SEKHOBHA
TRADING 21 CC Twenty
Seventh Respondent
PINETOURLS
SERVICES AND TRADING CC Twenty
Eighth Respondent
MATHULA
LANDSCAPING AND CIVIL
CONSTRUCTION
CC Twenty
Ninth Respondent
FANTIQUE
TRADE 188
CC Thirtieth

Respondent
MSUNDUZI
CIVIL (PTY)
LTD Thirty
First Respondent
SASONAKO
PROJECTS CC Thirty
Second Respondent
UMVUYO
HOLDINGS
CC Thirty
Third Respondent
INTERLLECTUAL
SERVICES AND INVESTORS CC Thirty
Fourth Respondent
CYRUS
INDUSTRIES
CC Thirty
Fifth Respondent
CROWN
ENERGY AND RECYCLING GROUP CC Thirty
Sixth Respondent
MMZ
MEDIA DISTRIBUTIONS AND SUPPLIES CC Thirty
Seventh Respondent
MALAGAZI
TRADING CC Thirty
Eighth Respondent
INANDA
DEVELOPMENT SERVICES CC Thirty
Ninth Respondent
SIZISA
UKHANYO TRADING 382
CC Fortieth
Respondent
DLOMO
BROTHERS
CC Forty
First Respondent
BABUSI
TRADING
CC Forty
Second Respondent
BHEKIZIZIWE
ELKANA SIBISI N.O. Forty
Third Respondent
(In
his capacity as trustee on the Elkasi Trust
No.
IT872/2009/PMB)
THOKO

THEMBILE NONSIZI ZONDI N.O. Forty

Forth Respondent

This

judgment was handed down electronically by circulation to the parties' legal representatives by email, and release to SAFLII.

The date and time for hand-down is deemed to be have been at 10h00 on 13 December 2021.

ORDER

The

following order is issued:

The

application is dismissed with costs; such costs are to include the costs of two counsel where so employed.

JUDGMENT

Delivered on: 13 December 2021

Marks AJ:

Introduction

- [1] This matter served before me as an interlocutory application in terms of s 26(6) and (10) of the Prevention of Organised Crime Act 121 of 1998 (POCA) for the release of certain restrained assets, and for the payment of R1 million for reasonable living and legal expenses. The application was opposed.
- [2] The applicant, Sandile Ngcobo (Ngcobo) and his wife, Vuyiswa Ngcobo (Vuyiswa) are respondents in the main application, whereby the National Director of Public Prosecutions (the NDPP) secured a restraint order granted ex parte by this court on 4 October 2019 in the form of a rule nisi. Ngcobo has opposed the confirmation of the rule and is applying for a discharge thereof. This matter referred to as the main application is set down for hearing on the opposed roll on 4 February 2022 at the Durban High Court. The rule nisi has been discharged in respect of Vuyiswa and therefore the interlocutory application proceeded in respect of Ngcobo only.
- [3] For reasons which shall become apparent, it is necessary to set out the prayers sought in the notice of motion that was filed on behalf of both Ngcobo and Vuyiswa in the interlocutory application on 8 January 2020.
- [4] The notice of motion seeks an order in the following terms:
- ‘(1) In terms of Section 26 (10) of POCA, the interim order issued on 4 October 2019 (the restrain order) is rescinded or varied to exclude:-

1.1 The Jaguar XF – registration ND [...];

1.2 The Porsche Cayenne – registration ND [...];

1.3 The Absa bank account number [...];

1.4 The second respondent's salary;

1.5 The cash sum of R 41 500, 00.

- (2) That the order in paragraphs 1.1 to 1.5 above shall operate within immediate effect.
- (3) The curator bonis shall return the property referred to in para. 1.1, 1.2 and 1.5 above to the second and eighteenth respondents within (3) days of this order.
- (4) Payment is to be made by the curator bonis in terms of Section 26 (6) of POCA for the reasonable legal expenses of the second and eighteenth respondents in the sum of R1 million into the trust account of Calitz Crockart and Associates Inc. within (7) seven days of the order.
- (5) Further and or alternative relief.
- (6) Costs in the event that the application is opposed.'

The

issues

- [5] The issues requiring determination are whether Ngcobo has complied with s 26(6) and (10) of POCA in respect of his application for the release of restrained assets and funds for reasonable living and legal expenses. If so, whether the court should exercise its discretion concerning the release of funds for the payment of these reasonable expenses. Before analysing the legal principles, it is necessary to give a brief background and summary of facts, which are either not in dispute or are common cause.

Background

facts and facts which are common cause

- [6] Ngcobo is employed at the eThekweni Municipality as the Deputy Head of Supply Chain Management and the Chairperson of the Bid Adjudication Committee. It is alleged that he, together with others, was involved in a fraudulent, corrupt scheme whereby employees of the eThekweni Municipality acted in concert with certain service providers in order to defraud the municipality in excess of R230 million. The NDPP has instituted proceedings against Ngcobo and others in the high court, however, the trial has not yet begun. Besides these charges, there are other cases pending against Ngcobo in the Durban Specialised Commercial Crime Court.

- [7] On 4 October 2019, Henriques J granted a provisional order in terms of s 26 of POCA against 44 respondents, including Ngcobo. In terms of the order, realisable property to the value of R230 571 760.96 was to be restrained from the 44 respondents. The property which Ngcobo was required to surrender in terms of the order included property specified and set out in the schedule annexed to the order, as well as other assets held by him at the time of the granting of the order or subsequently. The curator bonis appointed by the court was authorised to take possession of the property and to administer the realisable property. At a meeting held with Mr Howse SC, Ngcobo's legal representative, the curator bonis requested a list of Ngcobo's income and expenditure on oath for her to administer his bank accounts. She also requested a statement on oath declaring his interests in the properties under restraint. According to the curator's first report dated 22 November 2019, Ngcobo's restrained assets had an expected realisation value of approximately R7 million. It is from this value that Ngcobo is seeking R1 million for reasonable living and legal expenses.
- [8] In order to deal with the merits of the application, it is necessary to mention certain provisions of the order and thereafter consider the purposes of POCA, confiscation orders, restraint orders and the applicable legal principles.

The restraint order

- [9] In terms of the court order granted on 4 October 2019, the appointed curator bonis was given certain powers and duties. The order further advises the 44 respondents at para 1.3.24 that they must disclose to the curator bonis on affidavit, in such form as she determines, a description and whereabouts of all property not physically surrendered or to be transferred to the respondents, or any gifts made by the respondents. Further, at para 1.6.1 it spells out that the court may order the release of realisable property within the control of the curator bonis if a respondent satisfies the court that he has made full disclosure to the curator bonis under oath of all his interests in the property subject to the restraint and he cannot meet the expenses concerned out of the unrestrained property.

Legal principles

- [10] It was succinctly stated by Mathopo JA in *National Director of Public Prosecutions v Ramlutchman*[1] that the object of POCA is to:

‘...strip criminals of the proceeds of their criminal conduct. To this end the legislature has, in chapter 5 of POCA, provided an elaborate scheme to facilitate such stripping. This chapter deals with the making of confiscation orders by a criminal court at the end of a criminal trial.’

- [11] The purpose of a restraint order is to preserve the defendant's assets pending the ultimate determination of a confiscation order in terms of s 18 of POCA. However, a confiscation order may or may not ultimately be granted at the end of the day for a variety of reasons, namely, the defendant may be acquitted or the court hearing the application for a confiscation order may decide in the exercise of its discretion, not to make such an order. The restraint order will then be rescinded, and the defendant's assets returned to him.

These factors, which must be taken into account, are not decisive factors but merely guiding principles that the court's discretion may not be exercised on the basis that a confiscation order will inevitably be made. Whether a confiscation order will ultimately be made is for the determination of the court that deals with the criminal case. Dealing with restraint orders requirements set out in subsections (6) and (10) of POCA must be analysed.

[12] Turning to the relief sought in terms of s 26(10) of POCA and the applicability thereof. Section 26(10) reads as follows:

‘(10) A High Court which made a restraint order-

- (a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-
- (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
- (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.’

[13] The rule nisi against Vuyiswa was discharged on 12 November 2020 and the cash sum of R41 500 in para 1.5 of the notice of motion was released by the curator bonis. Furthermore, the curator bonis consented to the release of the Jaguar motor vehicle with registration letters and numbers ND [...] mentioned in para 1.1. The Porsche Cayenne motor vehicle with registration letters and numbers ND [...] mentioned in para 1.2 was destroyed in the July 2021 unrest that took place in KwaZulu-Natal and is no longer capable of being restored or released. Ngcobo's salary mentioned in para 1.4 was never restrained, and he receives his salary every month. It was only the bank accounts, including the bank account mentioned in para 1.3 that was restrained in terms of the court order. It is common cause that Ngcobo opened a new bank account into which he is receiving his salary. The bank account sought for release in the prayer is inextricably linked to the prayer for the release of funds for living and legal expenses.

[14] The requirements for the release of restrained assets for living and legal expenses are set out in s 26(6) of POCA. Section 26(6) states:

‘Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provisions 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.’

- [15] These legal requirements have been identified in a number of Constitutional Court judgments. In *Fraser v Absa Bank Ltd*[2] it was stated:

‘A defendant who applies to the High Court in terms of section 26(6) to make provision for reasonable living and/or legal expenses must satisfy the Court that he or she has disclosed under oath all his or her interests in property subject to the restraint order and that he or she cannot meet the expenses for which an allowance is sought out of the unrestrained property. If the court is satisfied in this regard, section 26(6) gives the court a discretion: it may “make such provision as the High Court may think fit” for the reasonable living and/or legal expenses.’

- [16] In the unanimous decision of *Naidoo & others v National Director of Public Prosecutions & another*,[3] the meaning of s 26(6) was discussed at length by Cameron J. The court dealt extensively with the conditions that must be met upon a proper interpretation of s 26(6) before an order can be made. In essence, the court found that s 26(6) made allowance for reasonable living and legal expenses on limited terms and that access to the assets is conditional. The two conditions being that there must be full disclosure of interest in property subject to the restraint order, and that the expenses cannot be met from the unrestrained property. The principles in *Naidoo* were confirmed in the majority decision of *National Director of Public Prosecutions v Elran*. [4]

- [17] An applicant must therefore meet the conditions before the court is entitled to exercise its judicial discretion in his favour. It follows therefore that there must be full disclosure under oath of all his interests in the restrained property, and that the expenses which are reasonable, cannot be met from the unrestrained property.

- [18] At the onset of the interlocutory being heard, Mr Howse contended that the provisions of s 26(6) and (10) of POCA have been complied with and therefore the court may and should exercise its discretion in the applicant’s favour as he has a fundamental right to legal representation. Counsel for the respondent, Mr Cassim SC, conceded that the applicant requires legal representation. However, he contended that the applicant had not made out his case in the founding papers and neither has he satisfied the requirements laid down in s 26(6) of POCA. Moreover, the release of the bank account in para 1.3 of the notice of motion was moot as Ngcobo had opened a second bank account without the knowledge of the curator, and in contravention of the restraint order.

- [19] The complaint that the applicant has not made out a case in the founding papers requires attention. The general rule, which is well established, is that an applicant ought to make out his/her case in the founding affidavit and papers and not in the reply. It is a basic requirement that the relief sought has to be supported by the facts as set out in the founding affidavit.
- [20] It is trite that an applicant must stand or fall by his founding affidavit and that he is not permitted to make out his case in reply. The principle was stated by Diemont JA in *Director of Hospital Services v Mistry*.^[5]

‘When, as in this case, proceedings are launched by way of notice of motion, it is to the founding affidavit, which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in *Pountas’ Trustee v Lahanas*^[6] and as has been said in many other cases:

“...an Applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny”.

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged,

“it is not permissible to make out new grounds for the application in the replying affidavit”

In this regard see also *Pearson v Magrep Investments (Pty) Ltd & others*,^[7] *KwaZulu-Natal Law Society v Debba*,^[8] and more recently, in *My Vote Counts NPC v Speaker of the National Assembly & others*.^[9]

- [21] I now turn to the founding affidavit and the papers attached thereto. The deponent to the founding affidavit is Sandile Ngcobo, the applicant. The affidavit is verbose comprising 55 paragraphs. It relates to the restraint order, the purpose of POCA, the property that was seized, and the purpose of confiscation orders. Most of the assertions in the affidavit are irrelevant as most of the property has been returned. I shall therefore confine myself to those facts still relevant in this application. Ngcobo admits that he opened another bank account in order to receive his salary and access the funds. He avers that it was done out of necessity as the curator had failed to remove the restraint. In respect of the legal fees, he explains that he cannot meet the legal expenses incurred from the unrestrained property as the legal expenses in the criminal matter alone total R500 000. Further legal expenses shall be considerably more. His assets under restraint are valued at approximately R7 million and he urged the court to award R1 million as it is unlikely that the confiscation order will ultimately be made.
- [22] In regard to the disclosure, he relies on the court order, together with Annexure ‘A’. He then asserts, under oath, that the property mentioned in the Annexure ‘A’ attached to the court order is the only property that he and his wife have an interest in. At para 48 of the founding affidavit he states:

'I hereby declare on oath that the property described in paragraph 11 to 16 of Annexure 'A' to the order issued on 4 October 2019 is property in which my wife and/or I have an interest.'

[23] I am not persuaded that the requirement in s 26(6) relating to full disclosure is met by a mere assertion by Ngcobo, even under oath. I am fortified in this belief in that further in the founding affidavit, on his own admission, he admits that disclosure to the curator has not yet taken place. At para 49 it reads:

'Disclosure will be made on affidavit to the curator bonis as soon as the curator bonis reverts in regard to the form in which she requires such disclosure (the form of disclosure is first requested in a letter by our attorneys dated 24 October 2019 marked "SN6").'

[24] The NDPP, in the opposing affidavit of Mr Samuels, states that Ngcobo has to date failed to provide the curator bonis with a schedule of income and expenses under oath as requested by her in terms of the order. Further, that according to the interim first report filed by the curator, Ngcobo was not forthcoming with information relating to his assets and all the bank accounts that were held at Absa Bank. It was only after investigations that the other accounts at Absa Bank containing the cash amounts of over R6 million was uncovered. In respect of the upliftment of his bank account, Ngcobo has on his own admission and in defiance of the court order opened another bank account at Absa Bank without the knowledge or consent of the curator into which his salary is being paid. Further, Ngcobo has not issued a statement under oath to the curator of his interests in the assets under restraint.

[25] The purpose of the requirement to make a full disclosure of his interests in the assets to the curator pursuant to the restraining order was discussed by Goosen J, in *Randell v Eybers NO & another* (Greenwood Primary School & another intervening):[10]

'The very purpose of the requirement is to enable the court to determine whether it should exercise a discretion in favour of the applicant. In my view it must follow, as a matter of logic, that the court should be apprised of the nature of the property, the origin of the interest in such property, the extent of such interest where relevant and, perhaps most importantly, what, if any, competing interests in said property exist.' (Footnote omitted).

[26] In the present matter, it does not avail Ngcobo to merely state that his interests in the assets restrained are ownership of such assets. There must be full and frank disclosure. Based on these facts, there has clearly been no full and frank disclosure to the curator bonis or the court for that matter, of his interests in the restrained property. It is of no surprise that the curator bonis has not acceded to his requests for the restraint of his assets to be lifted and for her to release funds for his reasonable living and legal expenses. Without the full disclosure aforementioned, she would be unable to ascertain whether the restraints should be lifted and what amounts of funds are reasonable and should be realisable.

[27] The founding affidavit, in my view, appears to be a lecture in law, and fails to disclose any facts or make out a case that entitles Ngcobo to the relief sought. He was required by the court order to disclose his interests in the restrained property, which he has by his own

admission failed to do. There must be a properly motivated application for the release of funds. The applicant bears the onus of proof. In discharging the onus, an applicant must go further than merely stating he is unable to meet his expenses. In conclusion, I find that the applicant has failed to make out a case for the relief sought and accordingly the application falls to be dismissed.

Costs

[28] Mr Cassim has argued for a punitive costs order against the applicant as he contends that the application was an abuse of court process as the applicant failed to comply with the curator's request and the initial restraint. I do not believe that a punitive order for costs will be justified in these circumstances. The general principle is that the costs normally follow the result and I can find no reason to deviate from this general principle.

Order

[29] In conclusion, the following order is issued:

The application is dismissed with costs; such costs are to include the costs of two counsel where so employed.

Marks AJ

Case Information

Date of Set Down: 24

November 2021

Date of Judgment: 13

December 2021

Appearances

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Ref: IC/RAC/ave/02N004003

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Ref: AFU:Adv B. Mothilall/119/683/19/A/P32

- [1] National Director of Public Prosecutions v Ramlutchman 2017 (1) SACR 343 (SCA) para 7.
- [2] Fraser v Absa Bank Ltd [2006] ZACC 24; 2007
- (3) SA 484 (CC) para 55.
- [3] Naidoo & others v National Director of Public Prosecutions & another 2012
- (1) SACR 358 (CC).
- [4] National Director of Public Prosecutions v Elran 2013
- (1) SACR 429 (CC).
- [5] Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-636B.
- [6] Pountas' Trustee v Lahanas 1924 WLD 67 at 68.
- [7] Pearson v Magrep Investments (Pty) Ltd & others 1975
- (1) SA 186 (D).
- [8] KwaZulu-Natal Law Society v Debba 2016 JDR 0787 (KZP).
- [9] My Vote Counts NPC v Speaker of the National Assembly & others 2016
- (1) SA 132 (CC) para 177.
- [10] Randell v Eybers NO & another (Greenwood Primary School & another intervening) [2014] 1 All SA 107 (ECP) para 53.

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