REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***YES***
(2) OF INTEREST TO OTHER JUDGES: ***YES***
(3) REVISED:
Date: 3 May '22 Signature:

CASE NO: A5021/2021

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Appellant
and	
WOOD, ERIC ANTHONY	First Respondent/Defendant
PILLAY, MAGANDHERAN	Second Respondent/Defendant
NYHONYHA, LITHA MVELISO	Third Respondent/Defendant
REGIMENTS CAPITAL (PTY) LTD (IN LIQUIDATION)	Fourth Respondent/Defendant
REGIMENTS FUND MANAGERS (PTY) LIMITED	Fifth Respondent/Defendant
REGIMENTS SECURITIES (PTY) LTD	Sixth Respondent/Defendant
ASHBROOK 15 (PTY) LIMITED	Seventh Respondent
CORAL LAGOON 194 (PTY) LIMITED	Eighth Respondent
ERGOLD PROPERTIES NO 8 (PTY) LIMITED	Ninth Respondent

MARCYTOUCH (PTY) LIMITED	Tenth Respondent
PILLAY, MAGANDHERAN NO	
(In his official capacity as Trustee of the	
Pillay Family Trust no: IT9190/03)	Eleventh Respondent
NYHONYHA, LITHA MVELISO NO	
(In his official capacity as Trustee of the	
Nyhonyha Family Trust no: IT11919/06)	Twelfth Respondent
NYHONYHA, MAGDELINE SEKGOPI NO	
(In his official capacity as Trustee of the	
Nyhonyha Family Trust no: IT11919/03)	Thirteenth Respondent
WOODS, ERIC ANTHONY NO	
(In his official capacity as Trustee of the	
Zara Share 1 Trust no: IT01484/06)	Fourteenth Respondent
TRUSTEGIC (PTY) LIMITED NO	
(In its official capacity as Trustee of the	
Zara Share 1 Trust no: IT01484/06)	Fifteenth Respondent
CEDAR PARK PROPERTIES (PTY) LIMITED	Sixteenth Respondent
LITTLE RIVER TRADING 191 (PTY) LIMITED	Seventeenth Respondent
KGORO CONSORTIUM (PTY) LIMITED	Eighteenth Respondent

Coram: Keightley J, Adams J *et* Randera AJ

Heard: 15 to 19 November 2021 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*. Further written submissions received thereafter.

Delivered: 3 May 2022– This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 3 May 2022.

Summary: Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 ('POCA') – Appeal against discharge of provisional order under s 26 – Order appealable

Requirement of good faith on part of applicant for *ex parte* order – material non-disclosure – approach to be adopted – applicant not acting in bad faith – not material non-disclosure – court *a quo* erred in discharging provisional order on grounds of non-disclosure

Application under s 26 – Approach to – joint and several restraint order against co-defendants permissible

Variation of provisional restraint order – competent and permissible

Section 36 of POCA discussed – property of liquidated company not subject to a restraint order made after the issue of liquidation application – if restraint order made before issue of liquidation application, then property subject to restraint order – liquidation of company in flux because of appeal process – return day of provisional order postponed in respect of liquidated company

Appeal upheld and provisional restraint order varied and confirmed.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Mahalelo J sitting as Court of first instance):

(1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.

(2) The order the court *a quo* is set aside and in its place is substituted the following: -

'(a) The applicant's application dated 22 January 2020 for variation of the restraint order is granted;

(b) The restraint proceedings instituted against the fourth defendant, Regiments Capital, are suspended, and the application for a restraint order against the fourth defendant is postponed *sine die*, with costs to be in the cause.

(c) The restraint order issued by Wright J on the 18 November 2019 is varied by the substitution of the amount of "R1,108 billion" with the amount of "R1,685 billion".

(d) Subject to para (b) above, the provisional restraint order made on 18 November 2019 by Wright J, as varied in terms of prayer (c) above, and subject to paragraph (e) below, is confirmed.

(e) The cap on the order is further adjusted with due regard to the payment which Regiments has made to the Transnet Second Defined Benefit Fund, in an amount of R639 111 816.83; and

(f) All of the defendants and the respondents, excepting the fourth defendant, Regiments Capital, jointly and severally, the one paying the other to be absolved, shall pay applicant's costs of the application, including the costs consequent upon the employment of two counsel, one being a Senior Counsel.'

(3) The respondents, excluding the fourth respondent, Regiment Capital, jointly and severally, the one paying the other to be absolved, shall pay the appellant's costs of the appeal, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.

JUDGMENT

The Court (Keightley J, Adams J *et* Randera AJ):

[1] The primary purpose of asset forfeiture legislation under the Prevention of Organised Crime Act[1] (POCA) is to ensure that a criminal does not enjoy the fruits

[1] Act 21 of 1998.

of his or her crime. It requires the money to be followed, the profits to be seized and the spoils of criminality to be targeted, and this serves the secondary purposes of deterrence and crime prevention.

[2] This appeal concerns asset forfeiture legislation and, in particular, a restraint order granted *ex parte* by the High Court (per Wright J) on application by the appellant (the National Director of Public Prosecutions (NDPP)) in respect of the property of the first to sixth respondents.[2] This restraint order was subsequently discharged on the return day by Mahalelo J on the basis that the NDPP, in her *ex parte* application, had failed to make full disclosure of all of the material facts, and for this reason alone the order was discharged and the application for a restraint order dismissed. Considering her findings that there was a material non-disclosure by the NDPP, the court *a quo* did not deem it necessary to deal with the merits of the application for a restraint order or, for that matter, with any of the other issues in dispute between the parties.

[3] The NDPP appeal against the order discharging the provisional restraint order with the leave of the court *a quo*.

[4] The first to sixth respondents are persons referred to in s 12 of POCA as 'defendants'. We adopt that terminology in this judgment. They are Eric Anthony Wood (Dr Wood), Maganheran Pillay (Mr Pillay), Litha Mveliso Nyhonyha (Mr Nyhonyha), Regiments Capital (Pty) Ltd, which is in liquidation (Regiments Capital), Regiments Fund Managers (Pty) Ltd (Regiments Fund Managers) and Regiments Securities (Pty) Ltd (Regiments Securities). We refer to these corporate defendants collectively as the Regiments companies, or sometimes simply as 'Regiments'.

[5] The NDPP claims there are reasonable grounds for believing that they may be prosecuted at least in respect of the offences of corruption, money laundering and fraud. Dr Wood, Mr Pillay and Mr Nyhonyha were the directors of the Regiments companies. They are also shareholders of the Regiments' holding company, Regiments Capital. They acquired most of their shares in this entity

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[2] The first to sixth defendants in the court *a quo*.

through their family trusts, who are joined as respondents. One of the contentions of the first to third defendants is that because it is their family trusts that acquired shares in Regiments Capital, the first to third defendants did not themselves benefit from any alleged unlawful activity. We deal with this issue later.

[6] The Regiments companies provided financial advisory services to state owned entities, most notably for present purposes, the Transnet SOC Ltd (Transnet) and the Transnet Second Defined Benefit Fund (the Fund) or, collectively, 'Transnet'. In the court *a quo* it was the case of the NDPP that, based principally on the amounts which Transnet paid to the Regiments companies, assets to the value of in excess of R1,108 billion should be subjected to a restraint order. Those payments had their origin in the Regiments companies corruptly having obtained contracts from Transnet. The associated alleged offences, so the NDPP contends, were part of the State capture project, and enriched the defendants, among others. As the payments arose from that corrupt relationship, the NDPP said that there are reasonable grounds for believing that a confiscation order, in that amount, may be granted in due course. In the interim, assets to that value fell to be restrained at the restraint stage of the forfeiture proceedings.

[7] It is also important to record at the outset that the Fund sued the respondents for some R848 million in respect of the unlawful conduct which it alleged had been committed against it. The respondents denied the allegations made by the Fund but repaid approximately R639 million to settle those claims.

[8] The seventh to eighteenth respondents[3] are alleged to be holding property for and on behalf of the defendants, and it is for this reason that they were cited as respondents in the *ex parte* application in the court *a quo*. In other words, it is not alleged that they may be charged with any offences, but their property is sought to be restrained on the basis that it falls within what POCA refers to as 'realisable property'. In this judgment, we shall refer to these respondents simply as 'the respondents'.

[3] The first to twelfth respondents in the court *a quo*.

[9] The foremost issue to be decided in this appeal is whether the court *a quo* was correct in its finding that the NDPP failed to make full disclosure in its *ex parte* application and that such failure was fatal to the confirmation on the return day of the provisional restraint order. If not, then we are required to adjudicate the merits of the application for a restraint order in terms of the provisions of section 26 of POCA, which authorises the NDPP to make an *ex parte* application for a restraint order in respect of property. In this judgment we deal with the following issues, albeit not necessarily in this order:

(a) Whether the discharge of a provisional restraint order is appealable.

(b) Whether the court *a quo* erred in discharging the provisional restraint order on the basis of alleged material non-disclosures.

(c) The legal framework for a restraint order.

(d) Are there reasonable grounds for believing that the defendants may be convicted of an offence? If so,

(e) Are there reasonable grounds for believing that the defendants benefited from the offences? If so,

(f) Are there reasonable grounds for believing that a confiscation order may be made against the defendants?

(g) The relevance of the defendants not yet having been charged.

(h) The potential criminal liability of the Regiments corporate defendants and the directors.

(i) The proper computation of the benefit received by the respondents.

(j) The position of the respondents and why their property is placed under restraint.

(k) Whether a joint and several restraint order against the co-defendants is competent and appropriate.

(l) Whether the application for a variation of the restraint order by the NDPP to increase the quantum of the order is competent.

(m) The effect of the contested liquidation proceedings involving Regiments Capital on the application to confirm the restraint order against it.

[10] Insofar as the variation issue is concerned, this served before the court *a quo* on the hearing of the return day of the Wright J *ex parte* order. The NDPP applied for an increase in the value of the restraint order to include the full amount which the Regiments companies received from Transnet as a result of the alleged offences. The defendants did not dispute that this was the full amount which the Regiments companies received, but they opposed the variation of the restraint. The Court *a quo* did not address the application for variation, as it discharged the restraint order. This is therefore also an issue which needs to be considered by us. The question to be decided being whether the NDPP was entitled to the variation order if regard is had to the relevant legislative provisions and other procedural requirements. We will in due course revert to this aspect of the matter.

[11] These issues are to be decided against the factual backdrop set out in the paragraphs which follow. In that regard, Mr Budlender, who appeared on behalf of the NDPP, with Ms Saller, submitted that in their opposing affidavits, the defendants barely engaged with the substance of the allegations of unlawful conduct made against them. For the most part, they relied on *in limine* arguments and other objections to the interim restraint order. We will weigh this submission during the course of our judgment.

[12] Before turning to the question of whether the learned Judge *a quo* erred in discharging the provisional restraint order for non-disclosure, there is one preliminary issue which requires our attention. It relates to the fundamental question of whether or not the order of Mahalelo J is appealable at all.

Is the discharge of a Provisional Restraint Order under POCA appealable?

[13] It is not in dispute that there is ample authority for the proposition that the granting of a restraint order is appealable. So, for example, in *Phillips and Others v National Director of Public Prosecutions*[4], the SCA explained that in order to be appealable, a judicial decision of the High Court had to be a 'judgment or order',

[4] *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA).

which, generally speaking meant that it had to be: (1) final in effect, that is, unalterable by the court whose judgment or order it was; (2) definitive of the rights of the parties in that it granted definitive and distinct relief; and (3) dispositive of at least a substantial portion of the relief claimed in the main proceedings.

[14] In the case of a restraint order under POCA, the SCA considered that it had the required finality and held as follows:

'[20] Counsel for the respondent is right, in my view, in submitting that a restraint order is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect as envisaged in *Zweni*. Plainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount. The crucial question, however, is whether a restraint order has final effect because it is unalterable by the court that grants it. In this regard counsel for respondent argued that the provisions of s 26(10)(a) deprived a restraint order of the finality required for appealability because it permitted variation and even rescission.'

[15] The SCA found that a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is, so the SCA held, final in the sense required by the case law for appealability. The appeal was accordingly entertained and dismissed.

[16] It is accordingly settled that the granting of a restraint order under POCA is appealable. The question is whether an order discharging a provisional restraint order is also appealable. The more particular question is whether a discharge of a restraint order for what the defendants and respondents label 'procedural reasons', such as that of non-disclosure, is appealable. They submit that it is not.

[17] As to the more general question, in *National Director of Public Prosecutions v Rautenbach and Others*,[5] the SCA had no difficulty entertaining an appeal against the discharge of a provisional restraint order. This approach

[5] *National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA).

was authoritatively confirmed and approved by the *ratio decidendi* in *National Director of Public Prosecutions v Van Staden and Others*[6], in which the SCA expressly held that the discharge of the provisional restraint order was appealable. In that matter, as in the present matter, the provisional restraint order was discharged for reasons of non-disclosure on the part of the NDPP. The SCA upheld the NDPP's appeal against the decision of the court *a quo* not to confirm the provisional restraint and confirmed the provisional restraint order.

[18] It therefore appears to us to be settled law that the discharge of a provisional restraint order, whether on 'procedural grounds' or not, is also appealable. There can be no question that such an order is final in effect in the sense required for appealability. While the NDPP could make fresh application for a new provisional restraint order, the initial provisional order is rendered lifeless consequent on its discharge.

[19] That then takes care of this preliminary point. Contrary to the submissions made by the defendants and respondents, the order of Mahalelo J discharging the provisional restraint, is indeed appealable.

[20] In order properly to frame the crucial issue relating to the alleged non-disclosure by the NDPP, we first provide a brief overview of the legal framework relating to a restraint order. Most of this is uncontentious.

The Legal Framework for a Restraint Order

[21] Chapter 5 of POCA provides for conviction-based forfeiture: a confiscation order may be made against a convicted defendant who is found to have benefitted from an offence of which he or she is convicted,[7] or a sufficiently closely related offence.[8] The confiscation inquiry is the final phase of the criminal forfeiture process. Although we are concerned in this appeal with the restraint and not confiscation phase of criminal asset forfeiture, there are underlying links between the two phases, and it is thus important to set out the basic applicable principles of confiscation.

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[6] Above n6.
[7] POCA sections 18(1)(a) and 18(1)(b).
[8] POCA section 18(1)(c).

[22] In *NDPP v Gardener and one Other*[9], the Supreme Court of Appeal noted that the confiscation phase involves a three-stage, post-conviction enquiry under s 18 of POCA:

'[17] Once a defendant's unlawful activities yield proceeds of the kind envisaged in s 12, he or she has derived a benefit as contemplated in s 18(1)(a). This entitles a prosecutor to apply for a confiscation order, and triggers a three-stage inquiry by the court. First, the court must be satisfied that the defendant has in fact benefited from the relevant criminal conduct; second, it must determine the value of the benefit that was obtained: and finally, the sum recoverable from the defendant must be established.'

[23] As was held in *NDPP v Rebuzzi*[10], the court's enquiry is directed towards establishing the extent of an offender's benefit rather than towards establishing who might have suffered loss. This is important to bear in mind for reasons that will become apparent later. A court has a discretion to determine the appropriate amount to be confiscated, but subject to an upper limit, namely the lesser of the value of the proceeds of the defendant's offences, and the value of the defendant's assets that might be realised in order to satisfy the confiscation order.[11]

[24] In *S v Shaik*[12] the Constitutional Court considered and decided certain of issues relevant to those that arise in these proceedings.

[25] The first of those issues was whether the confiscation order is to be made by reference to the 'gross proceeds' or 'net proceeds' of a defendant's offences when determining the defendant's 'benefit'. The defendants in that matter argued that the concept of 'benefit' in s 18(1) must be read 'to limit the broad language of the definition of proceeds of crime' in s 1 to apply only to net proceeds of crime.

[26] O'Regan J rejected this argument and held as follows:

'[60] In my view, this submission is based on a misconception of the section. As described in paragraph 25 above, section 12(3) provides that a person will have benefited from unlawful activities if he or she has received or retained any proceeds of

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[9] Above n9.
[10] Above n10.
[11] Section 18(2) of POCA.
[12] *S v Shaik* 2008 (5) SA 354 (CC).

unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes "proceeds of unlawful activities". It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in section 18, for that concept is based on the definition of the "proceeds of unlawful activities". That definition goes far beyond the limited definition proposed by the appellants. "Proceeds" is broadly defined to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity. A further difficulty with the appellants' argument is to be found in section 18(2). That section expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a net amount. The narrow interpretation of "benefit" proposed by the appellants cannot thus fit with the clear language of section 18 and the definition of "proceeds of unlawful activities". To interpret the section as suggested by the appellants would require giving a meaning to the section which its ordinary wording cannot sustain. In any event, both the dividends and the shares amounted to proceeds that flowed directly from the crime.'

[27] It was also held in *Shaik*[13] that a court should bear in mind that the definition of 'proceeds of unlawful activities' in the Act makes it possible to confiscate property that has not been directly acquired through the commission of crimes, but also through related criminal activity. A court should also bear in mind that 'one of the purposes of the broad definition of "proceeds of unlawful activities" is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs'.

[28] Thirdly, it was held in *Shaik*,[14] a court should have regard to the nature of the crimes and how closely these are connected to the purpose of the statue. The reason for this is that the larger the value of the confiscation order, the greater the deterrent effect of such an order. The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime.

[29] It is therefore settled law that it is the gross value of all proceeds flowing from the crime that is potentially liable to confiscation, subject to the court's discretion in setting an appropriate amount. In the case of proceeds derived from

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[13] *Shaik* above n12 at para 69.
[14] *Shaik* above n12 at para 71.

corruption, it will ordinarily be appropriate to order the confiscation of the full value of the benefit obtained.[15]

[30] Whereas the confiscation order is determined at the end stage of criminal forfeiture proceedings, POCA makes provision for the grant of a restraint order as an interim measure. Bearing in mind that trial, conviction and confiscation may only occur late in the day, a restraint order provides a mechanism to preserve property pending the conclusion of the criminal trial and (if there is a conviction) the application for a confiscation order. The restrained property acts as a form of security against the eventual satisfaction of any confiscation order that may be granted.

[31] As regards the making of a restraint order, the NDPP may apply *ex parte* for a restraint order against what POCA defines as realisable property pending the finalisation of the criminal process and the granting of those orders.[16] The Court may grant a provisional restraint order coupled with a *rule nisi*, to allow the defendant to answer the NDPP's application for restraint, while the realisable property is secured. To succeed in an application for confirmation of the provisional restraint order, the NDPP must show that there are 'reasonable grounds for believing that a confiscation order may be made against the defendant'.[17]

[32] The SCA has settled the approach which a court is to take in determining whether there are reasonable grounds to believe that a confiscation order may be made. In *Kyriacou*,[18] Mlambo AJA explained the test as follows:

'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 ... on the other hand the NDPP 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 the principles and onus that apply in ordinary motion

[15] Shaik above n12 at para 60.
[16] *NDPP v Kyriacou* 2004 (1) SA 379 (SCA).
[17] POCA s 25(1)(a)(ii).
[18] *Kyriacou* above n18 at para 10.

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.'

[33] In *Rautenbach*,[19] Nugent JA elaborated as follows:

'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 ..., 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.'

[34] As regards the quantum of a restraint order, our courts have also laid down certain applicable principles.

[35] The SCA noted in *Rautenbach*[20] that:

'Where the requirements of the Act have been met a Court is called upon to exercise a discretion as to whether a restraint order should be granted, and if so, as to the scope and terms of the order, and the proper exercise of that discretion will be dictated by the circumstances of the particular case. The Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order might be made must be capable of being ascertained, nor does it require that the value of property that is placed under restraint should not exceed the amount of the anticipated confiscation order. Where there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be granted, then clearly a Court properly exercising

[19] Above n5 at para 27.
[20] Above n5 at para 56.

its discretion will limit the scope of the restraint (if it go, grants an order at all), for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved - the absence of an 'appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to be served - will render the interference arbitrary and in conflict with the Bill of Rights.'

[36] Thus, the NDPP is not required to establish a case for the quantum of a restraint order with exactitude. In reality, some leeway must be given for reaching a reasonable estimation of an appropriate quantum. At the same time, however, the estimation of benefit, and hence quantum, is not necessarily determinative. A court is required to exercise its discretion in this regard so as to ensure that the quantum settled upon does not arbitrarily intrude on the defendant's property rights.

[37] As already indicated, it is the gross value of the proceeds of a defendant's offences that constitutes her 'benefits'. Where assets that were acquired with the criminal proceeds have appreciated in value, this too will form part of the benefit derived from the offence. The value of the realisable property which is necessary to satisfy the eventual confiscation order must be calculated with a view to the date when the confiscation order may be made.[21] Further, as the SCA noted in *Rautenbach*,[22] the effect of the presumption in s 26(2) of POCA is that once it is shown that a person benefited from the relevant offences, a court conducting a confiscation inquiry must presume, until the contrary is established, that any property held by her or him is the proceeds of the unlawful activity.

[38] What these principles demonstrate is that a range of permutations necessarily come into play when a court is required, in advance of the confiscation inquiry, to undertake an estimation of an appropriate quantum for a restraint order in any given case.

[39] With that brief review of the applicable legislative and legal framework, we now turn to the first main issue which we are required to decide, that being

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[21] POCA sections 20(1)(a) and (b).
[22] Above n5 at para 56.

whether the court *a quo* was correct in discharging the provisional restraint order because of the alleged material non-disclosures.

The alleged Material Non-Disclosures found by the Court *a quo*

[40] The court *a quo* found that there had been material non-disclosure of two matters, namely a consent order made by Vally J in litigation between the Wood trustees, on the one hand, and Mr Pillay and Mr Nyhonyha on the other (the Vally J order); and the settlement agreement which had been concluded between Regiments Capital and Transnet (the Transnet settlement).

[41] The NDPP accepted in the court *a quo*, and before us, that in bringing her *ex parte* application for a provisional restraint order, as she is authorised to do under s 26 of POCA, she was under an obligation to proceed with the utmost good faith. This obligation is well established in our case law and has been held to apply to *ex parte* applications for restraint orders.[23] The applicant must disclose all material facts which might influence a court in coming to its decision. The withholding or suppression of material facts, even if not wilful or *mala fide*, entitles a court to set aside an order granted *ex parte*.[24] The applicant must disclose all relevant facts she knows or expects the absent party would want placed before the court. In addition, she must exercise due care and make such enquiries and conduct such investigations that are reasonable in the circumstances before seeking *ex parte* relief.[25] If the court finds that there has been a failure to disclose such material facts, it has a discretion to discharge the provisional restraint order for that reason.

[42] It is important to appreciate that the obligation to disclose extends to facts that are material and relevant to the issues before the court and are known to the applicant. This was emphasised by the Constitutional Court in *Thint (Pty) Ltd v NDPP and Others, Zuma v NDPP and Others*:[26]

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[23] See, for example, *NDPP v Basson* 2002 (1) SA 419 (SCA) at para 21; *Kyriacou* n 5 above at paras 17-19

[24] *Basson*, *loc cit*, citing *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B.

[25] *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) (hereafter *REDISA*) at para 47

[26] *Thint (Pty) Ltd v NDPP and Others, Zuma v NDPP and Others* 2009 (1) SA 1 (CC).

'[102] It is our law that an applicant in an *ex parte* application bears a duty of utmost good faith in placing all the relevant material facts before the court. The duty of good faith requires a disclosure of all material facts within the applicant's knowledge. The Supreme Court of Appeal reiterated in *Powell* that an applicant for a search warrant is "under a duty to be ultra-scrupulous in disclosing any material facts that might influence the Court in coming to its decision". However, an investigator cannot be expected to disclose facts of which he or she is not aware. The duty is also limited to the disclosure of facts that are material. In a complex and vast case such as the present, there can be no crystal-clear distinction between facts which are material and those which are not. There will always be room for debate. It follows that, in cases such as the present, an applicant for a search and seizure warrant will inevitably have to make a judgment as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that renders it practically impossible for the State to comply with its duty of disclosure, or that will result in applications so large that they might swamp *ex parte* judges.' (emphasis added)

[43] The underlined portions of this passage from the judgment highlight two issues that are of particular relevance to the question of non-disclosure in this appeal, namely, the materiality of what was not disclosed, and whether the facts that were not disclosed were in the knowledge of the deponent to the founding affidavit, Advocate Cronje. The NDPP's case on appeal is that the court *a quo* erred in finding that the relevant disclosures were material. In addition, it contends that the Transnet agreement was not within the knowledge of Adv Cronje when she deposed to the founding affidavit and that, for this reason too, the court *a quo* erred in discharging the provisional restraint order for want of proper disclosure.

[44] We consider first the non-disclosure of the Vally J order. It was the case of Regiments before the court *a quo* that this order was in the form of an anti-dissipation order. It allegedly prevented Regiments from making distributions to shareholders or dealing freely with its assets in the interests of prioritising payment to its creditors. Regiments contended that the provisional restraint order was in conflict with the order of Vally J and ought thus to have been disclosed by the NDPP.

[45] The court *a quo* accepted Regiment's contentions. It found that it was not open to the NDPP to 'pick and choose' what should be drawn to the attention of the *ex parte* court. In the court *a quo's* view, the order was material and was of equal force to the pre-existing anti-dissipation orders that had been granted by Tsoka J and Van der Linde J, which the NDPP had disclosed and dealt with in her application. On this basis the court *a quo* found that the non-disclosure of the Vally J order related to a material fact that ought to have been disclosed.

[46] In order to determine whether the court a quo's conclusion was correct it is important to understand both the context and content of the Vally J order.

[47] The Vally J order was issued by consent on 26 September 2019 in an application involving a dispute between the Wood trustees, on the one hand, and Mr Pillay and Mr Nyhonyha, on the other. Although previous business partners in Regiments, these defendants had fallen out when Dr Wood established his company, Trillion. Dr Wood retained an interest in Regiments Capital by virtue of his shareholding in it, through his family trust. He alleged that he reasonably apprehended that Mr Pillay and Mr Nyhonyha, with whom he was in a bitter dispute, would dissipate the assets of Regiments to his family trust's disadvantage. He applied to court for an interdict.

[48] The Vally J order recorded the parties' settlement in the interdict application. The NDPP says that, properly understood, the order was not in the nature of an anti-dissipation order in the normal sense. Instead, its purpose and effect simply were to provide protection to the Wood trustees only. It provided no guarantee or protection to creditors, to the NDPP, or to anyone else. Dr Wood, Mr Pillay and Mr Nyhonyha were left at liberty to do jointly whatever they thought would serve their own interests. The NDPP points to a number of provisions of the Vally J order in support of its submission:

48.1 Clause 1.2 of the order provides that Regiments Capital shall, 'save as may be otherwise agreed with the [the Wood trustees]', apply the amounts it receives through various mechanisms towards settlement of listed creditors

listed and professional fees in respect of tax and legal services rendered to the Regiments' group.

48.2 Clause 1.5.1 provides that Regiments and its subsidiaries shall not make any distributions to their shareholders unless one of three conditions is met: (1) the distribution is proportionate to the shareholding between the shareholders; (2) the consent of the trustees of Dr Wood's trust consent, which consent shall not be unreasonably withheld: and (3) in terms of an order of court to the contrary.

47.3 Clause 1.5.2 provides that Regiments and its subsidiaries may encumber, or dispose of, or diminish the value of any of their assets, if they give written notice of five days to the applicants (the Wood trustees) in writing; or the Wood trustees have agreed in writing, which consent shall not be unreasonably withheld; or in terms of an order of court.

[49] It is quite plain from these provisions that the regime established under the Vally J order was to regulate between Dr Wood, Mr Pillay and Mr Nyhonyha how the assets of Regiments were to be dealt with, primarily to ensure that Dr Wood's interests in Regiments were protected. The Vally J order was not akin to the anti-dissipation orders granted by Tsoka J and Van der Linde J in July and December 2018 respectively. Those orders, which were granted at the behest of the Fund, prohibited (with limited exceptions) the Regiments companies and Mr Pillay and Mrs Nyhonyha from dealing in any way with their assets. They were anti-dissipation orders in the true legal sense. It was precisely because of the imminent settlement of the litigation between the Fund and the defendants that the NDPP proceeded to seek a restraint order. In the absence of the former anti-dissipation orders, the necessity for a restraint order was obvious.

[50] On the contrary, the Vally J order primarily governed relations between the parties to that litigation. It placed limitations on the powers of Dr Wood and Mr Nyhonyha to deal with Regiments assets. However, this was for the benefit of Dr Wood's interests, not the broader public interest. And, all of these limitations could be circumvented by agreement between those parties. It gave creditors no right to be paid because the parties could agree between themselves not to use

Regiments' assets to pay creditors. Further, it permitted a distribution of assets to shareholders, provided this was in proportion to their shareholding or, by agreement, in any distribution they wished.

[51] The Vally J order simply did not have anywhere near the same objectives and effect as either the Tsoka J or Van der Linde J anti-dissipation orders or a restraint order. The court *a quo* was wrong in its conclusion that it was 'of equal force' to the former orders and thus that it was materially relevant to the *ex parte* application. The Court *a quo*, in finding otherwise, misdirected herself. As the SCA noted in *Kyriakou*, the test for materiality in matters involving asset forfeiture involves the question of whether disclosure of the document in issue would have 'been the answer to a confiscation order'.[27] Quite obviously, in this case, the Vally J order, if disclosed was not the answer to the restraint application. Objectively speaking, therefore, it was not materially relevant to the *ex parte* application.

[52] In the circumstances, we agree with the submission by the NDPP that the order of Vally J did not have to be disclosed. It would have been of no assistance at all to Wright J when he considered making the restraint order. All it would have told him was that for reasons peculiar to their own dispute the defendants had agreed to certain limitations as to how Regiment's assets were to be dealt with. However, the limitations were governed almost entirely by the parties' relationship *inter se*, and they could do whatever they wanted with the assets, as long as they all agreed. The order could not affect the question whether Wright J should make the provisional restraint order (except perhaps persuade him to do so).

[53] Moreover, as a matter of objective fact, the order of Vally J did not bear on any issue which Wright J had to decide. It provided no answer to the application for a provisional restraint. If, as a matter of objective fact, it did not bear on any of issue which Wright J had to decide, it did not need to be disclosed. In any event, the court *a quo* failed to explain what the issue was which Wright J had to decide which was material and sufficiently relevant to the Vally J order. This, in our view, was a misdirection on the part of the court *a quo*.

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[27] Above n18 at para 129.

[54] In light of the above, we find no merit in the defendants' submission that there was very little likelihood of Dr Wood, Mr Pillay and Mr Nhyonyha reaching agreement to permit a dissipation of assets given the bad blood between them. We understand the defendants' submission to be that for this reason, for all practical intents and purposes, the Vally J order was an anti-dissipation order of far-reaching effect and for this reason was relevant and material to the restraint application. This submission asks the Court to speculate as to how the parties might conduct themselves in the future. Such an exercise could hardly have been expected of a Judge in Wright J's position. One wonders, then, of what assistance the disclosure of the Vally J order would have been. In any event, the fact remains that it simply was not an anti-dissipation order in any form approximating a restraint order. For this reason, its disclosure was not material.

[55] The NDPP furthermore submitted that, when Mahalelo J held that the NDPP should have disclosed the order to Wright J for him to decide whether it was material, she misconstrued and failed to perform her function. We agree. It was her task, on the return day, to decide whether there had been non-disclosure of material evidence.

[56] We turn to the non-disclosure of the Transnet settlement.

[57] By way of background, it is relevant to record that there were two settlement agreements involving different Transnet entities. The first was a settlement agreement between the Fund and the Regiments companies in terms of which the latter agreed to pay the Fund R500 million plus interest in full and final settlement of the Fund's civil claims against them. The Fund settlement agreement was concluded before the restraint application was made and was disclosed by the NDPP in her founding affidavit. The second settlement agreement, which was the subject matter of the Court *a quo's* decision to discharge the provisional restraint order was between the Regiments companies and Transnet. It was concluded on 2 October 2019, which was before the founding affidavit in the restraint application was commissioned. However, unlike the Fund settlement agreement, Adv Cronje made no reference to it in her affidavit.

[58] The Transnet agreement involved an undertaking by the Regiments companies to pay Transnet R180 million in full and final settlement of Transnet's civil claims against Regiments. The defendant's case is that the facts underpinning the Transnet claim were the same as those arising from the facts on which the restraint order is based, and that accordingly those claims have become settled as far as the Regiments defendants are concerned. It is common cause that the undertaking to pay was without any admission of liability on the part of the Regiment's companies. The Regiments entities alleged that they would pay Transnet 'in due course'. Mr Pillay stated in his answering papers filed on behalf of the Regiments defendants that payment of the R180 million was 'imminent before the restraint intervened'.

[59] The significance of the Transnet agreement, so the defendants alleged, is that as a result of the Regiments companies concluding both it and the Fund settlement agreement, it cannot be said that the Regiments defendants derived a benefit from the alleged conduct or remain in possession of alleged ill-gotten gains. Furthermore, so Regiments contended, as a result of its settlement agreements with the Fund and Transnet, there are no reasonable prospects that a confiscation order will be granted against them, alternatively, the restraint ought to be reduced by the amounts of those settlements. Consequently, they say that the Transnet settlement agreement was material and relevant to the restraint application and ought to have been disclosed to the *ex parte* Court.

[60] In the answering affidavit filed on behalf of the Regiments defendants, Mr Pillay averred that the NDPP 'either disregarded or was unaware that the Regiments defendants concluded a settlement agreement with Transnet'. However, he averred that she 'had to have been fully aware' of that settlement agreement 'by virtue of (the NDPP's) ongoing contact with Transnet'. He also referred to a presentation of Transnet's results by the Transnet CEO on 12 November 2019 in which he announced that the Regiments had concluded a settlement agreement with Transnet.

[61] In her replying affidavit, Adv Cronje stated that she became aware of the Transnet settlement only after the restraint order had been obtained. She had

raised the existence of that settlement in an affidavit filed by her on 22 January 2020 in support of the NDPP's application for a variation of the restraint order. She submitted that there could not have been a duty on her to disclose facts of which she was not aware.

[62] The Regiments defendants took a further point in their heads of argument to the effect that Adv Cronje must have known of the Transnet settlement agreement because it was referred to in the second half of an affidavit by Mr Nyhonyha, the first 13 pages of which were attached to the NDPP's founding affidavit. As this averment was not made by Regiments in its answering affidavit, Adv Cronje did not have an opportunity to answer to it. Despite this, the Court *a quo* noted that Adv Cronje had not disputed that she was in possession of Mr Nyhonyha's affidavit. The Court *a quo* concluded that: 'I am not persuaded that the NDPP became aware of the Transnet Settlement Agreement after the interim order was granted the more-so if it was publicly announced in the press a month before she applied for the interim order'.

[63] The Court *a quo* seems to have ignored the fact that the averment about Mr Nyhonyha's affidavit was never included in the answering papers and Adv Cronje had never had the opportunity to answer to it. The submission in heads of argument was not a valid basis on which to reject Adv Cronje's version that she did not know about the Transnet settlement agreement until after the restraint was granted. She disclosed the Transnet Fund settlement in the founding affidavit. Logically, there would have been no reason for her to have failed to disclose the Transnet settlement agreement had she indeed been aware of it.

[64] We find that the Court *a quo* erred in rejecting Adv Cronje's denial of her prior knowledge of the Transnet settlement. As the Constitutional Court held in *Thint*, a deponent cannot be expected to disclose facts of which she is unaware. The Regiments defendants submitted, however, that Adv Cronje failed in her duty, as stated in *REDISA*,[28] to take reasonable steps to make the necessary inquiries and investigations to determine the existence of the Transnet settlement.

[28] Above n25.

[65] The validity of this submission is linked to the question of whether the existence of the Transnet settlement was relevant and material to the restraint application. For it is only in respect of such relevant and material facts that the duty to investigate can arise.

[66] The NDPP submitted in this regard that the defendants misconstrue the relevance of the Transnet agreement to the restraint application. The respondents agreed to pay Transnet R180 million. However, the NDPP submitted that an agreement to make a payment to Transnet in settlement of civil claims, without any admission of liability, is not relevant to the determination of any of the issues before the court in a restraint application. The relevance of the Transnet agreement, as posited by the defendants, is that the amount agreed to be paid to Transnet ought to be deducted from the computation of the value of the benefit they derived and hence from the quantum of the restraint order. As such, so the argument proceeds, the *ex parte* Court ought to have been apprised of the agreement to pay.

[67] However, it is the gross, and not net benefit that is relevant to restraint proceedings. The Transnet agreement, at best, speaks to the question of net benefit and it is thus irrelevant to the question of the quantum of the restraint order. It is so that an actual payment to a victim of the alleged criminal offences may have relevance to the question of whether the quantum of the restraint order is constitutionally compliant (in other words, not a disproportionate limitation on property rights), an agreement to pay, standing alone, is irrelevant.

[68] The defendants acknowledged that Regiments had not paid the settlement amount to Transnet. Until such payment was made, the agreement was not relevant to the restraint proceedings. Adv Cronje was under no obligation to investigate and inquire into the Transnet settlement's existence.

[69] Therefore, we are of the view that the Transnet agreement was not material to the application for a provisional restraint order. Its non-disclosure was not a valid reason to discharge the provisional restraint and the Court *a quo* erred in finding that it was.

[70] As noted in the judgment of the Court *a quo* there were also other alleged non-disclosures raised by Regiments which that Court did not find necessary to traverse.

[71] These were, first, the alleged non-disclosure of the interests of two minority shareholders in the first respondent, Ashbrook, namely Rorisang Basadi Investments Holdings (Pty) Ltd (Rorisang) and Lemoshanang Investments (Pty) Ltd (Lemoshanang). Second, Mr Pillay and Mr Nyhonyha's alleged offer in June 2019 to co-operate with the investigation. Third, the manner in which the restraint order was implemented.

[72] We do not intend delving in detail into these alleged non-disclosures. Suffice to say, that there is no merit in the contentions relating to these other alleged non-disclosures.

[73] As to the first, regarding Rorisang and Limoshanang, the founding affidavit specifically identified them as minority shareholder of Ashbrook and excluded their shareholding from realisable property subject to restraint. Further averments made about the alleged seizure of their assets by the curator were shown in the replying affidavit to have been incorrect.

[74] As to the second alleged non-disclosure, it involves an email sent by an attorney acting on behalf of Regiments Capital to the NDPP on 7 June 2019. The email read as follows:

'We represent Regiments Capital (Pty) Ltd.

I would like to meet with you to introduce myself and discuss how best the current directors, Mr Niven Pillay and Mr Litha Nyhonyha, might be able to assist your investigations. I am currently available until 13:00 on Tuesday, 11 June, and for most of the day on the 12th and 13th.

I would appreciate it if you could revert as soon as possible.'

[75] The Regiments defendants say that the NDPP was duty-bound to disclose their 'offer of co-operation' to the *ex parte* Court. Instead, so the submission continues, she proceeded to obtain the 'draconian order' without making use of their invitation to interview Mr Pillay and Mr Nyhonyha.

[76] We fail to see how this email has any material relevance to the restraint proceedings. The email was stated in the broadest of terms, making no reference to any possible restraint proceedings. As the NDPP points out, it contained no acknowledgement or even intimation of wrongdoing on the part of Regiments, Mr Pillay or Mr Nyhonyha. There was no indication that they would be willing to disgorge any benefits improperly obtained, or indeed any hint of an undertaking not to dissipate assets.

[77] The third alleged non-disclosure was based on an allegation that in the immediate aftermath of obtaining the provisional order the NDPP deliberately effected service on some parties and held back on serving others so as to interfere with the implementation of the Transnet Fund settlement agreement. It was also averred that as part of this scheme, the NDPP gave a copy of the 'secret order' to Nedbank but instructed the bank to 'hold back on executing the order'. The NDPP replied fully to these averments in her answering affidavit explaining how they were mistaken both as to the facts and the Regiments defendants' interpretation of what transpired. We are satisfied that there is simply no basis upon which this averment of non-disclosure can be sustained.

[78] For all these reasons, we are of the view that there was no material non-disclosure by the NDPP in its founding papers as alleged by the Regiments defendants in their answering affidavit.

[79] In their heads of argument filed in support of their opposition to the appeal Dr Wood and his associated respondents raised additional averments of non-disclosure. Their particular submissions on non-disclosure were not alluded to by the Court *a quo* in its judgment. However, as counsel for Dr Wood and his respondents sought to persuade us that the submissions warranted a dismissal of the appeal, we must deal briefly with them.

[80] Dr Wood contends that the failure of the NDPP to disclose 'the existence and/or contents' of a criminal docket in the founding affidavit was such as to entitle the Court *a quo* to decline confirmation of the provisional restraint order.

[81] In his answering affidavit, Dr Wood noted that no indictment had been attached to the founding papers. He asserted that 'no docket has been

registered'. In her replying affidavit the NDPP confirmed that a docket had been registered on 9 June 2017. The NDPP also explained what further developments had taken place subsequently, including the fact that Adv Cronje had authorised an investigation on 31 July 2019 with a focus on the critical role played by the Regiments companies and their directors.

[82] Unsurprisingly, therefore, there is no doubt as to the existence of a docket. Dr Wood's complaint appears to be that the NDPP was under a duty to disclose the content of the docket as this might have affected the decision of the *ex parte* Court. The submission here is that if provided with a copy of the docket the *ex parte* Court would have understood that the investigation was incomplete, and a prosecution was not imminent.

[83] There is no duty on the NDPP to attach a copy of the docket to an application for a restraint order. Nor is the NDPP required to provide a charge sheet to the Court. Section 25(1)(b) provides that there must be reasonable grounds for believing that a defendant is to be charged. As the SCA found in *Rautenbach*:[29]

'The section requires a court to be satisfied that the person concerned is to be charged with an offence and not that the prosecution is imminent …. In my view that requires a court only to be satisfied that a prosecution is seriously intended and not that a charge sheet has already been drawn.' (emphasis added)

[84] Based on the jurisdictional requirements for the grant of a restraint order, the *ex parte* Court did not have to concern itself with whether or not a prosecution was imminent. It follows that the disclosure of the content of the docket was not relevant or material to the exercise of the power and discretion to grant the provisional restraint order.

[85] Even if we are wrong in our view that there was no material non-disclosure by the NDPP on any of the grounds averred, we nevertheless believe that the court *a quo* should have exercised its discretion in favour of the NDPP.

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[29] Above n5 at para 20.

[86] The SCA has explained that in exercising this discretion, a Court must have regard to the following factors: the extent of the non-disclosure; the question whether the judge hearing the *ex parte* application might have been influenced by proper disclosure; the reasons for non-disclosure; and the consequences of setting the provisional order aside.

[87] Where a Court exercises a discretion, it must explain how the relevant considerations bear on, and result in its decision. While Mahalelo J referred to these considerations, she did not undertake this analysis, and did not explain how they justified her decision to exercise her discretion against the NDPP.

[88] In our view, the Court *a quo* ought to have exercised its discretion not to discharge the interim restraint for the following reasons. The extent of the non-disclosure was limited, in the context of this case. As we have already indicated, even if we are wrong in our assessment that the matters not disclosed were not relevant and material and did not require disclosure, they were at best peripheral to the central issue to be determined, namely whether the NDPP had satisfied the court, on reasonable grounds, that a confiscation order might be made against the defendants upon the conclusion of criminal proceedings against them. The NDPP provided sufficient reasons that were factually undisputed on the papers for not including the matters complained of in her founding affidavit. In particular, with reference to the Transnet settlement agreement, there was no evidence to contradict the explanation on oath by the Appellant's deponent that she only became aware of the settlement after the founding affidavit was filed, and that she drew attention to it as soon as she became aware of it in her supplementary affidavit on 23 January 2020, and attached it to her replying affidavit. The consequences of discharging the provisional restraint order were grave in circumstances where the NDPP litigates in the public interest, and the NDPP had shown that she intends charging the respondents with corruption, which the Constitutional Court has said is potentially harmful to our most important constitutional values.

[89] As correctly submitted by the NDPP, even if, contrary to our primary finding, the NDPP erred in not disclosing the identified facts, it was an error of

judgment as to the sufficiency of relevance of those facts. In a large and complex case such as this it ought not to be punished with a discharge of the interim order.

[90] For all these reasons, we conclude that the Court *a quo* should not have discharged the provisional restraint order on the basis of alleged material non-disclosure. In any event, it should have exercised its discretion in favour of the NDPP.

[91] That then brings us to the merits of the application for a restraint order and the disputes residing under that heading.

The Offences – are there reasonable grounds for believing that the defendants may be convicted of an offence?

[92] Section 25(1)(a) of POCA gives the court a discretion to grant a restraint order if it is satisfied that there are reasonable grounds to believe that a confiscation order may be made. This entails, in the first place, that there are reasonable grounds to believe that the relevant defendant may be convicted of relevant offences. The second related question is whether there are reasonable grounds for believing that the defendants benefited from the offences.

[93] As indicated earlier, the case of the NDPP is that the defendants will be prosecuted at least in respect of the offences of corruption, money laundering and fraud.

[94] For purposes of the restraint application the NDPP relied on evidence obtained from a variety of sources, including documents and transcriptions of sworn testimony provided to the State Capture Commission; forensic legal and technical investigations undertaken at the request of state entities; and papers filed in the High Court in civil proceedings relating to and arising from actions launched against some of the defendants by the Transnet Fund.

[95] In summary, the NDPP avers that this evidence demonstrates that Dr Wood, Mr Pillay and Mr Nyhonyha, who were directors of the Regiments companies at the relevant time, together with Salim Essa (Mr Essa) and Kuben Moodley (Mr Moodley), who were involved with an entity called Albatime, formed a criminal conspiracy.

[96] In the first stage, the parties conspired to ensure that McKinsey Incorporated would appoint Regiments Capital as its 'supplier development partner' under a contract it had secured with Transnet to provide advisory services in relation to the acquisition of 1064 locomotives. A condition of Regiments Capital's appointment was that it would pay a substantial part of the fees which it was to receive from that appointment to companies nominated by Mr Essa and a smaller portion to a company nominated by Mr Moodley. According to the NDPP, neither Mr Essa or Mr Moodley provided any services except to facilitate the conclusion of Regiments Capital's appointment to the McKinsey contract. The clear inference is that there was no lawful basis for the payments made to them or to companies nominated by them.

[97] Subsequently, Regiments Capital irregularly replaced McKinsey as the lead Transnet advisor. It used its position to represent to Transnet that it was entitled to fees to which it was not entitled, and to receive payment of those fees. It also gave Transnet advice which, by inflating the price paid by Transnet for the locomotives, provided further financial benefit to the co-conspirator, Mr Essa.

[98] The NDPP says that in addition, after Regiments Capital tendered for providing asset management services to the Fund, its subsidiary, Regiments Fund Managers, was appointed to manage a significant portfolio on behalf of the Fund. In that capacity Regiments Fund Managers, together with its co-defendants, including Regiments Securities, committed a number of offences and other (non-criminal) illegalities. The Fund instituted its action referred to earlier against the defendants and other parties flowing from that conduct.

[99] Thus, it is the case of the NDPP in her founding papers that Regiments Capital corruptly and unlawfully obtained contracts from Transnet, either directly or (initially) as sub-contractor to McKinsey. She also alleges that the way in which those contracts were implemented, and the proceeds dealt with were corrupt to the core. It is furthermore averred by the NDPP that the corrupt nature of those contracts, the fraudulent manner in which the contracts were implemented, and the offences committed, have all been identified.

[100] As will become apparent from our consideration of the case below, one of the glaring features of the defendants' responses in their answering affidavits is they do not commit to a version on the facts. The defendants barely take issue with the factual allegations made by the NDPP, and where they do, they fail to engage in any substantial way with the averments against them.

Corruption in respect of Transnet

[101] The statutory offence of corruption is created by the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004 (PRECCA). The respondents, so the NDPP contends, committed at least three statutory offences of corruption.

[102] Firstly, they breached s 3 of PRECCA[30], which establishes the general offence of corruption. They did so in that they directly or indirectly agreed to give, and gave, gratification to or for the benefit of Mr Essa, Mr Moodley, as well as the Guptas and companies associated with them, to influence McKinsey or Transnet to award them the contracts in question, in a manner that amounted to the illegal, dishonest or unauthorised exercise of their powers, duties or functions, and that amounted to the violation of a legal duty or a set of rules.

[103] Secondly, so the NDPP alleges, the defendants breached s 4 of PRECCA,[31] which establishes offences in respect of corrupt activities relating to

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[30] Under s 3:
'Any person who. directly or indirectly-
(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person: or
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
in order to act personally or by influencing another person so to act, in a manner-
(i) that amounts to the-
(aa)) illegal, dishonest, unauthorised, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the,
exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation
(ii) that amounts to-
(*aa*) the abuse of a position of authority:
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules:
(iii) designed to achieve an unjustified result: or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything.
is guilty of the offence of corruption.'

[31] The relevant part of s 4 reads as follows:
'(1) Any-
(a) …
(b) Person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

public officers. They did so in that they directly or indirectly agreed to give, and gave, gratification to or for the benefit of Mr Essa, Mr Moodley, the Guptas and companies associated with them to influence Transnet to award them the contracts in question, in a manner that amounted to the illegal, dishonest or unauthorised exercise of its powers, duties or functions, arising out of a statutory, contractual or other legal obligation.

[104] Third, s 12 of PRECCA,[32] which establishes offences in respect of corrupt activities relating to contracts, was breached in that the defendants directly or indirectly agreed to give, and gave, gratification to or for the benefit of Mr Essa, Mr Moodley, the Guptas and companies associated with them in order to improperly influence the procurement of contracts from McKinsey or Transnet.

[105] The case of the NDPP is that the corruption offences have their origin in a meeting which took place in Sandton during or about October 2012. Information about the October 2012 meeting was given on 6 October 2017 by Mr Pillay and Mr Nyhonyha to a Mr Ian Sinton (Sinton) of Standard Bank. He subsequently gave evidence about the meeting to the State Capture Commission. A copy of his witness statement that served before the Commission is attached to the founding affidavit.

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in order to act, personally or by influencing another person so to act, in a manner-
(i) That amounts to the-
(aa) illegal, dishonest, unauthorized, incomplete, or biased; or
(bb) …,
exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
(ii) …
(iii) …; or
(iv) …
(v) …
is guilty of the offence of corrupt activities relating to public officers.'

[32] The relevant portion of s 12 reads as follows:
'(1) Any person who, directly or indirectly-
(a) …; or
(b) Gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-
(i) in order to improperly influence, in any way-
(aa) the promotion, execution or procurement of any contract with a public body, private organization, corporate body or any other organization or institution; or
(bb) …; or
(ii) …,
is guilty of the offence of corrupt activities relating to contracts.'

[106] Mr Sinton explained in his witness statement that the meeting was called by Standard Bank, which was the Regiments' entities bank at the time, following adverse reports in the media concerning Regiments, McKinsey and their relationship with Transnet. In calling the meeting, Standard Bank was complying with what it perceived were its obligations under the Financial Intelligence Centre Act (FICA), PRECCA and POCA to refrain from doing business involving suspicious transactions or from dealing in funds it knows or ought to suspect are the proceeds of crime or part of corrupt activity. Mr Sinton sought information from Regiments regarding its dealings with Transnet and McKinsey.

[107] In a nutshell, Mr Pillay and Mr Nyhonyha told Mr Sinton that during or about October 2012, Mr Pillay and Dr Wood were invited by Mr Moodley, who is a friend of Mr Pillay, to a meeting in Sandton. At that meeting, they met Mr Essa for the first time. He was accompanied by a Mr Vikas Sagar, a principal of McKinsey.

[108] Mr Pillay and Wood were told that McKinsey had concluded a consultancy contract with Transnet, who required McKinsey to appoint a black-owned 'supplier development partner' (SDP) for at least 30% of the consultancy fees to be earned on the contract. McKinsey offered to appoint Regiments Capital as its SDP, subject to Regiments Capital agreeing to share its fees with Mr Moodley and Mr Essa, who were to receive respectively 5% of the fees of Regiments Capital and 30% of all income derived by Regiments Capital, from the Transnet contract. Neither Mr Essa nor Mr Moodley would render any services beyond introducing Regiments Capital to McKinsey and Transnet. This offer was accepted by Regiments Capital.

[109] Pursuant to this agreement, Regiments Capital subsequently transferred more than R210 million from its account to two companies, Chivita and Homix, on behalf of Mr Moodley and Mr Essa. These amounts were the agreed 5% and 30% respectively and came from the income earned by Regiments Capital from the Transnet consultancy contracts.

[110] In November 2013 Dr Wood increased Essa's share of the proceeds from the Transnet consultancy work to 50% from 30%. Mr Pillay and Mr Nyhonyha told Mr Sinton that this was done without their knowledge.

[111] When Mr Sinton challenged Mr Pillay and Mr Nyhonyha on how Regiments capital could remain profitable if it paid out 35% and later 55% of its income to entities which provided no service other than 'facilitation', they explained that:

'the consultancy rates that McKinsey had agreed with Transnet were 400% more than Regiments would have been willing to agree to had it negotiated directly with Transnet'.

[112] Subsequently, Regiments Capital secured further Transnet contracts. It confirmed that it decided that it should 'honour' the revenue share agreements in respect of these mandates as well even though neither Mr Moodley nor Mr Essa had been involved in these specific subsequent Transnet procurement processes. This Regiments did so on the basis that without the 'introduction' provided by Mr Moodley and Mr Essa, Regiments Capital would 'not have been well placed' to win these contracts.

[113] The NDPP avers that the payments to Mr Moodley, Mr Essa, the Guptas and their nominees were 'gratifications' and constituted corruption in terms of PRECCA.

[114] Regiments Capital subsequently provided Standard Bank with a letter confirming their oral representations. Standard Bank terminated its relationship with Regiments as a result of its concerns about Regiments' agreement to pay 30% of its income from Transnet contracts to Mr Essa despite no services being rendered by him.

[115] It bears emphasising that the aforegoing facts are not materially disputed by the defendants in their answering affidavits. Neither Mr Pillay or Mr Nyhonyha dispute the correctness of Mr Sinton's evidence. Dr Wood disputes that he was at the October 2012 meeting. He makes general denials of parts, but not all, of what Mr Pillay and Mr Nyhonyha told Mr Sinton was agreed and implemented. Significantly, he gives a bare denial of the averment that he increased Mr Essa's share under the agreement to 50% without the other defendants' knowledge. He gives the same form of denial to the averment that Regiments Capital paid out R210 million to Mr Essa and Mr Moodley from the monies received under the Transnet contract with McKinsey.

[116] On behalf of the Regiments defendants in their answering affidavit, Mr Pillay accepts as common cause that 35% of the payments from McKinsey-related work did not come to Regiments. Dr Wood asserts that Regiments Capital had the relevant skill and staff to be sub-contracted to McKinsey, and that all interaction between McKinsey and Transnet was 'beyond scrutiny and professional'. However, it is significant that none of the defendants assert that there was any justifiable basis for the payments to Mr Essa and Mr Moodley, or, for that matter, the inflated contract prices.

[117] Mr Budlender, on behalf of the NDPP, submitted on this basis that on Regiments' own version all work and all payments which Regiments received from Transnet were the result of the 'introduction' provided by Mr Moodley and Mr Essa. The arrangement entered into at the meeting during October 2012 was corrupt, and therefore all of the payments which Regiments received from Transnet were the proceeds of that crime.

[118] As we have already indicated, the defendants do not put up a substantiated version to challenge the substance of the corruption case made out by the NDPP. Indeed, the Regiments defendants asserted that they could not answer to the merits of the offences in their answering affidavit as this would undermine their criminal defence later. They focused instead on criticising the nature of the evidence relied on by the NDPP in her affidavits in support of the restraint application. The Regiments defendants asserted that the NDPP's affidavit was 'replete with hearsay and conjecture'; they bemoaned what they described as the absence of first-hand evidence of persons with actual knowledge of the events and the reliance, instead, on expert evidence.

[119] Despite electing not to answer on the merits of the offences in their answering affidavits, in their heads of (and oral) argument, the Regiments defendants proceeded to conduct an analysis of the elements of the corruption (and money laundering) charges with a view to pointing out what they said were weaknesses in the NDPP's case in this regard. This was with a view to persuading the Court that the case against the defendants was speculative and without any prospect of ultimate success.

[120] Similarly, Mr Pillay stated in his answering affidavit that as he did not have the benefit of being privy to the exact nature of the charges against him, he was not in a position properly to deal with the allegations against him. He gave a general denial of his involvement in any criminal activity. In heads of argument filed on Mr Pillay's behalf, Mr Cilliers submitted that this general denial was sufficient to defeat the NDPP's case for a restraint order against Mr Pillay.

[121] Mr Nyhonyha also averred in his answering affidavit that it would be 'impossible' for him to answer allegations levelled against him that were in 'vague, non-specific and speculative terms'. He relied on a general and 'categorical' denial that he was involved in the offences identified. In written and oral argument, it was submitted by Mr Dörfling on his behalf that there was not a shred of evidence against his client. Mr Dörfling referred us to documents suggesting that Mr Nyhonyha was no longer participating in the day-to-day operations of Regiments since 2014. On this basis, it was asserted that the attempt to link him with the offences allegedly committed through the Regiments entities was 'disingenuous'. This was not an averment made by Mr Nyhoyhna in his answering affidavit, and the NDPP did not have an opportunity to deal with it.

[122] It was submitted on behalf of Dr Wood that the evidence of what Mr Pillay and Mr Nyhonyha told Mr Sinton is inadmissible against Dr Wood because of the principle that in criminal proceedings an extra curial statement made by one accused is inadmissible against another accused. On this basis it was submitted that in the absence of the NDPP indicating that it is in possession of other evidence linking Dr Wood to the October 2012 agreement, there is no reasonable expectation that a court may convict him of offences flowing from it. Ms Killian for Dr Wood sought to persuade us that the first three defendants could not be painted with the same brush, and that there was an absence of sufficient evidence in respect of her client.

[123] In the above paragraphs we have summarised as briefly as possible the submissions made on behalf of the defendants on the question of whether the NDPP has satisfied the jurisdictional requirement for the grant of a restraint order insofar as this pertains to whether there are reasonable grounds for believing that

the defendants may be convicted of the offences of corruption under PRECCA. These submissions were made over many days of argument before us, with the appeal being set down for five days.

[124] Despite the passionate submissions made by counsel for the defendants over the extended period of the hearing, it is important, in our view, not to lose sight of the legal principles applicable, and to the common cause facts of this case.

[125] Earlier in this judgment we recorded the relevant dicta from *Kyriakou*[33] and *Rautenbach*[34] which establish the principles on which it is to be determined whether the NDPP has met the requirements for the grant of a restraint order. In summary, these are the following:

125.1 A mere assertion that a confiscation order may be made is not sufficient.

125.2 However, the NDPP is not required to prove as a fact that a confiscation order will be made.

125.3 Nor does the Court have to be satisfied that the defendant is probably guilty of an offence, or that she probably benefitted.

125.4 There is no room in this inquiry for the application of the principles and onus ordinarily applicable in motion proceedings.

125.5 All that it is required is that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. And

[33] Above n18.
[34] Above n5.

what is required is no more than evidence sufficient reasonably to support the possibility of a conviction.

125.6 The Court must be made aware of at least the nature and tenor of the evidence. It may not rely merely on the NDPP's opinion.

125.7 The Court is not called upon to decide the veracity of the evidence. It must be satisfied only that the evidence might reasonably be believed. Manifestly false or unreliable evidence cannot be relied upon.

125.8 Not all the evidence must be placed before the Court.

[126] These principles expose the weaknesses of the criticisms based on the evidence relied on by the NDPP as asserted by the defendants. At this stage of the proceedings the NDPP does not have to produce for this Court all the evidence it will rely on for purposes of the prosecution. In fact, the NDPP makes it clear in her affidavits that the investigation is ongoing and more evidence is likely to come to light. The NDPP does not say that it will rely on the witness statement Mr Sinton's testimony before the State Capture Commission for purposes of the criminal trial, and with good reason. Obviously, it will have to produce admissible evidence from Mr Sinton at the criminal trial, but it is not suggested by any of the defendants that the NDPP will not be in a position to do so. The present proceedings are not criminal, and so questions of the admissibility thereof for purposes of the criminal trial, whether in general or in respect of Dr Wood specifically, are irrelevant.

[127] None of the evidence relied on by the NDPP to found reasonable grounds for believing that the defendants might be convicted on the corruption charges (or indeed any of the other offences) is manifestly false or unreliable. This is underlined by the crucial fact that the defendants have failed to put up any substantial answer to the NDPP's case against the defendants on these offences. Consequently, the following facts are common cause:

127.1 The evidence of Mr Pillay and Mr Nyhonyha about the October 2012 deal struck with McKinsey. Mr Sagar represented McKinsey at this meeting. In Mr Pillay's affidavit deposed to on behalf of the Regiments defendants, he states that Mr Essa appeared to have a pre-existing relationship with

Mr Sagar, and that Mr Moodley appeared to have approached Mr Sagar through Mr Essa.

127.2 This was the foundational agreement underpinning the case against the defendants.

127.3 Under this agreement Regiments agreed to pay Mr Essa and Mr Moodley sums exceeding R200 million for doing nothing more than setting up the introductory meeting between Regiments Capital and McKinsey.

127.4 Regiments Capital and all three of the directors, being Dr Woods, Mr Pillay and Mr Nyhonyha implemented the deal. They knew about it, they did not distance themselves from it, and they implemented it. They do not deny this in any material sense in their answering affidavits.

[128] Added to this is the failure by the defendants to offer any lawful justification for the substantial payments to Mr Essa and Mr Moodley. It is difficult to draw any other inference from this common cause evidence but that a criminal court may find that this foundational agreement was corrupt. In effect, Mr Pillay and Mr Nyhonyha bound Regiments Capital to a deal in which it agreed to give away a substantial portion of the fees it would earn as the SDP to Mr Essa and Mr Moodley, who had smoothed Regiments' path. Dr Wood was part and parcel of the implementation of the scheme. There are reasonable grounds for believing that a criminal court may find that these payments were gratifications and that in involving themselves in this scheme, the defendants engaged in corrupt activities under PRECCA.

[129] We are therefore satisfied that there are reasonable grounds for believing that the defendants may be convicted of corruption on the basis of the evidence relating to the October 2012 agreement and its subsequent implementation.

Fraud

[130] The NDPP also contends that there are reasonable grounds for believing that the defendants may be convicted of fraud arising from several incidents that have come to light from investigations into the relationship between Regiments and Transnet.

[131] The NDPP's contention relates to the appointment of Regiments Capital in the first place. Here, the NDPP avers that the appointment of Regiments as sub-contractor to McKinsey was itself unlawful in terms of the Public Finance Management Act 1 of 1999 (the PFMA) and achieved by fraud. She says that Regiments was culpably party to those appointments.

[132] On 26 July 2012, Transnet awarded a contract for the provision of transactional advisory services in respect of the acquisition of 1 064 locomotives to a consortium headed by McKinsey. Regiments was at that time not part of the consortium. Subsequent to the October 2012 meeting, Regiments was systematically inserted into the contract, without any proper procurement process having been followed for its appointment, as required by the PFMA. This was done at the expense of two other members of the original McKinsey consortium, namely an entity by the name of Lerama and Nedbank, both of whom were removed from the contract, paving the way for Regiments Capitals irregular appointment.

[133] Save for bare denials, and an assertion that Regiments Capital had the requisite skill to perform the work, and the correct BBBEE credentials, none of the defendants deal in any substantial manner with the irregularity of their appointment under the PFMA. Once they were appointed, however, they were entitled to payment of their invoices, and obliged under the October 2012 agreement to honour their obligations to Mr Essa and Mr Moodley who, to the defendants' knowledge, would contribute nothing in terms of services rendered under the contract with Transnet.

[134] As noted earlier, Regiments Capital ultimately replaced McKinsey as the lead adviser on the locomotive project. This occurred in circumstances where the original letter of intent (LOI) between McKinsey and Transnet had lapsed after two extensions. It lapsed on 1 December 2013. Notwithstanding it having lapsed, Regiments Capital and Transnet purported to amend the LOI on 4 February 2014 providing for the transfer of the consortium's funding and financing services to Regiments Capital. In a letter provided by McKinsey subsequently, it stated that it had ceded its rights under the LOI to Regiments Capital on 5 February 2014,

that is, a day after the purported amendment of the lapsed LOI by Regiments Capital and Transnet. Not only did Regiments Capital become the lead advisor in place of McKinsey under Transnet's locomotive project without any PFMA compliance, but the substitution of Regiments Capital was also executed under a process that appears to have been unlawful and fraudulent.

[135] None of the defendants deal substantially with these facts and averments. In the circumstances, it is difficult to avoid, and we can find no reason to avoid, the conclusion that there are reasonable grounds for believing that the respondents may be convicted of the offence of fraud in relation to Regiments Capital's appointment under the locomotives project contract with Transnet.

[136] In addition to the alleged fraud relating to their appointment, the NDPP contends that this corrupt and unlawful conduct was then compounded by the fraudulent inflation by Regiments of its fees with the connivance of senior management in Transnet. This aspect of the defendants alleged fraudulent conduct is dealt with in a forensic investigation report by MNS Attorneys (MNS), who had been appointed by Transnet to conduct a forensic investigation into alleged irregularities in the locomotives project. The NDPP relies on the findings of the report and attaches copies of two volumes of the report to the founding affidavit.

[137] Under the amendment of the LOI entered into between Transnet and Regiments Capital the master service agreement allocated a fixed fee to the latter of R13,5million for 'technical evaluation and execution services' which included 'the calculation of escalation and hedging costs'. The MNS report detailed that on 16 April 2014 a letter from Regiments Capital to Transnet, and an internal Transnet memorandum signed by Anoj Singh (Mr Singh), argued for the amendment of the remuneration model to a success fee or risk sharing fee. This was ostensibly on the basis that Regiments Capital had secured savings of R20 billion in respect of future inflation-related costs and foreign exchange hedging costs for Transnet, together with an alleged overall reduction of the overall transaction cost from R68 to R50 billion. Despite strong internal opposition by Transnet official, who, among other things, disputed that Regiments Capital had

secured significant savings for Transnet, the CEO of Transnet, Mr Molefe, approved the revised remuneration model the following day. The estimated fees on the new fee structure were R78.4 million. Regiments Capital was actually paid R79,23 million (inclusive of VAT) at the end of April 2014.

[138] None of the defendants took substantive issue with these aspects of the MNS report in their answering affidavits.

[139] MNS's findings pointed out that, because of the involvement in the contract of Regiments Capital, the Estimated Total Cost (ETC) of the locomotives had actually escalated from R38.6 billion to R54.5 billion. They estimated that the price ultimately paid for the locomotives was at least R8.8 billion more than could be justified. MNS concluded that not only was Transnet improperly advised to significantly over-pay for the locomotives: in addition, Regiments Capital undertook no services that would have justified its being paid a risk sharing fee. This is because it was the bank, JP Morgan, that ultimately hedged the financial risk, and the structuring of the transaction was due to ideas put forward by Transnet.

[140] Another investigation was conducted by Fundudzi Forensic Services, which was commissioned by the National Treasury to investigate and report on alleged irregularities at Transnet. Extracts from its report were also attached to the NDPP's founding affidavit. Like MNS, Fundudzi also concluded that the ETC was overstated by R9.2 billion. Fundudzi found too that Regiments Capital had advised Transnet to agree to the escalation despite knowing that it was an overstatement. Further details of the Fundudzi report are set out in the founding affidavit, explaining steps that were taken by high-ranking Transnet officials, including Mr Anoj Singh to mislead the Transnet Board into agreeing to the escalation of costs.

[141] Yet another investigation concluded that there had been no savings to Transnet. This was the forensic investigation commissioned by Transnet into the acquisition of the locomotives which was conducted by Werksmans Attorneys. Professor Wainer was a forensic auditor on the investigation. On the purported R20 billion savings effected by Regiments Capital, which justified the escalated

R78.4 million fees, Prof Wainer found that Regiments Capitals' calculations pertaining to the purported savings were 'absurd, obviously wrong and grossly misleading'. He described the claimed R20 billion savings as 'bogus': in truth there had been no saving at all. He said that in real terms, the acceleration had a negative financial effect on Transnet:

'Not only did the shortening of the period lead to an increase in the actual price to be paid to the supplier, and not only did that additional price have to be paid over the period of three years instead of six years, but in addition, the shortening also led to a demand by the suppliers for far larger advance payments.'

[142] In addition to the first fee escalation of R78.4 million, MNS reported that Transnet approved a further escalation of the contract price for transaction advisory services and support in respect of the locomotives project, from R99.5 million to R265.5 million. This was to permit an additional payment of R166 million to Regiments Capital in respect of securing a loan from the China Development Bank for payment of the locomotives.

[143] MNS found that the scope of work in respect of which this payment was made was already provided for in the existing agreement, which allocated a fixed fee of R15 million in respect of funding and financing services to Transnet on the locomotives project. MSN's findings were supported by an expert report by Dr Jonathan Bloom, which he confirmed in his evidence under oath to the State Capture Commission. Dr Bloom concluded that at least 95% of the work scoped as part of the extended contract was already covered by the existing contract for services. The extended contract was 'wordsmithed to imply either an extension of the scope of the LOI or totally revised scope of tasks stated in the said LOI'.

[144] The only response from any of the defendants on this averment was from Dr Woods, who stated that '*as far as (he) recall(s) there were two separate contracts entered into in this regard*'. He provided nothing to substantiate this and gave no further details in elaboration.

[145] Dr Bloom also expressed the view that the subsequent R166 million-fee charged in respect of securing the China Development Bank loan was

significantly in excess of market related fees for similar transactions. In Bloom's opinion it was overstated by some R90 million.

[146] In the answering affidavits the defendants say no more than that the adjustments of Regiments Capitals' fees were justified and market related. In submissions made on behalf of the Regiments defendants, Dr Bloom's expertise was challenged, in broad terms and without any substance.

[147] The defendants also do not answer to the above-described findings of the Fundudzi report and Prof Wainer. Dr Wood states that they do not implicate him personally, but apart from that he 'notes' what the NDPP avers from these reports in the founding affidavit. The Regiments defendants do not deal with them at all in their answering affidavit, and nor do Mr Pillay and Mr Nyhonyha.

[148] What is not disputed is what Mr Pillay and Mr Nyhonyha told Mr Sinton, namely that Regiments Capital remained profitable despite channelling 35% and later 55% of its income from Transnet contracts to Mr Essa and Mr Moodley precisely because the consultancy rates McKinsey had agreed with Transnet for the locomotives project were inflated by 400%. Regiments Capital stepped into that project as lead adviser. On the common cause facts, the blueprint for inflated fees was laid down from inception. In this context, the MNS and Fundudzi findings, as well as the opinion of Dr Bloom, ring true.

[149] It follows also from the uncontested evidence, that Regiments Capital received substantially inflated fees through what, on reasonable grounds, appear to have been fraudulent means. Misrepresentations were made to Transnet that Regiments had saved it R20 billion as a basis for the fee increases. However, this was not true: in fact, Regiments' involvement in the locomotives project led to an increase in costs for Transnet. None of the directors of Regiments Capital attempts to justify the inflated fees it received from Transnet. All of them were aware that substantial portions of those fees would be siphoned off to Mr Essa and Mr Moodley, while at the same time retaining Regiments Capital's profitability. The only explicable basis for their implementation of the foundation agreement is that they had knowledge of and joined in the fee inflation scheme.

[150] There are thus reasonable grounds to believe that the defendants may be found to have committed fraud by a criminal court for their conduct in the transactions involving the locomotives project.

Offences in respect of the Transnet Fund

[151] The NDPP further contended in her founding affidavit that the evidence shows a similar pattern of corruption in the relationship between the Regiments companies and the Fund. This appears from the evidence contained in an affidavit of Mr Maritz, the Principal Officer of the Fund, in the litigation between Dr Wood, Regiments, the Fund and Capitec. In a nutshell, Mr Maritz stated that over a period of three years, from November 2012 to October 2015, the directors of the Regiments companies sought and managed to procure Regiments Fund Managers' appointment to administer a portfolio of assets of the Fund at what he said were hugely inflated rates.

[152] The relevant evidence of Mr Maritz is dealt with in some detail in the NDPP's founding affidavit. In essence, it shows that in Regiments Capital's, and ultimately Regiments Fund Managers,' relationship with the Fund, the same pattern of irregular appointment and payment of substantial fees to 'business development partners' was followed as in relation to Transnet. In this case, the business development partners in question were Gupta-linked entities. In brief:

152.1 A 'co-operation agreement' was entered into between Regiments Capital and Gateway Limited (Gateway), a company incorporated in the UAE. Gateway has been credibly linked in the media to the corrupt Estina Dairy project, as well as to the Gupta family wedding which took place in Sun City in 2013 and which has been alleged to have been funded through public funds from the Free State government. This agreement was signed by Dr Wood and witnessed by Mr Pillay. The agreement related

to an expected request for proposals from the Fund for appointment as fund manager.

152.2 Ultimately, the agreement was that Regiments would provide the personnel, if it was appointed under the procurement process, but would pay an 'advisory fee' to Gateway out of the fees earned from the Fund.

152.3 Mr Essa pushed Regiments to motivate for their appointment under the RFP, providing them with information suggesting he might have access to the kinds of investment strategies in which the Transnet Fund might be interested.

152.4 Regiments Fund Managers was appointed, together with another bidder, under the procurement process, despite concerns from some members of the committee. However, the bid did not provide for outperformance fees and the deal fell through when Regiments sought to negotiate a higher fee structure

152.5 Between May and July 2015 Regiments Capital was in negotiations with another company linked to the Guptas, Forsure (Pty) Ltd (Forsure) on similar terms to the Gateway contract. Email evidence shows that Dr Wood and Mr Pillay discussed a business development fee arrangement in terms of which Forsure would be paid 50% of revenue obtained from any asset management fees, and 60% of any quarterly outperformance fees which Regiments Fund Managers received from the Fund.

152.6 On 3 August 2015 Regiments Fund Managers were notified by Transnet that they were appointed to manage a portfolio to a value of R1.3 billion on behalf of the Fund. The letter includes a draft investment management agreement which did not refer to outperformance fees.

152.7 In the interim, and while the negotiations with Forsure were under way, a new Transnet director was appointed and he became the Chair of the Fund's Board. This was Mr Stanley Shane. Mr Mokgakare Seleke was also appointed to the Board. Both have been linked to the Gupta family.

Mr Shane was subsequently involved in Dr Woods' company Trillion, after he and the other Regiments' directors fell out.

152.8 Regiments Fund Managers demanded that outperformance fees be included in any management agreement, which they succeeded in having included as a quarterly outperformance fee of 25%. This overrode the advice of the Board's investment consultants that this was an inappropriate measure of performance which fails to account for long-term, real outcomes. An increase in the portfolio of R7.7 billion to be managed by Regiments Fund Managers, to a total of R9 billion, was also secured.

152.9 Mr Maritz, who attended the relevant Board meetings, attests that it was Mr Shane who drove this process which secured Regiments Fund Managers an inappropriate outperformance fee.

152.10 In his evidence, Mr Sinton linked Forsure to the web of companies through which Regiments made on-payments of the 'facilitation fees' he discussed with Mr Pillay and Mr Nyhonyha at the October 2012 meeting.

[153] Critically, yet again, the defendants provide no substantive response to the averments made in the NDPP's founding affidavit regarding the appointment of Regiments Fund Managers and related events.

[154] These events, so it was submitted on behalf of the NDPP, show the same essential features as identified above in relation to the Regiments appointment to Transnet, namely: the appointment of Regiments under unlawful and irregular circumstances; fraudulent claims to fees to which they were not lawfully entitled; and the payment of a substantial kickback to Gupta-related companies which provided no service for the 'fees' they obtained.

[155] In light of the failure of any of the defendants to deal with the relevant averments, we agree with the NDPP's submission. It seems to us, therefore, that there are reasonable grounds to believe that a court may find that the offence of corruption by the defendants has been established relative to the Fund and its operations sufficient to secure their convictions.

[156] Mr Maritz also provided evidence in his affidavit of the misappropriation from the Fund of close to R229 million over the period December 2015 to April 2016, paid by Regiments Fund Managers (who had control over the Fund's accounts) to Regiments Securities. It is not necessary to go into the details of this misappropriation. They are set out in detail in the founding affidavit. Suffice to say that the invoices underlying those payments show that the bulk of these payments were in fact 'business development' payments made to Mr Moodley and other Gupta-linked entities via Albatime. This is contrary to what the NDPP says was the defendants' version (in civil litigation with the Fund) which was that the amounts were for services rendered by Regiments Capital and/or Dr Woods' company Trillion to Transnet. The Fund also averred that Regiments Fund and Regiments Securities undertook 'bond churning' activities that were aimed at turning a profit for those entities rather than for the benefit of the Fund.

[157] In the NDPP's founding affidavit she details the versions put up by the defendants in the civil litigation in relation particularly to the alleged misappropriation of funds from the Fund. She explains why their version is deficient. We are not called upon at this restraint stage of proceedings to weigh any competing versions on a balance of probabilities. In our view, the evidence contained in, and attached to the founding affidavit is sufficient to establish that, in this respect, too there are reasonable grounds for believing that the defendants may be convicted of fraud relative to this misappropriation.

Money laundering

[158] The NDPP also alleges that the defendants committed the statutory offence of money-laundering created by s 4 of POCA[35] in that they knew or ought

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[35] Section 4 reads as follows:

'Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect-

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

reasonably to have known that the money derived from Transnet and the Fund was the proceeds of the offences of corruption or fraud. They agreed, and made payments to companies linked to Mr Essa, Mr Moodley and other Gupta-linked front companies. Thus, they knew or ought reasonably to have known that they were performing acts which were likely to have, and did have, the effect of concealing the movement of the proceeds of unlawful activities procured in breach of PRECCA.

[159] In respect of the corruption offences in relation to Transnet, we have noted that the defendants failed to advance any justification for the payments to Mr Essa and Mr Moodley. We have concluded in this regard that there are reasonable grounds for believing that a criminal court may find that these payments were gratifications and that in involving themselves in this scheme, the defendants engaged in corrupt activities under PRECCA. It follows from this that a criminal court may also find that the defendants knew or ought reasonably to have known that the monies they paid to Mr Essa and Mr Moodley were the proceeds of crime.

[160] There is also evidence as to the way in which these monies were dealt by Regiments after receipt from Transnet that underlines the case for money-laundering.

[161] According to Mr Sinton's testimony before the State Capture Commission, Mr Pillay and Mr Nyhonyha told him that within a day or two of Regiments Capital being paid by Transnet, it would get an email from Mr Essa reminding Regiments to pay him his share.

[162] Mr Sinton described the general pattern of the on-payments which Regiments made in respect of the payments from Transnet. Attached to his witness statement to the State Capture Commission were schedules of money flows, derived from an analysis of relevant bank accounts held with Standard Bank.

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
(aa) to avoid prosecution; or
(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence.

shall be guilty of an offence.'

[163] A regular recipient of the on-payments from Regiments Capital was a company called Homix, which also had an account with Standard Bank. According to Mr Sinton, most of the transfers into that account were from Regiments and companies linked to the Gupta family. Payments out of the account were to another account linked to the Guptas and Mr Essa in the media, namely Bapu Trading CC. Homix paid BAPU more than R320 million.

[164] Bapu also had an account with Standard Bank and Mr Sinton described in his testimony before the State Capture Commission a web of payments going back and forth among numerous companies linked in the media with the Gupta family or Essa. Some of these also had accounts with Standard Bank and few, if any, had sources of legitimate funds other than transfers from public entities, including Transnet.

[165] Based on his analysis of the movements into, out of, and between the accounts, Mr Sinton drew the inference that money-laundering was taking place. He stated that if one had regard to the statutory provisions around the prohibition on dealing with the proceeds of crime, and facilitating money-laundering, objectively a reasonable banker would conclude that these large amounts of money moving rapidly between companies all managed by people who are associated with one another gives rise to an inference that there was an attempt to disguise the source of the money. This led him to conclude that the transfers were illicit.

[166] Mr Maritz's affidavit also dealt with the funds received from Transnet. When the relationship between Dr Wood, on the one hand, and Mr Pillay and Mr Nyhonyha on the other, the parties sought to negotiate Dr Wood's exit from the Regiments group and his move to Trillian. Draft agreements were exchanged between the parties in 2016 by way of emails. Mr Maritz attached to his affidavit some of these 'Navigator' documents, as they were called by the parties. One of these was a spreadsheet entitled 'Ledger Accounts Summary Regiments Capital'. It described the ledger movements for each of the Regiments' accounts for the 2015/2016 financial year, as well as a forecast for the 2016/2017 financial year. It indicated that;

166.1 With all but two exceptions, all of Regiments Capital's active business was with Transnet.

166.2 With the exception of a single account, labelled 'Trans FR China Dev' every other Regiments Capital advisory account was subject to 55% payments to 'business development' partners.

166.3 Of the total of R429 044 962.01 received by Regiments Capital, it retained only R185 million, and on-paid R274 million, an aggregate of 64% to 'business development partners'.

[167] Other emails and invoices attached to Mr Maritz's affidavit relate to the payment of the increased fee of R166 million paid to Regiments Capital relating to the loan raised from the China Development Bank. Regiments Capital retained only 22% of the amount invoiced by them. The balance of R124 480 million was on-paid to 'business development' partners. This amount was invoiced by Mr Moodley's company, Albatime, which took a 3% cut, and on-paid the balance to Sahara Computers (Pty) Ltd, a company widely accepted to be under the control of the Gupta family.

[168] A further email exchange between Dr Wood and Mr Moodley on 16 June 2015 set out the financial arrangements underpinning the alleged corruption and money laundering scheme based on a sliding scale of payments to 'business development' partners that left Regiments Capital with between 4% and 45% of the payments from state owned entities.

[169] Mr Maritz concluded that:

'It is difficult to conceive of any innocent explanation for the payment to "business development partners" of between 50% to 55% of the value of contracts Regiments Capital was actually performing for organs of stale in the 2016 financial year and those it hoped to obtain going forward … In fact, it now seems clear that under the euphemism of "business development" payments, Regiments Capital was laundering hundreds of millions of rands of public funds for the benefit of its "business development" partners who in all cases in respect of which there is evidence of their identities, were either Moodley and Albatime or front companies linked to the Gupta family.'

[170] It is common cause that the monies received by Regiments Fund Managers from the contract with the Fund was also dealt with on the basis of the on-payment of a percentage to Mr Essa and Mr Wood. Mr Pillay and Mr Nyhonyha have stated in affidavits in civil litigation that this was because 'Regiments would not have qualified for this mandate had it not been for the exposure to the greater Transnet group via the McKinsey relationship'.

[171] In their answering affidavit the Regiments defendants do not deal with the pertinent paragraphs of the NDPP's founding affidavit dealing with the above evidence. Mr Nyhonyha aligns himself with the answering affidavit of the Regiments defendants, as does Mr Pillay. Dr Wood either notes the allegations in the relevant paragraphs, does not admit them, or claims generally that he was not directly involved in the conduct described. He states a general denial of 'any involvement in any illegal activities' and claims that he 'cannot be expected to provide "an explanation" if no offences were committed by me'.

[172] From the evidence discussed above it seems demonstrably clear to us that there are reasonable grounds for believing that the defendants may be convicted of money laundering under s 4 of POCA.

The role and potential culpability of Dr Wood, Mr Pillay and Mr Nyhonyha in the offences implicating the Regiments defendants

[173] In terms of s 332 of the Criminal Procedure Act, Act 51 of 1977, a corporate body may be found criminally liable for the acts and omissions of its directors in the exercise of their powers or performance of their duties. This provides the basis for the prosecution of the Regiments defendants on the offences discussed above. On the evidence referred to above, all three of the Regiments entities were involved to some degree in the alleged offences. In addition, Mr Pillay stated in an affidavit filed in business rescue proceedings that the Regiments entities were financially inter-dependent, with inter-company loans and that they have secured each other's debts to third parties.

[174] As to the individual directors, the NDPP says that they are liable to prosecution as both principal offenders and as accomplices. In the latter

capacity, they aided, abetted and assisted in the offences, founding their liability either under the common law or under s 18(2) of the Riotous Assemblies Act.[36]

[175] In August 2006 Dr Wood, Mr Pillay and Mr Nyhonyha bought out the shareholdings of the other three directors of Regiments Capital. Dr Wood and Mr Pillay did so through their respective family trusts, and Mr Nyhonyha partially through his family trust, and also in his own name. They became the only three directors and shareholders. According to Mr Nyhonyha, since that time, Regiments Capital was 'owned, managed and funded by myself, Pillay and Wood.'

[176] The defendants differ to some extent as to their particular roles in the Regiments entities. However, what is clear is that they were all involved in some capacity or another. Mr Pillay headed Regiments Fund Managers, and, according to Dr Wood, the groups' advisory and financial structuring division. Dr Wood was the chief operating officer of the Regiments group dealing with finances among other things. According to the Regiments defendants, Dr Wood was responsible for Regiments advisory. It seems to be common cause among them that Mr Nyhonyha was the group chairman. According to Dr Wood, Mr Nyhonyha was the *de facto* CEO. The Regiments defendants say that Mr Nyhonyha commenced a partial retirement in later 2013 although no details of what this entailed has been given by them. Dr Wood says that Mr Nyhonyha expressed a wish to retire but maintained his operational duties at least until 2015. As indicated above, Mr Nyhonyha identified himself as one of those who 'managed' Regiments Capital. He has also deposed to the founding affidavit in at least two applications related to the events at issue in this case, demonstrating that he must have had knowledge of and been involved in the events. After the

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[36] Act 17 of 1956. S 18(2) provides that:
'…Any person who-
(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation,
shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

break down of the relationship between the directors, Dr Wood left to found Trillian. However, he remained a director until at least October 2016.

[177] Apart from their obvious involvement in the operations of the Regiments entities, as appears from the evidence discussed in more detail in the previous section, the directors are also directly implicated in the alleged criminal conduct. In summary:

177.1 Mr Pillay and Mr Nyhonyha don't deny that they were party to the foundation agreement of October 2012 and agreed to make, and made, payment under it. Nor do they dispute that they agreed because the consultancy rates with Transnet were inflated by 400%.

177.2 While Dr Woods says he was not at the meeting that led to the foundation agreement, he doesn't deny knowledge of it or his involvement in implementing it. Nor does he deny the on-payments to 'business development partners'. Significantly in this regard, he was responsible for Regiments' finances.

177.3 None of the director defendants provide any substantiated denial of Mr Maritz's evidence dealing with the documents exchanged during the course of the Navigator negotiations.

177.4 None of the director defendants provide any innocent explanation for the on-payments of substantial sums to, among others, Mr Essa and Mr Moodley.

177.5 The evidence of Regiments Fund Managers' appointment as advisors to the Transnet Fund implicates both Dr Wood and Mr Pillay directly.

177.6 They are also implicated directly in the negotiation of the agreement with Forsure. Mr Pillay does not deny that he agreed the 'business development splits' with that entity.

[178] While this evidence more obviously implicates Dr Wood and Mr Pillay, it is probable, and at least believable on reasonable grounds, that Mr Nyhonyha had personal knowledge of the events and the on-payment scheme. This must be so given his involvement in the business of the Regiments group as discussed

earlier in this section of the judgment. Pertinently, he does not aver that he was unaware of the scheme. It is also significant that he did know and was party to the foundation agreement, which kick-started the whole affair.

[179] Mr Nyhonyha is on record in an affidavit filed in support of the removal of Dr Wood as a delinquent director as saying that until 1 March 2016 he, Mr Pillay and Dr Wood 'were the persons responsible for the direction and decisions of Regiments'. He averred further in the affidavit that: 'In negotiating the Navigator Agreement the parties' intentions were to achieve essentially a value split based on shareholding proportions of Pillay, Wood and me (via the respective trusts) …'. In his own words, Mr Nyhonyha was clearly intimately involved in the events that form the subject matter of the restraint application.

[180] As we indicated earlier in analysing the mass of factual averments implicating the defendants in the alleged criminal activities, most of the evidence is either not disputed at all by the director defendants or is disputed only by means of bare denials. If these were ordinary motion proceedings, the evidence would satisfy the standard *Plascon-Evans* test as elaborated upon by the SCA in J W Wightman[37]:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed ... When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[181] However, as noted earlier in our analysis of the applicable principles, that is not the test. The bar is very much lower in applications for a restraint order. The question is whether there is evidence that might reasonably support a conviction and a consequent confiscation order, and whether that evidence might reasonably be believed. There is no basis on which it could be found that the evidence that is relied upon in this matter is manifestly false or unreliable.

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[37] *J W Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.

[182] In light of all the facts before us, we therefore reiterate our view that there are reasonable grounds for believing that a criminal court may convict the defendants, including the director defendants, of the offences identified by the NDPP.

Reasonable grounds to believe that the defendants benefited from their offences or related criminal activities and that a confiscation order may be made

[183] In our view, the aforegoing analysis of the facts also addresses the next two issues in dispute, those being, (1) are there reasonable grounds for believing that the respondents benefited from the offences; and (2) are there reasonable grounds for believing that a confiscation order may be made against the defendants?

[184] Both these questions can and should be answered in the affirmative. Section 12(3) of POCA states that a person has benefited from unlawful activity 'if he or she has at any time, … received or retained proceeds of unlawful activities.' As the SCA stated in *Gardener*:[38]

'Once a defendant's unlawful activities yield proceeds of the kind envisaged in s 12, he or she has derived a benefit as contemplated in s 18(1)(a). This entitles a prosecutor to apply for a confiscation order ….'.

[185] The NDPP contends that the defendants benefited collectively from the offences in the total amount received under the relevant contracts. Save for some bare denials of benefit, for example from Mr Pillay, none of the defendants take substantive issue with the NDPP's averment that they benefited.

[186] In *Shaik*[39] the Constitutional Court explained who a shareholder in a company enriched through criminal offences can benefit:

'Similarly, the definition (of proceeds of unlawful activities) makes clear that proceeds of crime will constitute proceeds even if 'indirectly obtained'. The Supreme Court of Appeal held that a person who has benefitted through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefitted from that

[38] Above n9 at para 17.
[39] Above n12 at para 26.

crime. As counsel for the NDPP pointed out, when a shareholder commits a crime by which his or her company is enriched, the shareholder may well benefit from the crime in two ways. The value of his or her shares will increase, as will the dividends generated by those shares, because the company is now more profitable.'

[187] We know that the director defendants held their shares in Regiments Capital through their family trusts. Dr Wood confirms that Regiments Capital paid dividends on a regular basis based on the cash in the company and the cash requirements of the business. It was the three directors, according to Dr Wood, who made and implemented dividend decisions. He also says that each director received a salary. Neither of the other two directors dispute this. In addition to these benefits, logically their shareholding in Regiments Capital would have increased as the company became more profitable as a result of the contracts with Transnet and the Fund and the payments derived from them.

[188] It was not necessary, as was suggested by counsel for Mr Pillay and Mr Nyhonyha in argument, for the NDPP to provide evidence in its founding affidavit as to how much each individual director defendant benefited. At this stage of the inquiry POCA does not require a calculation of the actual amount in which each defendant benefited. All that must be established is that there are reasonable grounds to believe that a criminal court may find that they benefited. On the evidence before us this jurisdictional requirement is established.

[189] The point is simply that the defendants, by all accounts, benefitted from these offences in that between them they were paid hundreds of millions of rand, which they would not have received but for their unlawful corrupt and fraudulent actions. The evidence demonstrates reasonable grounds to believe that from inception and as a result of the foundation agreement, the relationship between Regiments Capital and Transnet was corrupt. It follows that all proceeds flowing to the defendants arising out of that relationship is tainted and must be regarded as a benefit of the offences. Similarly, the facts demonstrate that the relationship between Regiments and the Fund was similarly corrupted. The proceeds from that relationship must also be considered as benefits under s 12 of POCA.

[190] It follows, as a matter of logic, that this means that any court convicting the defendants may make a confiscation order against them as it is enjoined to do by the provisions of POCA.

[191] A related question is whether, in a case like this, the benefit should be treated as collective in the sense that a joint and several restraint order is appropriate. There is some dispute about this issue. We deal with it later under a separate heading. It is an issue which has more to do with the proportionality of a restraint order than with the issue of whether benefit has been established at all. We deal separately, too, with the question of the quantum of the restraint order.

The relevance of the defendants not being charged

[192] It is common cause that the respondents have to date not been formally charged, despite the fact the offences date back to before 2018. From this can be inferred, so the argument on behalf of the defendants goes, that they are unlikely to be prosecuted, let alone be convicted and a confiscation order made.

[193] Where a prosecution for an offence has not yet been instituted against the defendant concerned, the court must be satisfied, before it makes a restraint order that the defendant 'is to be charged with an offence'. (Section 25(1)(b)(i) of POCA).

[194] Dr Wood points out that no indictment was attached to the founding affidavit and asserts that no docket has been registered. Mr Pillay and Mr Nyhonyha point out that the respondents have not yet been criminally charged, and that the NDPP does not provide a CAS number for the respondents or attach a draft charge sheet to its affidavit.

[195] The NDPP contends that none of this bears on whether the interim restraint should be confirmed. The NDPP states in the founding affidavit that the defendants will be charged in this Court in due course. None of the respondents actually denies that this is the case. We agree.

[196] In *Rautenbach*[40], the SCA explained what the test is in this regard:

'It was also submitted that until such time as the appellant has produced a charge-sheet it cannot be said that Rautenbach is to be charged with an offence – which is one of the prerequisites for the exercise of the powers conferred upon a court by section 25(1)(b) ... The section requires a Court to be satisfied that the person is to be charged with an offence and not that the prosecution is imminent ... That requires a Court only to be satisfied that a prosecution is seriously intended and not that a charge-sheet has already been drawn. I see no reason to doubt that the appellant's expressed intention in the present case is serious.'

[197] There is no reason to doubt the NDPP's expressed serious intention to prosecute the defendants. No other reason has been advanced as to why the NDPP has expended the considerable time, effort and other resources which are involved in bringing the application, in applying for and obtaining a search warrant in respect of the Regiments digital devices, and in having those analysed and examined. The suggestion made is that the delay itself places doubt on the NDPP's intention to charge the defendants. Without more it would be speculative to reach that conclusion.

[198] The above SCA authority, coupled with the detailed explanation given by the NDPP in her answering papers, in our view, takes care of this point. The requirement of s 25(1)(b)(i) is plainly satisfied. The respondents are to be charged with an offence.

[199] A further question was raised and debated in oral argument before us. What we have discussed above pertains to the fact that the defendants had not been charged as at the time the restraint application was instituted, and the matter considered by the Court *a quo*. However, the Court *a quo* gave its judgment on 26 October 2020. This appeal was argued in November 2021. The point was made at the hearing of the appeal that the defendants had still not been charged with the alleged offences.

[200] The defendants submitted that given what was stated by the NDPP in her affidavits filed in the application, the further delay of in the failure of the charges

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[40] Above n5 at para 20.

being instituted against them called for an explanation. They contend that she had ample opportunity to do so, and that she could have done so in response to a supplementary affidavit filed by the provisional liquidators of Regiments Capital, which the NDPP did not oppose.

[201] The matter before us is an appeal against the discharge of the provisional restraint order. It is trite that in general, in deciding an appeal, the court decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards.[41] The contentions of the defendants overlook this fundamental principle.

[202] There is no evidence before us about events pertinent to the criminal investigation against the defendants that may have occurred while the appeal process had been underway. It would be speculative for this Court to traverse the issue. The supplementary affidavit filed by the provisional liquidators of Regiments Capital did not raise the issue. What we are called on to determine is whether the Court *a quo* correctly discharged the provisional restraint order. Should any of the defendants in the future wish to challenge the order because of what they consider to be an unreasonable delay in instituting charges against them, they may have recourse to s 25(2) of POCA,[42] to apply for the rescission of the order. In those proceedings, all relevant facts may be placed before the court which would then be best placed to deal with the issue.

[203] The aforegoing relates to the defendants. The next question is whether the other twelve respondents and their property could and should be involved in the restraint. We proceed to deal with that issue.

The position of the respondents

[204] As we explained earlier, it is only the defendants who are to be charged with offences. Nonetheless, the NDPP seeks to place property held by the

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[41] *Webber-Stephen Products Co v Alright Engineering (Pty) Ltd* 1992 (2) SA 489 (A) at 507.

[42] Section 25 provides that:

> 'Where a High Court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.'

respondents under restraint, and it is for this reasons that they were joined in the restraint application. The NDPP seeks to restrain the respondents' property on the basis that it falls within what POCA calls 'realisable property' and is thus subject to restraint.

[205] POCA defines realisable property as being property 'held' by a defendant, or 'any property held by a person to whom that defendant has directly or indirectly made any affected gift.'[43] In terms of s 12(2)(a): '… any reference … to a person who holds property shall be construed as a reference to a person who has any interest in the property…'.

[206] As noted by Heher J in *Phillips*:[44]

'It is significant that POCA does not refer to the ownership of realisable property. The concept of 'holding' immovable property can occupy one or more of many semantic slots in a range through ownership, possession, occupation, and holding as a nominee. The context is decisive. In the POCA, the primary concern of the Legislature is not the title, registered or otherwise. On the contrary, one major evil which the Legislature contemplates and sets out to neutralise is the concealment by criminals of their interest in the proceeds of crime. That suggests that the 'holding' of property should be given a meaning wide enough to further that end.'

[207] In *Shaik*,[45] O'Regan ADCJ observed that criminals will frequently seek to evade POCA's statutory purposes through a 'clever restructuring of their affairs'. It is rarely the defendants in their personal capacity who formally benefit from the offence, or who formally own the realisable assets. POCA recognises this, and casts its net widely to answer the two questions: (1) did the defendants benefit; and (2) and do the defendants hold the realisable property?

[208] The Constitutional Court held in that matter that POCA applies to benefits which a defendant obtained indirectly from her crimes through entities in which she has an interest, in proportion to that interest, and that such a wide interpretation flows not only from the wording of the statute but also its purpose.

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[43] Section 14(1).
[44] *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 80-81.
[45] Above n12 at para 69.

[209] It was contended by the respondents in *Phillips*[46] that it is only if the NDPP succeeds in piercing the veil of corporate personality or can show that a respondent company received affected gifts that corporate property may be restraint. Heher J dismissed this contention finding that:

'Without attempting to place strict limits on the expression, I have no doubt that when a person exercises control over the disposal over property ... or has the exclusive use and control over the properties ... and is the real beneficiary (albeit through his shareholding) of the income from those properties or any proceeds of disposal of them, then he holds such properties within the meaning of section 14(4) of the Act and it is unnecessary to invoke the doctrine of "lifting the veil".'

[210] The material question in determining whether property is 'held' by the defendant is therefore not who formally owns it, but who controls it or has its use or benefit. To hold otherwise would frustrate the purpose of POCA.

[211] The NDPP's case is that the Regiments companies and the defendant directors hold, both directly and indirectly, realisable property through trusts and subsidiary companies in the Regiments group. The trusts in question are associated with the director defendants. They are the Zara Trust, which is the Wood family trust, the Pillay Family Trust, and the Nyhonyha Family Trust.

[212] Dr Wood is one of two trustees of the Zara Trust. He, his wife and two daughters are beneficiaries of the Trust. Dr Wood says that the three family trusts 'are the shareholders of (Regiments Capital) and it was the three partners' joint intention to use their position on the board to protect respective interests of their family trusts'. He denies that the Zara Trust is his *alter ego* and provides a confirmatory affidavit indicating that trust decisions are taken jointly with an independent co-trustee.

[213] Mr Pillay stated that the Pillay Family Trust was registered in 2003, long before the events relevant to the application. It has always had three trustees and was managed by them. Mr Pillay never had a majority or veto vote. It held its own banking account and books of account and is fully tax compliant. He also avers that the Trust acquired Mr Pillay's shareholding in Regiments Capital in

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[46] *Phillips* above n44 at para81.

2011 through a loan advanced by Mr Pillay to the Trust. He says the Trust has paid back the loan. Mr Pillay denies that the Trust received any benefit from the alleged unlawful activities.

[214] Mr Nyhonyha says that he resigned as a trustee in October 2018. He says it has been in existence since November 1996 and has always operated as a separate legal person. He denies he has acted as its 'controlling mind' or that it is his *alter ego*. It is a 'common or garden family' trust and not a 'sham'. The beneficiaries are the Nyhonyha family. Mr Nyhonyha contends that the NDPP has failed to make out a case for piercing the corporate veil in respect of the Nyhonyha Family Trust.

[215] In essence, then, Dr Wood, Mr Pillay and Mr Nyhonyha say that the intercession of their respective family trusts places their shareholding in the Regiments companies beyond the reach of the court. Further, that an order restraining the assets of the trusts is not permissible.

[216] Following Heher J in *Phillips*,[47]Lewis JA in *Van Staden*,[48] and on the basis of the dicta of O'Regan J in *Shaik*[49] and Cameron JA in *Land and Agricultural Bank*,[50] it is not necessary in a matter such as this, where the question is whether the defendant 'holds' the property in terms of POCA, to demonstrate that a notional corporate veil should be lifted, or that there has been an 'abuse' or that the trusts in question is the *alter ego* of the defendants. It is sufficient to show that the defendant is, in substance, the person who is the real beneficiary of the property in question. It is important, too, to bear in mind the legislative purpose, which is to extend, rather than restrict, the restraint net over affected property.

[217] Applying these principles, Mr Budlender contended that the facts in this matter show that Dr Wood, Mr Pillay and Mr Nyhonyha have used their family trusts to hold their shares in the Regiments companies, which they controlled as directors, and to enjoy the benefit. For that reason, they cannot rely on the trust

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[47] Above n44.
[48] Above n6.
[49] Above n12.
[50] *Land and Agricultural Bank of South Africa v Parker & Others* 2005 (2) SA 77 (SCA).

form to distance themselves from the benefits which they obtained through the Regiments companies.

[218] There is evidence in support of this submission.

[219] In affidavits previously filed on behalf of Regiments by Mr Pillay and Mr Nyhonyha, both have said under oath that they (and Dr Wood) are the shareholders in Regiments, directly or through their family trusts.

[220] In Mr Nyhonyha's answering affidavit on behalf of the Regiments companies in the Wood application, he says at para 69:

'Three of the original six shareholders left the company over the years and it came to be quite successful over about a decade under the management of myself, Dr Wood and Mr Pillay, who were the only remaining shareholders, either directly or through our family trusts.' (emphasis added)

[221] In Mr Pillay's answering affidavit in an application by the Fund for an Anton Piller order, he says that he and Mr Nyhonyha (not the trusts) caused Wood to be removed as director at a shareholders' meeting:'

'Dr Eric Wood was a director of Regiments Capital until October 2016 when we (Mr Nyhonyha and I) caused him to be removed at a shareholders' meeting.' (emphasis added).

[222] We have already referred to Mr Nyhonyha's averment under oath that Regiments was 'owned, managed and funded by myself, Pillay and Wood'. (emphasis added). What is more, despite Dr Wood's protestations of the independence of the Zara Trust, in the Regiments companies' joint answering affidavit in an application by Dr Wood, Mr Nyhonyha averred that he had known and had business dealings with Dr Wood as a co-shareholder and co-director in the Regiments companies for some ten years. Further, that during this whole time Dr Wood did not treat the Wood family trust as a separate legal entity with independent decision-making powers and processes, and he never required the other trustees' views to be taken into account in the course of conducting shareholder business within the Regiments companies. Dr Wood did not defer to or respect the dividing line between his interests and those of the Wood family trust in any substantive way and treated the Wood family trust as a means to

advance his personal interests and that of his immediate. He said that Dr Wood was in all decision-making respects the shareholder in the Regiments companies.

[223] It is not for this Court to determine whether Dr Wood or Mr Nyhonyha is right. The fact remains that there are counter-averments that place doubt on Dr Wood's averments regarding the true nature of the Zara Trust. In any event, Dr Wood himself has stated on affidavit in this application that: 'In 2006, it was decided that three of those shareholders/directors (in Regiments Capital) would exit the business, their shares being bought by me and (Mr Pillay) and Mr (Nyhonyha). The shares of the three existing shareholders were, accordingly, bought by me and (Mr Pillay) and Mr (Nyhonyha), through our respective family trusts'. (emphasis added)

[224] In the words of the director defendants themselves, then, they structured their acquisition of their shares in Regiments Capital through their family trusts. There can be little question, if any at all, that they were the real beneficiaries of the shareholdings, and thus the real beneficiaries of what flowed to the family trusts from those shareholdings. As a matter of common sense, the trusts would have been paid dividends. As we know, the payments to Regiments Capital were overwhelmingly from Transnet and Transnet Fund-related contracts. It follows that the family trusts benefited directly from the offences, and the director defendants indirectly through their beneficial interests in the trusts. On these facts, a conclusion that the trust property in this case is immunised from restraint would be inimical to the legislative purpose behind the broad definitions of property 'held by', and a person who 'holds' property.

[225] The evidence shows that Dr Wood's family trust holds the Regiments shares on behalf of Dr Wood. On his own version, he bought the shares through the trust. He has control of the trust's shareholding in Regiments, and he has enjoyed the fruits of that shareholding, both personally and by providing for his family.

[226] The same applies to the Pillay family trust and the Nyhonyha family trust.

[227] The evidence shows that Mr Pillay acquired the Regiments shares through the trust, and the trust holds those shares on his behalf. He controls the Pillay

family trust's shareholding in Regiments and has enjoyed the fruits of that shareholding, both personally and by providing for his family.

[228] The evidence shows that the Nyhonyha family trust holds its assets, including its shares in Regiments, on behalf of Mr Nyhonyha. The trust's cash assets consistently have been, and are, used for his benefit. Evidence to this effect appears from the Nyhonyha Family Trusts tax returns. It is not necessary to pierce the trust's corporate veil in those circumstances.

[229] For all these reasons, we are satisfied that the property of these family trust should be included in the restraint order.

[230] The aforegoing principles apply equally both to the corporate respondents (Marcytouch and Ergold), and to companies in which Regiments has shares.

[231] The shareholding in the first of the Regiments respondent entities is Ashbrook 15 (Pty) Ltd (Ashbrook). It is held by Regiments Capital (59.82%); Ergold Properties No 8 CC (Ergold) (13.09); Marcytouch (Pty) Ltd (Marcytouch) (9.37%); Lemoshanang Investments (Pty) Ltd (Lemoshanang) (13.29%) and Rorisang Basadi Investments Holdings (Pty) Ltd (Rorisang) (4.42%). It seems that since the Fund settlement was implemented, Lemonshanang and Rorisang ceased their shareholding.

[232] The second of the respondent entities associated with Regiments is Coral Lagoon 194 Proprietary Limited (Coral Lagoon). It is wholly owned by Ashbrook. Coral Lagoon holds over 1,3 million shares in Capitec that were subject to the anti-dissipation interdict imposed in relation to the Fund’s civil litigation. Ashbrook and Coral Lagoon were established solely in order to take advantage of an offer by Capitec to take part in a BEE transaction for the purchase of Capitec shares and to house those shares. The main function of these entities is to manage the Capitec investment, including payment of dividends to shareholders. Mr Nyhonyha is one of two directors managing Ashbrook and Coral Lagoon.

[233] Ergold is a close corporation the sole member of whom is the Pillay family trust. Marcytouch is a private company of which Mr Nyhonyha is the sole director and shareholder.

[234] Cedar Park Properties 39 (Pty) Ltd is wholly owned by Kgoro Consortium (Pty) Ltd (Kgoro), which in turn is wholly owned by Regiments Capital.

[235] The defendants contended that it was not permissible to restrain the assets of the respondents including Ashbrook, Coral Lagoon, Ergold and Marcytouch. This is because there is no evidence of wrongdoing on their part; they did not receive any benefit from unlawful activities; they have separate legal personalities and *bona fide* operations; the requirements for lifting the corporate veil are not met; and there is no evidence that they received any affected gifts.

[236] In light of the principles discussed above, these contentions have no merit. The question is not whether the respondent entities have separate legal personalities or not, or whether they are implicated in wrongdoing. The question is whether any of the defendants can be said to have any interest in the property of the respondents.

[237] That question is clearly answered in the affirmative in respect of the corporate respondents wholly owned by Regiments Capital or in which it holds an interest. It is furthermore common cause that Regiments Capital is the holding company in the Regiments group. Dr Wood described it as the 'investment vehicle' for its shareholders to hold their interests in the Regiments group. It is also common cause that the companies in the Regiments group are financially interdependent, have made inter-company loans to each other, and have secured each other's debts to third parties.

[238] Ergold has a close association with Mr Pillay. His family trust is the sole member of Ergold and, according to company documents Mr Pillay represents the family trust for purposes of managing Ergold. Its registered address is Mr Pillay's home address. The financial statements of the Pillay family trust record an interest-free long-term loan to Ergold with no repayment date. In 2018 the loan stood at nearly R114 million and in 2019 it was nearly R103 million. The NDPP says that Mr Pillay 'holds', for purposes of POCA, Ergold's shareholding in Ashbrook through the trust. For similar reasons as those given in respect of the trust itself, we find that Ergold's property is held by Mr Pillay and is thus properly subject to restraint. As it is not necessary to lift the corporate veil in

these circumstances, it does not matter that Ergold is tax compliant, has its own legal personality and conducts itself above board.

[239] As regards Marcytouch, Mr Nyhonyha is its sole director and shareholder. The registered address of Marcytouch is Mr Nyhonyha's home address. As per the authority cited above, there is no need to pierce the corporate veil, because the point is simply that Marcytouch's assets are plainly 'held by' Mr Nyhonyha as contemplated by POCA.

Quantum of the restraint order and computation of benefit

[240] POCA does not fix the quantum of a restraint order, and so it lies at the discretion of the Court, judicially exercised, to determine an appropriate amount of such an order. In this case, the NDPP seeks an order in the amount of the total collective benefit of the defendants from their impugned contracts with Transnet and Transnet Fund. The original provisional restraint order covered a quantum of R1 108 000 000. As we discuss later, the NDPP seeks to vary the order so as to increase the restraint cap.

[241] The defendants contended that if the Court was to confirm the provisional restraint order, the restraint cap should be reduced by the following amounts: (1) the amount paid to the Fund in terms of the Fund settlement agreement, that being R639 111 816.83; (2) the amount which Regiments has agreed to pay to Transnet, namely R180 million; (3) the amount which Regiments says it paid to Mr Essa and Mr Moodley, namely R326 821 763; (4) the VAT which the Regiments defendants received from Transnet, in a total amount of R152 010 122,46; and (5) the amount of R228 983 985 which Regiments say they paid to Trillian as an advisor's fee in terms of what are referred to as the swap agreements which continue to be performed by the Fund and Transnet.

[242] In essence, the respondents say that for a benefit to be counted towards a restraint order, it must have been received without counter performance, and it must have been retained in the account of a defendant. This issue has been addressed above. The authorities are clear – it is the gross benefit, not the net benefit, which determines the potential confiscation, and therefore the appropriate amount of the restraint. This is underlined by the fact that under

s 12(3) of POCA any proceeds of unlawful activities that are 'received or retained' (emphasis added) constitute a benefit.

[243] As regards, the settlement with the Fund, the basis for the NDPP's acceptance that it should be taken into account in capping the restraint order is not because it constitutes a deduction from gross proceeds. Instead, the NDPP acknowledges that once that amount was paid over from assets not under restraint, it is appropriate to take it into account when determining the appropriate value of the restraint order. That does not, however, mean that the benefit has been disgorged, as the respondents would have it. It is because, as submitted by Mr Budlender, s 30 of POCA makes provision for the satisfaction of a victim's claim or judgment against a defendant, after a confiscation order is made but prior to the realisation of the defendants' realisable property.

[244] Section 30(5) permits a court faced with an application for the realisation of a defendant's assets to adjust the realisation order to take account of a victim's claim. Where, as in the case of the Fund, a victim's claim has already been satisfied from unrestrained assets, it will ordinarily be appropriate to have regard to this fact in determining the value of realisable assets to be subject to restraint.

[245] However, the settlement agreement with Transnet falls to be considered differently. This is because at the time of the hearing and judgment in the Court *a quo*, the Regiments companies had not paid the amount they undertook to pay in settlement of the Transnet claim. Payment was due on or before 2 October 2020. The NDPP submits that until such time as Regiments had satisfied that claim from unrestrained assets, the settlement in and of itself was irrelevant to the computation of the restraint order. We agree. First, because it is gross and not net benefit that is relevant to that calculation. Second, because in any event an undertaking to pay is not a payment. Third, it follows that the settlement undertaking does not fall to be considered as an appropriate factor in the same way as the payment to the Fund.

[246] Furthermore, it is important to state, as a matter of principle, that a settlement between parties in civil litigation cannot dictate the calculation of benefit. The benefit calculation is to be made on the basis of the provisions of

POCA. The NDPP contends that the gross benefit which Regiments derived from their corruption is at least R1, 108 (and more, if the variation order is granted). Regiments recorded a contingent liability of R268 470 000 to Transnet and the settlement amount was R180 million. This illustrates that the parties cannot and do not, through the settlement of civil litigation, determine what benefit a defendant actually derived from its offences in terms of POCA.

[247] As for the amounts which Regiments paid to Mr Essa, Mr Moodley and Gupta-related companies, the Regiments defendants contend that those payments, which on the papers are tainted by corruption, ought to be excluded from the computation of their benefit. Apart from the fact that POCA is concerned with gross benefit, the defendants' contention is extraordinary. It suggests that for the purpose of calculating benefits under POCA, an unlawful gratification – a bribe, in common parlance – is a deductible expense. If this were so, it would completely undermine the Legislative intent behind asset forfeiture by permitting wrongdoers to keep the proceeds of unlawful activities.

[248] This also applies to the R228 million which the defendants say was paid to Trillian as an advisor fee in respect of the swap agreements. Whether Regiments paid part of its benefit to Trillian is irrelevant to the computation of the benefit received by Regiments. Regiments unlawfully took this money from the assets of their client, the Fund. It is inconceivable that Regiments would have settled the Fund's claim in this regard, unless they knew that they did not have a defence to the claim.

[249] As regards VAT, the respondents say that Regiments collected VAT on behalf of SARS, and that this must be deducted from their benefit. They have not attached any VAT returns or proof of payments to SARS. They do not even allege that they have actually paid this amount or any amount to SARS. They say it is an amount (collected several years ago) which they 'would have settled with SARS'. They say that the VAT 'payable' on R1 085 786 589.32 is R152 010 122.294, but they do not say that they have paid it, or even that they will pay it from unrestrained assets.

[250] On the evidence before us there is thus no basis for deducting those amounts from the benefit they received.

[251] As for the deduction of the value of services which the respondents say Regiments provided to the Fund and Transnet, the applicable POCA principles again provide the answer. The calculation of benefit is not done on the same basis as it would be in a civil claim for damages. Whether the victim suffered a loss (or even gained an advantage) is irrelevant to the question the Court must determine, namely what is the value of the property (money) which the defendants 'received, retained or derived' at any time in connection with the unlawful activity – in other words, their gross benefit.

[252] In any event, the evidence does not establish that Transnet and the Transnet Fund were advantaged by their association with the Regiments entities. On the contrary, the evidence shows that the fees invoiced by and paid to the Regiments entities were inflated to accommodate the on-payments to so-called 'business development' partners.

Joint and several restraint order

[253] The NDPP accepts that she cannot seek confiscation orders against each of the defendants separately for the full amount of the collective benefit flowing from the alleged offences, and that such confiscation orders that may be granted should be on a joint and several basis. Consequently, she seeks a restraint order on a joint and several basis too, with an upper limit on the realisable property subject to restraint set at R1 108 billion. This is reflected in paragraph 3.2 of the provisional restraint order granted by Wright J, which states that:

'… the following property, although bound to be disclosed, is excluded from the restraint and surrender provisions of this order:

…

Such realisable property as the *curator bonis* may certify in writing to be in excess of R1,108 billion, adjusted to take into account:

3.1.1 Fluctuations in the value of money as calculated in terms of sections 15 and 20 of the POCA; and

3.2 Expenses related to restrained assets which would ordinarily be carried by the estate.'

[254] Save for this, and certain other exclusions that are not presently relevant, the order applied to 'realisable property as defined in sections 12 and 14 of the POCA'. It extended to, among others, property held by the defendants and any of the respondents as specified in Annexure A, and all other property held by the defendants at the time of the granting of the order or subsequently. This is in terms of paragraph 2 of the provisional restraint order.

[255] The effect of these provisions is that what the NDPP in effect seeks is a capped restraint order, which may be applied against the property of the various defendants and respondents jointly and severally. The defendants take issue with this.

[256] The defendants contend that it is not a general principle that multiple defendants should be visited with a joint and several restraint order. Whether an order of that nature is appropriate will depend on the facts. Mr Dörfling, for Mr Nyhonyha, submitted that in this case, where it is known what the shareholdings of each of the director defendants is in Regiments Capital, it would be constitutionally disproportionate to make a joint and several order against them for the total amount of the benefit received. He pointed out that an order of that kind would potentially prejudice one defendant at the expense of another. For example, despite Mr Nyhonyha's 35% combined shareholding in Regiments Capital, it is possible under the order that all property held by him and his family trust could be restrained, and none, or disproportionately less of the other defendants and their associated trusts.

[257] In *Rautenbach* the SCA considered the principles applicable to question of proportionality in determining the quantum of a restraint order:

'Where the requirements of the Act have been met a court is called upon to exercise a discretion as to whether a restraint order should be granted, and if so, as to the scope and terms of the order, and the proper exercise of that discretion will be dictated by the circumstances of the particular case. The Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order

might be made must be capable of being ascertained, nor does it require that the value of property that is placed under restraint should not exceed the amount of the anticipated confiscation order. Where there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be granted then clearly a court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all) for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved – the absence of an 'appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to serve' – will render the interference arbitrary and in conflict with the Bill of Rights. To the extent that the decision in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 78A-B might suggest that a restraint order is permissible even where it is apparent that there is no such relationship in my view that is not correct. But in the absence of any indication of the lack of such connection I do not think the purported exercise of a court's discretion can import requirements for the grant of such an order that the Act does not contain. It must also be borne in mind, when considering the grant of such an order, that once it is found that a person has benefited from an offence, and that he or she held property at any time, a court that conducts the enquiry contemplated by s 18(1), is required by s 26(2) to presume until the contrary is shown that the property was received by him or her as an advantage, payment, service or reward in connection with the offences or related activities referred to in s 18 (1) (see *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA)para13).'[51] (emphasis added)

[258] There is legal precedent for orders under Chapter 5 of POCA to be made on a joint and several basis. In *Shaik*, a joint and several confiscation order was made against multiple accused in the criminal court. Neither the SCA nor the Constitutional Court interfered with that aspect of the confiscation order. In *Mokhabukhi and Another v State*[52] on appeal from a magistrate's court order this Division also imposed joint and several liability under a confiscation order on the co-accused. The Court found that an order of that nature was appropriate because the accused had 'acted in collaboration with each other with common

[51] Above n5 at para 56.

[52] *Mokhabukhi and Another v State*. Unreported decision of the Transvaal Provincial Division dated 11 September 2006 under case no A156603.

purpose'.[53] Further, that it was 'impossible to say what specific benefit was enjoyed by each of the appellants'.[54]

[259] In *Shaik* the court convicting the defendants made confiscation orders directing that the three defendants pay to the State a '*combined aggregate liability of R21 018 000*'. However, each of the second and third defendants were ordered to pay the full amount jointly and severally. It was contended before the SCA by the defendants that the same proceeds, passed through different hands, cannot constitute the proceeds of criminal activity in the hands of each intermediary. Consequently, the defendants submitted that there cannot be a multiplicity of confiscation orders against each of them. The SCA dismissed this contention saying:

'We do not agree. The movement of funds through different hands is essential to the concealment of crime and the successful manipulation of its benefits. Multiple orders are necessary as a deterrent not only to the principal actors in the criminal activity but to all those who facilitate such concealment and manipulation. To uphold the appellant's submission would therefore serve to frustrate the aims of POCA. There was, correctly so, an implicit recognition of this by Van der Merwe J in *NDPP v Johannes du Preez Joubert and others* (unreported judgment in TPD case 24541/2002 delivered 2 March 2003) quoting *R v Simpson* (1998)2 CR App R(S) 111:

> "... the phrase "any payments or other rewards received in connection with drug trafficking" has been interpreted literally, notwithstanding that such an interpretation means that there can be multiple recovery of the same sum which passes through the hands of successive dealers, regardless of the amount of profit made by the dealer or dealers or of whether any profit was made at all."

Of course a court confronted with the choice may consider it appropriate to so phrase its order that the recovery in its total effect, will be limited, although made against a number of defendants. That is what Squires J achieved in the present case by placing a cap on the total which the State would be entitled to recover.'[55] (emphasis added)

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[53] At p21.
[54] At p20.
[55] Above n12 at para 25.

[260] The SCA has thus recognised that joint and several confiscation orders, coupled with an overall cap on the total amount recoverable, may be an effective means of achieving the purposes of POCA while at the same time avoiding an arbitrary deprivation of property by ensuring that there is no over recovery, for want of a better description, to the State. *Shaik* reiterates that multiple orders against several defendants serves a legitimate deterrent purpose. It is important not to lose sight of this.

[261] Although these cases concerned confiscation orders, as opposed to restraint orders, the same principles must apply. After all, the purpose of a restraint order is to secure so much realisable property as may be necessary to satisfy a confiscation order that may be granted down the line. The deterrent effect of confiscation orders is served by permitting the NDPP to place under restraint as much property from each defendant as is necessary to reach the upper limit of the cap.

[262] In this case, as in *Mokhabukhi*,[56] the director defendants collaborated and acted in concert, with the Regiments defendants, in the alleged offences from which the benefit arose. They owned, managed and funded Regiments and thus at least indirectly benefited from the proceeds of the impugned contracts. The case for a joint and several order against all the defendants is established. There is no good reason to believe that an order of this nature will lead to manifest disproportionality. First, because we have no facts before us to establish that this will be the effect of such an order. Mr Nyhonyha suggests that the restraint may operate differently between the different defendants unless there is a proportional limit placed on the property of each defendant that may be restrained. However, he places no facts before the court to substantiate his suggestion. Nor does he or his fellow defendants deal substantively with the question of benefit in their answering affidavits. They simply deny having benefited at all. At this stage, we do not know the actual benefit received by the individual defendants.

[263] The second reason is that the underlying purpose of confiscation and restraint would not be served by proportionalising the restraint order as suggested

[56] Above n52

by Mr Nyhonyha. It would limit the ability of the NDPP to secure assets sufficient to reach the upper limit of the restraint cap, and therefore undermine the very purpose of the restraint proceedings. To the extent that some defendants may have more assets placed under restraint than others (bearing in mind we have no evidence to establish that this will occur), it is justified by their common involvement in the alleged offences at issue, their collective benefit and the need to serve the legislative purpose of POCA.

[264] For these reasons, it is not necessary to interfere with the nature of the order sought by the NDPP in this regard.

The Variation Application

[265] On 22 January 2020 the NDPP instituted an application to vary the provisional restraint order granted by Wright J to increase the limit or cap of the restraint order to R1,685 billion. Adv Cronje filed an affidavit in support of this application. She stated that since deposing to the initial founding affidavit further evidence had become known to her showing that the benefit which the defendants obtained exceeded the amount reflected in the founding affidavit.

[266] In the founding affidavit the NDPP averred that the defendants had benefited in an amount of 'at least' R1 108 billion. The estimated benefit derived from the alleged offences involving payments from Transnet was R508 million and the benefit flowing through Regiments Fund Managers from the Transnet Fund was estimated to be R600 million. In the variation application, Adv Cronje attached an affidavit by Mr Tsoka, a Senior Manager employed by Fundudzi. He was involved in the Fundudzi investigation referred to earlier. Mr Tsoka stated that as part of the investigation he had been given access to details from Transnet of all payments made to Regiments Capital Management. From these he calculated that Regiments had actually been paid R1,085 billion. In other words, substantially more than the R508 million estimated in the founding affidavit.

[267] Based on these calculations, the NDPP sought a variation of the provisional restraint order to raise the cap.

[268] The defendants oppose the application for the variation on two broad grounds. The first is that POCA does not provide for the variation of a provisional

restraint order. The second is that the variation application is not based on new evidence that was unavailable at the time the NDPP made her application for the *ex parte* order. According to the defendants, the NDPP had considered the Fundudzi report when she deposed to the founding affidavit. Therefore, the calculation referred to by Mr Tsoka was already available to her at that stage. They say that the NDPP cannot be permitted to supplement her case in this fashion and the affidavit should not be admitted into evidence

[269] On the first point, the defendants base their case primarily on s 26(10)(a) which provides that:

'A High Court which made a restraint order may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and shall rescind the restraint order when the proceedings against the defendant concerned are concluded.'

[270] In *Phillips* the SCA held that:

'Absent the requirements for variation or rescission laid down in s 26(10)(a) (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a restraint order is not capable of being changed. The defendants stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is, in my opinion, final in the sense required by the case law for appealability.'[57]

[271] Based on this dictum the defendants contend that only a defendant, and not the NDPP, has the right to seek to vary a restraint order. They say that save for a defendant who meets the requirements of s 26(10)(a), a restraint order cannot be varied under POCA. For additional support, they point out that in 1999

[57] Above n4 at para 22.

the Legislature saw fit to remove what had been s 26(5)(a), which provided for a general power of the courts to vary a restraint order at any time 'in the interests of justice'. The defendants say that the removal of this general power indicates that the Legislature was intent on overriding and doing away with a general power to vary restraint orders under POCA.

[272] In our view there is no merit in the defendants' submissions on this score. In the first place, the order granted by Wright J was an interim order granted in the form of a rule *nisi*. In *Rautenbach* the SCA explained that-

'An interim order that is made *ex parte* is by its nature provisional – it is "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side"'.[58]

[273] It is the essence of a provisional order that it may be varied. This is an entrenched common law principle, as explained in *South Cape Corporation*:

'At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.'[59]

[274] Until it is confirmed on the return day, a provisional restraint order may be varied by the court that made it, on good cause shown. We agree with Mr Budlender's submission that in this respect a provisional restraint order is no different from any other order granted *ex parte* in the form of a *rule nisi*. *Phillips* was not concerned with a provisional restraint order. It was concerned specifically with the rescission of a restraint order that had been confirmed on the return day. The defendant thereafter sought to rescind the order on the basis that it was impossible for the curator to discharge his duties under it. In that context, the SCA found that the power to vary was limited to the circumstances under s 26(10)(a) being established. One can understand why, in respect of final restraint orders, the Legislature removed the additional power to vary or rescind in the interests of

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[58] Above n5 at paras 11 & 13.

[59] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H; see also *Freedom Stationary (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) para 16.

justice. No doubt it was intended to close this loophole so as to ensure that the objectives of asset forfeiture were not undermined by a wide power to vary or rescind. For this reason, defendants are now restricted, under s 26 (10)(a) to very limited grounds for variation and rescission.

[275] But pending the return day of an interim restraint order it is nothing more than a provisional order. The very nature of the proceedings envisages that variations may be necessary once all parties have been heard. The court's power to vary a provisional order is built into their DNA. When a Court is asked on the return day to confirm a provisional order, it may confirm the provisional order in full; it may amend and confirm the provisional order; and it may discharge the provisional order. To apply s 26(1)(a) to provisional restraint orders would be nonsensical: for example, it would mean that a defendant who could show that the benefit was in fact substantially less than that estimated in the provisional restraint order would not be entitled to an order confirming the provisional restraint but in a lesser amount.

[276] It is correct that POCA does not address the variation of provisional orders expressly. However, and contrary to the defendants' submissions, there is nothing in POCA which provides that a POCA provisional order, unlike all other provisional orders, may not be varied. Section 26(10) of POCA does not contradict this general rule. It limits the circumstances in which a 'restraint order' can be varied. A 'restraint order' is defined in section 12 of POCA as an order referred to in section 26(1) of the Act. A provisional order is not a section 26(1) order: it is a section 26(3) order.

[277] Accordingly, we agree with the submission made by Mr Budlender that a provisional restraint order can, by its very nature, be varied. This then means that the NDPP's affidavit in support of the variation application, which is not a supplementary founding affidavit, as contended by the respondents, for which the Court's leave was required, could and should have been received into evidence by the court *a quo*.

[278] There is no legal rule that the variation of a provisional order may only be sought on new evidence. A variation application does not have to be launched

within a particular time, so long as it is sought before the provisional order is made final.

[279] In any event, the affidavit of Mr Tsoka, was deposed to on 21 January 2020. The evidence he provided, namely the calculation of the amounts paid to Regiments by Transnet for the 2014-201 7 financial years, was not known to Adv Cronje when she made her founding affidavit. She stated that at the time when she deposed to the founding affidavit, the evidence known to her indicated that the defendants benefitted from their unlawful conduct as against Transnet in an amount of at least R508 million. That is self-evidently the truth. There would have been no conceivable reason for her to seek a restraint in a lesser amount, if she had known that in fact that the benefit was greater.

[280] The defendants suffered no prejudice through the variation application. They had the opportunity to answer the NDPP's averments, but elected not to take issue with the substance of Mr Tsoka's affidavit. One must infer that they do not have a response, or that they have elected not to take the risk of engaging with issues that may harm their criminal defence. They are entitled to assume that position, but they must live by the consequences.

[281] The application for the variation of the provisional restraint order should therefore have been granted by the court *a quo*.

The Liquidation of Regiments Capital

[282] That brings us to the last issue which requires our attention and that relates to the fact that during or about the time of the granting of the provisional restraint order and its subsequent discharge by the court *a quo*, the fourth respondent, Regiments Capital, was liquidated and shortly thereafter the liquidation proceedings were set aside. The question to be asked is this: What effect, if any, does this have on the assets of Regiments Capital? Are those assets to be included under the restraint order or should they fall under the powers and control of the liquidators appointed to the liquidated company?

[283] The legal consequences of the winding up of a company, in the context of restraint and confiscation orders, flow from s 36 of POCA. It may be apposite to cite that section it full:

‘**36 Effect of winding-up of companies or other juristic persons on realisable property**

(1) When any competent court has made an order for the winding-up of any company or other juristic person which holds realisable property or a resolution for the voluntary winding-up of any such company or juristic person has been registered in terms of any applicable law-

(a) no property for the time being subject to a restraint order made before the relevant time; and

(b) no proceeds of any realisable property realised by virtue of section 30 and for the time being in the hands of a *curator bonis* appointed under this Chapter,

shall form part of the assets of any such company or juristic person.

(2) Where an order mentioned in subsection (1) has been made in respect of a company or other juristic person or a resolution mentioned in that subsection has been registered in respect of such company or juristic person, the powers conferred upon a High Court by sections 26 to 31 and 33 (2) or upon a *curator bonis* appointed under this Chapter, shall not be exercised in respect of any property which forms part of the assets of such company or juristic person.

(3) Nothing in the Companies Act, 1973 (Act 61 of 1973), or any other law relating to juristic persons in general or any particular juristic person, shall be construed as prohibiting any High Court or *curator bonis* appointed under this Chapter from exercising any power contemplated in subsection (2) in respect of any property or proceeds mentioned in subsection (1).

(4) For the purposes of subsection (1), 'the relevant time' means-

(a) where an order for the winding-up of the company or juristic person, as the case may be, has been made, the time of the presentation to the court concerned of the application for the winding-up; or

(b) where no such order has been made, the time of the registration of the resolution authorising the voluntary winding-up of the company or juristic person, as the case may be.

(5) The provisions of section 35 (2) are with the necessary changes applicable to a company or juristic person who has directly or indirectly made an affected gift.’

[284] The sequence of events and their consequences under s 359 of the old Companies Act are as follows. On 19 November 2019 the provisional restraint order was issued. During May/June 2020 the application for confirmation of the provisional restraint was argued before Mahalelo J and judgment was reserved. On 16 September 2020, while judgment was awaited, Twala J made a final order of liquidation of Regiments Capital. The legal effect of this, in terms of s 359, was to suspend the pending confirmation application as against Regiments Capital. On 26 October 2020 Mahalelo J handed down judgment, and discharged the restraint order. By then, Capital Regiments had been finally wound up by order of this Court. Therefore, in the light of s 359, that step had no effect as far as Regiments Capital is concerned, because the jurisdiction of the court had been ousted and the assets of the said company had been placed under the administration and control of the liquidators.

[285] Importantly though on 22 February 2021 this court (per Vally J) issued an order in terms of which *inter alia* the winding up of Regiments Capital was set aside. Pursuant to this order, the Capitec shares previously held by Coral Lagoon, a wholly-owned subsidiary of Ash Brook, were distributed to Ash Brook's shareholders, namely Regiments Capital, Marcytouch and Ergold. The realised value of a portion of such shares together with certain cash reserves now held by Regiments Capital (in liquidation), amount to approximately R380 million.

[286] The order setting aside the winding up is currently the subject of an application for leave to appeal to the Supreme Court of Appeal. The operation of the section 354 order is suspended pending the determination thereof with the effect that Regiments Capital remains in liquidation. That application was still pending at the time that we heard the application for leave to appeal. It means that the situation as regards Regiments Capital is in flux: it is still under winding up because of the suspension of the Vally J setting aside order. However, we do not know whether that order ultimately will prevail.

[287] As things stand, we cannot confirm the restraint order against Regiments Capital because its assets are currently under the control of the liquidators. The

NDPP accepts this. However, the NDPP contends that this does not mean that the order against Regiments Capital should be discharged.

[288] It is common cause that the presentation of the winding up application preceded the grant of the provisional restraint order. For this reason, Mr Leathern, who appeared for the liquidators of Regiments Capital with Ms Verwey, contends that the NDPP, knowing full well that the assets of Regiments Capital could not and should not have been subjected to any restraint and/or confiscation order, should have opted not to proceed against it with the restraint proceedings, especially not on appeal. Therefore, so the argument is concluded, the appeal against Regiments Capital should simply be dismissed with costs.

[289] Section 36 was authoritatively interpreted in *Bester and Another NNO v National Director of Public Prosecutions; National Director of Public Prosecutions v Kleinhans and Others*[60], in which Maya JA held as follows at para 9:

'As I see it, s 36(1) therefore defines the concept "assets of the company" in liquidation. It excludes all assets subject to a restraining order which preceded the relevant date [the date of presentation of the winding up application], but includes all subject to a restraining order which was granted after the relevant date.'

[290] And at para 12:

'The trigger for s 36(2) to apply is that a winding up order has been made .... Both subsections [s 36(1) and s 36(2)] find no application unless a company is eventually wound up.'

[291] As Maya JA explains, what the Legislature intended was a 'shifting phenomenon' whereby, once a company was finally wound up [in other words, there is a final winding up order, not subject to appeal processes], the legal position shifted retrospectively with reference to the date upon which the winding up application had been presented.

[292] In the present circumstances, in which the liquidation order has been set aside, and the appeal against that order is pending before the SCA, it is not yet known whether, in the words of Maya JA, the 'trigger' for the application of s 36

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[60] *Bester and Another NNO v National Director of Public Prosecutions; National Director of Public Prosecutions v Kleinhans and Others* 2013 (1) SACR 83 (SCA).

of POCA will manifest. We agree with the submission by Mr Budlender that in the words of Maya JA, ss 36(1) and (2) 'find no application' at this stage. Those sections will only find application if the appeal against the order setting aside the winding up succeeds. We cannot look into a crystal ball at this stage to determine whether this trigger will be pulled or not. For these reasons, we agree with the submission by Mr Budlender submitted that the application against Regiments Capital should be suspended, and the application in respect of that entity postponed *sine die*.

[293] This is so for the simple reason that, although Regiments Capital remains in liquidation, the future of the liquidation proceedings is uncertain. It may very well be that the 'shifting phenomena' referred to by Maya JA, would ultimately result in the assets of Regiments Capital reverting back to the control of the *curator bonis*. That is the order that, in our view, ought to have been granted by the court *a quo* relative to Regiments Capital and the proceedings against it should have been postponed *sine die*.

[294] The subsidiaries, Regiments Fund Managers and Regiments Securities were not placed under winding up. The shareholding of Regiments Capital in these entities are assets that currently fall under the control of the liquidators. Their status as realisable property must await the outcome of the winding up appeal process.

[295] However, what of the assets of these subsidiaries? They do not fall under the control of the liquidators and there is no impediment to confirming the restraint order in respect of those assets. The NDPP submitted that the assets of the subsidiaries could however fall under the control of the curator. This is because although those assets are not owned by Regiments Capital (or for that matter the Regiments Capital shareholders), they are 'held' by the ultimate shareholders as envisaged in s 14(1)(a) of POCA, and are therefore constitute realisable property vis-à-vis Dr Wood, Mr Nyhonyha and Mr Pillay. This seems to us to be consistent with the broad definition of realisable property, and its interpretation in the jurisprudence. The assets of the subsidiaries ought properly to be placed under restraint.

Conclusion and Costs of Appeal

[296] For all these reasons the appeal must succeed.

[297] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*[61]. There are no grounds in this case to depart from the ordinary rule that costs should follow the result.

[298] Moreover, as pointed out by Mr Budlender, the Supreme Court of Appeal has consistently awarded costs to the appellant where there has been a successful appeal against the discharge of a provisional restraint. In that regard, we were referred to *Kyriacou*,[62] *Rautenbach*[63] and *Van Staden*.[64]

[299] The matter was complex and papers voluminous. All but one of the respondents have employed more than one counsel (one of them has employed three). In those circumstances, we are persuaded that it is appropriate that the costs of two counsel be awarded, one of being senior counsel where so employed.

[300] The respondents, excluding Regiments Capital, should therefore pay the appellant's costs of the appeal.

Order

[301] In the result, the following order is made: -

(1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.

(2) The order the court *a quo* is set aside and in its place is substituted the following: -

'(a) The applicant's application dated 22 January 2020 for variation of the restraint order is granted;

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[61] *Myers v Abramson*,1951(3) SA 438 (C) at 455.
[62] Above n18.
[63] Above n5.
[64] Above n6.

(b) The restraint proceedings instituted against the fourth defendant, Regiments Capital, are suspended, and the application for a restraint order against the fourth defendant is postponed *sine die*, with costs to be in the cause.

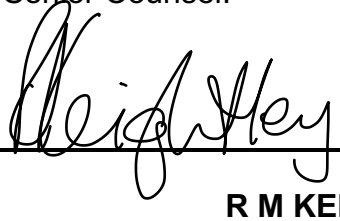
(c) The restraint order issued by Wright J on the 18 November 2019 is varied by the substitution of the amount of "R1,108 billion" with the amount of "R1,685 billion".

(d) Subject to para (b) above, the provisional restraint order made on 18 November 2019 by Wright J, as varied in terms of para (c) above, and subject to para (e) below, is confirmed.

(e) The cap on the order is further adjusted with due regard to the payment which Regiments has made to the Transnet Second Defined Benefit Fund, in an amount of R639 111 816.83; and

(f) All of the defendants and the respondents, excepting the fourth defendant, Regiment Capital, jointly and severally, the one paying the other to be absolved, shall pay applicant's costs of the application, including the costs consequent upon the employment of two counsel, one being a Senior Counsel.'

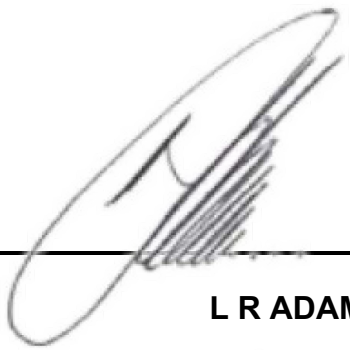
(3) The respondents, excluding the fourth respondents, Regiments Capital, jointly and severally, the one paying the other to be absolved, shall pay the appellant's costs of the appeal, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.



R M KEIGHTLEY

Judge of the High Court

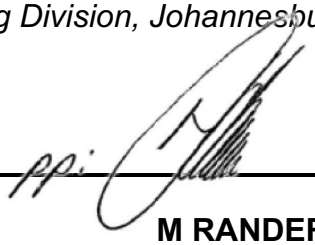
Gauteng Division, Johannesburg



L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg



M RANDERA

Acting Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON:	15th to 19th November 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams*.
JUDGMENT DATE:	3 May 2022 – judgment handed down electronically
FOR THE APPELLANT:	Advocate G Budlender, together with Advocate K Saller
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE FIRST, FOURTEENTH AND FIFTEENTH RESPONDENTS:	Advocate Estelle Killian SC

INSTRUCTED BY:	Fairbridge Wertheim Becker Attorneys, Johannesburg
FOR THE SECOND, NINTH AND ELEVENTH RESPONDENTS:	Adv J G Cilliers SC, together with Adv A Ramlaal
INSTRUCTED BY:	Ravie Govender Law Inc, Sandton
FOR THE THIRD, TENTH, TWELFTH AND THIRTEENTH RESPONDENTS:	Adv Danie Dörfling SC, together with Advocate Gcobani Ngcangisa
INSTRUCTED BY:	Moroka Attorneys, Bloemfontein
FOR THE FOURTH RESPONDENT:	Adv D M Leathern SC, together with Adv J L Verwey
INSTRUCTED BY:	Tintingers Incorporated, Pretoria
FOR THE FIFTH TO EIGHTH, SEVENTEENTH AND EIGHTEENTH RESPONDENTS:	Adv I V Maleka SC, together with Advocate A C McKenzie and Advocate T Scott
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