

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case no: 44211/2012**

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

06/02/2018  
DATE

  
SIGNATURE

In the matter between:

**NGENGELEZI ZACCHEUS MNGOMEZULU**

**First Applicant**

**NONTANDO MNGOMEZULU**

**Second Applicant**

**and**

**THEODORE WILHELM VAN DEN HEEVER N.O**

**First Respondent**

**THEODORE WILHELM VAN DEN HEEVER**

**Second Respondent**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Third Respondent**

**THE MASTER OF THE HIGH COURT, JOHANNESBURG**

**Fourth Respondent**

**MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

**Fifth Respondent**

**BASFOUR 481 (PTY) LTD**

**Sixth Respondent**

**COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION**

**Seventh Respondent**

**COMMISSIONER: COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

**Eighth Respondent**

**GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**Ninth Respondent**

**THE MASTER OF THE HIGH COURT, PRETORIA**

**Tenth Respondent**

**Summary** - *Account by curator appointed under POCA: The applicants whose property was the subject of a restraint order and curatorship under POCA applied for an order that the curator account to them in relation to his administration of the property when the restraint order fell to be discharged. It was argued by the curator that as POCA circumscribed the function and powers of the curator to account he had no obligation to account to the applicants at common law. The curator and the State entities sought that he be discharged*

*immediately and that he account to the Master only in terms of POCA. The applicants claimed that he should not be released until he has accounted to them at common law. The curator argued that s 28(3)(b) of POCA dictates that the curator must be discharged immediately on rescission of the restraint order.*

*Held – the curator was obliged to account to the applicants under the common law which obligation went beyond the requirements of the accounting prescribed under POCA*

*Held – s 28(3)(b) does not preclude the discharge by the court of the curator at any time and the court, in the exercise of its discretion may determine the manner and time of such discharge.*

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## JUDGMENT

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**FISHER J:**

### INTRODUCTION

[1] The stated purpose of Prevention of Organised Crime Act<sup>1</sup> ("POCA") is to provide a civil remedy for the preservation, seizure and forfeiture of property which is derived from or concerned with the carrying out of unlawful activities<sup>2</sup>. Central to the machinery provided for in POCA are sections 26 and 28 of POCA. Section 26 provides for the granting of a restraint order which prohibits a person charged with or to be charged with an offence from dealing with the property concerned, with the ultimate aim that it be confiscated by the State. Section 28 allows for the appointment, by the court that has granted the restraint order, of a *curator bonis* to take possession and control of the restrained property. This appointment can occur at any time after the restraint order is granted. The curator acts, at all times, subject to the directions of the court. Such directions can be varied from time to time. In terms of Section 26(10)(b) of POCA the court must rescind the restraint order when the

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<sup>1</sup> 121 of 1998

<sup>2</sup> Preamble to POCA

proceedings against the defendant are concluded<sup>3</sup>.

[2] This case deals with the aftermath of the rescission of a restraint order where no confiscation order has ensued (in this case because of acquittal), with specific reference to the legal obligations of the curator to the owner of the property under his curatorship.

## FACTS

[3] The First Applicant was arrested on various criminal charges during July 2004. On 17 September 2004, the Third Respondent ("NDPP") brought an *ex parte* application for a restraint order against the Applicants - who are married to each other. The Court granted a provisional restraint order on the same date and also appointed the First Respondent (to whom I shall refer as "the curator") as *curator bonis* - with detailed directions as to the performance of his function. The restraint order was made final on 21 January 2005 and pursuant thereto letters of curatorship were issued. On 23 July 2012, the First Applicant was acquitted of all charges against him. The restraint order and the curatorship endure, and have done for more than 13 years.

[4] The property under restraint included some 12 immovable properties, interests in a number of close corporations; shareholding in companies including the sixth respondent; movable properties - which included Persian carpets, artworks, vehicles - and the interests in some 46 bank accounts. The curator took possession of the property in terms of an order which formed part of the order in issue.

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<sup>3</sup> Section 17 deals with the conclusion of proceedings against a defendant. It reads as follows." For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when—

(a) the defendant is acquitted or found not guilty of an offence;  
 (b) subject to section 18 (2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her;  
 (c) the conviction in respect of an offence is set aside on review or appeal; or  
 (d) the defendant satisfies the confiscation order made against him or her."

[5] For the period that the restraint order has been in force, the property has been under the control of the curator, and the applicants and the various companies and close corporations have not been able to deal with it. During 2011 the close corporations and companies, except the sixth respondent, were removed from the registers of companies and close corporations for failure to submit statutory annual returns and consequently all of their property at the time of their de-registration became *bona vacantia* and passed into the ownership of the State. Relief was initially sought in this application for the re-registration of these entities, but this has since occurred and the relief is no longer sought.

[6] It is not disputed by the curator and the State that the value of the restrained property has reduced during the course of the curatorship. The total forced sale value of the restrained property as at 27 October 2004 was more than R11.5 million while in January 2013, the curator valued the restrained property at no more than R3 million and requested that the security bond required to be maintained by him should be reduced to cover that amount. This reduction was duly achieved. The contention of the applicants is that the diminution of the value of the property is as a result of his mismanagement. The curator denies this. I am not called on to deal with this dispute.

[7] The curator has, as yet, made no formal accounting as to his administration of the property. In terms of section 32(2) of POCA the provisions of the Administration of Estates Act<sup>4</sup> apply *mutatis mutandis* in relation to the functions of a curator appointed under POCA. Thus the obligation to account under POCA is owed to the Master in accordance with section 83 of the Administration of Estates Act which reads as follows:

**“Accounts by tutors and curators (1) Every tutor or curator shall-**

*(a) on or before the date in every year which the Master may in each case determine, lodge with the Master a complete account in the prescribed form of his administration during the year ending upon a date three months prior to the date so determined, supported by vouchers, receipts and acquittances and including a statement of all property under his control at the end of such last-mentioned year, and if he carries on any business or undertaking in his capacity as tutor or curator, also a statement relating to such business or undertaking; and*

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<sup>4</sup> Act 66 Of 1965

*(b) if required to do so by the Master by notice in writing, produce, within a period specified in the notice, for inspection by the Master or by any person nominated by him for the purpose, any securities held by him as tutor or curator.*

*(2) Any person who ceases to be tutor or curator shall, not later than thirty days thereafter, or within such further period as the Master may allow, lodge with the Master a complete account, in the prescribed form, of his administration between the date up to which his last account was rendered under subsection (1) and the date on which he ceased to be tutor or curator, supported by vouchers, receipts and acquittances, and including a statement of all property under his control immediately before he ceased to be tutor or curator."*

[8] The curator alleges that the Master has dispensed with the requirement of filing annual accounts. Whether the Master is entitled so to dispense with this requirement is questionable. However, it is also not necessary for me to decide this aspect. The curator submits that his only obligation is to account in terms of section 83(2) of the Administration of Estates Act within 30 days of his discharge. He contends further that he should be discharged immediately.

## **ISSUES IN DISPUTE**

[9] While the applicants seek orders rescinding the restraint order – to which they are obviously entitled in light of the acquittal, <sup>they</sup> contend that those orders should be granted subject to compliance with certain conditions. Central to these proposed conditions is the recognition of the common law obligation to account fully to the applicants and the discharge of the curator only once the accounting procedure contended for and any statement and debatement process which may follow has been finalized.

[10] Notices of opposition were delivered on behalf of the curator and the NDPP, together with the Minister of Justice and the Government. I will refer collectively to these State entities as "*the State*".

[11] Much of the relief initially sought by the applicants, which included relief relating to the reregistration of the deregistered entities and access to the property, has been resolved by consent or is not required at this time. In essence, the curator and the State currently oppose the application on the basis that the restraint order should be rescinded and that the curator should be unconditionally discharged with immediate effect, with only the obligation to account to the Master on the limited basis provided for in the Administration of Estates Act. The State delivered a counter-application for an order to this effect.

#### Curator's Obligations at Common Law

[12] The curator argues that the applicants are entitled only to an accounting in terms of POCA and not under the common law. The State takes a similar stance. The curator and the State however offer different bases for their respective contentions – the curator agreeing that the nature and extent of the obligations differ but arguing that the applicants are not entitled to an accounting under the common law; the State contending that the accounting contemplated under the Act is, in effect, the same as that allowed for under the common law in that the broader obligations of the common law should be read into the obligations to account under POCA. The contention appears to be that because there is no legislative *lacuna* the common law can only be resorted to under exceptional circumstances and by use of the court's inherent power in terms of section 173 of the Constitution to protect and regulate its processes in the interests of justice.

[13] Once one disposes of the State's contention that the two accounting processes are substantively similar, one is left with a concession made on behalf of the State that, if they do differ materially, the applicants are indeed entitled to a fuller accounting than POCA allows.

[14] As stated above, POCA in relation to the accounting which is required, has resort to the accounting demanded of a curator under the Administration of Estates

Act. Regulation 7 of the Regulations promulgated under this Act<sup>5</sup> deal with what is required of accounts by curators to the Master. It is immediately apparent from a reading of these requirements that they go no further than requiring, what was described by Slomowitz AJ in *Doyle v Board of Executors*<sup>6</sup> as “generally accepted bookkeeping principles”<sup>7</sup> In this case Slomowitz AJ expounded on the differences between the two types of accounting thus:

*“ I have chosen to emphasise the obligation to give an accounting because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office. That, in turn, expresses the remedy as opposed to the right.”*<sup>8</sup>

[15] The curator argues that what the applicants seek is an impermissible extension of his powers and duties which he says are circumscribed by POCA and the court order appointing him. He contends that the order sought by the applicants will lead to the “side -stepping” of the prescripts of POCA. In this regard he seeks to invoke principles espoused in *Phillips v National Director of Public Prosecutions*<sup>9</sup> to the effect that, where a statute fully circumscribes a particular procedure, the common law cannot be resorted to in a bid to avoid that procedure.

[16] It is apparent that the curator’s contention that he is obliged only to account under POCA, arises as a result of a failure to appreciate that his obligation as curator is both statutory, in relation to his function within POCA and fiduciary *vis-à-vis* the applicants. This failure also underpins the contentions of the State.

<sup>5</sup> GN R473 in GG 3425 of 24 March 1972 (as amended)

<sup>6</sup> 1999 (2) SA 805 (C)

<sup>7</sup> *Id* at p 813

<sup>8</sup> *Id* at 813

<sup>9</sup> 2006 (1) SA 505 CC



[17] In *Sacks v Ogince*<sup>10</sup> it was held that the duty to account under common law arises separately from, and irrespective of, the obligation of a curator to account to the Master in terms of the Administration of Estates Act<sup>11</sup> because “*the two accounts are rendered to different persons and for different purposes*”.<sup>12</sup> To my mind, the same considerations hold sway here. While a right to receive an account and a corresponding duty to furnish one may be imposed by statute or arise by contract, at common law the right to receive an account most commonly arises from the existence of a fiduciary relationship between the parties.<sup>13</sup> Such a relationship is usually (although not necessarily decisively) marked by three characteristics: (a) Scope for the exercise of some discretion or power, (b) A power or discretion that can be used unilaterally to affect the beneficiary’s legal or practical interests, (c) A peculiar vulnerability to the exercise of that discretion or power.<sup>14</sup>

[18] There can be no doubt that a curatorship under POCA meets these criteria. The curator is in total control of the property. That he stands in a fiduciary relationship towards the applicants in relation to the restrained property is clear. This was not disputed by the opposing respondents. It follows that he is therefore in the ordinary course, under a duty at the end of his period of office to render an account to them in the manner required by the common law.<sup>15</sup>

[19] As set out above, the purpose of POCA is to provide a civil remedy for the preservation, seizure and forfeiture to the State, of property which is derived from or concerned with the carrying out of unlawful activities. The accounting prescribed is thus devised to meet this purpose. It is primarily, if not entirely, fashioned to serve the interests and purposes of the State. It does not describe nor facilitate the fiduciary

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<sup>10</sup> 1960 (1) SA 180 (O) at 181E-H. See also *Clarkson v Gelb & Others* 1981 (1) SA 288 (W) at 293F - 295C

<sup>11</sup> The wording of the relevant section (section 89(1) of the Administration of Estates Act 1913) was similar to section 83 of the current Administration of Estates Act: “Every tutor and every curator shall, on or before the fifteenth day of February in every year, lodge with the Master a just, true, and exact account of his administration up to the thirty-first day of December last preceding, supported by vouchers, together with a true copy of that account.”

<sup>12</sup> *Sacks* (above) at 181D-183E.

<sup>13</sup> Eg *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 at 19; *Doyle v Fleet Motors* 1971 (3) SA 760 (A)

at 762; *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) para 15.

<sup>14</sup> *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) para. 33

<sup>15</sup> *Sacks v Ogince* (above) at 181E-H. See also *Clarkson v Gelb & Others* above at 293F -295C.

obligations and duties owed to an owner in relation to the administration of his property.

[20] The court in *Sacks* went further and found that an argument by the defendant that he had, in any event, complied with his common law obligation to account by rendering “a full account to the Master which was available for inspection by the plaintiff” was untenable and that:

“... the rendering of periodical accounts to the Master is not a compliance with the common law duty of rendering a final account to the ward, merely because it is technically possible for the ward to obtain all he wants to know by spending time and money to peruse the accounts at the Master’s office.”<sup>16</sup>

[21] In other words, the existence of one basis for rights and duties of the parties to account (even *inter se*), does not exclude the application of the duty of a fiduciary to account at common law. As the Appellate Division noted in *Bellairs v Hodnett*,<sup>17</sup> “principles of equity underlie a fiduciary duty” and it is “the substance of the relationship and not the form in which it was cast [which] must be looked at in order to ascertain its existence, nature, and extent”. In that case, the fact that the parties had chosen a company structure to give effect to their relationship did “not affect the existence, nature, or extent of any fiduciary duty resting upon [one of the parties]”<sup>18</sup>. These observations have been approved in a number of cases.<sup>19</sup> It matters not, as raised by the curator, that the sales of the immovable properties ensued with the court’s approval and that the reasons for such sales were made out in each of the proceedings in terms of which such approval was sought. The mere fact that information of what the curator has done in relation to the administration of the property may be available from another source does not relieve the curator of his obligation to account.

<sup>16</sup> *Id* at 183H; see also *Doyle v Board of Directors (above)* at 808F; 812C (dealing with the fiduciary obligations of a trustee of an *inter vivos* trust to a beneficiary which were held to extend beyond the statutory requirements); *Krige v Van Dijk’s Estate* 1918 AD 110 at 112 and 121 (in which all 3 judges held that where an attorney had been employed by the executors of an estate to administer the estate on their behalf, he had a specific duty to account to them and that it was insufficient for him to rely on the statutory liquidation and distribution accounts that he had prepared for lodgement with the Master

<sup>17</sup> *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1130F.

<sup>18</sup> *Clarkson (above)* at 295

<sup>19</sup> *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 65H; *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA) para 27; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 36

[22] In *Clarkson v Gelb*<sup>20</sup> the court (*per* Coetzee J) was clear that, in our common law, an action exists against an executor at the suit of the heirs for the rendering of accounts, debatement thereof, payment of balances found to be due, and payment of damages for maladministration. He, however, remarked baldly, and somewhat cryptically with respect that *"In view of the statutory provisions which relate to the administration of a deceased's estate, it is probably now limited, in modern times, to simply an action for damages."*<sup>21</sup>

[23] Mr Theron for the curator seeks to rely on this *obiter* aside for the proposition that the rights of the applicants were limited to the claiming damages of damages. This assertion clearly is against the authorities.

#### Nature of the Accounting Due

[24] I now turn to dealing with the nature of the statement to be given and the process that should follow the accounting.

[25] After having received an account as to the administration of his property the owner is entitled to a debatement of such account<sup>22</sup>. Voet stated in relation to the administration of a ward's property by a guardian that the ward was entitled to rely upon the *utilis curationis causa actio*, *"the aim of which is in the main that what is found out of the property of the ward in the hands of the guardian shall be made good to the ward, as well as damages, that is to say the loss which has happened and the gain which has not come to hand as a result of something not having been managed by the guardian in the course of his duty as it ought to have been managed."* Voet went further in explaining the nature of the process as follows: *"But this cannot be satisfactorily established except by the presentation of accounts of receipts and expenditure together with the inventory which was framed about the ward's property before the administration began. Before everything therefore a guardian is fast bound by this*

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<sup>20</sup> 1981 (1) SA 288 (W) at 295 D -E

<sup>21</sup> *Id* at 295

<sup>22</sup> *Sacks v Ogince* 1960 (1) SA 180 (O) at 181E-H. See also *Clarkson v Gelb & Others* 1981 (1) SA 288 (W) at 293F -295C.

*action to render accounts of his administration. These accounts should then be weighed or examined to see whether the charges contained in them are just and honest, whether the receipts have been correctly entered upon them and so forth.*"<sup>23</sup> He noted that the process of "weighing" or "examining" the accounts (which is in essence a debatement) "should be settled by the discretion of the Judge".<sup>24</sup>

[26] In *Doyle and another v Fleet Motors PE (Pty)Ltd*<sup>25</sup> the court echoed these sentiments of Voet to the effect that it falls to the court to determine the nature of the account and the process following on such accounting. The court held as follows *per* Holmes JA:

*"On proof of the foregoing [the right to an account and the failure to provide one], ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account."*<sup>26</sup>

[27] In this case the applicants seek an accounting to them which goes about showing how the property has been administered and explaining the basis for the decisions taken in relation to the management and preservation of the property and especially in relation to the disposal of property over the years. As set out above, this goes further than the regulation 7 account tendered by the curator and such tender is, in any event, that he will account to the Master and not to the applicants. The courts have recognised that the duty of a functionary in a fiduciary position is extensive and that it must entail a full explanation of all that was done in the administration. In *Doyle v Board of Executors (above)* Slomowitz AJ held that it was the duty of a curator is to "give an accounting to his principal of all that he knows and has done in the execution of his mandate and with his principal's property". This

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<sup>23</sup> *Johannes Voet, Commentary on the Pandects (Gane's Translation, Butterworth Durban 1956) at 27.3.7.*

<sup>24</sup> *Voet, Gane's Translation (above), 27.3.7.*

<sup>25</sup> 1971 (3) SA 760 (A)

<sup>26</sup> At 762

approach was approved by the Supreme Court of Appeal in *Grancy Property Limited*.<sup>27</sup>

[28] Given the compound nature of the remedy of a statement and debatement of account (and also the further relief entitling the claimant to payment of the balance found to be owing and damages arising from mismanagement), it is unsurprising that the courts have emphasised the need to take a flexible and practical approach to the procedure. In *Doyle v Fleet Motors*, Holmes JA said:

*“... The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach if for further directions if need be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts.”*<sup>28</sup>

[29] In this matter I am not called upon to deal directly with the debatement process. The parties agree that the nature and extent of the account must first be decided and that they should then be allowed to approach the court for further directions as to the process of debatement to follow, if any.

### Time of Discharge of the Curator

[30] This brings me to the dispute in relation to whether the curator should be immediately discharged (as the respondents suggest) or not.

[31] The appointment of the curator occurs in terms of POCA and thus his fiduciary relationship to the applicants arises from such statutory appointment. Section 28(3)(b) of POCA, states that a court “*shall rescind the order and discharge the curator bonis concerned if the relevant restraint order is rescinded*”<sup>29</sup>. It is contended

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<sup>27</sup> *Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others* 2014 JDR 0647 (SCA) (1 April 2014) para 26.

<sup>28</sup> At 762 -763

<sup>29</sup> POCA, s 28(3)(b).

on behalf of the curator that this means that the discharge must take place immediately on the rescission of the restraint order. The applicants contend that there is no time limit prescribed for the discharge of the curator and that it is not appropriate for him to be discharged before the accounting and debatement process envisaged is finalised.

[32] Mr Unterhalter for the applicants contends that, at common law, a curator will not be discharged prior to delivery of the final accounting. Curiously Voet appears to draw a distinction in this regard between the *actio tutelae directa* (curatorship in respect of a minor ward) and the *utilis curationis causa actio*. It appears that whereas the former remedy can only be sought after the end of the administration (i.e. on the majority of the ward) in relation to curatorships of non-minors that are for a “*fixed and definite*” period the remedy must be sought during the curatorship.<sup>30</sup>

[33] In the case of *In re W. Clydesdale*<sup>31</sup> an application by a non-minor ward for the discharge of his *curatores bonis* (appointed on the grounds of mental illness), the Cape Supreme Court is reported to have said that “... *persons appointed as curatores bonis could only be discharged on sending in their accounts. Therefore the Court could not make the order which they were asked to do until the curatores bonis had filed their accounts, when the previous order should be discharged.*”

[34] In 1947, Maasdorp referred to this judgment in concluding that “*before the final account has been rendered, a guardian will not be released from his guardianship*”.<sup>32</sup>

[35] Even if it would be possible for the owners of the restrained property to seek an accounting after the discharge of the curator, it is submitted that the maintenance of the curatorship would be an appropriate application of the flexible nature of the remedy, particularly in the light of the Court’s supervisory role in relation to the functions of a curator appointed under POCA.

<sup>30</sup> Voet, Gane’s Translation (above), 27.3.20.

<sup>31</sup> *In re W. Clydesdale* (1861) – 1867) 1 Roscoe 258.

<sup>32</sup> Maasdorp’s *Institutes of South African Law* (7th ed.) vol 1 (Juta, 1947) p 321, also cited in *Sacks* (above) at 183B.

[36] In this regard section 28(1)(a) of POCA empowers a court that has made a restraint order at any time to ...

*“(a) appoint a curator bonis to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely-*

*(i) to perform any particular act in respect of any of or all the property to which the restraint order relates;*

*(ii) to take care of the said property;*

*(iii) to administer the said property; and*

*(iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking”.*

[37] Although section 28(3)(b) of POCA, states that a court that made a surrender order and appointed a *curator bonis* thereunder “*shall rescind the surrender order and discharge the curator bonis concerned if the relevant restraint order is rescinded*”,<sup>33</sup> the section also empowers the Court to “at any time ... *vary or rescind the surrender and appointment order or vary the terms of the appointment of the curator bonis concerned ...*”.

[38] In *Phillips v NDPP*,<sup>34</sup> Howie P noted that this differentiates a surrender and appointment order from a restraint order made under section 26, which may only be varied or rescinded in certain limited circumstances and which is therefore final in nature and appealable. On the other hand, “*no limits*” (other than that “*sufficient cause must be shown*”) are placed on the variation of an order appointing a curator under section 28. This was confirmed in a subsequent decision of the SCA in the same matter as follows:

*“... it is apparent that once an order is made in terms of s 28(1)(b) directing property to be surrendered to the curator bonis, a High Court which made the order may in terms of s 28(3)(a) vary or rescind that order or it may discharge the curator bonis or vary the terms of his or her appointment. The circumstances in which the power to vary or rescind may be exercised are not circumscribed. Any good or sufficient cause*

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<sup>33</sup> POCA, s 28(3)(b).

<sup>34</sup> *Phillips v NDPP* 2003 (6) SA 447 (SCA) at paras 14 and 21. cf *Atkin v Botes* 2011 (6) SA 231 (SCA).

*would suffice and a Court would be entitled to have regard to 'a number of disparate and incommensurable features' when exercising the power so afforded to it. ...*

*In the result the High Court granting the order was empowered on good or sufficient cause shown to vary or rescind at any stage the order in terms of s 28(1)(b) or to vary or rescind any of the terms of the curator's appointment. Good or sufficient cause for varying the terms of the curator's appointment would typically include the need to ameliorate or resolve some administrative difficulty. If the curator bonis had no authority in terms of his appointment to let any one or more of the properties, as was held by De Jager AJ to be the case, the respondents or the curator bonis would have been free to approach the Court for a variation of the terms of his appointment so as to authorise him to do so.*<sup>35</sup>

[39] The clear implication of this is that the curator “acts throughout under the supervision of the High Court, which may direct how the property is to be realised and to whom the proceeds are to be distributed”.<sup>36</sup> Although this *dictum* related to a curator dealing with confiscated assets under section 30, a curator dealing with restrained assets is in no different position.<sup>37</sup>

[40] I do not agree with the submission on behalf of the curator to the effect that section 28(3)(b) does not permit of the interpretation contended for by the applicants being that the curator need not be discharged immediately on rescission of the restraint order and that he can and should remain in office until the accounting and debatement process is at an end. There is no time limit prescribed for the discharge of the curator and, as set out above, the office created by POCA envisages court oversight as a central ingredient of the office.

[41] In any event, and even if there were any uncertainty in this regard to the reading of this section, given that POCA authorises a serious erosion of the rights

<sup>35</sup> *NDPP v Phillips* 2005 (5) SA 265 (SCA) at paras 15 and 16, confirmed on appeal in *Phillips v NDPP* 2006 (1) SA 505 (CC) at paras 53 – 54.

<sup>36</sup> *Rebuzzi* (above) at para 16. In the original *Phillips* judgment appointing the curator (*NDPP v Phillips* 2002 (4) SA 60 (W)), Heher J noted at para 52 that “[t]he provisions of the Act ... make it clear that [confiscation order] proceedings take place under the supervision and guidance of the High Court, which is vested with wide discretionary powers to ensure that those proceedings are fairly conducted.”

<sup>37</sup> *Mngomezulu v NDPP* 2007 (2) SACR 274 (SCA) at para 17.



contained in the Bill of Rights. It must be applied in accordance with the rights and values protected by the Constitution.<sup>38</sup>

## **COSTS**

[42] The curator is cited in his personal capacity as well as in his official capacity. Costs are sought against him personally. The curator's failure to account to the applicants and the State's failure to recognise his obligation to do so necessitated the bringing of this application or, at best for him and for the State, led to the application being opposed unnecessarily over a protracted period and on a number of fronts. There was no basis for the curator to oppose the application in either of his cited capacities. To the extent that costs were granted against him in his official capacity – these would in the normal course come out of the property under curatorship. As a functionary under POCA and under the common law he was required to do no more than accept the guidance of the court on these matters. He has not given any cogent explanation as to why he did not simply abide in the matter. This suggests that his own interests have motivated his opposition even though those interests clearly conflict with his fiduciary obligations. Furthermore, the decision taken to oppose the application was unreasonable.

[43] In the circumstances the State parties and the curator personally should pay the costs of the application.

## **ORDER**

In the circumstances the following order is granted :

1. The orders of restraint and surrender of property granted under sections 26 and 28 of the Prevention of Organised Crime Act against the applicants by this Honourable Court under case number 2004/19884 on 17 September 2004 and 21 January 2005 ("the restraint

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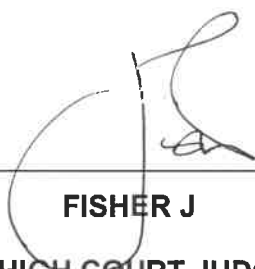
<sup>38</sup> *Frazer v Absa Bank Ltd* (NDPP as Amicus Curiae 2007(3)SA 484 (CC) at para 46.

orders"), with the exception of paragraphs 1.4 and 1.20 thereof, are rescinded;

2. The first respondent ("the curator") is ordered to render a full and proper account to the applicants, within 30 days of the date of the grant of this order in respect of the curator's curatorship of all the property which has at any time been subject to the curator's curatorship under the restraint orders, including proceeds therefrom.
3. Such account is to include the following, for the period from 2004 to the date of the account:
  - a. a statement of all money received by or in respect of and all payments made out of or in respect of the relevant property;
  - b. a statement of any assets and liabilities in respect of the relevant property at inception, throughout the curatorship and as at the date of the statement of account;
  - c. a statement of all liabilities (including contingent liabilities and encumbrances) incurred in respect of the relevant property at any time during the curatorship;
  - d. a statement of all income and liabilities declared to tax authorities in respect of any of the relevant property, the further entities, the applicants and/or the sixth respondent, and all taxes paid to and/or levied by the tax authorities in respect of the above property and/or persons;
  - e. supporting vouchers in respect of the items listed above, including:
    - i. the books of account maintained by the curator for the relevant property reflecting all assets, liabilities, revenue and expenses in respect thereof;
    - ii. bank statements for all bank accounts operated by the curator under the restraint orders or in respect of the relevant property;
    - iii. all documents in relation to the sales of any assets, including all correspondence in relation to those sales and valuations of those assets;

- iv. all documents, including quotes, orders, invoices and delivery notes for all repair and other work said to have been conducted in respect of the relevant property;
- v. all correspondence, memoranda, agreements or documentary evidence of any arrangements with any auctioneer in relation to the sale of any of the relevant property, and in relation to the storage of any of the relevant property;
- vi. all documents in relation to payments received from any auctioneer, including any commissions or other incentives paid directly or indirectly by such auctioneer to, or for the benefit of, the curator, which was directly or indirectly related to the sale or storage of any of the relevant property;
- vii. all invoices and other supporting documentation in relation to any expenditure, charges (including rates and taxes, electricity and water charges), fees (including legal and banking fees), costs and taxes of any kind incurred in respect of the relevant property;
- viii. all taxing masters' reports on any legal fees incurred in respect of the curatorship of the curator;
- ix. all documents evidencing and supporting payments to the curator and/or Deloitte & Touche Trust (Pty) Ltd from or in relation to the relevant property and/or the curator's curatorship;
- x. all correspondence between the curator and the fourth and tenth respondent in relation to the curatorship, any accounting by the curator, the relevant property and the curator's fees;
- xi. all correspondence between the curator and any tax authority in relation to any of the relevant property, the further entities, the applicants and/or the sixth respondent, including all tax returns filed by the curator in respect of the above property and/or persons;

- xii. all comparative quotes received in relation to any services to be rendered or expenditure to be incurred in respect of the relevant property;
  - f. a statement reflecting how, when, and for what reasons the curator decided to:
    - i. incur a liability in respect of any of the property;
    - ii. alienate or encumber any of the property;
    - iii. make payments or fail to make payments due or claimed by third parties in relation to the property;
    - iv. deregister any of the companies and close corporations.
4. Should the applicants dispute the adequacy of the account furnished, they shall, within 14 days of the receipt of such account, give notice to the curator specifying the respects in which it is contended that the account is inadequate and the curator shall be afforded a further 14 days within which to amplify the account failing which the applicants shall be entitled to approach the court for further directions either on these papers duly supplemented or otherwise;
5. The curator is ordered to place all the relevant property as may be in his the possession/ under his control, under the control of the applicants or the entity from whom possession and/or control was acquired by the curator, whichever is applicable;
6. The second, third, fifth, and ninth respondents are directed to pay the costs of this application jointly and severally the one paying the others to be absolved, such costs to include the costs of two counsel where employed.



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**FISHER J**  
**HIGH COURT JUDGE**  
**GAUTENG DIVISION, JOHANNESBURG**

DATE OF HEARING: **14 November 2017**

DATE OF JUDGMENT AND ORDER: **06 February 2018**

DATE OF REVISED JUDGMENT AND ORDER: **06 February 2018**

LEGAL REPRESENTATIVES:

FOR THE APPLICANT:

**Adv DN Unterhalter SC with  
him Adv RJA Moultrie  
Instructed by Hurwitz Higgs  
Attorneys and Conveyances.**

FOR THE 1<sup>st</sup> AND 2<sup>nd</sup> RESPONDENT:

**Adv E F Theron SC with him  
Adv TV Steyn**

**Instructed by De Vries Inc.**

FOR THE 3<sup>rd</sup>, 5<sup>th</sup> AND 9<sup>th</sup> RESPONDENT:

**Adv F Latif SC**

**Instructed by the State Attorney**