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

CASE NO: 20738/2008

IN THE RESTRAINT APPLICATION

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant

and

THE DEFENDANTS

JOHANNES ERASMUS VAN STADEN	First defendant
GERHARD PHILIP BOTHA	Second defendant
MARC SHOEMAN	Third defendant
CAREL BRAAM DE VRIES	Fourth defendant
S & D CONSULTING SOMERSET WEST CA (SA) (PTY) LTD	Fifth defendant

THE RESPONDENTS

JOHANNES ERASMUS VAN STADEN N O IN HIS CAPACITY AS A TRUSTEE OF THE SWORDFISH TRUST	First respondent
MARIA NAOMI VAN STADEN NO IN HER CAPACITY AS A TRUSTEE OF THE SWORDFISH TRUST	Second respondent
MARC SHOEMAN N O IN HIS CAPACITY AS A TRUSTEE OF THE SWORDFISH TRUST	Third respondent
MARC SHOEMAN & ASSOCIATES CC	Fourth respondent
GARY WYBO NEWMARK	Fifth respondent
JAN GABRIEL DU PREEZ	Sixth respondent
MARIA NAOMI VAN STADEN	Seventh respondent
CHANTELLE VENTER	Eighth respondent
ANNDIA VAN STADEN	Ninth respondent
PETER GABRIEL VAN STADEN HEREIN REPRESENTED BY HIS MOTHER AND LEGAL GUARDIAN MARIA NAOMI VAN STADEN	Tenth respondent

INDO-ATLANTIC MOTOCROSS (PTY) LTD	Eleventh respondent
TRIBAL ZONE TRADING 584 CC	Twelfth respondent
MICHELLE LE ROUX	Thirteenth respondent
RYNO ENGELBRECHT N O IN HIS CAPACITY AS LIQUIDATOR OF INDO-ATLANTIC GROUP HOLDINGS (PTY) LTD (IN FINAL LIQUIDATION)	Fourteenth respondent
BRIAN SHAW N O IN HIS CAPACITY AS LIQUIDATOR OF INDO-ATLANTIC SEAFOODS (PTY) LTD t/a SOUTHERN OCEAN FISHING (IN PROVINCIAL LIQUIDATION)	Fifteenth respondent
CHRIS VAN ZYL N O IN HIS CAPACITY AS LIQUIDATOR OF INDO-ATLANTIC SHIPPING LIMITED (IN PROVINCIAL LIQUIDATION)	Sixteenth respondent

IN THE LEGAL AND LIVING EXPENSES APPLICATION

JOHANNES ERASMUS VAN STADEN	First applicant
GERHARD PHILIP BOTHA	Second applicant
MARC SCHOEMAN	Third applicant
CAREL BRAAM DE VRIES	Fourth applicant
S & D CONSULTING SOMERSET WEST CA (SA) (PTY) LTD	Fifth applicant

and

LEON KNOETZE N O	First respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second respondent

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JUDGMENT DELIVERED ON 9 MARCH 2011

BLIGNAULT J:

[1] This judgment concerns two related opposed applications brought in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998 ("POCA") that were heard together.

[2] In the first application ("the restraint application") the applicant is the National Director of Public Prosecutions ("the NDPP"). The principal defendant (as defined in POCA) is Mr Johannes Erasmus van Staden ("Mr van Staden"). The object of this application is the confirmation of a provisional restraint order in terms of section 26(3)(a) of POCA. It is defended by Mr van Staden.

[3] The second application ("the legal and living expenses application") was brought by Mr van Staden and some of his family members against the NDPP for the provision of reasonable legal and living expenses in terms of the provisions of section 26(6) of POCA. It is defended by the NDPP.

[4] The relevant statutory provisions form part of Chapter 5 of POCA which is headed "Proceeds of Unlawful Activities". The general object of this chapter is the confiscation of money or property from a person that has been convicted of an offence and has been found to have benefited from that offence.

The word "defendant" is defined in Chapter 5 of POCA as follows:

> *"'defendant' means a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 25 (1) (b);"*

The relevant part of section 25 of POCA read as follows:

> ***"25 Cases in which restraint orders may be made***

(1) A High Court may exercise the powers conferred on it by section 26 (1)-

(a) when-

(i) a prosecution for an offence has been instituted against the defendant concerned;

(ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant

(b) when-

(i) that court is satisfied that a person is to be charged with an offence; and

(ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person."

The relevant parts of section 26 read as follow:

"26 Restraint orders

(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.

... ...

(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.*

(b) *when-*

(i) *that court is satisfied that a person is to be charged with an offence; and*

(ii) *it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.*

... ...

(6) *Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit-*

(a) *for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and*

(b) *for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate, if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."*

[5] The background to the two applications may be sketched briefly. On 12 December 2008 the NDPP obtained by way of an *ex parte* application a

provisional restraint order in terms of section 26(1) of POCA in respect of property of Mr van Staden and a number of other persons and entities. Various assets of Mr van Staden (and some of his family members) were seized pursuant to the provisional restraint order and a *curator bonis* has been appointed in terms of section 28 of POCA to take care and administer these assets. A criminal trial, in which Mr van Staden and the other defendants have been charged with fraud, is likely to be heard later this year. Mr van Staden claims that he has no assets to finance his legal costs nor sufficient income to meet his living expenses and that of his family.

[6] The provisional restraint order has already been confirmed against the other defendants except for Mr van Staden. It has also been confirmed against the respondents who have defences to the application, save Mr Gary Newmark (the fifth respondent) and persons and entities that are related to Mr van Staden. Fifth respondent did not raise any substantial defence to the application and is not opposing the application. The restraint order against Mr Newmark, said counsel for the NDPP, can now be confirmed. The only substantive defendant at this stage is therefore Mr van Staden.

[7] I propose to deal with the restraint application first. The NDPP's founding affidavit was made by Mr J K Rossouw, a Deputy Director of Public Prosecutions. He contended that the NDPP will provide proof at the criminal trial that a systematic value added tax ("VAT") fraud was committed over the period from 2005 to 2008 by three companies in the Indo-Atlantic group of companies, namely Indo-Atlantic Seafoods (Pty) Ltd ("Indo Seafoods"), Indo-

Atlantic Shipping (Pty) Ltd ("Indo Shipping") and Indo-Atlantic Group Holdings (Pty) Ltd ("Indo Holdings") in an amount of at least R246 million. Mr van Staden was the majority shareholder, director and chief executive officer of the companies in that group. Mr Rossouw contended that Mr van Staden:

(i) was involved in this fraud by reason of his position in the group of companies and the *de facto* control which he exercised;

(ii) was directly involved in the fraud; and

(iii) received a benefit of not less that R100 million from the fraud.

[8] It is apparent from the provisions of section 25(1) of POCA that the NDPP must show at this stage that there are reasonable grounds for believing that a confiscation order may be made against Mr van Staden at the conclusion of the criminal trial. Such a confiscation order may be made if the trial court finds that Mr van Staden has benefitted from any offences of which he is convicted, or any other offence which the court finds to be sufficiently related.

[9] In the founding affidavit Mr Rossouw provided an overview of the VAT fraud allegedly committed by the three companies. Inasmuch as Mr van Staden does not seriously dispute the existence of a fraudulent scheme (he claims that he has no knowledge of it and that he was not involved in it) it is not necessary to describe the nature of the scheme in detail. It is based on the feature of the VAT legislation that VAT is not payable on goods sold and exported. The fraud was committed by way of four methods. Firstly false invoices were generated in order to make false input claims. Secondly,

invoices were used as if they had been paid whereas they had not been paid. Thirdly genuine invoices were used to make input VAT claims where no payment had been made. Fourthly the company fraudulently inflated its export figures.

[10] Any entity exporting goods from South Africa is obliged by the Customs and Excise Act 91 of 1964 to register with customs as an exporter and to keep records of exported goods. Indo Seafoods first registered for export on 18 October 2006, and declared export sales to customs from November 2006 onwards. A comparison between the volume of export sales declared to Customs and the export sales declared on Indo Seafoods' VAT returns shows that over the period November 2006 to July 2008 the export sales declared to Customs exceeded those declared on VAT returns by more than R2 billion.

[11] The South African Revenue Service ("SARS") has established that an amount of at least R246 499 372,99 was obtained by means of fraudulent information in the VAT returns. All VAT payments to the three companies over the relevant period were made to S D Consulting (Pty) Ltd, a company of which Mr Marc Schoeman (third defendant) is the sole director and shareholder and Schoeman CC, a close corporation of which Mr Schoeman has a controlling interest. These two entities paid the funds received from SARS to Indo Holdings or other companies in the group but they retained an amount of at least R37 million.

[12] Mr Rossouw contended that the NDPP will prove that Mr van Staden was involved in the fraud. Apart from the fact that he was a director and major shareholder of the companies, he was the *de facto* manager of the business of the whole group. Mr Rossouw also contended that there is direct evidence in regard to certain events which show that Mr van Staden was involved. The NDPP calculated, on the basis of his 60% shareholding in Indo Holdings, that the benefit which Mr van Staden received as a result of the fraudulent scheme amounted to R147 million.

[13] Mr Rossouw contended that, given the magnitude of the fraudulent scheme, it is simply not credible that Mr van Staden, being the majority shareholder in the group and *de facto* in control of it, could not have been aware of the scheme. Over the period from 14 October 2005 to 31 October 2008, 50% of the total credits and deposits coming into the bank account of Indo Holdings, constituted VAT refund payments. It is also not credible, Mr Rossouw contended, that Mr van Staden could have been unaware of the amount of R37 million paid to the Schoeman entities for nothing more than using their bank accounts as a conduit.

[14] The NDPP also relied upon particular instances of Mr van Staden's alleged involvement in the fraud. On 20 January 2006, for example, SARS received an instruction signed by Mr van Staden on behalf of Indo Holdings that VAT refunds were in future to be paid to the account of Indo Holdings. This instruction was carried out but Mr Schoeman objected to this manner of payment. A dispute ensued and Mr van Staden allegedly took sides with Mr

Schoeman. An e-mail exchange dated 23 March 2006 shows that the former *modus operandi* was restored by way of an arrangement between Mr van Staden and Mr Schoeman.

[15] Mr Rossouw also relied on an e-mail sent by Mr van Staden to Mr Schoeman and Ms Botha at a time when SARS was calling for supporting documentation in respect of certain invoices. The e-mail concluded by stating: "It is time to stand together now and get this submitted tomorrow and approved". Included in this e-mail was an incomplete invoice on the letterhead of Isotherm, purportedly dated 4 August 2003.

[16] The Swordfish Trust ("the Trust") also featured in the application. Mr van Staden, Ms Naomi van Staden and Mr Marc Schoeman are the trustees of the Swordfish Trust. Mr Rossouw contended that as a matter of fact it will be shown that Mr van Staden exercised control over the acquisition use and disposal of the Trust's assets. He and his family are the real beneficiaries of the income from the assets of the Trust. Mr Rossouw also contended that certain jewellery claimed by Mr Naomi van Staden (Mr van Staden's wife and the seventh respondent) and a sectional title unit in the name of his daughter, Ms Anndia van Staden were realisable property.

[17] The founding affidavit contained a number of references to Mr C B de Vries, the former chief financial officer of the group of companies. He is the fourth defendant in the restraint application and a co-accused in the criminal trial. Mr Rossouw said that Mr de Vries, after consulting his attorney, agreed

to co-operate with the NDPP and consulted with them. Mr Rossouw's founding affidavit was supported by an affidavit made by Mr Francois Petrus Scholtz, an investigator in the Criminal Investigation Section of SARS. In para 26 of this affidavit Mr Scholtz described this meeting with Mr de Vries as follows:

> *"26. On 27 November 2008, I was present during the search and seizure operations at the Indo Group offices at Vogue House, Thibault Square, Cape Town. Carel Braam De Vries (**De Vries**) was also present during the operations. He is the Fourth Defendant in the present application. He indicated that he was prepared to talk to me about the reason for the search and seizure operation. Before communicating with De Vries any further , I called Rossouw, who advised De Vries to contact his attorney. De Vries called his attorney, Shervaan Rajie (**Rajie**) of Cliffe Dekker Hofmeyr Inc, and spoke to him in private while I waited in a separate room. Subsequently, Rossouw arrived and warned De Vries of his status as an accused and of his rights both to remain silent and to not incriminate himself. De Vries still elected to proceed with the interview. After Rossouw and I had interviewed De Vries, he indicated that he would be willing to make a statement under oath. He subsequently advised us, through a second attorney, George van Niekerk of Edward Nathan Sonnenbergs, that he is preparing a statement and will provide it in due course."*

[18] Mr Rossouw referred to the same meeting and said the following:

> *"In the circumstances, although we rely in this application on information provided by de Vries to me and Scholtz, he has not yet completed the affidavit that he had undertaken to furnish to us"*

[19] Mr van Staden defended the main application on behalf of himself and second, seventh, eighth, ninth, tenth and eleventh respondents. He said at the outset that in preparing his affidavit he had no access to the relevant files, records, documentation and computers as they had been seized by the NDPP or the South African Police Service. That made it difficult for him to recall the relevant facts. Mr van Staden's answering affidavit is a lengthy document. It is not necessary to analyse it in detail. The tenor of his affidavit is that he had not knowledge of any fraud but if there was a fraudulent scheme, others, in particular Mr de Vries, would have been responsible. He repeated his objection a number of times to the unsworn hearsay evidence of De Vries on which the NDPP relied a number of times.

[20] Mr van Staden provided a description of his functions as the chief executive officer of the companies in the group. These included the negotiating of agreements, the marketing of the company and their products, the acquisition of fishing rights and fishing vessels and the development of processing facilities. He said that he had little to do with the financial management and nothing to do with statutory obligations, SARS matters and VAT claims because he had a well qualified financial director in the person of Mr de Vries. He (Mr van Staden) was only a nominal signatory involved in tax matters. He had no financial training or understanding. He said that he cannot be made accountable for the mistakes or fraud of Mr de Vries. He employed what he regarded as competent persons. Mr van Staden summarised his evidence in this regard by stating that his function was to

grow rather than micro manage the business. The companies, he said, "were my life".

[21] Mr van Staden described the position and responsibilities of Mr de Vries. He was a friend and business partner and became part of Indo Holdings Group in 2005. He was a chartered accountant with an MBA degree. He was the financial director with the responsibility to ensure compliance with all relevant statutory regulations including those of SARS. He (Mr van Staden) regularly signed documents presented to him on behalf of Mr Gerhard Botha (second defendant) and Mr de Vries, without reading them. He trusted his staff. In or around August 2008 it came to his notice that some of his senior accounts staff suspected Mr de Vries of mismanagement and irregularities with respect to, *inter alia*, tax related matters. An investigation was launched and Mr de Vries' employment was terminated. De Vries promised to take care of his department and he was reinstated. De Vries then developed what he himself described as the "disgruntled employee syndrome".

[22] Mr van Staden contended that the NDPP should not in its founding papers have placed any reliance on the informal unsworn oral averments attributed to Mr de Vries, He said that he had, by then, 17 August 2010, not received the De Vries affidavit which De Vries undertook to provide to the NDPP. Mr de Vries was an accomplice and had a motive and the knowledge to fabricate evidence against him He again referred to the seriously deteriorating relationship between him and De Vries. His evidence should

have been treated with caution and it should not have been presented in an informal unsworn manner.

[23] Mr Rossouw filed a replying affidavit on behalf of the NDPP. In regard to Mr van Staden's complaints in regard to the hearsay evidence of Mr de Vries, he said the following:

> *"26. Van Staden makes two complaints in respect of the NDPP's introduction in the founding papers of information obtained from De Vries:*
>
> *26.1 First, he alleges that the NDPP based its case on information obtained from De Vries, which he alleges is unreliable.*
>
> *26.2 Second, he complains that such information was not given on oath, and alleges that the NDPP undertook to provide a sworn statement by De Vries on oath but has not done so.*
>
> *Reliance on De Vries*
>
> *27. The NDPP's application for a restraint was only partly based on information obtained from De Vries. At paragraphs 20 to 30 of Scholtz's affidavit, he sets out an overview of the investigation on which his conclusions are based. These make abundantly clear that information obtained from De Vries was not the only, or even the most important, source on which the NDPP's case was based.*
>
> *28. De Vries is an accused in the criminal case and information obtained from him must be treated with the appropriate caution. Nevertheless, far from exculpating Van Staden, the subsequent investigation has largely borne out the information provided by De Vries.*
>
> *29. I must also point out that Van Staden's version of the importance of De Vries in the Financial affairs of the Indo Atlantic group of*

companies only strengthens the case for relying on information provided by him.

Information given by De Vries was not on oath

30. *The NDPP disclosed to the Court that a sworn statement had not yet been obtained from De Vries, and presented the Court with the tenor of the information obtained from him on an informal basis.*

31. *This was the best evidence available to the NDPP at the time the restraint order was sought. I submit the NDPP was entitled to rely thereon. The weight to be attached to the evidence lay in the Court's discretion when it made the restrain order.*

32. *I submit the case made out by the NDPP at the time the restraint was sought was sufficient for this Court to grant it the relief it sought. This will be addressed further in argument.*

33. *Van Staden is incorrect in alleging that the NDPP undertook to place De Vries' statement before this Court. As appears clearly from paragraphs 54 of my affidavit in the founding papers and paragraph 26 of Scholtz's affidavit in the founding papers, it was De Vries who undertook to provide the prosecution team with a sworn statement. De Vries did so on 8 September 2009.*

34. *Van Staden personally collected a CD containing all statements, including that of De Vries, from me on 29 April 2010. I therefore do not understand how he can allege, under oath, that he has not received the statement.*

35. *I do not attach the statement here out of concern for the fairness of the trial of Van Staden and his co-accused. These papers are a matter of public record and I fear that witnesses may be tainted if De Vries' statement becomes available to them before they are called to give evidence. The statement will be made available to the Court at*

the hearing of this matter, and a copy will again be provided to Van Staden on request.

[24] Mr van Staden deposed to a rebuttal affidavit. He admitted that a CD was handed to him. It contained 7000 unindexed papers. He was told that the CD emanated from Advocate Geyser who is the prosecutor in the criminal case. He assumed that it pertained to the criminal case and not the civil case. He said that he had not always had access to a computer and so had not opened or presented documents. Mr van Staden said that at a pre-trial conference in the criminal trial Advocate Geyser was ordered by the Judge President to make the CD available for all accused who requested it. He was then informed by Advocate Geyser that he had to provide 8000 blank pages before hard copies would be provided to him.

[25] At the hearing of the matter counsel for Mr van Staden raised a number of defences *in limine*. One of them was that the NPPD should not have placed Mr de Vries' unidentified hearsay evidence before the court which granted the provisional restraint order. I turn to this defence first.

[26] It is generally recognised that applications of this nature under POCA are draconian in effect. This is vividly illustrated by the facts of the present case. As a result of one single order granted *ex parte* Mr van Staden was deprived of all his assets and his businesses which went into liquidation. His family life was seriously affected. He is now dependant on charity from friends for the most basic food and clothes. It is therefore self-evident that the

NDPP must act in such a matter with scrupulous fairness to a defendant. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC).

[27] It is furthermore settled law that an applicant in an *ex parte* application is required to observe the *uberrima fides* (utmost good faith) rule. He/she is required to disclose all material facts which might influence a court in coming to a decision. See *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) para [296]. This rule is normally applied with reference to the situation as it existed when the order was applied for. In the present case, however, the NDPP probably did not withhold any information available to them at the time when the application was brought. It was stated in the founding affidavit that the NDPP was relying in this application on information provided by de Vries.

[28] In my view however the NDPP, in observing the *uberrima fides* rule, was under an obligation to obtain the affidavit on which reliance had been placed and which had been promised by Mr de Vries, and make it available to the court. This was a duty which the NDPP owed to the court in order to ensure that the alleged evidence on which the court relied, in fact existed and justified the court order. It is self-evident that the NDPP should have discharged this duty as soon as practically possible. At the same time, the affidavit should have been served as soon as possible on Mr van Staden. He was entitled to know what the case against him was.

[29] It seems to me in any event that there was an implied undertaking in Mr Rossouw's founding affidavit that the NDPP would file and serve Mr de Vries' affidavit as soon as it was practically possible.

[30] It is against this background that I intend to consider the treatment by the NDPP of Mr de Vries' statement in this matter. To that end I propose to list the statements made in paras 26 to 36 of Mr Rossouw's replying affidavit (see para [23] above) and comment upon them in turn.

[31] Mr Rossouw's first statement

> Mr de Vries' evidence was not the only, or even the most important, source on which the NDPP's case was based.

> Comment

> The requirements of fairness and disclosure to the court apply to each and every item of material evidence placed before a court, not only to the "most important sources". In any event, it was unequivocally stated in the founding statement that the case against Mr van Staden was, inter alia, based on evidence obtained from Mr de Vries.

[32] Mr Rossouw's second statement

The subsequent investigation has largely borne out the information provided by Mr de Vries.

Comment:

Whether a subsequent investigation is successful or not is entirely irrelevant to the requirements of fairness and disclosure to the court. Such a criterion would, furthermore, entrust it to the NDPP's discretion to decide *ex post facto* whether any particular conduct has been fair or unfair.

[33] Mr Rossouw's third statement

The importance of Mr de Vries in the Indo-Atlantic group of companies only strengthens the case for relying upon him.

Comment

It is difficult to understand this statement. Mr de Vries is an accomplice. One of Mr van Staden's main complaints is that Mr de Vries was, by virtue of his situation in the companies, in a position to have committed the fraud and to implicate him (Mr van Staden) falsely.

[34] Mr Rossouw's fourth statement

The NDPP disclosed to the court that an affidavit had not yet been obtained from Mr de Vries.

Comment

This statement is correct but the disclosure to the court contained at least an implied undertaking to place the affidavit in the court file and to serve it upon Mr van Staden or, if the affidavit was not received or was inconsistent with the tenor of the information on which the NDPP decided to launch the application, to inform the court and Mr van Staden accordingly.

[35] Mr Rossouw's fifth statement

The NDPP presented the court with the tenor of the information on an informal basis.

Comment

It is noteworthy that the reference is now made to the *tenor* of the information and not to the information itself as was stated in the founding affidavit. The problem, however, is that the

information was never identified by the NDPP when it brought the application for the provisional restraint order. No-one can determine today whether the *tenor* of the information indeed corresponds with that on which the NDPP apparently relied when it asked for the provisional restraint order.

[36] Mr Rossouw's sixth statement

The hearsay evidence was the best evidence available to the NDPP.

Comment

This statement is not correct. The best evidence was an affidavit obtained from Mr de Vries. It should not have taken more than say two days to get it. Mr de Vries was accompanied by an attorney and, on the face of it, did not deal with complex matters.

[37] Mr Rossouw's seventh statement

The weight to be attached to the evidence lay in the court's discretion.

Comment

The court could not have judged the weight to be attached to the hearsay evidence because the evidence was not identified.

[38] Mr Rossouw's eighth statement

The case made out by the NDPP was sufficiently strong to obtain the relief sought.

Comment

This statement is unfortunately worded. It tends to suggest that Mr van Staden could be treated with a lesser degree of fairness because the case against him was very strong. In the founding affidavit it was in any event stated that the NDPP relied upon Mr de Vries' information.

[39] Mr Rossouw's ninth statement

The NDPP did not undertake to place Mr de Vries' affidavit before the court. Mr de Vries undertook to furnish the NDPP with an affidavit.

Comment

In my view this contention is not persuasive at all. The statement to the court in the founding affidavit obviously implied that the NDPP would make this affidavit available to the court and Mr van Staden. The NDPP was in any event obliged to disclose all material facts to the court. The NDPP could not appoint itself as arbiter to decide whether the affidavit had been received timeously and whether its contents corresponded with the hearsay information supplied to the court before the order was obtained or not.

[40] Mr Rossouw's tenth statement

Mr van Staden personally collected a CD containing all the documents, including Mr de Vries' statement.

Comment

This form of service, namely the delivery of a CD with 7000 unindexed pages of documents and leaving it to Mr van Staden to search for Mr de Vries' statement, is in conflict with every rule of practice and every principle of fairness.

[41] Mr Rossouw's eleventh statement

Witnesses may be tainted if Mr de Vries' statement is made available to the public.

Comment

This reason is not persuasive. Mr de Vries' statement should have formed part of the founding affidavit or be disclosed to the court and Mr van Staden thereafter. The CD with the statement was in any event made available to Mr van Staden without any condition of confidentiality.

[42] Mr Rossouw's twelfth statement

Mr de Vries supplied his affidavit to the NDPP on 8 September 2009.

Comment

This statement raises important questions. Why did it take some ten months before this statement was received by the NDPP? Why were the delay and the reasons for it, never disclosed to the court or to Mr van Staden?

[43] Mr Rossouw's thirteenth statement

Mr de Vries' statement will be made available at the hearing of the application.

Comment

I do not know whether Mr de Vries' statement was available at the hearing of the application. It was not presented or offered to me. Counsel did not refer to its contents in argument. It would in any event have been impractical for the NDPP to make it available at that stage of the proceedings. It would have given rise to further postponements, further affidavits and further argument. The papers in this matter, I may mention, already comprised more than 4000 pages. The nett result, I may add, is that I never saw Mr de Vries' affidavit.

[44] The NDPP, as I have said above, is obliged to act with scrupulous fairness towards a defendant such as Mr van Staden and with utmost good faith to the court. It is clear from my comments in regard to Mr Rossouw's affidavit that the NDPP failed to comply with these standards in certain material respects. It did not act fairly towards Mr van Staden and it did not disclose all material facts to the court. Mr van Staden has been prejudiced by the NDPP's failure to observe these rules.

[45] In principle the violation of the rules of procedural fairness vitiate the entire process in question. See *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (No 1) 2008 (3) SA 91 (E) para [76]:

> *"[76] Because of the purpose of the requirements of procedural fairness and the values that due observance of these requirements is designed to further - accurate, rational and legitimate decision-making that can further the public interest, and that serves as something of a safeguard against oppressive or otherwise improper official decision-making - an insistence by the courts that they be observed 'is an end in its own right'. As a result, the rules of procedural fairness 'are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question'. Flowing from this, administrative decisions taken in violation of the rules of procedural fairness are invalid, irrespective of the merits... ..."* [Footnotes omitted]

[46] In the case of a failure to disclose all material facts to the court, the court has a discretion to set the provisional order aside. See *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 29:

> *"[29] It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside."* [Footnotes omitted]

[47] In the present case I have considered the nature and extent of the NDPP's failure to observe the two rules in question. Having regard to their importance, their cumulative effect and the prejudice caused to Mr van Staden, I am of the view that the provisional restraint order falls to be discharged. Put differently, the NDPP's application for the confirmation of the provisional restraint order falls to be refused.

[48] It is therefore not necessary for me to consider the merits of the application for the confirmation of a final restraint order.

[49] Upon the discharge of the restraint order, the application for living and legal expenses falls away. It is therefore not necessary to make any order in that application.

[50] Mr van Staden was successful in the restraint application and the NDPP should pay his costs. The living and legal expenses application was brought as a direct result of the restraint order which has now been discharged. The NDPP should therefore also pay Mr van Staden's costs in that application.

[51] In the result I make the following orders:

(a) The provisional restraint order granted by this court against Mr Johannes Erasmus van Staden on 12 December 2008, is hereby discharged.

(b) The NDPP's application for the confirmation of the provisional restraint order, is hereby dismissed.

(c) The NDPP is ordered to pay Mr van Staden's costs in the restraint application and in the application for the payment of living and legal expenses.

A P BLIGNAULT