NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO

CASE NO: 441/2016

In the matter between

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

LIZO MTWAZI **First Defendant**
FINISWA NONTHATU TSHAYINGCA **Second Defendant**
NONTOMBI MTWAZI **Third Defendant**

JUDGMENT

HARTLE J:

[1] On 23 August 2016 the applicant obtained a provisional restraint order against the parties pursuant to the provisions of section 26 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA"). It is not material to repeat the contents of the order.

[2] It was granted in the usual format coupled with a rule *nisi*, returnable on 4 October 2016 initially, calling upon the parties to show cause why the order, issued with immediate effect, should not be made final. The return date has been extended over a number of postponements to the date of this judgment.

[3] The objective of the provisional restraint order was evidently to preserve certain immovable property of the first defendant and respondent identified at the time of the grant of the rule *nisi*, and other "realisable property"[1] so that it may in due course be realised in satisfaction of a confiscation order (which the state suggests is reasonably anticipated against the defendants), and to prevent the dissipation or concealment of these assets.

[4] The first defendant is in the employ of the Department of Education as a senior administration clerk in the examinations section based in Schornville. The respondent is his wife to whom he is married in community of property and they reside together in King William's Town in

[1] See section 12(1), read with section 14 of POCA for the definition of "realisable property". For present purposes we are concerned with property "held" by the defendants, or any property held by a person to who they have directly or indirectly made any "affected gift". The latter concept is also defined in section 12(1).

the property which has been attached by the curator appointed pursuant to the provisional restraint order. She has been joined as a respondent in these proceedings as she has a clear interest in the property to which the order relates by virtue of her marriage to the first defendant. The second defendant is also described as an employee of the Department of Education. She is a Grade R practitioner based at a school in Frankfort. She resides in Bhisho.

[5] The defendants and the respondent in this matter were served with the papers in this matter only after the first return date. The first defendant filed an answering affidavit in his own capacity and on behalf of the respondent, but no authority to represent her interest was put up by him, neither did she file a supporting affidavit. The omission is not critical as far as I am concerned though for the reasons which follow. I will assume for present purposes that she merely aligns herself with the first defendant's denial that he criminally appropriated any funds of the Department of Education or was complicit in the payment of unauthorized marking fees to the second defendant as alleged in the indictment to which I will shortly refer. I say so because she raises no independent basis to show cause why the restraint order should not be made final against her. She stands or falls as it were by the first defendant's denial aforesaid.

[6] Mr. Poswa appeared before me on behalf of both the first defendant and the respondent on the extended return date. There was no appearance for the second defendant who does not oppose the application.

[7] The purpose of POCA and the justification *inter alia* for provisional restraint orders against realisable property as an effective mechanism to meet the act's overall purpose has been eloquently summarized in NDPP v Mohammed N.O & Others.[2] The idea is that criminals should be stripped of the proceeds of their offences to remove the incentive for crime. POCA uses two mechanisms to achieve this end, which are set forth in Chapter 5 (comprising subsections 12 to 36) and Chapter 6 (comprising subsections 37 – 62). We are here only concerned with the provisions of Chapter 5, which provides for the ultimate forfeiture of the benefits derived from crime, but its confiscation machinery may only be invoked when the "defendant"[3] is convicted of an offence. The purpose of a restraint order is to preserve sufficient property to satisfy a reasonably anticipated confiscation order.[4]

[8] Whilst the affect of POCA appear harsh because the act intercepts the property rights of individuals who may be entirely innocent of any complicity with crime (such as the respondent in this instance), the Constitutional Court has found the provisions of POCA not only to be consistent with the Constitution, but to be a "friend" to its aims, as is evidenced from the following observation by Cameron J in NDPP v Elran:[5]

> "There is no constitutional challenge to these provisions. We therefore have no reason to approach the powers POCA confers on courts with reserve. We should

[2] 2002 (4) SA 843 (CC) at pars [14] to [16].

[3] This is the appellation used in POCA. "Defendant" is defined in section 12(1) as a person against whom a prosecution for an offence has been instituted, and one who is to be charged with an offence on the basis envisaged in section 25(1)(b).

[4] NDPP v Rebuzzi 2002 (1) SACR 128 (SCA) at par [4].

[5] 2013 (1) SACR 429 (CC).

> embrace POCA as a friend to democracy, the rule of law and constitutionalism — and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them."[6]

[9] A reading of POCA makes it clear that its provisions apply to offences committed before and after its commencement and has a wider ambit than only the organized crime offences referred to in Chapters 2, 3 and 4 of the Act. The act also applies to "cases of individual wrongdoing".[7]

[10] POCA is therefore of relevance to the alleged unlawful activity which is the subject matter of the prosecution, the details of which I will shortly relate.

[11] The jurisdictional requirements for the granting of a restraint order applicable to the relevant fact-set in this matter are set forth in section 25 (1)(a) of POCA as follows:

> **"25. Cases in which restraint orders may be made.**—(1) A High Court may exercise the powers conferred on it by section 26 (1)—
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> (*a*) when—
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> (i) a prosecution for an offence has been instituted against the defendant concerned;

[6] At par [70].

[7] Mohunram v NDPP 2007 (4) SA 222 (CC) at pars [25] – [34].

> (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
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> (iii) the proceedings against that defendant have not been concluded; ”

[12] It is common cause in this matter that a prosecution has been instituted against the defendants in the Regional Court, Zwelithsa. They have both been indicted on several charges of theft, fraud and money laundering on the basis that they colluded and conspired with one another to commit these offences. They have also been charged with a contravention of section 6 of POCA, which is the offence of acquiring, using, or having possession of property, to wit funds appropriated from the Department of Education in this instance, concerning which it is alleged they know or ought reasonably to have known it formed part of the proceeds of the unlawful activities of another person.

[13] It is further common cause that the proceedings against the defendants have not been concluded, neither has a confiscation order been made as yet.

[14] A confiscation order can only ensue upon a conviction of the defendants of an offence. This appears from section 18(1) of POCA, which provides as follows:

> “(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from—
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> *(a)* that offence;

> (*b*) any other offence of which the defendant has been convicted at the same trial; and
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> (*c*) any criminal activity which the court finds to be sufficiently related to those offences,
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> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order."

[15] Section 12(3) of POCA, in turn, provides that a person has benefited from unlawful activities "if he or she has at any time, whether before or after the commencement of POCA, received or retained any proceeds of unlawful activities".

[16] A confiscation order is directed at confiscating the benefits that accrued to the offender, whether or not such offender is still in possession of the particular proceeds. Once it is shown that a material benefit accrued, the offender may be ordered to pay the state the monetary equivalent of that benefit even if it means that it must be paid from assets that were legitimately acquired.

[17] In this matter it has not been suggested (assuming the element of criminality is established) that a benefit did not accrue to the defendants. On the contrary those benefits are palpable in the sense that the proceeds of the unlawful activity alleged were self-evidently paid to the banking accounts of the pair.

[18] A restraint order can only be made once the NDPP "has discharged the onus of showing a reasonable prospect of obtaining *both* a conviction in respect of some or all of the charges levied against an accused person and a subsequent confiscation order." [8] A conviction is a *sine qua non* for a confiscation order.[9]

[19] That brings me to the remaining question which I need to determine, namely whether the applicant has established that there are reasonable grounds for this court to believe that there might be a conviction, which in turn provides the basis upon which a confiscation order may be made against them.

[20] Since restraint order applications are in the nature of civil proceedings,[10] POCA requires that any question of fact to be determined by a court in such proceedings shall be decided on a balance of probabilities.[11]

[21] The immediate inclination, where a court is faced with a contest between the applicant and the defendants on the return day on issues of fact, is to resort to the principles set forth in Stellenbosh Farmers' Winery Ltd v

[8] NDPP v Tam & Others 2004 (4) SACR 126 (W) 129 at page 129 c - d.

[9] NDPP v Alexander & Others 2001 (2) SACR 1 (T) at page 7.

[10] Section 13(1) & (2) of the POCA.

[11] Section 13(5) of the POCA.

Stellenvale Winery (Pty) Ltd[12] and Plascon-Evans Paints v Van Riebeeck Paints[13] applicable to the determination of disputes in ordinary motion court proceedings, but the Supreme Court Appeal in NDPP v Kyriacou[14] has pointed out that such an approach in applications to confirm restraint orders is incorrect.

> "[9] Furthermore, approaching Van Wyk's disputed evidence relating to the further alleged criminal activity of the respondent in accordance with the principles set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), the learned Judge concluded that the order sought by the appellant could not be granted 'if the truth cannot be established from the papers'. He went on to say that the 'discretion to grant a restraint order is to be sparingly exercised and then only in the clearest of cases and where the considerations in favour substantially outweigh the considerations against', relying in this regard on what was said in *National Director of Public Prosecutions v Mcasa and Another* 2000 (1) SACR 263 (Tk) at 275*e - f*.[15]
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> **[10] In my view, the learned Judge's approach to the matter was incorrect as was the Court's approach in *Mcasa's* case.** Section 25(1)*(a)* confers a discretion upon a court to make a restraint order if, *inter alia*, 'there are reasonable grounds for believing that a confiscation order may be made. .'. While a mere assertion to that effect by the appellant will not suffice *(National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) (2001 (2) SACR 712) para [19] at 428B - C (SA)), on the other hand the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of

[12] 1957 (4) SA 234 (C).

[13] 1984 (3) SA 623 (A).
[14] 2004 (1) SA 379 (SCA).

[15] The court was here referring to the approach adopted by the court *a quo.*

> the principles and *onus* that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order." (Emphasis added)

[22] The test for a final restraint order is not the same as that for a final interdict. POCA prescribes its own test, which test has been elucidated by the courts.[16] As indicated above the question whether the defendants could derive a benefit from the offences with which they have been charged does not really pose an issue in the present matter. The more compelling issue is focused on the likelihood, based on the evidence which is before me, of the state obtaining a conviction which will, in turn, be the basis upon which a confiscation order is in this instance (extremely) likely to be made. A court making a restraint order does not have to decide that the offences were probably committed. It is only called upon to find that there are "reasonable grounds for believing that a court might find that they were probably committed".[17]

[23] Hurt J in NDPP v Mtungwa[18] described the burden as being "a comparatively light one of proof on the NDPP".

[24] It is also helpful to refer to the remarks of Nugent JA in NDPP v Rautenbach[19] to appreciate the distinction between the application of the

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[16] Albert Kruger, Organized Crime & Proceeds of Crime Law in SA at par 5.2.7.

[17] NDPP v Rautenbach 2005 (4) SA 603 (SCA) at pars [27] and [51].

[18] 2006 (1) SACR 122 (N) at page 128.

[19] *Supra*.

principles and onus that apply in ordinary motion court proceedings and the requisite test in applications in terms of section 26 of POCA:

> "[26] The Court *a quo* approached the matter as follows:
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> > 'The Act requires that it must be shown that "grounds" exist which grounds appear to a Court to be of such a nature that they would support a future confiscation order. This means that, as a first requirement, the applicant has to prove the existence of such "grounds". That is a factual question and according to s 13(5) of the Act, the *onus* of proving such facts must be discharged by the applicant on a balance of probabilities.'
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> [27] **In my view, that is not correct.** It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (*National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) (2001 (2) SACR 712) in para [19]) it is nevertheless not called upon to decide upon the veracity of the evidence. **It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed**. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true."[20] (Emphasis added)

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[20] At pars [26] and [27].

[25] The evidence on which the applicant hopes to inspire a belief in this court that there are reasonable grounds for believing that a confiscation order following a conviction may follow has been summarized in the applicant's founding affidavit as follows:

25.1 The first defendant, in his capacity as administration clerk at the Department of Education (since 1998 to 2015), was tasked with the loading of claims for examination marking and in fact processed claims for those who worked as examiners for the Department of Education during examinations.

25.2 It come to the attention of Mr. Andre Kelderman, a deputy director in personnel expenditure at the Department of Education, who analyzed practitioners' salaries during October 2015, that the second defendant was earning above her relevant pay grade.

25.3 Upon investigation it was discovered that the extra money that she was receiving was for "marking fees" and that the subjects that she was purported to have assisted with during examinations were above her grade level and were thus irregularly made.

25.4 When the second defendant was interviewed she identified the first defendant as the person responsible for this happenstance. He asked for her bank account details (Absa [9...]), to which account he ensured that amounts of cash were deposited

(masquerading as “marking fees”). After she had withdrawn these funds from her account, they were shared between them.

25.5 Further investigations into the history of the first defendant’s salary revealed that he had since 2002 to 2015 been processing claims for “marking fees” in his own favour, and had been paying these into his own bank account, to wit Nedbank [2...].

25.6 A subsequent audit of all the “marking fees” claims mentioned above was done and it revealed that an amount totaling R280 569.28 (Two hundred and eight thousand five hundred and sixty nine rand and twenty eight cents) had been misappropriated by the defendants.

25.7 The *modus operandi* in committing fraud, so the applicant claimed, was that the first defendant would create fictitious claims for “marking fees”, abusing his position of trust in order to achieve these purposes, resulting in the rerouting of the total sum appropriated to both his personal bank account and that of the second defendant, from which they both benefited.

25.8 The period in which the fraud took place was from June 2002 until December 2015.

[26] The applicant submits that this (the summation in the founding affidavit, coupled with what is to be gleaned from the supporting affidavit of the investigator and the annexures put up) is “strong evidence” to indicate

that the defendants were involved in the commission of offences and that a confiscation order may be made against them relating to the offences and/or sufficiently related criminal activity as might be established by the trial court.

[27] The first defendant in his answering affidavit denies that he perpetrated or was involved in any criminal activities. He admits receipt of the sum of R122 652.97 into his bank account, but claims that these monies were paid to him as remuneration for services rendered in his administrative capacity at marking centres. (He does not pertinently deny the allegation that he (as opposed to anyone else) processed the claims for marking fees in his own favour, although he generally distances himself from being involved in the processing, approval or payment of these claims to the extent of his involvement, according to him, being only to sign his printed claim forms provided by those capturing the claims on the computer.) He further denies the suggestion that administrative personnel are not entitled to earn marking fees and has put up examples of colleagues' payslips, all reflecting a common pay code for these supplementary payments. A single payslip in his favour is also attached, bearing the same code. (His rank is specified as "invalid", but the applicant has not drawn on this feature as being indicative of anything suspicious on its own.)

[28] As for the second defendant's involvement and his alleged collusion with her, he denies paying any fictitious claims to her or having any knowledge of any salary analysis concerning her. He claims not to have been linked in any way to the payments made to her.

[29] Apart from his denial aforesaid, the first defendant also challenges the integrity of the evidence relied upon by the applicant on the grounds, firstly, that it is founded on inadmissible hearsay and secondly, that the evidence purporting to incriminate him is only brought forth in the applicant's replying affidavit.

[30] A word needs to be said about the presentation of the applicant's case. The primary deponent on behalf of the applicant is an advocate in the employ of the Deputy Director Public Prosecution's Office, Ms. Peters, attached to the East London office of the Asset Forfeiture Unit ("AFU"). She claims to have personal knowledge of the facts unless otherwise indicated, but the source of her information is that of Mr. Mdutyana, a senior special investigator employed by the National Prosecuting Authority ("NPA"), also attached to the AFU. He is said to be an experienced investigator into both general and organised crime and also claims to have personal knowledge concerning the investigation against the defendant, unless otherwise indicated. He however also depends on someone else for the information he relates concerning the defendants, namely Ms. Plata, who is a deputy director in the salary control section of the Department of Education. The critical detail stated by Mr. Mdutyana which links the first defendant to the second defendant is based on information received by Ms. Plata that the first defendant purportedly requested her to give him her banking details, with a view to paying undue monies into her account which they thereafter shared, but one looks in vain for this information in Ms. Plata's affidavit.

[31] The manner in which Ms. Plata's affidavit has simply been tagged on as an annexure to Mr. Mdutyana's affidavit has also resulted in the first defendant not pointedly responding to it. He refers in his answering affidavit to the founding affidavit of Ms. Peters and to Mr. Mdutyana's supporting affidavit, and replies to the averments in those affidavits only.

[32] It is to be noted that Ms. Plata's affidavit is a photocopy extract from a police docket which purports to have been commissioned. The signature and certificate of the commissioner has been written in ink on what is patently a photocopy of her original handwritten statement; bears no official stamp; and is undated. Moreover, her affidavit refers to annexures comprising source documents, from which she has drawn certain pertinent conclusions, which have not even been provided.

[33] She further bases her narrative on discussions she held with Mr. Stephanus Louw (who it was revealed in the replying affidavit is a private investigator who has been involved in investigating the claims against the defendants), whose affidavit was however not attached to the founding papers.

[34] The only evidence mentioned by Ms. Plata in her affidavit against the first defendant which purports to finger him as being under criminal suspicion concerning the payments made to him (she does not state at whose instance) is the allegation that they "appeared" to be irregular because he was not an educator, but an administrative personnel employee. Further there is or was no paper trail or record of the original claims lodged by him with the Department of Education for the payment to him of "marking fees",

but the impact of the deficiency in this regard is given no context in relation to the criminal investigation against him.

[35] The only annexures to Ms. Plata's affidavit are printouts of payments to both defendants' banking accounts, which payments are not in dispute.

[36] In its replying affidavit the applicant repeated its summary of what the case is against the first defendant and further simply dismissed his answer as bearing "nothing more than a bare denial" of the allegations against him. Ms. Peters added that it was "highly unlikely and contrary to inherent probabilities "that he would have been entitled to receive payment for services rendered in such manner". This statement is premised on a supposed averment by Ms. Plata in her affidavit (which she self-evidently deposed to before the first defendant filed his answering affidavit) that she "was unaware of such an arrangement", but one looks in vain for such a suggestion in it. The only irregularity which had earlier been flagged by her, which I have highlighted above, is the supposed norm that only educators are entitled to receive making fees, as opposed to admin personnel, a policy the first defendant (who works in that section) has refuted as being baseless.

[37] The applicant has not dealt definitively in reply with the first defendant's exculpatory averment that he earned the marking fees paid to his banking account (and that admin staffers can indeed earn such supplementary income). It has simply dismissed the first defendant's plea in this regard as a bald denial. Ms. Peters ironically submits that the truth will out at the criminal trial to prove that his suggestion that the case against him is "all a misunderstanding" is without any basis, this in a sense amounting to

a concession that there may well be truth in his denial that he was not entitled to these payments as remuneration.

[38] The applicant amplified its case in reply by submitting for the first time the source of its intelligence that the first defendant together or collusively with the second defendant laundered funds, or conspired to commit a fraud on the Department of Education. Evidently this is in the form of a witness statement dated 17 December 2015 deposed to by the second defendant in the criminal investigation. The applicant also added the witness statement which was deposed by the police of Mr. Kelderman, (who incidentally does not implicate the first defendant at all), and private investigator, Mr. Louw, who was mandated by the Department of Education to investigate "irregular claims".

[39] The second defendant in her affidavit does not pertinently implicate the first defendant, but rather an employee of the Department of Education who she says arranged to pay fictitious monies into her bank account. She says that they would meet after each transaction and share in the funds. She does not clearly mention the identity of the person who conspired with her on this basis (I am sure she could have done so in a current affidavit), but provides the following description of the culprit:

> "The person whom had made all the arrangements for the deposits into my account is only known to me as Lizo. He is light well built and of medium length. He drives a white Ford Bantam, registration unknown to me. I usually contacted him at phone number [0...]. Our initial introduction was over the phone, after

> Lizo had phoned me with this proposal. Lizo is employed at the Schornville offices at the Department of Education."

[40] Mr. Louw relates in his affidavit how the investigation led him to isolate the first defendant as the culprit on the basis of the information furnished to him by the second defendant:

> "I then drove her to Zwelitsha SAPS, whilst driving there I continued in repeatedly asking from her whom the person was in the Department, whom was assisting her in obtaining irregular/additional payments, for services she hadn't rendered. She quoted the name "Lizo" 3 times, whom according to her is employed at Schornville offices at the Department of Education.
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> …
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> She confirmed in her statement that she had met "Lizo" in 2013. According to her, after she had supplied him with her PERSAL number, had arranged for monies to be paid into her account, by the Department of Education. She further stated that she would share the monies with him, after she had drawn the funds from her bank account.
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> …
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> After returning Ms Finisa Nonthathu Tshayingco's to Bisho, I returned to the Department of Education where I met Ms Lungiswa Plata, the Deputy Director of the Salary Control Section at the Department. I then divulged the contents of Ms Finisa Nonthathu Tshayingco's statement to her, in which a "Lizo" was implicated. I asked her if she knew anyone by the name of "Lizo" was working with her or in any section which was dealing with the Department's funds.
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> She then identified a person by the name of "Lizo", as Mr Lizo Mtwazi, employed by the Department at the Examination Section. I then requested from her to conduct a quick analyses of payments for "other allowances", as made to Ms Finiswa Nontathu Tshayingco from the Departments PERSAL system. It was

> then, moments later established that such payments had in fact been made into Mr Lizo Mtwazi's bank account."

[41] The rest of his affidavit is focused on the search and examination of what claim forms could be found (none of which, such as were available, are even attached to the affidavit), but these further averments do not relate to the first defendant *per se* or link him to the payments to the second defendant.

[42] Before assessing the evidence before me, a few remarks need to be made concerning the nature and tenor of the evidence that is necessary to inform a court that there are reasonable grounds for believing that the trial court might find that the offences were probably committed.

[43] In NDPP v Rautenbach,[21] Nugent JA emphasized that the NDPP should set out its case in such a manner that the defence is "fairly informed" of the case to meet. Although these comments were made in the context of a prosecution still to be instituted against Rautenbach,[22] they apply equally to the present situation:

> "…but that does not mean that it must be presented in any particular form. What is required is only that the case that is sought to be made out by the appellant is articulated with sufficient clarity to reasonably inform the respondent of the case against him or her. But when evaluating whether that has been done it can be assumed that a respondent is not obtuse and will draw those inferences that fairly

[21] *Supra*.

[22] *Supra*.

present themselves from the allegations, in much the same way as an accused person is expected to do when confronted with an indictment."[23]

[44] In NDPP v Naidoo & Others,[24] Rabie J had reason to deal with a challenge by certain defendants in a POCA application against the adequacy of the evidence presented by the applicant to meet the requirements postulated in section 25(1) to confirm a provisional restraint order. He highlighted the approach to be adopted in this regard with reference to several other judgments of our courts, including NDPP v Rautenbach:[25]

"Lack of particularity and hearsay evidence

In dealing with the main criticisms of the remaining defendants referred to above, namely that the applicant failed to disclose the allegations on which it relies, that particularity is lacking, that the allegations mainly constituted hearsay evidence and that the applicant's case was amplified in reply, the undermentioned references are relevant. In regard to the manner in which the applicant's case must be presented, the honourable Nugent JA said the following at 612H (SA) para [21], in *NDPP v Rautenbach and Others (supra*):

'[21] Allied to that earlier contention was also a submission that the appellant's case is vague and inconsistent and has varied over time with consequent uncertainty for Rautenbach of the case that he was called upon to meet. The appellant must set out his case in such a manner that the respondent is fairly informed of the case that he or she is called upon to meet (cf *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan*)* but that does not mean that it must be presented in any particular form. What is required is only that the case that is sought to be made out by the appellant is articulated with sufficient clarity

[23] *Supra* at par [21].

[24] 2006 (2) SACR 403 (TPD).

[25] This is the same passage highlighted in par [43].

to reasonably inform the respondent of the case against him or her. But when evaluating whether that has been done it can be assumed that a respondent is not obtuse and will draw those inferences that fairly present themselves from the allegations, in much the same way as an accused person is expected to do when confronted with an indictment.'

In this regard mention should also be made of the findings of the honourable Van der Westhuizen J in *National Director of Public Prosecutions v Alexander and Others* 2001 (2) SACR 1 (T) at 8*f* - *i* where he stated the following in regard to hearsay evidence that had been tendered by the applicant:

'In forming such an opinion or a belief a court obviously has to take into account that the *onus* of proof in the criminal trial will indeed be on the State, and that it is beyond reasonable doubt. What does this say regarding the admissibility of for example hearsay evidence? Hearsay evidence is generally inadmissible, but it is well known that there are exceptions. These have to be applied within the context of a particular case and situation. By its nature the evidence available to a court in a restraint order application may not necessarily be as direct and concrete as could be expected to secure a criminal conviction. After all, s 25(1)*(b)* even allows for this procedure where a court is satisfied that the person is still to be charged with an offence. It might sometimes be unavoidable to take some hearsay evidence into account. Certainly support of any hearsay allegations in the relevant affidavits would be most valuable, *inter alia* in view of the drastic consequences of this procedure. It would be highly undesirable to grant an order in an application merely based on wild and unsupported hearsay allegations.

I am of the opinion that the above exposition is in accordance with the views expressed in the Full Bench judgment of Madlanga AJP and Kruger AJ, with which Locke J concurred, in *National Director of Public Prosecutions v Mcasa and Another* 2000 (1) SACR 263 (Tk).'

I respectfully agree with the approach and remarks of Van der Westhuizen J. Without detracting from the *caveat* regarding 'wild and unsupported hearsay allegations', and without proposing an absolute rule in this regard, I am of the view that it would be unnecessary to consider the relevance of hearsay evidence in

a matter such as the present on the basis of a strict application of the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988 in respect of every piece of hearsay evidence in the applicant's papers (as it was submitted on behalf of the defendants the approach should be). In considering hearsay evidence in a matter such as the present, the court will necessarily have regard to factors such as the nature and purpose of the evidence, the probative value and reliability thereof, the reason why direct evidence was not submitted, the possible prejudice to the other party and all the other facts of the case. These are, *inter alia*, the factors which, according to s 3 of Act 45 of 1988, the court should take into account, but as the veracity of the evidence is at this stage of the process not the primary question but only whether there is evidence that might reasonably be believed and which might reasonably support a future conviction and a consequent confiscation order, a formal ruling in terms of Act 45 of 1988 as to the admissibility of every piece of hearsay evidence is not required.

Furthermore, in an application for a restraint order, especially one involving alleged criminal activities of the magnitude alleged in the present case, reliance upon hearsay evidence is virtually indispensable and even more so where the restraint is applied for before an indictment is served. This is so because the application for a restraint will usually precede the completion of the criminal investigation, and disclosure of evidence before completion of the investigation might well prejudice the capacity of the prosecution to effectively prosecute in the ensuing trial and may also, as I have indicated above, endanger the safety of potential witnesses.

Even if I were to be wrong in my aforesaid view regarding the formal and express application of s 3 of Act 45 of 1988 not being necessary, I am nevertheless satisfied that if the section were to be applied, sufficient amount of admissible evidence can be found to exist which corroborates the other direct evidence and which would support the confirmation of the rule *nisi*.

I am satisfied that it is clear from the founding papers that the criminal case against the defendants which resulted from an extensive investigation, is supported by a substantial body of evidence, including the documentary evidence

> attached to the affidavits, which was collected over an extended period of time from a variety of sources."

[45] In distilling these principles and the approach which a court is expected to adopt on a return date against the background of the express purpose of a restraint order and the wider objectives of POCA, it is apparent that a less rigid degree of proof of persuasion is acceptable, although a court must obviously be astute not to fall on the side of confirming restraint orders where the grounds pleaded for the remedy is based on "wild and unsupported hearsay allegations".

[46] The concept of reasonableness is, as always, the great leveler. Does the evidence reasonably support a conviction and consequent confiscation order, and can that evidence be reasonably believed? In NDPP v Alexander[26] Van Der Westhuizen J justifies the lighter onus in applications of this nature and puts it into perspective. He also highlights what other remedies are open to a defendant who complains that the provisions of section 26 of POCA are drastic, draconian, and unconstitutional:

> "The granting of a restraint order in the form of a rule *nisi* is clearly not the end of the road for a defendant. Whereas an order of that nature should surely not be granted glibly, because of its potentially devastating effect on someone who has not yet been convicted, an unhappy defendant has various legal avenues open to it, including to apply for the variation or rescission of the order, as well as the anticipation of the return date with 24 hours' notice.
>
> …

[26] 2001 (2) SACR 1 (T).

> The potentially drastic or even devastating consequences of a restraint order have to be taken into account, as I indicated, eg with regard to the degree of proof or persuasion required and the nature of evidence admitted. However, one must not lose perspective. The issuing of a warrant of arrest, for example, by a magistrate (in terms of s 43 of the Criminal Procedure Act 51 of 1977), which is hardly controversial, also works with concepts such as a reasonable suspicion that an offence has been committed and relies on information provided by police officers. Its consequences could certainly also be serious."[27]

[47] To return to the evidence in the present matter, although it is obvious that there are a lot of the shortcomings in the applicant's case which I have highlighted above - which would in regular criminal proceedings be a cause for concern, they are not fatal to the applicant succeeding, well at least not on the basis which I hereafter find.

[48] Although it hardly serves any purposes to isolate and deal with the criminal charges separately (because at the end of the day and for the reasons I will get to, the likelihood of there being a conviction in respect of the balance of them still remains), I deal firstly with that portion of the evidence that relates to the payments made by the Department of Education to the first defendant's own bank account and his denial and exculpatory defence to the charge made against him in the indictment.[28]

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[27] At page 9 c – d, and e – f.

[28] The indictment has been strangely framed by lumping all the unlawful activities together, whereas there is no obvious link between the first and second defendants concerning the payments which it is alleged he fraudulently processed as exam fees into his own bank account. The indictment also speaks of a prior criminal agreement entered into between the accused "1, 2, 3 and 4" (*sic*). Although it is not the place to criticize the indictment, the applicant should be astute to make it clearer. The indictment is in a sense a part of the evidence which goes towards proving the likelihood that the offences outlined therein were probably committed. In NDPP a Alexander & Others the court observes that an indictment may assist a court to form an opinion as to the likelihood of a later conviction and confiscation order on the basis of what is stated therein, bearing in mind the burden of proof which will be applicable in the trial court in due course

[49] In respect of these limited allegations, this is the converse of a situation where a defendant is expected to not keep him or herself dumb when, with a little bit of imagination, he can easily grasp the nature of the case he is called upon to meet. Here, apart from stating that the payments made to his account "appeared" to be irregular, the applicant has been somewhat glib in laying a foundation for a reasonable suspicion concerning these. Leaving aside the mere appearance of an irregularity, one would expect after a thorough investigation that there would be some indication from the source documents that the suspicion has a tangible basis. It is reckless not to reflect on what the documents say at all or leave this to the imagination. Simply because the dice falls on the side of the aims and objectives of the POCA being a necessary evil in today's society rife with crime, is not a licence for the NDPP to obtain preservation orders against persons charged with criminal offences as of rote, without giving careful consideration to detail and verifying defences where possible, especially where there is room for misunderstanding.

[50] I have already pointed out above that the applicant has not bothered to responsibly check up on the defendant's defence or even asked itself the question whether the evidence which purports to incriminate him on this peculiar basis can be reasonably believed in the light of his defence. Absent such verification, which I daresay should not have been hard to obtain, I do not agree with the applicant's submission that the first defendant's denial of his complicity in respect of this activity constitutes a bare one and falls to be

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(*Supra* at page7 i – page 8 c). A badly framed indictment might well flag a reservation that the state will have difficulty ultimately in securing a conviction.

dealt with on such a basis. On the contrary, his say-so that he legitimately earned the fees under investigation and did not steal or defraud the Department of Education of the sum of R122 652.97 paid into his banking account is entirely plausible. In this respect the evidence poised against him, which points to probable criminal activity (by the mere receipt of marking fees paid to his banking account because he is not an educator) is of the kind referred to in NDPP v Rautenbach[29] as "manifestly unreliable". If it were the only charge against him I would not hesitate to discharge the rule *nisi* against him forthwith.

[51] But that is not the end of the matter because there are other charges at play which still require attention. In this respect, the allegations of the second defendant which the state intends to rely on in the criminal trial do draw the first defendant in and create a reasonable anticipation that he could be convicted together with her of defrauding the Department of Education or of stealing or laundering the monies which were paid to her. It matters not in my view that this evidence was only disclosed in the applicant's replying affidavit for the first time. No doubt the criticism by the first defendant that the second defendant's allegations of his involvement were in the nature of inadmissible hearsay evidence forced the applicant's hand in producing her witness statement. Once it was filed, it rendered the first defendant's complaint of inadmissible hearsay evidence entirely moot.

[52] The first defendant was at liberty to request permission to file a further set of affidavits if he wished to negate the case against him on the strength of the second defendant's evidence which suggests that he is

[29] *Supra*.

probably guilty of the offences said to have been committed together with her, but he has chosen not to. He has also pleaded a bare denial that he was complicit with her in the manner alleged. Rather than seeking the court's permission to deal with the identification of him in the further affidavit, Mr. Poswa argued from the bar that the identification evidence linking the first defendant to the unlawful activities of the second defendant fell short of pointing to him as being the party who colluded with her and that this negated the reasonable anticipation that he could therefore be convicted together with her on the basis of the criminal activities pertaining to the payments made to her account. It is clearly one thing to allege that he is not the person who the second defendant identifies in the witness statement (or that the investigation trail which led the police back to him was flawed on some or other basis and mistakenly led to him being charged as opposed to another "Lizo"), but it is quite another to take a supine position and complain that it can't be proven from the second defendant's affidavit who the "Lizo" is who she identifies. This is because the court is not required to decide upon the veracity of the identity evidence for present purposes. Mr. Poswa's criticism may well take on a different significance in the criminal trial, but it does not in my view detract from my reasonable belief that this information supports the likely conviction of the pair. It can also be reasonably believed in my opinion against the first defendant's bare denial in this respect.

[53] I am satisfied in the result that here are more than reasonable grounds to believe that the defendants may be convicted on at least those charges pertaining to the payments made to the second defendant's bank account, and that a confiscation order may be granted against them arising therefrom.

In the result the applicant is entitled to an order confirming that the rule be made final and absolute pending the conclusion of the defendants' criminal trial and application in terms of section 18 of POCA.

[54] Although there need not be a precise correlation between the value of the property restrained and the value of the proceeds of criminal activity because the restraint order is only provisional pending the further anticipated criminal proceedings and confiscation order, it is desirable to limit the extent of the value of the property restrained by the order proportional to the lesser proceeds paid to the second defendant's banking account, i.e. R157 916.31. The trend of our court has been to keep proportionality in mind, even where restraint orders are concerned (as opposed to confiscation orders), the objective being to not make inroads into a person's property rights more than is necessary to achieve the so-called draconian (but obviously warranted) purposes of POCA.[30]

[55] The costs should follow the result, with one *proviso*. The matter stood poised for argument on 23 March 2017 when it was postponed and the rule extended to 18 May 2017, with costs reserved, because the curator's report was not yet available. No explanation was tendered by the curator as to why his report was so substantially delayed. If one has regard to the limited nature of the steps taken by him so far, which he details in his first interim report, there is nothing which obviously informs the lengthy delay. Mr. French submitted that it was beyond the control of the applicant that the absence of the curator's report presented itself as a challenge to the matter

[30] NDPP v Rautenbach, *supra*, at par [68].

proceeding on the return date, whereas Mr. Poswa squarely attributed the fault to the applicant.

[56] I am inclined to agree with Mr. Poswa that the estate of the defendants should not be mulct by these wasted costs, especially where the defendants are evidently not at fault for the delay in the filing of his report. Curators appointed by the court must be astute not to burden the estate of defendants by unnecessary expenditure where it can be avoided. The rote notion that because a provisional order is in place, it follows that every postponement thereafter is automatically one for the defendants' estate, is to be decried.

[57] The costs of 15 December 2016 and 17 January 2017 were also reserved. I was informed that in good time before the hearing on 15 December 2016, Mr. Poswa requested that the matter be postponed because he would not be available to argue the application on the allocated date. He needed to present himself in the Mthatha High Court instead to argue an application for leave to appeal. Mr. French graciously conceded his request and no unnecessary costs are likely to have been incurred after their agreement, except for the appearance by Mr. French to move the postponement. Since Mr. French is a state advocate, however, no costs arise on this basis. Unfortunately the date to which the matter was postponed at first (17 January 2017) turned out to be an unopposed motion court day and the matter could accordingly not proceed. Both parties appear to have been under the mistaken impression regarding the agreed day for the hearing. The last postponement was again moved by Mr. French. I am therefore inclined to order that the costs of these two postponements as well not be borne by the defendants or the respondent.

[58] For the rest, and even though the first defendant to an extent succeeds in his defence, it is but a small triumph against the likelihood that there might nevertheless still be a conviction and a consequent confiscation order. For this reason his estate, together with the second defendant's, should absorb whatever costs of the application there may be.

[59] In the result I issue the following order:

1. The rule *nisi* issued on 23 August 2016, which was extended pending this judgment, is hereby made final and absolute with the following two *provisos*:

    1.1 the realisable property indicated in prayer 2.1 is limited to the sum of R157 916.31; and

    1.2 the wasted costs of the postponements of 15 December 2016, 17 January 2017 and 23 March 2017, shall not be recovered from either defendant's estate, neither from that of the respondent's.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 May 2017

DATE OF JUDGMENT : 5 June 2017

Appearances:

For the appellant: Mr. French, The National Director of Public Prosecutions, East London.

For the first respondent: Mr. Poswa instructed by Malusi & Co. Attorneys of East London (ref. Ms Nongogo/8396-A-civ).xz