IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 8420/03

In the application of:

ALEXANDER GERHARD FALK First Applicant

FALK REAL ESTATE SA (PTY) LTD Second Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGEMENT DELIVERED THIS 10th DAY OF JULY 2009

Louw, J:

[1] The first applicant is Alexander Gerhard Falk, an adult male German businessman of 55 Magdalenne Street, Hamburg, Germany, to whom I shall refer herein as Falk. The second applicant is Falk Real Estate SA (Pty) Ltd a South African registered private company with its principle place of business at the farm Carnetsfontein, Bovlei, Wellington, Western Cape Province, to whom I shall refer herein as FRSA. Falk is the owner

of all the shares of FRSA, who owns and conducts a wine farming operation on two farms in the Western Cape. FRSA banks with the Standard Bank of SA Ltd (Standard Bank) and has an account at its branch in Wellington.

[2] The respondent is the National Director of Public Prosecutions (the NDPP), who is also the applicant in the main application brought under case nr 8420/03 against Falk and FRSA.

[3] In this application the Applicants apply for orders setting aside:

1. the registration on 13 September 2004 of a foreign restraint order against Falk by the Registrar of this Court in terms of section 24 of the International Co-operation in Criminal Matters Act 75 of 1996 ('the ICCMA'); and

2. the interdictory relief granted on 16 August 2005 by this court (per Veldhuizen, J) to the NDPP against Falk and FRSA in terms of Chapter 5 of the Prevention of Organised Crime Act 121 of 1998 ('the POCA'), read with section 24 of the ICCMA.

[4] In a notice issued by the registrar of this court on 13 September 2004, directed at both Falk and FRSA, they are informed of the registration of the foreign restraint order. The relevant part of the notice reads as follows:

> You are hereby notified that a foreign restraint order with the effect and in respect of the property described hereunder has been registered at the High Court (Cape of Good Hope Provincial Division) on 13 September 2004.
>
> Particulars of the restraint and the property concerned:

> As appears from the copies of the order made on 23 August 2004 by the Regional Court Hamburg and the certified English translation thereof marked 'A' and 'B', the said court has ordered the attachment of EUR 31 645 413, 34 of your estate in favour of the Free and Hanseatic City of Hamburg

[5] The relevant part of the order made by the Regional Court Hamburg on 25 August 2004 records that it was ordered in the criminal proceeding against Falk 'due to the suspicion of very serious fraud' as follows:

> Due to the claim of
> The Free and Hanseactic City of Hamburg -creditor-
>
> To the forfeiture of compensation for lost values and – due to the claims of persons who suffered damages (so-called 'recovery assistance') – to the amount of altogether at least EUR 31,645,413, 34 against the accused
> Alexander Gerhard Falk -debtor-
> The attachment of the property of the accused to an amount of EUR 31,645,413, 34 is hereby ordered in favour of The Free and Hanseactic City of Hamburg.
>
> The enforcement of this arrest may be suspended and the accused shall become entitled to apply for the enforced arrest being lifted by means of a deposit of EUR 31,645,413, 34 or a written, irrevocable, unconditioned, unlimited and absolute guarantee issued by a major German bank or savings bank as of the same amount.
>
> The court marshal, the public prosecution service and their assistant officers shall be entitled – in the course of enforcement of this arrest order – to search the dwellings, the business and other premises as well as any container used by the accused.

[6] The order made by Veldhuizen, J on 16 August 2005 provides as follows:

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The following orders are made:

1. Orders:

1.1 Interdicting the first respondent (Falk) from dealing in any way with his shares in the second respondent (FRSA), currently held in trust by the Cape Town office of Bowman Gilfillan (reference Mr Tim McIntosh)

1.2 Interdicting the respondents from:

1.2.1 Dealing in any way with the E 5,22 million currently in the *nostro* account of the Standard Bank of South Africa held with the Deutsche Bank AG, account number 100-9573445-1000, Alfred Herhausen Allee 16-24, Eschborn 6570, pursuant to SWIFT transfers to the second respondent of E 1,57 million and E 10,9 million on 5 June 2003 from bank accounts in Germany;

1.2.2 Dealing in any way, other than in the ordinary course of business, with the second respondent's other assets.

[7] In setting out the background to the application, I rely on and take over the formulation thereof set out in the heads of argument prepared by Mr Breytenbach on behalf of the NDPP which counsel for the parties agree correctly reflect the relevant facts.

[8] Falk was arrested in Germany on 6 June 2003 on charges of, amongst other things, rigging the share price of a German-listed company Ision Internet AG (Ision), through making intentional misstatements and seeking to obtain an unlawful gain for himself and third parties to the detriment of an English company, Energis plc (Energis). Details of the allegations against Falk were that he conspired in Hamburg and thereafter collaborated with his co-accused to manipulate the share-price of Ision upwards by arranging fictitious transactions and publishing false sales figures based on these transactions. This resulted in a significant rise in Ision's share price between 15 August 2000

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and 18 December 2000 and induced the unsuspecting purchaser, Energis (through its wholly owned subsidiary Energis Jersey Investments Ltd (now renamed Osborne One Jersey Ltd (Osborne)), to purchase a 'parcel' of approximately 75% of the shares in Ision at the inflated price. Energis paid €812 million for the shares at a time when the true underlying value of the shares was approximately €280 million. The purchase price comprised two cash payments (on 30 January 2001 and 5 March 2001) totalling € 209 999 999,84 and two transfers of Energis Jersey Investments Ltd shares (31 January 2001 and 2 March 2001). At all material times Falk was the chief executive officer of Ision, as well as a major shareholder in Ision through, first, a direct shareholding of 1,26% (which was part of the 'parcel' sold to Energis) and, secondly, an indirect 34% shareholding (through his wholly-owned company Alexander Falk Holding GmbH (Falk Holding)) in Ision's majority shareholder, the Swiss company Distefora Holding AG (Distefora). Falk's benefits from the sale were a direct payment of €10 231 200 for his 1,26% shareholding in Ision and 34% of an extraordinary dividend of 233 million Swiss Francs distributed by Distefora. The cash consideration Falk received totalled €31 916 398,04.

[9] On 5 June 2003, one day before Falk's arrest, two significant events occurred:

1. On 5 June 2003 deposits of €1 570 500 and €10 901 500 were made into the '*nostro*' account of Standard Bank held with the Deutsche Bank AG, account number 100-9573445-1000, Alfred-Herhausen Allee 16-24, Eschborn 65760, Germany (the *nostro* account). The deposits were electronic 'SWIFT' transfers. The €1 570 500 emanated from Falk's private bank account with Hauk & Aufhäuser Private Bank (Hauk) and the €10 901 500 emanated from the account of Falk Holding with Hauk. The '*INWARD SWIFT PROCESSING COMMAND*' for each transaction describes the '*BENEFICIARY CUSTOMER*' as '*FALK REAL ESTATE LTD*' (a reference to FRSA). The aggregate of the two transfers was €12 470 000. The

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instructions for the transfers were given by Falk. The transfers were accompanied by instructions not to convert the money to South African Rands but to return the funds to Germany. The instruction to return the funds could not be carried out by Standard Bank without FRSA'S permission or instructions, who then gave the following instructions which were carried out by Standard Bank. As against the €1 570 500, on 10 June 2003 €500 000 was transferred to a bank account held by Hornblower Fischer AG with Hypo Vereinsbank, Frankfurt, and on 19 June 2003 €50 000 was converted to R460 365 and transferred to FRSA's bank account at the Wellington branch of the Standard Bank. As against the €10 901 500, on 20 June 2003 €2 700 000 was transferred to a bank account held by Dr Berhard van Schweinitz Notar with Aareal Bank AG, Hamburg, €2 500 000 was transferred to a bank account held by Nadia Falk with Commerzbank AG, Hamburg, and €1,500 000 was transferred to a bank account held by Hornblower Fischer AG with Commerzbank AG, Hamburg. After those transfers, €5,220 000 (the **€5,22 million**) remained in Standard Bank's *nostro* account (the ***nostro*** account).

2. On 5 June 2003, pursuant to an application by the Hamburg Prosecutors made in terms of the German Rules of Criminal Procedure, the German Criminal Code and German Rules of Civil Procedure, the Chamber for Economic Offences of the Hamburg Regional Court (*Landgericht*) (the Hamburg Regional Court) granted an order in the following terms:

> *'On account of the claim of the Free and Hanseatic City of Hamburg – **Creditor** – to forfeiture of replacement value **at an amount of at least €225.000.000 as well** as on account of the **claims of Offended parties at a total amount of at least another €306.500.000** (so-called recovery assistance) against the Accused **Alexander Gerhard Falk – Debtor** – in favour of the Free and Hanseatic City of Hamburg there is ordered the attachment into the fortune of the Accused at an amount of €532.000.000'*. (emphasis in the original)(the first Hamburg restraint order)

The amount of €532 000 000 represented what at that stage was considered to be the gains made by Falk as a result of the Ision scheme.

[10] Between 16 October and 13 November 2003 Falk and FRSA made several unsuccessful attempts to move the €5,22 million out of the *nostro* account. Details of these attempts are set out in the papers.

[11] On 26 June 2003 the Hamburg Public Prosecutor's Office directed a request for mutual legal assistance to the South African authorities. The request was based on the first Hamburg restraint order against Falk and on a restraint order made by the Hamburg Local Court against Falk Holding. (The NDDP does not rely on the latter order because Falk Holding does not have any assets in South Africa.) The requested acts of legal assistance are described as follows:

> *'It is requested to execute the attachments existing against Falk and his GmbH into the account/the accounts/deposits of 'Falk Real Estate Pty Ltd.' with the 'Standard Bank of South Africa' in Wellington as well as the attachment of the South African firm of the Accused Falk'.*

[12] On 8 July 2003 the Director-General: Justice and Constitutional Development (the DG) decided to approve the request for mutual legal assistance in terms of section 24 of the ICCMA. In the present case the NDDP did not rely on the DG's decision of 8 July 2003 because at the time the DG took that decision it was not clear whether or not the Hamburg orders were subject to review or appeal. That was a matter about which the DG had to be satisfied in terms of section 24(1) of the ICCMA. On 13 November 2003 the DG reconsidered the German authorities' request for mutual legal assistance and, after considering the issue of appealability or reviewability, decided to register in this court the order made by the Hamburg Regional Court against Falk only. The registration of the first

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Hamburg restraint order in this Court in terms of section 24(1) of the ICCMA occurred on 23 December 2003 (under case number 10931/03) pursuant to a rule *nisi* operating with interim effect issued by Griesel J on 12 December 2003 (as rectified on 23 December 2003) under case number 8420/03. The latter is the case number under which the present application is brought by Falk and FRSA. The interdict granted by Griesel, J in effect restrained Falk and FRSA from dealing with the EUR 5,22 million in the *nostro* account and from dealing in any way other than in the ordinary course of business with any of FRSA's other assets.

[13] On 14 June 2004 the German Constitutional Court (*Bundesvervassungsgericht*) upheld a constitutional complaint (*Verfassungsbeschwerde*) against the first Hamburg restraint order filed by Falk on 7 July 2003. In its judgment, the German Constitutional Court criticised the procedure followed by the Hamburg Regional Court and also found that there was insufficient evidence to justify the quantum of the restraint order (€532 million). The German Constitutional Court set aside the first Hamburg restraint order and referred the matter back to the Hamburg Regional Court for re-determination.

[14] This led to the first intervention by Energis and its subsidiary Osborne, the victims of the offences with which Falk was charged in Germany. On 27 July 2004 Energis and its subsidiary Osborne applied urgently under case number 6214/04 for leave to intervene in the NDPP's application and for interdicts similar to those granted to the NDPP by Griesel J in relation to Falk's shares in FRSA and the €5,22 million in the *nostro* account. This relief, which did not relate to FRSA's other assets, was sought in the event of the rule *nisi* granted by Griesel J on 12 December 2003 being dismissed and the NDPP's alternative application for a preservation of property order not succeeding. They stated that they intended instituting an action for damages against Falk in Germany and sought to secure his assets in South Africa pending the outcome of that action.

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[15] On 5 August 2004 Binns-Ward AJ granted an order by agreement in case number 6214/04 postponing the matter to 16 September 2004 and recording that Falk and FRSA had given Energis and Osborne an undertaking in the following terms:

> '2. *It is recorded that without prejudice to their rights and without admission of any entitlement on the part of applicants thereto, first and second respondents undertake that, in the event of fourth respondent and/or the National Director of Public Prosecutions releasing any of the assets of either first and/or second respondent which are currently subject to the order of the above Honourable Court dated 12 December 2003 and granted under Case No. 8420/03, first and second respondents hereby undertake:*
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> 1. *that as regards the shares of FRSA, they shall be held in trust by the Cape Town office of Bowman Gilfillan (Reference Mr Tim McIntosh), which shares shall not be dealt with in any manner; and*
>
> 2.1 *that as regards the funds referred to in paragraph 4.1.2 of applicants' notice of motion filed of record therein (or any part thereof), such funds shall remain in the account held at Deutsche Bank AG (Account No. 100-9573445-1000) and shall not be dealt with in any manner.*
>
> 3. *This undertaking shall expire at 23h59 on Thursday 23 September 2004, unless extended by first and second respondents at their election. In the event of first or second respondents failing to extend the undertaking the applicants shall be entitled forthwith to apply for the relief in the applicants' notice of motion filed of record.'*

[16] On 5 August 2004 the NDPP released Falk and FRSA from the interim interdict granted by Griesel J and on 6 August 2004 the NDPP delivered Falk's shares in FRSA to Mr McIntosh.

[17] On 26 August 2004 Falk and FRSA applied in terms of section 26 of the ICCMA under case numbers 10931/03 and 7101/04 for the setting aside of the registration of the first Hamburg restraint order on 23 December 2003 in this Court. In view of the German Constitutional Court's decision of 14 June 2004 the NDPP did not oppose the substantive relief sought in case numbers 10931/03 and 7101/04 and did not apply for the confirmation of the rule *nisi* issued by Griesel J on 12 December 2003 and extended by Waglay AJ on 4 March 2004. The NDPP's only opposition to the application in case numbers 10931/03 and 7101/04 concerned the question of costs. The outstanding issue of the costs was settled on the basis that the NDPP's tender of the costs of a junior counsel was accepted.

[18] On 25 August 2004, in the wake of the decision of the German Constitutional Court on 14 June 2004, the Hamburg Regional Court issued a new restraint order authorising the attachment by the Free and Hanseatic City of Hamburg (the City of Hamburg) of assets in Falk's estate valued at €31 645 413,34 (the second Hamburg restraint order) to secure those assets for possible forfeiture to the City of Hamburg in the event of Falk being convicted of the crimes with which he was charged.

[19] Pursuant to a request made on 3 September 2004 by the Hamburg Prosecutors to the DG for mutual legal assistance to enforce the second Hamburg restraint order against Falk's assets in South Africa and to do whatever is possible to secure Falk's assets in South Africa, the DG, on 9 September 2004 authorised the registration in this court of the second Hamburg restraint order in terms of section 24 of the ICCMA. On 13 September 2004 the second Hamburg restraint order was registered in this Court in terms of section 24 of the ICCMA under case number 7698/04.

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[20] The present application under case number 8420/03 and the application by Energis and Osborne under case number 6214/04 were postponed, first on 16 September 2004 by Potgieter AJ to 10 February 2005 and thereafter, on 7 February 2005, the two matters were further postponed by agreement by Hlophe, JP for hearing on the semi-urgent role on 16 August 2005. In this matter the following interim relief was granted by agreement against Falk and FRSA who were the first and second respondents respectively:

> '2.1 *the First Respondent shall be interdicted in terms of s 26(8) of the Prevention of Organised Crime Act 121 of 1998 from dealing in any way with his shares in the Second Respondent currently held in trust by the Cape Town office of Bowman Gilfillan (Reference Mr Tim McIntosh);*
>
> 2.2 *the First Respondent and Second Respondent in both matters shall be interdicted in terms of s 26(8) of the Prevention of Organised Crime Act 121 of 1998 from:*
>
> 2.2.1 *dealing in any way with the €5,22 million currently in the nostro account of the Standard Bank of South Africa held with the Deutsche Bank AG, account number 100-9573445-1000, Alfred-Herhausen Allee 16-24, Eschborn 65760, Germany, pursuant to SWIFT transfers to the Second Respondent of €1,57 million and €10,9 million on 5 June 2003 from bank accounts in Germany; and*
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> 2.2.2 *dealing in any way, other than in the ordinary course of business, with any of the Second Respondent's other assets.*'

[21] On 16 August 2005, the matters under case numbers 8420/03 and 6214/04 came before Veldhuizen J. The only relevant orders sought and granted on this occasion were two interdicts sought by the NDPP against Falk and FRSA as ancillary relief in terms of the provisions of section 26(8) of the POCA. That section enjoins the High Court making the restraint order to, at the same time, make *'any other ancillary orders that the Court considers appropriate for a proper, fair and effective execution of the order'*. The orders were made in order to give practical effect to the registration of the second Hamburg restraint order and to preserve specific assets held by Falk, which assets the NDPP

claimed included assets held by Falk through FRSA. The orders made by Veldhuizen, J are set out in paragraph [6] above.

[22] The NDPP has filed a number of affidavits in this matter deposed to by Dr Henry Winter a public prosecutor who is the head of the Financial Investigations Unit of the public Prosecutions Department in Hamburg, Germany. Dr Winter deposed to various events relating to the prosecution of Falk in Germany as well as the decisions given by various courts in Germany. Dr Winter also testified to and explained aspects of German Law. During the course of argument Mr Breytenbach on behalf of the NDPP placed Dr Winter's qualifications before the court. Mr van Riet, on behalf of the applicants indicated that he accepted Dr Winter's expertise in these proceedings. It is clear that he is duly qualified to testified in these proceedings, having received a doctorate in Law at Hamburg University in 1984 and having worked for 22 years with the German criminal Law and procedure. He has held his present position as head of the Financial Investigations Unit since 2003.

[23] The following key events occurred in Germany after the order was made by Veldhuizen, J on 16 August 2005.

[24] The first event is that Falk's criminal trial commenced on 3 December 2004 in the Hamburg Regional Court. On 21 April 2005 Falk was, in view of the long time spent in custody, released on certain bail conditions pending the outcome of the trial. The trial ran for 157 days and came to an end in the Hamburg Regional Court trial court on 9 May 2008 when the court delivered its oral judgment and Falk was convicted of conspiracy to attempt to commit fraud, of conspiracy to misrepresent the financial position of a corporation and of misstating information in Ision's annual financial statements. Falk was

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sentenced to imprisonment for a period of four years and, along with the other defendants, he was ordered to pay the costs of the proceedings.

[25] The further relevant events were that on 1 February 2006 the Hamburg High Court (*Oberlandesgericht*) upheld an appeal by the Hamburg Prosecutors against an order made by the Hamburg Regional Court on 23 December 2005 to lift the second Hamburg restraint order of 25 August 2004. The Hamburg High Court reinstated the restraint order. On 30 January 2007 the Hamburg Regional Court denied a further application by Falk to rescind the second Hamburg restraint order. On 23 October 2007, pursuant to a further appeal by Falk, the Hamburg High Court again confirmed the second Hamburg restraint order. In doing so the Hamburg High Court held that Falk remained strongly suspected of having committed a completed fraud because the available evidence indicated that Energis had suffered a loss of at least EUR 46,7 million and that the restraint orders served the purpose of securing assets for a likely forfeiture to the state or, to the extent the Energis was able to prove its claim for compensation of Energis.

[26] As indicated earlier, the criminal trial against Falk and his four co-accused in the Hamburg Regional Court came to an end in that court on 9 May 2008 when the court delivered its oral judgment. In terms of § 275 paragraph 1 of the German Code of Criminal Procedure, the written judgment must be delivered within 37 weeks of the date of the oral judgment. Although the Hamburg Regional court convicted and sentenced Falk as aforesaid, the court refused to grant the forfeiture order against Falk and his wholly-owned company Falk Holding specifically requested by the Hamburg prosecutors, because it apparently held the view that Falk did not gain any advantage through the offence he committed that could be declared forfeited .

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[27] Both the Hamburg Prosecutors and Falk have noted appeals to the Federal Court (*Bundesgerichtshof*) against the Hamburg Regional Court's decisions in the criminal trial.

[28] On 13 May 2008 the Hamburg Prosecutors noted their appeal to the Federal Court against the following decisions of the Hamburg Regional Court:

1. the decision not to convict the defendants of a completed fraud; and
2. the decision not to grant the requested forfeiture order against Falk and his wholly-owned company Falk Holding.

[29] On 14 May 2008 Falk noted an appeal to the Federal Court against his conviction.

[30] In view of the Hamburg Regional Court's decisions to convict Falk of attempted fraud and conspiracy only and not to make a confiscation order, on 13 May 2008, in anticipation of the Hamburg Regional Court now lifting the second Hamburg restraint order of 25 August 2004, the Hamburg Prosecutors brought an application to the Hamburg Regional Court that any such order lifting the restraint be suspended pending an appeal against the anticipated order to the relevant appeal court, namely the Hamburg High Court. On 21 May 2008 the Hamburg Regional Court ordered that the second Hamburg restraint order it had made on 25 August 2004 be lifted, but simultaneously ordered that its own order (i.e. the one lifting the restraint order) be suspended pending the outcome of the Hamburg Prosecutors' appeal to the Hamburg High Court.

[31] The reasons given by the Hamburg Regional Court for lifting the second Hamburg restraint order indicate that the Hamburg Regional Court was not satisfied that the evidence reliably established the value of the parcels of shares exchanged under the

relevant share purchase agreement (by means of which Osborne purchased Ision), i.e. that the evidence did not reliably establish that Energis had suffered damage caused by the defendants' manipulation of Ision's turnover during the third quarter of 2000 and their fraudulent representations to Energis and Osborne about such turnover and that this inability, in turn, made it impossible to establish whether Falk had obtained a benefit that would justify a forfeiture order.

[32] The reason given by the Hamburg Regional Court for suspending the lifting of the second Hamburg restraint order, however, is that it accepts that the Hamburg Prosecutors have reasonable prospects of success in their appeal against the lifting of the second Hamburg restraint order in light of the findings by the Hamburg High Court (most recently the finding on 23 October 2007) which run counter to the findings made by the Hamburg Regional Court. Dr Winter explains:

> 'There is, on the papers, a marked difference of opinion between the Regional Court and the Hamburg High Court on the question whether the evidence is sufficient to prove Mr Falk guilty of fraud. The Regional Court acknowledged this difference of opinion in its decision of 21 May 2008 to suspend the operation of its orders lifting the restraint over Mr Falk's and Falk Holding's assets'.

[33] Not only did the Hamburg Regional Court suspend its lifting of the second Hamburg restraint order, but on 7 August 2008, the Hamburg Prosecutors' appeal to the Hamburg High Court against the lifting by the Hamburg Regional Court of the second Hamburg restraint order was upheld by the High Court and it ordered that the restraint orders against Falk, dated 25 August 2004, and against Falk Holdings, dated 15 November 2004, remain operative insofar as they aim to secure assets for a possible future forfeiture to the state. The court found that it remained the case that it was likely

that a forfeiture order would be made pursuant to the appeal by the Hamburg Prosecutors to the Federal Court against the decision by the Hamburg Regional Court on 9 May 2008 in the criminal trial of Falk and his co-accused.

[34] The Hamburg High Court's reasons for its decision that the second Hamburg restraint order against Falk should remain operative form part of the papers and were briefly summarised as follows by Dr Winter in a supplementary affidavit:

1. Firstly, on the facts established by the Hamburg Regional Court it was clear that Falk had received at least an amount of €31 645 413,34 (i.e. the amount of the restraint order) as a result of his unlawful actions.
2. Secondly, the court found that a possible forfeiture order was not barred by a civil claim by Energis because the Hamburg Regional Court had found on 9 May 2008 that Energis had failed to establish the grounds for such a claim. In terms of German law, in the event that a victim of crime (such as Energis) can establish a civil claim against the perpetrator, the state's claim to forfeiture of any illegally obtained assets is superseded by the victim's claim.
3. Thirdly, the court reaffirmed its stance stated on a number of occasions in previous decisions that it is likely that any later enforcement of a forfeiture order would fail or become substantially more difficult without a restraint order in place. The court pointed out that Falk had in the past taken steps to render execution of a possible forfeiture order impossible or extremely difficult by transferring substantial funds overseas.

[35] On 14 May 2008 Energis and Osborne obtained orders on an *ex parte* basis by this Court (*per* Veldhuizen J) under case number 7718/08, including a rule *nisi* operating as an interim interdict in the following terms:

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'2. A rule nisi be issued calling upon the respondents to show cause on 29 July 2008 at 10h00 or so soon thereafter as counsel may be heard why an order should not be granted:

2.1 interdicting and restraining first and second respondents from:

2.1.1 dealing in any way with the Euro 5 220 000 currently in the second respondent's account with the third respondent held with the Deutsche Bank AG, account no. 100-9573445-1000, Alfred-Herhausen Allee 16-24, Eschborn 65760, Germany, pursuant to SWIFT transfers to the second respondent of Euro 1 570 000 and Euro 10 900 000 on 5 June 2003 from bank accounts held by the first respondent and Alexander Falk Holding GmbH respectively;

2.1.2 dealing in any way with the shares held by first respondent in second respondent and which are currently held in trust by Bowman Gilfillan, Cape Town;

2.2 Interdicting and restraining third respondent from making payment of the aforesaid amount of Euro 5 220 000 to or on behalf of first or second respondents;

pending the final determination of the civil proceedings instituted by first and/or second applicants against first respondent and others in Germany.'

'3. Paragraphs 2.1 and 2.2 above shall operate as a temporary interdict pending the return day hereof.'

[36] The NDPP, who was cited as a respondent in case number 7718/08, agreed to an order that the Energis application be heard together with the present matter. The reason for this is that in their papers Energis and Osborne have subordinated the relief they seek to the interdicts the NDPP obtained from this Court on 16 August 2005.

[37] On 2 June 2008 Falk and FRSA launched the present application under csase nr 8420/03. The matter was initially set down for hearing on 30 June 2008 during this Court's mid-year recess. The matter was later set down for hearing on 1 July 2008 by the applicants' attorneys. On 19 June 2008 the NDPP consequently brought an application for an order postponing the hearing of the present application to 29 July 2008 for hearing together with the application by Energis and Osborne under case number 7718/08. The postponement application was accompanied by the bulk of the NDPP's answering papers in the present application, namely the NDPP's main answering affidavit by Ms Zuretha Venter and the supporting affidavit by Dr Winter. The answering papers also include an application to strike out inadmissible expressions of opinion on German law by Falk on which he does not have the necessary expertise. On19 June 2008 this Court (*per* Desai J) ordered that the present application be postponed to 29 July 2008 for hearing together with the application by Energis and Osborne under case number 7718/08. On 18 July 2008 the NDPP delivered a supplementary affidavit to place before this Court, copies of the relevant documents obtained from the Hamburg Prosecutors and certified translations thereof into English. The present application and the application by Energis and Osborne under case number 7718/08 were not ripe for hearing on 29 July 2008 because Falk and FRSA had not delivered their replying affidavits in the present matter or their answering affidavits in case number 7718/08. Consequently, on 1 August 2008, by agreement between the parties, I made an order that both matters be postponed for hearing together on Wednesday 29 and Thursday 30 October 2008 and, amongst other things, fixed a timetable for the delivery of the replying papers in the present application and the answering and replying papers in the application by Energis and Osborne. One of the provisions of the order made on 1 August 2008 was that the NDPP was entitled to

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deliver supplementary papers at any time before the delivery of judgment in order to apprise the Court and the Applicants of any further relevant events in Germany.

[38] Pursuant thereto, on 29 August 2008 and 15 September 2008, respectively, the NDPP delivered a supplementary affidavits by Dr Winter and the NDPP's attorney dealing:

1. with the outcome of the Hamburg Prosecutors' appeal to the Hamburg High Court against the Hamburg Regional Court's decision on 21 May 2008 to lift the second Hamburg restraint order against Falk (and the 15 November 2004 restraint order against Falk Holdings). On 7 August 2008 the Hamburg High Court upheld the appeals and ordered that the restraint orders shall remain operative insofar as they aim to secure assets for a possible future forfeiture to the state; and

2. to place before the Court the (German) originals and certified translations into English of the orders made and reasons given by the Hamburg High Court on 7 August 2008.

[39] The order I made by agreement on 1 August 2008 also dealt with possible requests by Falk and FRSA for a variation of the interdicts granted by Veldhuizen J on 16 August 2005 in the present matter and the similar interdicts granted by Veldhuizen J on 14 May 2008 in the application by Energis and Osborne under case number 7718/08. Falk and FRSA had mooted the possible variation of the interdicts to permit the release of money for purposes of paying their legal representatives and meeting the costs of FRSA's farming operations. The order consequently provided that if Falk and FRSA wanted such a variation, by 8 August 2008 they had to deliver a motivated written request. If they did so the NDPP, by 15 August 2008Energis had to respond in writing. If Falk and FRSA were

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not satisfied with that response, by 22 August 2008 they had to bring any application for an order varying the interdicts in accordance with their initial request.

[40] Pursuant thereto, on 8 August 2008 Mr Van der Hoven delivered a written demand on behalf of FRSA that the NDPP, Energis and Osborne agree to the release of R500 000 to pay FRSA's legal representatives and, referring to three annexures to the letter (marked 'A' to 'C'), R418 695,10 to pay FRSA's creditors and further monthly amounts ranging between R87 555 and R401 599 for *'the payment of ongoing farming expenses'*.

[41] On 13 August 2008 the attorney of Energis and Osborne responded to Mr Van der Hoven's letter saying they did not consider that it warranted the release of the funds requested and that they required FRSA to bring a substantive application for the release of the funds.

[42] On 14 August 2008 the NDPP's attorney responded to Mr Van der Hoven's letter by refusing FRSA's demands and setting out its reasons for doing so. These included the following:

1. The NDPP's attorney noted that Mr Van der Hoven was instructed by FRSA, that his demand was made on behalf of FRSA only and that in his letter he dealt with the financial position and financial needs of FRSA only. The NDPP does not accept however that for purposes of this case there is any legally significant distinction between Falk and his wholly-owned South African company FRSA, or that for purposes of this case the NDPP (or this Court) can be asked to assess FRSA's financial position independently of Falk's financial position. The NDPP

sought the interdicts that were granted on 16 August 2005 in terms of section 26(8) of POCA in order to preserve assets held by Falk. The NDPP claimed that those assets included the assets held by Falk through FRSA.

2. The NDPP's attorney contended that, absent the requirements for variation or rescission of a restraint order laid down in section 26(10)(a) of the POCA, the order granted on 16 August 2005 by this Court, which is an ancillary order of the sort mentioned there, is not capable of being changed. (See Phillips v NPDD 2003(6) SA 447 (SCA) at 453 F par [22]) The NDPP's attorney contended that Section 26(10)(a) applies only when the operation of the order concerned will deprive the person affected by the operation of the order of the means to provide for his or her reasonable living expenses, will cause undue hardship for that person and that hardship outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. FRSA's claims for the release of money for legal expenses and business expenses, as distinct from living expenses, do not meet the first of those requirements.

3. With specific reference to FRSA's claim for R500 000 for legal fees, the NDPP's attorney pointed out that FRSA's application for the setting aside of the orders granted on 16 August 2005, to the prosecution of which the claim for R500 000 for legal fees was directed, is based solely on assertions in the founding affidavit by Falk that the judgment of the Hamburg Regional Court on 9 May 2008 entitled him to have the second Hamburg restraint order lifted in Germany and its registration in South Africa set aside. Those assertions are incorrect not only for the reasons given in the NDPP's answering and supplementary answering affidavits delivered on 19 June and 18 July 2008 but also because on 7 August 2008 (i.e. the day before Mr Van der Hoven's letter) the Hamburg High Court

confirmed the restraint orders against Falk and Falk Holding for the purpose of securing assets for a possible forfeiture to the state, as distinct from securing assets for possible restitution to Energis. As is apparent from, amongst other things, the affidavit by Dr Winter, under German law a forfeiture to the state is permissible even if the victim cannot prove a claim for compensation.

4. The NDPP's attorney averred that Mr Van der Hoven's explanation of FRSA's claims for the release of money to pay FRSA's creditors and meet the future costs of FRSA's farming operations, was not properly motivated. He referred in detail to the deficiencies he contended there were in the motivation. These appear from the correspondence annexed to the papers. The NDPP's attorney further said that if FRSA decided to institute proceedings for the variation of the interdicts, its founding papers should include the information specified in the letter, under oath, concerning Falk and FRSA.

[43] FRSA did not bring any application for an order varying the interdicts.[1]

[44] On 22 September 2008 Mr Van der Hoven delivered on behalf of Falk and FRSA replying affidavits in the present matter by Mr Van der Hoven himself and Mr S A Louw. On 25 September 2008 Mr Van der Hoven delivered an unsigned affidavit by Falk in which he confirms the affidavits of Mr Van der Hoven and Mr Louw insofar as they relate to him or the affairs of FRSA.

[45] In Mr Van der Hoven's replying affidavit, Falk and FRSA ask for the first time for an order in terms of section 26(c) and (d) of the ICCMA setting aside the registration of the second Hamburg restraint order in this Court on 13 September 2004. Until the delivery of that affidavit the substantive relief sought by them has been confined to the interdicts

[1] In the light of the decision in Phillips v National Director of Public Prosecutions *supra* at 453FG par [22]

granted by this Court on 16 August 2005. They justify this new relief on several grounds set out in a section of Mr Van der Hoven's replying affidavit and in the affidavit by Mr Louw.

[46] The NDPP then delivered an application to strike out that section of Mr Van der Hoven's replying affidavit and the affidavit by Mr Louw on the grounds that they contain matter which should have been in the founding papers, that part of that section of Mr Van der Hoven's replying affidavit and the whole of the affidavit by Mr Louw constitute an impermissible and belated attempt to secure the release of money for FRSA's legal expenses and business expenses and that the NDPP has been prejudiced by the raising of this new matter in this fashion and at this late stage of the proceedings.

[47] The relief sought in this application by Falk and FARSA are to be found in the Notice of Motion dated 30 May 2008 and the prayer set out in paragraph 22.2 of the replying affidavit of van der Hooven, their attorney. The relief sought reads as follows:

Notice of Motion dated 30 May 2008;

1. The order granted on the 16th August 2005 by the Honourable Court (per Veldhuizen, J) be set aside;
2. That the shares of the first respondent in the second respondent held in trust by the Cape Town Office of Bowman & Gilfillian (Ref Tim McIntosh) be returned to the first applicant;
3. That the amount of € 5.22 Million held in the nostro account with Standard Bank of South Africa held with Deutsche Bank AG, account nr 100-9573445-1000 be released to the second applicant;
4. Costs of suit in the event of this application being opposed.

The Replying affidavit of van der Hooven

22.1 Setting aside the registration of the Hamburg restraint order made by this court on 13 September 2004

22.2. Setting aside the restraint order made by this court on 16 August 2005;

22.3. Ordering that the Respondent pay the costs of this application.

[48] The order sought by Falk and FRSA is in the first place, the setting aside of the interdictory relief granted on 16 August 2005 by this Court to the NDPP. The principal bais on which the relief is sought is the contention that the criminal proceedings against Falk in Germany were concluded by Hamburg Regional Court's judgment of 9 May 2008 and that consequently Falk and FRSA are entitled to an order in terms of section 26(10)(b) of the POCA, read with section 17(b) of the POCA, rescinding the orders granted on 16 August 2005.

[49] In broad outline, the NDPP's contention is that this is a matter which essentially concerns the question whether a foreign restraint order that was registered in this court should be set aside together with the ancillary orders made pursuant to the registering of the foreign restraint order. The NDPP consequently contends that the matter must be decided under the provisions of Chapter 4 of the ICCMA. Mr van Riet, on behalf of Falk and FRSA, contended that the matter should be decided under the provisions of Chapter 5 of the POCA.

[50] The provisions of Chapter 4 of the ICCMA, in particular sections 22 to 26 thereof, deal with, amongst other things:

1. the registration in South Africa of foreign restraint orders, the effect of such registration and the setting aside of such registration; and

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2. the registration in South Africa of foreign confiscation orders, the effect of such registration and the setting aside of such registration.

[51] The ICCMA defines a

'foreign restraint order' as an *'order issued by a foreign court or tribunal in a foreign State in respect of an offence under the law of that State, aimed at restraining any person from dealing with any property'*.

and a

'foreign confiscation order' as *'any order issued by a court or tribunal in a foreign State aimed at recovering the proceeds of any crime or the value of such proceeds'*

[52] Section 24 of the ICCMA deals with the registration in South Africa of foreign restraint orders. It provides:

'(1) When the Director-General receives a request for assistance in enforcing a foreign restraint order in the Republic, he or she may lodge with the registrar of a division of the Supreme Court a certified copy of such order if he or she is satisfied that the order is not subject to any review or appeal.

(2) The registrar with whom a certified copy of a foreign restraint order is lodged in terms of subsection (1), shall register such order in respect of the property which is specified therein

(3) The registrar registering a foreign restraint order shall forthwith give notice in writing to the person against whom the order has been made-

(a) that the order has been registered at the division of the Supreme Court concerned; and

(b) that the said person may within the prescribed period and in terms of the rules of court apply to that court for the setting aside of the registration of the order.

(4) (a) Where the person against whom the foreign restraint order has been made is present in the Republic, the notice contemplated in subsection (3) shall be served on such person in the prescribed manner.

(b) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign restraint order.

[53] Mr Breytenbach has set out in his heads of argument the relevant legislative schemes of the ICCMA and the POCA. Mr van Riet did not cavil with this exposition and I can do no better than to adopt and set out Mr Breytenbach's exposition in what follows.

[54] Section 25 of the ICCMA provides that the effect of the registration in a High Court in South Africa of a foreign restraint order is that it has the effect of a *'restraint order'* made by that High Court. Section 1 of the ICCMA defines *'restraint order'* as meaning *'a restraint order or a preservation of property order'* made under the POCA. The POCA incorporates two different types of forfeiture in one statute, *'criminal forfeiture'* (in Chapter 5) and *'civil forfeiture'* (in Chapter 6). Chapter 5 provides for the forfeiture of the benefits derived from crime. Its mechanisms may only be invoked when criminal proceedings are pending or about to be instituted. Forfeiture under Chapter 5 is based on and follows only after a criminal conviction. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but it is not conviction-based and it may be invoked even when there is no criminal prosecution. A confiscation order in terms of Chapter 5 is a civil judgment for the payment of an amount of money based on the value of the benefit that the defendant derived from crime. It is not limited to the actual proceeds themselves. It seeks to deprive the defendant of the value of the benefit he or she derived from crime. Chapter 6 is narrower than Chapter 5 in this respect, for it is limited to the forfeiture of the actual proceeds of crime or assets representing those

proceeds. It is however wider than Chapter 5 in another respect, in that it also provides for the forfeiture of the instrumentalities of crime.

[55] Both Chapters 5 and 6 make provision for interim orders aimed at preserving the *status quo* pending the outcome of the proceedings for a confiscation order (Chapter 5) or a forfeiture order (Chapter 6). The Chapter 5 *status quo* order is a '*restraint order*'. Its main effect is to prohibit any person from dealing in any manner with the property to which it relates. The Chapter 6 *status quo* order is a '*preservation of property order*'. Its main effect is to authorise the seizure of the property concerned by a police official.

[56] The second Hamburg restraint order made by the Hamburg Regional Court on 25 August 2004 was made in the course of criminal proceedings to attach Falk's property pending its possible confiscation when those criminal proceedings are concluded. It is common cause that, as submitted by Mr Breytenbach, for this reason, under section 25 of the ICCMA, read with the definition of '*restraint order*' in section 1 thereof, pursuant to its registration in this Court on 13 September 2004 the second Hamburg restraint order has had the effect of a '*restraint order*' made under Chapter 5 of the POCA (section 26), as opposed to a '*preservation of property order*' made under Chapter 6 of the POCA (section 38).

[57] Section 26(1) of the ICCMA deals with the setting aside of the registration of a foreign restraint order and provides:

> '*(1) The registration of a foreign restraint order in terms of section 24 shall, on the application of the person against whom the order has been made, be set aside if the court at which the order was registered is satisfied-*
>
> *(a) that the order was registered contrary to a provision of this Act;*
>
> *(b) that the court of the requesting State had no jurisdiction in the matter;*
>
> *(c) that the order is subject to review or appeal;*

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(d) that the enforcement of the order would be contrary to the interests of justice; or

(e) that the sentence or order in support of which the foreign restraint order was made, has been satisfied in full.'

[58] Sections 20 to 22 of the ICCMA are similar to sections 24 to 26 and are concerned with the registration, effect and setting aside of a foreign confiscation order. They differ in that the approval of the Minister of Justice is a prerequisite for the registration of a foreign confiscation order and, once registered, a foreign confiscation order has the effect of a civil judgment of the court at which it has been registered in favour of the Republic as represented by the Minister. The DG must pay over to the requesting State any amount recovered in terms of a foreign confiscation order, less expenses incurred in connection with the execution of the order.

[59] Sections 17 and 26 of the POCA form part of Chapter 5 of that act. Section 26(10)(b) deals with the rescission of a restraint order and provides:

'A High Court which made a restraint order-

(a)...

(b)shall rescind the restraint order when the proceedings against the defendant concerned are concluded.'

Section 17 provides when, for the purposes of chapter 5, the proceedings against a defendant are concluded. It provides:

'For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when- ...

(a) the defendant is acquitted or found not guilty of an offence;

(b) subject to section 18 (2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her;

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(c) the conviction in respect of an offence is set aside on review or appeal; or

(d) the defendant satisfies the confiscation order made against him or her.'

[60] The Applicants' contention is that by reason of the nature and effect of the judgment by the Regional Court of Hamburg on 9 May 2008, the criminal proceedings in Germany have now been concluded because the Hamburg Regional Court decided after the conviction of Falk of attempted fraud, not to make a confiscation order against Falk. Section 17(b) of the POCA, as pointed out, provides in terms that the proceedings shall be concluded when '. . . *the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her*'. Consequently, the provisions of section 26(10)(b) of the POCA which provides that 'a *High Court which made a restraint order)..(b)**shall** rescind the restraint order when the proceedings against the defendant concerned are concluded*, read with section 17(b) thereof, oblige this Court, to rescind the interdicts granted by this Court on 16 August 2005 pursuant to the registration in this Court of the second Hamburg restraint order on 13 September 2004. Mr van Riet, on behalf of the applicants submitted that it is as simple as that. He pointed out that whilst section 17 (c) makes provision for the case where a conviction is set aside on review or appeal, in which event the proceedings shall likewise be deemed to be concluded, there is no corresponding provision regarding section 17 (b) to allow for the alteration on appeal or review of the decision not to make a confiscation order. He submitted that the decision of the trial court (as opposed to any higher court on appeal or review) in favour of an accused, not to make a confiscation order, was conclusive. The applicants further contend that the fact that the order of 16 August 2005 was clearly based on the registration in this court of the second Hamburg restrain order, does not detract from the fact that the order of 16 August 2005 was granted under the provisions of the POCA (section 26(8)) and that its continued

enforcement is governed by the provisions of the POCA. In addition, the restraint order of 16 August 2005 is, unlike the second Hamburg restraint order, mainly concerned with the assets of FRSA and not the assets of Falk. FRSA is not a party to the second Hamburg restraint order which ordered the *'attachment of the property of the accused (Falk) to an amount of EUR 31,645,413'*

[61] Mr Breytenbach submitted that the criminal proceedings in Germany against Falk were not concluded by the Hamburg Regional Court's decision in the criminal trial of 9 May 2008. According to the undisputed expert evidence of Dr Winter, who is as mentioned earlier, a public prosecutor in Germany and is the head of the Financial Investigations unit of the Public Prosecutions Department in Hamburg, the noting of the appeals by Falk and by the Hamburg prosecutors automatically suspended the operation of the Hamburg Regional Court's decisions in the criminal trial. Dr Winter further testified that when determining these appeals the Federal Court has wide powers to grant appropriate relief. It may overturn the decision of the Hamburg Regional Court in its entirety and refer the matter back to the Hamburg Regional Court to be reheard before a different Chamber. It may also make a specific finding that the facts establish that a completed fraud was committed, in which case it is likely that the matter will be referred back to a different Chamber of the Hamburg Regional Court for a reassessment of the sentence. It may also itself interfere directly with the sentence imposed by the Hamburg Regional Court by either increasing or lessening it, although it normally refers matters back for reconsideration. Finally, it may also make a forfeiture (confiscation) order. Dr Winter consequently denied that the criminal matter against Falk has been concluded since Falk may, depending on the finding of the Federal Court, either be acquitted or be convicted of a more serious offence, his matter may be reheard before a different Chamber of the Regional Court, or he may have his sentence increased or

lessened. The Federal Court may also make a forfeiture (confiscation) order. The applicants have not disputed Dr Winter's evidence regarding these features of the German criminal procedure. The applicants are seeking final relief in motion proceedings and neither Dr Winter's denial nor his explanation for the denial is far-fetched, clearly untenable or palpably implausible. The matter must consequently be decided on the basis that the criminal proceedings against Falk have not been concluded in Germany in the sense that pursuant to the appeal to the Federal Court, Falk may still be convicted of completed fraud and a confiscation order may still be made. However, as was pointed out by Mr van Riet, Dr Winter did not purport to interpret the provisions of the POCA which is a piece of South African legislation. Section 17(b) states unequivocally that where the court convicting the defendant, sentences the defendant without making a confiscation order, the proceeding are concluded *for the purposes of chapter 5* of POCA. Subject to what is said hereunder in regard to section 24A of the POCA, I am inclined to agree with Mr van Riet's submissions in regard to the effect of section 17(b) read with section 26(10)(b) of the POCA.

[62] Mr Breytenbach submitted that even if the proceedings may in terms of section 17(b) be held to have been concluded, the provisions of section 26(10)(b) of the POCA do not apply. The interdicts were granted by this Court on 16 August 2005 pursuant to and as ancillary orders to the registration in this Court of the second Hamburg restraint order on 13 September 2004. He submitted that the setting aside of both the registration in this Court of the second Hamburg restraint order on 13 September 2004 and the interdicts granted pursuant to it by this Court on 16 August 2005, falls to be decided under the provisions of section 26 of the ICCMA and not section 26(10)(b) of the POCA.

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[63] The second Hamburg restraint order was made in the course of criminal proceedings. It ordered the attachment of Falk's assets to an amount of EUR 31,645,413, 34 pending its possible confiscation when those criminal proceedings are finally concluded in Germany. Since the restraint order was registered in South Africa, under section 25 of the ICCMA it has had the effect of a *'restraint order'* made under Chapter 5 of the POCA. Section 26(1) of the POCA describes that effect, namely it prohibits any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with the property to which the order relates. Section 26(8) adds that a High Court may make any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order. The NDPP sought the 16 August 2005 interdicts and the interdicts were granted under section 26(8) of the POCA. Mr Breytenbach submitted that in reading section 25 of the ICCMA together with the provisions of section 26 of the POCA, the provisions of section 26 apply *mutatis mutandis* to a foreign restraint order registered under section 24 of the ICCMA. If these sections were not read in this manner, he submitted, the provisions of section 25 would make no sense. It could not have been the intention of the legislator that the High Court could not give practical effect in South Africa to a foreign restraint order registered here under the ICCMA because that order was not made in the first instance by the High Court itself, but becomes operative here by reason of its registration by the registrar of the High Court. Mr Breytenbach, submitted that it does not follow, however, from the fact that a foreign restraint order registered in terms of section 24 of the ICCMA has *'the effect of'* a restraint order (or a preservation of property order) made under the POCA, that the foreign restraint order *becomes* a restraint order (or a preservation of property order) made under the POCA. It remains a foreign restraint order, i.e. an order issued by the Hamburg Regional Court (a foreign court in a foreign State) in respect of an offence under the law of Germany, aimed at restraining Falk from dealing with his assets up to

the amount specified. Therefore, he contended, where there are competing provisions in the ICCMA and the POCA which deals with a particular circumstance or eventuality which arises from the registration of the foreign order, it is the provisions of the ICCMA that must prevail because it is that Act which gives the foreign order it effect in South Africa. Section 26(10)(b) of the POCA, which provides that a *High Court which made a restraint order*, shall rescind it when the proceedings against the defendant concerned are concluded, does not apply, he submitted, to a foreign restraint order registered under section 24 of the ICCMA. The setting aside of the registration of a foreign restraint order, he pointed out, is specifically dealt with in section 26 of the ICCMA. It provides that the registration of a foreign restraint order in terms of section 24 thereof shall, on the application of the person against whom the order has been made, be set aside if the court at which the order was registered is satisfied that any one of the circumstances described in sections 26(1)(a) to (e) exists or has arisen. Mr Breytenbach accepts that if the registration of the foreing restraint order is set aside under section 26 of the ICCMA, the ancillary orders made in terms of section 26(8) of the POCA, in this case the orders of 16 August 2005, also cease to have any effect. He pointed out that the provisions of section 26(10) (b) the POCA is also limited to the setting aside of the restraint order and does not refer to the setting aside of any ancillary order. In contrast, section 26(10) (a) deals with the rescission and variation of the restraint order and of ancillary orders. He submitted that where the scheme in both acts are similar, the setting aside of the registration of the restraint order must be dealt with under the provisions of the ICCMA. He further pointed out that while there are different jurisdictional facts or circumstances in which the restraint order or its registration may be set aside, section 26(1)(d) of the ICCMA is all embracing and, he submitted, covers all the circumstances mentioned in section 17 read with section 26(10)(b) of the COPA. Under section 26 (1) (d) of the IMMCA, the court has to take into account all relevant factors when determining

whether the interest of justice are such that the enforcement of the restraint is no longer acceptable. Under section 26(10) (b) of the POCA, the court has no discretion and shall rescind the order if the proceeding against the defendant has come to an end.

[64] Although I find the reasoning of Mr Breytenbach persuasive, it is, however, not necessary, in my view to decide these issues because even if the provisions of section 26(10)(b) of the POCA are applicable to the setting aside of the registration of a foreign restraint order and ancillary orders, the position would then be governed by the provisions of section 24A of the POCA which provides, in my view, a complete answer to the applicants' case based on chapter 5 of POCA. The section provides as follows:

24A Order to remain in force pending appeal

> A restraint order and an order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned.

[65] The Hamburg Regional Court made a number of decisions in the criminal matter on 9 May 2008 including the decisions to convict Falk of attempted fraud and the decision not to make a confiscation order pursuant to Falk's conviction. Mr Breytenbach submitted that the latter decision, that is the decision not to make a confiscation order, was a *decision by the court in relation to the making of a confiscation order* within the meaning of the provisions of section 24A. Since the second Hamburg restraint order was in force at the time of the Hamburg Regional Court's aforesaid decision in the criminal matter on 9 May 2008 and since that decision of the Hamburg Regional Court is on appeal to the Federal Court, the restraint order and ancillary interdicts cannot be rescinded because section 24A of the POCA provides, in peremptory terms, that the

restraint order and ancillary interdicts shall remain in force pending the outcome of the appeal to the Federal Court.

[66] Mr van Riet contended, however, that on a proper construction of the relevant sections of the POCA, the provisions of section 24A are not applicable to the decision of the Hamburg Regional court not to make a confiscation order. First, he pointed out, the provisions of sections 28(10)(b), read with section 17(b) are in conflict with the provisions of section 24A and although both sections 26(10) and 24A (and, incidentally section 29A) were introduced at the same time into the POCA by Act no 38 of 1999, the provisions of section 26(10) were not stated to be subject to the provisions of section 24A. This he said is a telling indication that the provisions of section 24 A were not intended to override the provisions of 26(10)(b) and 17(b). He relies, secondly, on the provisions of section 18(1) of the POCA, which reads as follows:

> 18 Confiscation orders
>
> (1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –
>
> (a) that offence;
>
> (b) any other offence of which the defendant has been convicted at the same trial; and
>
> (c) any criminal activity which the court finds to be sufficiently related to those offences,
>
> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make

any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

[67] Mr van Riet submitted that section 24A does not apply to a decision not to make a confiscation order and that the words, *any decision by the court in relation to the making of a confiscation order,* refer to decisions made ancillary to the making of an order of confiscation under section 18(1) of the POCA. Mr van Riet referred to a number of decisions a court may make that he submitted are the decisions the provisions of section 24 A were intended to refer to as decisions made '*in relation to the making of a confiscation order*'. These include for example, the decision referred to in section 18(1) where the court may enquire into and find that the defendant has benefited from criminal activities; the decision to make '*further orders as it may deem fit to ensure the effectiveness and fairness of that (confiscation) order*' and a decision in terms of section 19(2) determining the value of the defendant's proceeds of unlawful activities. He contended that section 24A must in order to give proper meaning and effect to its provisions be read to apply to the situation where the court has in fact made a confiscation order after conviction and has in the process made ancillary orders of the kind referred to above. When there is an appeal in respect of these ancillary orders, the restraint order shall remain in force pending the outcome of the appeal. He further pointed out that the issue of an appeal against the conviction had already been addressed in section 17 (c) of the POCA and that there is no reference in section 17 to an appeal against an acquittal or a refusal to make a confiscation order. Reading the section as contended for by the NDPP would mean that the state could avoid the consequences of an acquittal referred to in section 17(a) read with section 26(10)(b), by simply lodging an appeal against the acquittal.

[68] In my view the decision by a trial court, in this case the Hamburg Regional Court, not to make a confiscation order pursuant to the conviction of a defendant is indeed one of the decisions the legislator had in mind when it referred in wide terms to *any decision by the court in relation to the making of a confiscation order.* The decision in this case not to make a confiscation order which order was specifically requested by the Hamburg prosecutors certainly is in my view a decision in relation to the making of a confiscation order. There is no reason to read the wide words '*any decision in relation to the making of a confiscation order*' to be confined to decisions in regard to the making of orders ancillary the confiscation order. In my view the legislator had intended the *status quo* regarding the restraint to continue pending the outcome an appeal against the refusal to make the order of confiscation. To do otherwise might very well render the outcome of the appeal, if successful, nugatory. This means that the taking effect of the provisions of section 26(10) (b) is in effect delayed pending the appeal against the decision not to make a confiscation order. Mr van Riet submitted that the 'draconian' effect of the measures relating to restraint and later confiscation of benefits, is tempered by the fact that once a trial court has convicted an accused but has made no confiscation order, the restraint order must be set aside and should not await the outcome of an appeal against the decision not to make a confiscation order. I do not agree. The provision of chapter 5 of the POCA is aimed at depriving criminals of the benefits of their crimes and the delay in rescinding a restraint order until the appeal has been determined would not have a 'draconian' effect.

[69] The relief sought can therefore not be granted under the provisions of chapter 5 of the POCA if such provisions do apply to this case.

[70] The applicants' alternative contention is that, although they do not accept that the setting aside of the registration of the second Hamburg restraint is a necessary

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prerequisite for the setting aside of the restraint order made on 16 August 2005, this Court may, and should, in any event, in terms of section 26(c) or (d) of the ICCMA, set aside the registration in this Court of the second Hamburg restraint order on 13 September 2004. Once the registration of the second Hamburg restraint order is set aside, the order made on 16 August 2005 cannot survive on its own, given that it was sough by the NDPP and was made ancillary to and to give effect in South Africa to the registration of the second Hamburg restrain order. The NDPP accepts that this would be the consequence of the setting aside of the registration of the constraint order under section 26 of the ICCMA.

[71] The reliance on the provisions of section 26 (c) of the ICCMA, namely *'that the order is subject to review or appeal'*, is not correct. As is pointed out by Mr Breytenbach, the Hamburg Prosecutors' appeal to the Hamburg High Court against the Hamburg Regional Court's 21 May 2008 decision to lift the second Hamburg restraint order, was determined on 7 August 2008 when the Hamburg High Court upheld the appeal and confirmed that the second Hamburg restraint order will continue to operate until the Federal Court has determined the appeals by the Hamburg Prosecutors and Falk against the Hamburg Regional Court's 9 May 2008 verdict and sentence in the criminal trial as well as the Hamburg prosecutors' appeal against its refusal to make a confiscation order. There is no suggestion that the Hamburg High Court's decision of 7 August 2008 is itself subject to a further appeal.

[72] The applicants further contend that the registration of the second Hamburg restraint order should be set aside in terms of section 26(d) of the ICCMA because its continued *'enforcement would be contrary to the interests of justice'*.

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[73] The question is whether it will contrary to the interest of justice for the *status quo* to be maintained in South Africa pending the determination of the Hamburg Prosecutors' appeal to the Federal Court against the Hamburg Regional Court's 9 May 2008 verdict and sentence in the criminal trial and its refusal to make a confiscation order. In the Germany the courts have already held that the restraint order made by the Hamburg Regional Court should continue to remain in place pending the outcome of the appeal. The question is what should be done in the meantime in South Africa.

[74] Mr van Riet has pointed out firstly that the ICCMA is according to its Long Title concerned *inter alia* with *'the confiscation and transfer of the proceeds of crime between the Republic and foreign states'*, and he submitted that since, on the papers, only EUR 4,2 million of the EUR 5,22 million in the *nostro* account was directly linked to the proceeds of Falk's alleged fraud and that the farm land owned by FRSA was acquired before the events in Germany in respect of which Falk was charged and ultimately convicted, the continued enforcement of the restraint in South Africa is contrary to the interest of justice. He emphasised that In the criminal case, the German trial court, after an extensive trial stretching over many days, specifically declined to make a confiscation order. This decision arrived at after extensive evidence was heard on the matter, was that no financial damage on the part of the innocent party could be demonstrated. Consequently, he submitted, it cannot possibly be said to be in the interests of justice that a foreign restraint order, upon which the ancillary South African restraint order was founded, and having the same effect, should continue to apply. He emphasised that whether the enforcement of the foreign restraint would be contrary to the interest of justice is to be determined within the South African context and the effect that the continuing restraint would have on FARSA, a South African company and on its farming activities. He emphasised that there are worker who are

dependent for their livelihood on the continuation of FRSA's farming activities. These activities are in jeopardy because the money in FARSA's bank account up to EUR 5,22 million is interdicted. It cannot be in the interest of justice, he submitted, for a South African company not to be able to access the funds in its own current account because a foreign restraint order made against the sole shareholder and director of that company is to remain in place pending an appeal in Germany. Futhermore, it is not in the interest of FRSA, of the NDPP or of the German authorities for FRSA's most valuable asset, the farms to deteriorate in value, he submitted. The only object of a restraint order is to preserve assets pending the grant of a confiscation order. Here a valuable asset is in danger of deteriorating in value. Once a trial Court, for sound reasons in this case, he submitted, has decided to decline the grant of a confiscation order, specifically requested by the prosecuting authorities, the basis for such restraint he submitted has fallen away. It can never be said, he submitted, to be in the interests of justice, in such circumstances, to continue to place an out and out embargo on the use of another entity's assets (worth some ± R100 million) because the prosecuting authority considers that the decision not to make a confiscation order may be reversed on appeal.

[75] Mr Breytenbach has in my view correctly pointed out that the restraint order made in Germany is in respect of EUR 31,645,413, 34 which, in South Africa has the effect, after registration on 13 September 2004, of a restraint order under chapter 5 of the POCA, which has as its focus, not the proceeds of crime but *'realisable property . . . held by the person against whom the order is being made'* (section 26(1) and (2) of the POCA). The NDPP's contention that for the purposes of this case the assets held by Falk include the assets held by Falk through FRSA, of which Falk is the sole shareholder, is well founded.[2] it is not necessary to show that the money or assets restrained are proceeds of

[2] NDPP v Phillips and others, 2002 (4) 60 (W) at 132 G- 133F par [81], not adversely commented upon on appeal to SCA (2003(6) SA 447 at 454 E-F)

crime. What must be shown ultimately is to what amount the accused has benefited from the offence or offences of which the accused was convicted at the same trial or any criminal activity sufficiently related to those offences. The position in Germany appears to be similar in the sense that what is required is proof that the accused, Falk, has obtained benefits by unlawful means. On 7 August 2008 the Hamburg High Court held that the second Hamburg restraint order should remain in place pending the outcome of the appeal in Germany to the Federal Court, to secure assets for a possible future forfeiture to the State. In effect the decision was that the interests of justice in Germany clearly required that the *status quo* (i.e. the continued operation of the second Hamburg restraint order) be maintained pending the determination of the Hamburg Prosecutors' appeal to the Federal Court.

[76] I my view, it has been established that there is a real risk that Falk and FRSA will seek to hide their assets or the proceeds of their assets if the registration is set aside. The Hamburg High Court has held that that there was a real likelihood that Falk would take steps to render execution of a possible forfeiture (confiscation) order impossible or extremely difficult by transferring the assets overseas should restraint orders not be in place to secure the assets. The events referred to earlier in my view bears this out. The NDPP's papers in this matter show that on the probabilities Falk, through his wholly owned company Falk Holding in June 2003 at the time of his arrest in Germany transferred to FRSA in South Africa a substantial portion of the benefit he derived from the fraud of which he stood accused of in Germany by the Hamburg Prosecutors. In June and October 2003 Falk attempted to retransfer to accounts in Germany the entire €5,22 million in the *nostro* account. This he did in an attempt to make it more difficult for Energis, Osborne and the Hamburg Prosecutors to restrain the money. In my view it has been established that if the registration of the restraint order is set aside and the interdicts are lifted, there is a real risk that Falk and FRSA will take steps to ensure that if the

Hamburg Prosecutors' appeal to the Federal Court is successful and a forfeiture (confiscation) order is consequently made against Falk, the assets currently under restraint cannot be located and attached to satisfy the forfeiture order. There is a likelihood that if the registration of the second Hamburg restraint order be set aside and the 16 August 2005 interdicts be lifted, FRSA might, being at liberty to do so, alienate FRSA's main assets (i.e. the farms) and/or that Falk, also being at liberty to do so, might alienate his shares in FRSA, and might transfer proceeds of those sales overseas or take steps aimed at making it hard for the authorities to find them. It is therefore not, in my view, contrary to the interest of justice for the registration of the second Hamburg restraint order to remain in place pending the outcome of the appeal to the Federal Court in Germany.

[77] I conclude therefore that the registration of the second Hamburg restraint order should not be set aside in terms of section 26(1)of the ICCMA.

[78] Mr van Riet has asked that in the event of it being held that the registration should not be set aside in its entirety, I should make an order which facilitates the release of such funds as are necessary in order to cover the arrear farming debts of FARSA; its ongoing farming expenditure and the reasonable legal expenses of FARSA in this matter. In effect this will amount to an order for the release of a portion of the amount held in the nostro account from the restraint. In this regard he has relied on the facts set out in the affidavit of Mr Louw, a co-director with Falk of FRSA and who has actively been involved as the farm manager on the farm owned by FRSA since 1996 and the replying affidavit deposed to by the applicants' attorney Mr van der Hooven. These facts deal mainly with the fact that FARSA is not able to continue with its farming activities which had up to recently been financed with loans from sympathetic overseas entities. In my view there is no basis upon which the partial relief sought in the alternative can be made in this case.

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The restraint order which has been registered was made in Germany for the amount of EUR 31,645,413, 34. It does not appear to me that it is competent under section 26(1) of the ICCMA to set aside the registration of the foreign restraint order in part.

[79] The NDPP has also brought an application to strike out certain paragraphs in the replying affidavit of Mr van der Hooven, the whole of the affidavit of Mr Louw on the basis that it constitutes new matter and in addition, in the case of van der Hooven affidavit, also an impermissible and belated attempt to secure the release of money for FARSA's legal and business expenses. There is also an objection to parts of an affidavit deposed to be Falk wherein he expresses opinions in regard to aspects of German law. In view of the conclusion to which I have come in this matter I am of the view that the NDPP has not been prejudiced by the matter and it is not necessary to decide the application to strike out. Very little time was spent on it in any event and the cost must follow the cost in the main application with which this judgment is concerned.

[80] I consequently make the following order:

1. The application is dismissed.

2. The applicants Falk and FRSA are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

W. J. LOUW, J