

SOUTH AFRICA / JUDGMENT

Van Zyl and Another v National Director of Public Prosecutions and Another (40839/2008) [2009] ZAGPHC 44 (22 January 2009)

[2009] ZAGPHC 44

COURT

High Courts - Gauteng

BEFORE

Webster

CASE / FILE NUMBER

40839/2008

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL

PROVINCIAL DIVISION)

CASE

No.: 40839/2008

DATE

In

the matter between:

SAREL

JACOBUS VAN ZYL 1st

APPLICANT

JEANETTE

HELENA FERREIRA 2nd

APPLICANT

And

THE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 1st

DEFENDANT

MICHEAL

LAWRENCE STEWART 2nd

DEFENDANT

JUDGMENT

WEBSTER J

1. The first applicant seeks an order, in terms of Section 26(6) of the Prevention of Organized Crime Act No. 121 of 1998 (POCA) for the release of R800 000 for legal expenses and R400 000 for living expenses, such funds to be released to him from the proceeds of two properties which are the subject matter of a restraint order.
2. The second applicant seeks an order that her weekly salary be released to her for living expenses. This relief is not opposed and no further reference will be made to the second applicant save in the order that will be granted.
3. The first respondent resists the application principally on two grounds namely that the first applicant has failed to make full disclosure on oath
 - (i) of all his interest in property that is subject to the restraint order;
 - (ii) that he cannot meet his expenses from his assets that are not subject to the restraint order;
 - (iii) of his living and legal expenses are not reasonable.
4. It is common cause that on 24 October, 2007, and under case number 39358/2007, the first respondent obtained a provisional restraint

order against the first and second applicants. In that application the second respondent was appointed the curator. It is further common cause that the provisional restraint order was executed on the 31st of August, 2007: the return date was the 3rd of June, 2008. On the latter date the provisional restraint order was set aside. An application for leave to appeal was moved and refused on 26 August, 2008. It is further common cause that on the 19th of June, 2008, the first respondent again moved the current provisional restraint order which was granted. The seizure of the first appellant's assets was executed on the 17th of August 2008 at the offices of the attorneys of the applicants.

5. The case made out by the first applicant is that with the seizure of his assets he has no income save the rental from the surgery from which he previously operated whilst in practice which surgery has been leased to another dentist. He avers further that he derives some rental from immovable property which is the subject matter of the restraint order. He avers that since the criminal case commenced he has been obliged to obtain legal representation, that he has run up costs for such legal representation and he is heavily indebted to his attorneys for the professional services rendered by them. He also claims that he is unable to provide for his own needs because of the seizure of the assets that he owns. He avers further that he was obliged to raise a loan with his father, that he has not been able to service that loan and he is now in a situation where he cannot access any funds from any sources. He therefore approaches this court for relief in terms of Section 26(6) of POCA.

6. In an application such as this an applicant is obliged to make full and frank disclosure to the court. The first respondent has set out in great detail the facts in support of the allegations of the first applicants failure to disclose on oath all his interests in property which he owns, and in particular, the first respondent states that the first applicant has concealed three motor vehicles which had been disclosed in the previous application.
7. The curator avers that he has never been in possession of these motor vehicles, even on the authority of the seizure of August,
 2007. He avers that on that occasion the vehicles were in the possession of certain persons and he was furnished with the telephone numbers of those persons. Several attempts to communicate with those persons failed and he consequently never took possession of the vehicles. The second respondent further avers that with the seizure in July, 2008, the issue of the motor vehicles was again raised with the first applicant who undertook to furnish the curator with the details and valuations of the said motor vehicles. He avers that despite such an undertaking, the first applicant has done nothing to provide the required information.
8. The second issue raised by the respondents relates to the surgery which the first applicant owns. The applicant claims that he has negotiated the sale of this asset and that the purchase price has been agreed at with the prospective purchaser in the amount of R1.3 million. He seeks authority for the purchase price to be paid into the trust account of his attorneys. The second respondent avers that he was never consulted regarding this sale and objects to the first applicant's proposals.
9. The third objection raised by the second respondent is the rental that the first applicant avers he receives for the surgery. The second respondent avers that this has never been disclosed to him nor has such rental been paid to him. In essence the objection is that the first applicant has continued to deal with property that is the subject of a restraint order in contravention of such order.
10. The first applicant deals with the objections raised by the respondent in a rather unusual manner. His first stance is that the second respondent has been aware of the assets that he owns, that these were the subject matter of the previous restraint order and assumes therefore that he was not under an obligation to make, once again, if he had in the first instance, full disclosure of not only the assets but the whereabouts of the assets so that the second respondent would be in a position to take possession of those assets and to take control of those assets. This, in my view, is a disingenuous way of dealing with a failure to make appropriate and full disclosure. Secondly, whatever transpired in the 2007 application cannot be assumed to be common cause between the parties and to be within the knowledge of the second respondent and that he is under a legal obligation to take due notice of all that was disclosed in the papers in the first application.

11. I am satisfied on the issue of motor vehicles that the first applicant has not complied fully with the interim order granted in this matter. Further, I am satisfied that the first applicant was under a duty to disclose fully where and with whom such vehicles

were. He was obliged to make full disclosure of the negotiations for the sale of the surgery and in fact, ought not to, in the first instance, have entered into such a sale unless such sale occurred after the interim order of the 2007 application had been discharged and before the order in this current matter had been granted. That does not appear clearly from his affidavit and he was legally obliged, in my view, to make such disclosure.

12. The same applies to the rentals for the properties. It does not lie with the first applicant to collect rentals and service the bonds on those properties as though he is still the unfettered owner of the properties. He is under a legal obligation to make disclosure of income and to ensure that all rentals in fact are paid to the second respondent. It is clear from the papers that the first applicant has not been totally open and forthright with the second respondent.
13. With regard to the living expenses the first applicant has again not made full and frank disclosure. The expenses which the first applicant sets out in his affidavit do not, in my view, deal with living expenses. He sets out what his income is from the practice as well as the rental for the immovable property and against that sets out his monthly expenses in the form of instalments to the various banks, SARS, in respect of motor vehicles which are the subject matter for non-disclosure, his debts in respect of credit cards and various other creditors. The only items which, in my view, would be regarded as living expenses are dealt with very cursorily and with no particulars thereof at the end of the schedule of his indebtedness. These are:

"Colleen (dogter) R1 750

Water en ligte en erfbelasting R2 500

Bediende R1 600

Kos/Brandstof ens. R3 500

These are about the only expenses which, in my view, would qualify for living expenses. With regard to the aforesaid items, no particulars

are given and no breakdown of how such, and in particular the last item "Kos/Brandstof ens.", is made up. I am in agreement

with the respondents that the claim for living expenses is too vague and has not been set out with sufficient detail to enable the respondents to make an informed decision of the reasonableness of such expenses.

14. I deal now with the issue of legal expenses. The first applicant avers that from the amount which he wants to have released to him there is provision for a fine of R150 000. There is a further amount of R250 000 which would have to be refunded to SASOLMED, he avers further that he is already indebted to his attorneys in amount of R400 000 and that this sum total therefore is R800 000 which he wishes to have released to him as reasonable legal costs.

15 According to my understanding of section 26(6) of POCA, funds which can be released to an applicant would be those "reasonable legal expenses of such person in connection with any proceedings instituted against him/her ..." and not refunds of amounts forming the subject matter of the criminal case nor past legal expenses that have been incurred by the applicant. It is expenses which are intended to enable the applicant to obtain legal representation in the pending criminal case. This is not the case made out by the first applicant.

16. Upon a conspectus of the issues referred to, it is my considered view that the first applicant has not made the necessary full disclosure. I am not satisfied that the requirements for the living expenses as well as the legal expenses as contemplated in section 26(6) of POCA have been satisfactorily disclosed to the court.

17. The following order is made:

(i) The first applicant's application is dismissed with costs.

(ii) The second applicant is hereby authorised in terms of the provisions of section 26(6)(a) of Act 121 of 1998 to retain her current weekly income as an employee. This order will be retrospective with effect from 16 September, 2008.

G. WEBSTER

JUDGE IN THE HIGH COURT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2009/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-zyl-and-another-v-national-unknown-topic-agphc-2009>

Prepared on 9 October 2026 · Esheria