THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 198/2011

In the matter between:

CHRISTIAN FINDLAY BESTER NO	1st Appellant
GERARD LEONARD PARIS NO	2nd Appellant
(In their capacity as provisional liquidators of **AQUILA HOLDINGS (PTY) LTD** (in provisional liquidation))	
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Respondent

In re:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
FRANCOIS EMIL JACQUES KLEINHANS	Defendant
HILDA GRACE KLEINHANS	1st Respondent
AQUILA HOLDINGS (PTY) LTD (in liquidation)	2nd Respondent
FINISHING TOUCH TRADING 75 (PTY) LTD t/a AQUILA PROPERTIES SOLUTIONS	3rd Respondent
RICH REWARDS TRADING 52 (PTY) LTD t/a AQUILA FINANCIAL SERVICES	4th Respondent
GLOBAL PACT TRADING 73 (PTY) LTD	5th Respondent

Neutral citation: *Bester NO v NDPP* (198/11) [2011] ZASCA 234 (30 November 2011)

Coram: Brand, Maya and Seriti JJA

Heard: **21 November 2011**

Delivered: **30 November 2011**

Summary: Interpretation of s 36 of the Prevention of Organised Crime Act 121 of

1998.

ORDER

On appeal from: Western Cape High Court, Cape Town (Fourie J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) The 490 shares in Optipharm Healthcare (Pty) Ltd held by Aquila Holdings (Pty) Ltd (in liquidation) are excluded from the "Schedule of Known Assets" reflected in annexure "A" to the provisional restraint order of 3 July 2009 (the restraint order), and the restraint order is varied in this respect.

(b) The costs of the intervention application launched by the first and second intervening applicants shall be paid by the applicant, including the costs of two counsel where employed.

(c) Subject to the aforegoing, the restraint order is confirmed against the defendant and respondents only in respect of such property as held by them at the date of this order.'

JUDGMENT

MAYA JA (BRAND and **SERITI JJA** concurring):

[1] This appeal concerns the interpretation of s 36 of the Prevention of Organised Crime Act 121 of 1998 (POCA). More particularly, it raises the question as to the effect of a restraining order under s 26 of POCA on the

assets of a company in liquidation where that order is made after the presentation of an application for the winding-up of the company, but before the actual winding-up order is granted.

[2] The relevant facts are briefly these. On 19 November 2008 BMI-Techknowledge Group (Pty) Ltd, a creditor of Aquila Holdings (Pty) Ltd (Aquila), launched an application in the Western Cape High Court for the liquidation of Aquila on the basis that it was unable to pay its debts. On 10 March 2010 Aquila was placed in provisional liquidation. It was finally wound up on 10 May 2010. In the interim, on 3 July 2009, the respondent (the NDPP) obtained a provisional restraint order in an application launched under s 26 of POCA[1] in respect of the realisable property of Aquila, Aquila's sole director and shareholder, Mr Francois Kleinhans, and other entities linked to it. In terms of this order, 490 shares owned by Aquila in Optipharm Healthcare (Pty) Ltd, a company in which it had 70 per cent shareholding, were provisionally restrained and Mr Stephen Powell was appointed as *curator bonis* with the mandate to take possession of the shares which Aquila was ordered to surrender to him.

[3] On 24 May 2010 the appellants, then Aquila's joint provisional liquidators, launched an application seeking leave to intervene in the restraint proceedings and a variation of the restraint order releasing the shares from its ambit by virtue of s 36(2) of POCA on the basis that Aquila's

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1 Section 26 of POCA makes provision for restraint orders and the relevant parts read:

'(1) The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(2) A restraint order may be made–

(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

(b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;

(c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.

(3) (a) A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.'

winding-up had started before the restraint order was granted. This, in their opinion meant that Aquila's assets fell to be administered by them. On 2 December 2010 the court below (per Fourie J) simultaneously heard the NDPP's application for the confirmation of the provisional restraint order (which was not opposed) and the intervention application. By then the appellants had become Aquila's liquidators.

[4] The court below acknowledged the appellants' right to intervene in terms of s 28(2)(a) of POCA but dismissed their application and confirmed the provisional restraint order without variation. The gist of its reasoning was that s 36(1) has no application in the matter, and that on the ordinary meaning of the provisions of s 36(2), its operation is triggered only if the winding-up order has actually been granted when the restraint order is made, which did not happen in this case. The appellants challenge this decision with the leave of the court below.

[5] Section 36 of POCA reads:

'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 *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) ...'[2]

[6] I see no ambiguity in the wording of these provisions. Given their plain meaning and read in context, their operation is governed by two jurisdictional facts envisaged in both subsecs (1) and (2) – ie the 'making' of an order for the winding-up of a company and the grant of a restraint order in respect of its realisable property. The sequence in which these two events occur is crucial. Section 36(1) presents no controversy. Read with the definition of 'relevant time' set out in subsec (4)(a), it expressly excludes assets under restraint from a company's estate where the restraint order preceded the presentation to court of such company's winding-up application.

[7] But POCA bears no description of the phrase 'presentation to the

2 'Realisable property' is defined in s 14 as follows:

'(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely–

a) any property held by the defendant concerned; and

b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

(2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.'

'Affected gift' is in turn defined in s 12(1) as 'any gift (a) made by the defendant concerned not more than seven years before [the institution of a prosecution for an offence or the date on which a restraint order is made]; or (b) made by the defendant concerned at any time, if it was a gift …(i) of property received by that defendant in connection with an offence committed by him or her or any other person; or (ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection …'.

court' which, incidentally, is used nowhere else in the Act but in ss (4)(a). A contention made on the appellants' behalf in this regard was that the words must be given the established judicial meaning (to ensure certainty in the law among other reasons) placed upon a similar phrase previously used by the Legislature, in respect of a similar subject matter, in s 348 of the Companies Act 61 of 1973 (the Companies Act).[3] The latter section deals with the commencement of a winding-up of a company by a court which is 'deemed to commence at the time of the presentation to the Court of the application for the winding-up'. In this context, our courts have interpreted the words 'presentation to the Court' as meaning when the application is filed with the Registrar of the court.[4]

[8] The respondent conceded the correctness of these contentions, rightly so in my view. As pointed out by the appellants' counsel, s 348 of the Companies Act, as does s 36(4)(a) of POCA, deals with issues such as the timing of the presentation to court of a company's winding-up application, such application's impact on the company's assets, the rights of creditors etc. The two sections are *pari materia*. And the Legislature, necessarily aware of its previous use of an identical phrase in a similar situation in s 348 of the Companies Act and the subsequent judicial construction ascribed to it by the courts, must have intended it to bear the same meaning in s 36(1) of POCA. So, the words 'presentation to the court concerned' used in s 36(4)(a) mean, for purposes of determining the 'relevant time' mentioned therein, when an application for the winding-up application of a company is filed with the Registrar of the court.

[9] The respondent's argument, which found favour with the court below,

3 The Companies Act has since been repealed by s 224 of the Companies Act 71 of 2008 although its application to a company liquidated for inability to pay its debts is saved by transitional provisions set out in item 9 to schedule 5 of the latter Acts.

4 See, for example, *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C) at 141I-142A; *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 347A; *Venter NO v Farley* 1991 (1) SA 316 (C) at 320C-F; *The Nantai Princess Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess and other Vessels* 1997 (2) SA 580 (D) at 584G-586G.

is that s 36(1) does not apply in a case like the present where the restraint order was made after the relevant time, that is, after the winding-up application was filed with the registrar of the court. I do not agree with this argument. It is true that s 36(1) does not deal expressly with this situation, but I believe it must be taken to do so implicitly. What the section expressly provides is that property of a company which has already been restrained by an order under s 26 of POCA before the relevant date, will not be excluded from the assets of the company after winding-up. But logic dictates that the converse must equally hold true. Where the restraining order was made after the relevant date, the property of the company subject to the restraint order must form part of the assets of that company after winding-up. 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, but includes all assets subject to a restraining order which was granted after the relevant date.

[10] This brings the enquiry to the effect of s 36(2) on the present facts; put differently, are the shares excluded from the ambit of the restraint order? The parties were agreed that the assets of a company are not realisable property if a restraint order follows after a winding-up order has been made and that they fall outside the purview of the powers vested in a court or a *curator bonis* under Chapter 5 of POCA. As indicated earlier, the point of difference relates to whether the section applies in a case such as the present, where the winding-up application preceded a restraint order granted before the company was finally wound up. The appellants argued that as s 36(1) excludes property from 'the assets of the company' where the restraint order precedes the relevant time of a winding-up, *ex contrariis* and on a proper construction of its wording, s 36(2) must cover any other winding-up in which the restraint does not precede the relevant time as long as a winding-up order is ultimately granted.

[11] The main contention made on the NDPP's behalf, on the other hand, was that s 36(2) 'applies only where a court is seized with an application for a restraint order in respect of assets which already fall under the control of liquidators, because a winding-up order "*has been made*" in respect of the company that owns the assets' with the result that the subsection could find no application on the present facts as no winding-up order had been made when the restraint order was granted. Some of the reasons advanced in support of this approach were that the appellants' interpretation of the subsection –

(a) creates a 'shifting situation', which is not contemplated either by s 36 or the rest of POCA, in which a court grants a restraint order (in terms of which a company's assets are placed under the control of a *curator bonis*) when no winding-up order has been made, but then, anomalously, the restraint order, whilst remaining extant, loses its force consequent to the granting of a winding-up order which removes the assets from its ambit and the control of the *curator bonis*;

(b) impermissibly imports the 'relevant time' into s 36(2) as it is explicitly defined only 'for the purposes of subsection (1)' and can have no application to subsection (2); and

(c) is inconsistent with POCA's other provisions (for example, s 35 which is a corresponding section dealing with the property of a natural person whose estate has been sequestrated and s 29(2)(c) which regulates immovable property subject to restraint) and its structure.

[12] Put simply, the NDPP's interpretation is that s 36 (2) applies only where the restraint order is granted after a company has been wound up. I agree with his counsel that the trigger for s 36(2) to apply is that a winding-up order 'has been made'. But so does s 36(1). Both subsections find no application at all unless the company is eventually wound up. The first

difficulty that arises on the construction contended for by the NDPP is that situations will arise which are governed by neither s 36(1) or 36(2). If the restraining order precedes the relevant date s 36(1) applies, so he argued. If the winding-up order comes before the restraining order, s 36(2) applies. But what about a situation like the present where the restraining order is granted between the relevant date and the winding-up order? A further problem raised by the construction contended for by the NDPP is that it renders s 36(1) superfluous. Any restraining order that precedes the winding-up order will take preference to the latter order and it matters not whether the restraining order was granted before or after the relevant date. If that was so, the whole field would be covered by s 36(2). I believe it hardly requires any motivation that a construction of s 36 which requires one of the subsections to be ignored completely, cannot be sustained.

[13] The NDPP's argument that 'relevant time' is specifically defined for the purposes of subsection (1) only, takes the matter no further, since that concept is not used in any other section. Further, his approach completely ignores the words 'mentioned in subsection (1)', in reference to the order in subsec (2), which clearly link the order to which the latter subsection refers, to the application envisaged in subsection (1). When the two subsections are read together, as they must, it inexorably follows that the application pursuant to which the winding-up order contemplated in subsec (2) was made, is that mentioned in subsec (1). Thus, the 'relevant time' of the application in subsec (1) directly impacts subsec (2) and must be the same for both subsections. This construction accords with the scheme and objectives of s 36 which refers to 'property which forms part of the assets of [a] company' in liquidation in both ss (1) and (2): delineating the assets which constitute the estate of a company in liquidation in subsec (1) and providing for those not covered by these provisions (which must fall under the liquidator's control when a winding-up order is granted) in subsec (2). In

short, s 36(1) defines the 'assets of the company' after winding-up. Section 36(2) tells us what will happen to those assets after winding-up. The wording of subsec (3) appears to reinforce this view as it seeks to protect from limitation the powers of the high court and *curator bonis* 'contemplated in subsection (2) in respect of *any property or proceeds mentioned in subsection (1)*' (emphasis added).

[14] The further string to the NDPP's bow, his reliance on the differently worded provisions of s 35 of POCA, does not seem to me to lend any support to his cause. The section provides:

'Effect of sequestration of estates on realisable property

1) When the estate of a person who holds realisable property is sequestrated–
   a) the property for the time being subject to a restraint order made before the date of sequestration; and
   b) the proceeds of any realisable property realised by virtue of section 30 and for the time being in the hands of a *curator bonis* under this Chapter,

shall not vest in the Master of the High Court or trustee concerned, as the case may be.

2) ...
3) Where the estate of an insolvent has been sequestrated, 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–

a) in respect of any property which forms part of that estate; or
b) in respect of any property which the trustee concerned is entitled to claim from the insolvent under section 23 of the Insolvency Act, 1936.

4) Nothing in the Insolvency Act, 1936, shall be construed as prohibiting any High Court or *curator bonis* appointed under this Chapter from exercising any power contemplated in subsection (3) in respect of any property or proceeds mentioned in subsection(1).'

[15] Quite obviously, ss 36(1) and (2) are the equivalent of s 35(1)(a) and 35(3)(a), respectively. But, in language different to that used in its counterpart, s 35(3)(a), unequivocally and without any reference to s 35(1)(a), deals with the estate of an insolvent that 'has been sequestrated' before

the restraint order is made and excludes property constituting that estate from the ambit of the various powers it confers. And s 35(1)(a) simply excludes property subject to a restraint order granted before the sequestration order from the insolvent estate without making any provision for 'relevant time', as done in s 36(1), or any qualification relating to the filing of the application for sequestration. The differences in the respective provisions are far from trifling. They are, in my view, deliberate and were clearly meant to distinguish between natural persons and juristic entities because the Legislature could simply have used identical language in both scenarios had its intention been to treat them similarly. The distinction is not surprising in any event in view of the fact that the concept of a winding-up order commencing retrospectively is unique to company law and has no corresponding provision in the law of insolvency. Therefore, the meaning of s 35(3) cannot be attributed to s 36(2).

[16] I find it unnecessary to deal with the other points raised on the NDPP's behalf as they do not take the dispute any further. To sum up, the restraint order must precede the filing of a winding-up application as otherwise, as here by virtue of s 36(2), a *concursus creditorum* is established over the assets of the company where the winding-up order is granted. This situation clearly operates to exclude the restraint order which must then lie dormant and the *curator bonis* must yield his control over the assets to the liquidator. Thus, the so-called 'shifting' phenomenon adverted by the NDPP seems to be precisely what the Legislature intended. In this case, s 36(2) of POCA excludes the shares from the ambit of the restraint order granted on 3 July 2009. For these reasons, it was not competent for the court below to confirm the provisional restraint order in respect of such shares. The appeal must succeed. However, the appropriate relief is a declaratory order and not a variation of the restraint order as was originally sought by the appellants because, as pointed out above, the effect of the restraint order is simply

excluded by operation of the law.

[17] Accordingly, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) The 490 shares in Optipharm Healthcare (Pty) Ltd held by Aquila Holdings (Pty) Ltd (in liquidation) are excluded from the "Schedule of Known Assets" reflected in annexure "A" to the provisional restraint order of 3 July 2009 (the restraint order), and the restraint order is varied in this respect.

(b) The costs of the intervention application launched by the first and second intervening applicants shall be paid by the applicant, including the costs of two counsel where employed.

(c) Subject to the aforegoing, the restraint order is confirmed against the defendant and respondents only in respect of such property as held by them at the date of this order.'

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MML Maya

Judge of Appeal

APPEARANCES

For Appellant:	S. Olivier SC
	R. Howie
	Instructed by:
	Bowman Gilfillan Inc., Cape Town
	Matsepes Inc., Bloemfontein
For Respondents:	G. Budlender SC
	K. Saller
	Instructed by:
	State Attorney, Cape Town
	State Attorney, Bloemfontein