IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA

CASE NO: 40451/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 01 SEPTEMBER 2022

SIGNATURE: *ML SENYATSI*

In the matter between:

REGIMENTS FUND MANAGERS (PTY) LTD	First Applicant
REGIMENTS SECURITIES LTD	Second Applicant
ASH BROOK INVESTMENTS 15 (PTY) LTD	Third Applicant
CORAL LAGOON 194 (PTY) LTD	Fourth Applicant
KGORO CONSORTIUM (PTY) LTD	Fifth Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent

EUGENE NEL N.O.
(second respondent cited in his capacity
as the curator bonis of the applicants) Second Respondent

JUDGMENT

SENYATSI J:

INTRODUCTION:

[1] This is a full judgment with reasons following the order issued on 5 July 2022

BACKGROUND

[2] On 19 November 2019, the first respondent, National Director of Public Prosecutions ("NDPP"), obtained *ex parte* and in camera a provisional order against the applicants and other parties in terms of Chapter 5 of the Prevention of Organised Crime Act, no 121 of 1998 ("POCA") capped in an amount of R1, 108 billion. The effect of the provisional restraint order was that the applicant's property to the value of R,1 108 billion immediately vested in the *curator bonis*.

[3] The confirmation of the provisional restraint order was opposed. On 28 October 2020, the order was discharged in full due to the first respondent's failure to disclose certain material facts. As a consequence, the applicants immediately resumed control of their property and the *curator bonis* ceased to serve as such. The applicants were therefore able to fund several of the litigation cases which were then pending at the time. The applicants were also able to institute other litigation in order to protect their interests.

[4] NDPP appealed the judgment discharging the provisional order to the Full Bench of this Division. On 3 May 2022, the Full Bench of this division upheld the appeal

of the first respondent and confirmed the provisional restraint order that had been discharged by the *court a quo*. Consequently, the control of the applicant's property reverted to the *curator bonis*.

[5] The applicants then appealed the Full Bench's judgment and delivered an application for special leave to appeal in terms of sections 16(1) and 17(3) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act") to the Supreme Court of Appeal on 3 June 2022. The application remains pending and the first respondent is due to deliver her answering affidavit on 4 July 2022 (after which the applicant will be required to deliver a replying affidavit by 18 July 2022).

[6] On 14 June 2022, and after delivering their application for special leave to appeal, the *curator bonis* sent an email to the applicant's attorney and indicated that he (the curator bonis) did not have sufficient assets to meet the restraint value of R1, 108 billion and therefore could not release the assets of funds to pay for the legal expenses in the pending SCA appeal.

[7] The *curator bonis's* refusal was made at the time when the applicants and the NDPP were engaged in a dispute before the Supreme Court of Appeal and which required the applicants to take further steps between 4 July 2022 and 18 July 2022, which triggered the urgent application. Upon hearing the application, the court was satisfied that the application was urgent.

[8] The application is opposed by the NDPP on the ground that it was not urgent as urgency was self-created by the applicants.

[9] The second ground relied on for opposing the application was that the applicants failed to provide supporting documentation as required by section 26 (6) of POCA on full disclosure of the applicants' restrained property and that there is sufficient unrestrained property to cover the legal expenses. The first respondent contended that the application should be dismissed with costs.

ISSUES FOR DETERMINATION

[10] The issue for determination was whether the application was urgent and secondly whether the requirements of s26 (2) of POCA had been met.

THE LEGAL FRAMEWORK

Urgency

[11] The question whether a matter should be enrolled and heard as an urgent application is regulated by the provision of Rule 6(12) of the Uniform Rules. Rule 6(12) provides as follows:-

> *"(12) (a) In urgent applications the court or a judge may dispense with the forms of service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure which shall as for as practicable be in terms of these Rules as it deems fit.*
>
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub rule, the application must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[12] The correct interpretation of the rule is that the procedure set out in Rule 6(12) is not there for the taking. An applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question whether a matter is sufficiently urgent to be enrolled and heard as such

is underpinned by the issue of absence of substantial redress in an application in due course.

[13] In *Luna Maubels Vervaardigers (Edms) Bpk v Makin and Another*[1] the court held that "urgency" in respect of urgent applications involves, mainly, the abridgement of times prescribed by the Rules, and secondly, the departure from established filing and sitting times of the court. The court further held that practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and of the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate with that exigency. Mere lip service to the requirements of Rule 6(12)(b) will not do; an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter is set down.

[14] *In Re Several Matters on the Urgent Court Roll* [2] it was held that the test in determining whether an application is urgent is the determination as to whether or not an applicant will be able to obtain substantial redress in due course. The court furthermore held that substantial redress in terms of Rule 6(12), is not equivalent to the irreparable harm that is required before granting an interim relief. It is something less. [An applicant] may still obtain redress in an application in due course but it may not be substantial.[3]

[15] The trigger for the present application has been the *curator bonis*' position that he was still verifying the disclosure made by Mr Nyonya ("Nyonya") to enable him to make a determination on whether or not to release the excess funds to meet the legal expenses related to the appeal to the Supreme Court of Appeal. The

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[1] 1977 (4) SA 135 (W)
[2] 2013(1) SA 549 (W)
[3] Ibid Several Matters par [7]

NDPP opposed the application on the ground that there was no urgency. I do not agree with the contention. It is within the applicants' rights to be properly represented in the pending appeal and by legal representatives of their choice. In fact, to the extent that the funds are available to be meet the legal expenses, I see no reason why the NDPP opposes this application especially given the fact that if this application is to be heard in the normal course the respondents would be seriously prejudiced as the process at the Supreme Court of Appeal is ongoing and will not wait for the application for payment of legal expenses by the *curator bonis* to unfold. I am therefore satisfied that urgency has been established.

[16] The legal framework of the relief sought is regulated by section 26(b) of POCA which provides that a court may grant the relief sought if it is satisfied that:

> "*16.1. the person whose expenses must be provided for has disclosed under oath all his or her interests in the property subject to a restraint order" and;*
>
> *16.2. the person must meet the expenses concerned out of his or her unrestrained property."*

[17] Our courts have had an opportunity to interpret the requirements of section 26(6)(b) of POCA. In *Naidoo v National Director of Public Prosecutions*[4] the court held at [20] that:

> "*Yet the express terms of section 26(6) make allowance for reasonable living and legal expenses only on limited terms. First, the access is granted only for the legal expenses of —a person against whom the restraint order*ll *was made. Second, it is conditional on full disclosure. Third, the person must not be able to meet the expenses concerned out of his or her unrestrained property. Given these conditions, it is not a*

[4] 2012 (1) SACR 358 (CC) at para [20]; 2011 (12) BCLR 1239 (CC);

plausible interpretation that access can be given to property held by a person other than the person against whom the restraint order has been made."

[18] The nub of the matter is that section 26 (6) does not create a mechanism through which an accused person not yet convited may access restrained assets held by him or her for reasonable legal expenses.[5] Section 26(6) 6 allows for living and legal expenses only in limited terms. First, the access is granted only for legal expenses of a person against whom the restraint order was made. Second, it conditional on full disclosure. Third, the person must not be able to meet the expenses and out of his or her unrestrained property. In these conditions it is not a plausible interpretation that access can be given to property held by a person other than the person against whom the restraint order has been made.

[19] NDPP contends that the decisions and actions of the *curator bonis* are conditional on him receiving full and accurate disclosure from the applicants. They contend that the *curator bonis* does not have sufficient assets to meeting the restrain value he can release assets or funds because he is still waiting for Nyonya to disclose the assets.

[20] NDPP furthermore contends that because Nyonya is a respondent in the restraint application and a director of the applicants in the present application and a trustee of Nyonya Trust which is a direct shareholder in the first and second applicants and an indirect shareholder in the third, fourth and fifth applicants, his disclosure is crucial to enable the *curator bonis* to make a determination on releasing the assets to enable the applicants to meet their legal expenses.

[21] The *curator bonis* confirmed that the applicants complied with their disclosure

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[5] National Director of Public Prosecutions v Naidoo & Others [2011] 2 All SA 410 (SCA)

obligations and that he was in the process of verifying the disclosures made.

[22] I do not find any sufficient reason advanced as to why the *curator bonis* has not released the sum of money required to meet the legal expenses.

[23] In *Fraser vs Absa Bank Limited* (NDPP as *amicus curiae)* [6], the court held that the applicant must satisfy the pre-conditions under section 26 (6)of POCA. I am of the respectful view that as confirmed by the *curator bonis*, the applicants have met the disclosure requirements. It cannot be argued, as NDPP are attempting to do, that because the *curator bonis* was still verifying the information after confirming that the applicants have met the disclosure requirements, that they have not complied with section 26 (6) of POCA.

[24] It is no doubt that the urgent application was triggered when the *curator bonis* refused to release the funds at the time when the applicants and NDPP were engaged in a dispute before the Supreme Court of Appeal requiring certain steps to be taken between the 4th July 2022 to 18 July 2022. It would not be in the interest of justice at such reasonable expenses by the applicants to prosecute rights in the Supreme Court of Appeal are withheld based on the veiled refusal by the *curator bonis* to release same.

[25] The evidence adduced by the applicants showed that the applicants made full disclosure to the *curator bonis* on two occasions, during November 2019 and thereafter during May 2022. I am not, for these reasons, persuaded that additional disclosure had to be provided. I have also not been provided with reasons by the respondents as to the basis for contending that the disclosure was not adequate when the *curator bonis* confirmed that it was. Consequently, I find that the applicants are not able to meet the legal expenses required to pay counsel in the Supreme Court of Appeal litigation.

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[6] 2007 (3) SA 484 (CC) at para 45

[26] The expenses required to be paid to the legal representatives are in my view, market related.

ORDER

[27] The following order is made:

1. The forms and service for the Uniform Rule of Court are dispensed with and the matter is enrolled and heard as an urgent application in terms of Rule 6(12);

2. The second respondent is directed to release such realizable property within his control to meet the reasonable legal expenses of the applicants (fifth and sixth defendants and first, second and twelve respondents in *court a quo*) in convention with the proceedings and any related criminal proceedings;

3. The second respondent is directed to pay such legal expenses in accordance with the mandate and fee agreements attached to the founding affidavit as annexures "FA11" and "FA12"

4. The first respondent is directed to pay the costs of this application, including the costs of two counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD AND JUDGMENT RESERVED: 5 July 2022

DATE JUDGMENT DELIVERED: 1 September 2022

APPEARANCES

Counsel for the Applicant: Adv IV Maleka SC
Adv T Scott

Instructed by: Smit Sewgoolam Inc.

Counsel for the Applicant: Adv. Sazi Tisani

Instructed by: National Prosecuting Authority; Adv Suna de Villiers