Republic of South Africa
In the High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between: Case Number: 8420/2003

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

And

ALEXANDER GERHARD FALK First Respondent
FALK REAL ESTATE (SA) (PTY) LIMITED Second Respondent

And

ENERGIS PLC First Intervening Party
OSBORNE ONE JERSEY LTD Second Intervening Party

Judgment: 6 July 2012

Louw, J

[1] This is an interlocutory application in ongoing litigation between the National Director of Public Prosecutions (the NDPP) and the two respondents, Mr Alexander Gerhard Falk (Falk) and his company Falk Real Estate SA (Pty) Ltd (FRSA). Energis plc and Osborne One Yersey Ltd were joined by order of this

court as intervening parties. I shall refer to the intervening parties jointly as Energis.

[2] The background to the litigation is set out in various judgments of this court and of the SCA and Constitutional Court (Falk and Anor v NDPP 2011(11) BCLR 1134 (CC)), all of which dismissed the application by Falk and FRSA to set aside the registration in this court on 13 September 2004 of the second restraint order made in Germany (the second Hamburg restraint order) and the subsequent interdictory relief first granted on an interim basis by Hlophe, JP on 7 February 2005 and finally by Veldhuizen, J in this Court on 16 August 2005 (the ancillary interdict). In terms of the latter order (which was ultimately confirmed by the Constitutional Court), Falk was interdicted from dealing with his shares in FRSA and both Falk and FRSA were interdicted from dealing with:

1. the approximately E5,22 million held in FRSA's bank account (the Nostro account); and
2. FRSA's remaining assets, other than in the ordinary course of business.

[3] The Constitutional Court confirmed that since the date of its registration in this court the second Hamburg restraint order has had the effect of a restraint order made by this court under section 26 of the Prevention of Organised Crime Act, 121 of 1998 (POCA). The effect of the restraint is that 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. At

paragraphs [72] to [78], the Constitutional Court dealt with the interaction between the restraint order which was registered in this Court and the ancillary interdict made by Veldhuizen, J as follows under the heading: What does 'having the effect' of a domestic order mean?

"[72] . . . what does section 25 of ICCMA mean by stating that when a foreign restraint order has been registered, it shall have the effect of a restraint order made by the division of the High Court at which it has been registered?

[73] The dictionary meaning of "effect" is, *inter alia*, "[t]he state or fact of being operative" or "to come into force." This would imply that once a foreign restraint order is registered it operates as if it were, for all intents and purposes, a domestic restraint order.

[74] If registration gave the German order the effect of a domestic order, why did the NDPP obtain the ancillary interdictory order? Could the German order, once registered, not have been enforced in South Africa?

[75] It might well be that a registered foreign restraint order could, as a self-standing order, have effect of a domestic order and could indeed be enforced as such. Thus, it would not always be necessary to obtain an interdict from the High Court, before the registration of a foreign restraint order could have practical effect in South Africa. It is not necessary to reach a conclusion on this possibility, though, given the facts of this case.

[76] Section 25 of ICCMA provides a link between ICCMA and POCA. Once a foreign order is registered and has the effect of a domestic order, it is for the purposes of POCA an order under section 26(1) of POCA. Section 26(8) serves

to make the section 26(1) order more effective. This may be required where the restraint order itself is not enough, or requires that the property be seized. It might also be necessary that some other kind of ancillary order – for example the interdictory order in this case – be granted that "the court considers appropriate for the proper, fair and effective execution" of the section 26(1) order. So, if registration of a foreign restraint order gives it the effect of a section 26(1) order, section 26(8) empowers the court to grant ancillary orders that render the registration more effective.

[77] . . . The German restraint order does not specify any actual assets in South Africa, but rather talks more generally about a lump sum that the accused owes as a result of his criminal dealings. In contrast, the order issued by the High Court specifies the assets. Thus, the registration of the German restraint order provided the jurisdictional basis upon which an application could be made by the NDPP to restrain specific assets in South Africa.

[78] On the facts of this case, it is quite clear that the interdictory relief was essential to the efficacy of the original restraint order. This is how ICCMA and POCA interact in the circumstances of this matter."

[4] In the main application to which this is an interlocutory, the NDPP originally sought an order

"declaring Falk to be in contempt of the restraint order made by the Hamburg regional Court on 25 August 2004 and registered in this Court on 13 September 2004 in terms of section 24 of the International Co-operation in Criminal Matters

Act 75 of 1996 under case number 7698/04, which since the date of its registration has had the effect of a restraint order made by this Court under section 26 of the Prevention of Organised Crime Act 121 of 1998, due to his purported cessions during 2005 and on or about 13 December 2007 to Aquilar Consulting Inc of his claims on directors loan account, against FRSA."

[5] The NDPP first became aware of the fact that Falk had a loan account in FRSA when it was disclosed in audited financial statements for the period 1 July 2002 to 30 June 2006 which formed part of the replying papers filed on behalf of Falk and FRSA on 22 September 2008 in their ultimately unsuccessful application for the setting aside of the registration of the second Hamburg restraint order and the ancillary interdict. The financial statements disclosed that Falk and his co-director, Mr Stephanus Louw (Louw) had directors' loan accounts and that Falk's loan account, which stood at R1 021 681,00 as at 30 June 2004, increased to R22 554 527,00 in the financial year to 30 June 2005. This increase was accompanied by a corresponding decrease (with a discrepancy of R1) in FRSA's share subscription account from R21 532 845 to nil. FRSA's total directors' loan account increased further and by the end of the 2006 financial year, it stood at over R24 million.

[6] During 2009 Louw, who is also the manager of the South African wine estate owned by FRSA, brought an application to liquidate FRSA. In response to the application, the NDPP, on 11 August 2009 launched an application in terms of

section 28(1) of POCA which was supported by Energis, for the appointment of a curator bonis to Falk's property in South Africa that was subject to the restraint order and, having been alerted to the existence of Falk's loan account in FRSA, the NDPP specified Falk's directors' and/or shareholders loan account(s) in FRSA' as being part of the property which should be subject to the restraint order.

[7] Falk and FRSA opposed the granting of the curatorship order in part. After hearing argument, including argument on the issue whether the restraint order included Falk's loan account in FRSA, this court made an order granting the curatorship, appointed Mr Schalk Willem de Wet as curator bonis and specified the property subject to the restraint order to include Falk's directors' and/or shareholder's loan account(s) in FRSA. Reasons were given for the decision on 11 September 2009 but neither Falk nor FRSA sought leave to appeal against the granting of the curatorship order or any of the terms of the order.

[8] The curator bonis delivered his first report on 11 December 2009 which report included copies of unaudited financial statements for FRSA for the financial years ended June 2007 and June 2008 which he had obtained from FRSA's auditors and which showed that by the end of the 2008 financial year, Falk's directors' loan account had increased to R 26 906 884.

[9] During March 2010 Falk delivered an affidavit dated 1 March 2010 in an

application brought by Energis under case no 2557/2009 in this court wherein Falk disclosed that he had ceded his loan account against FRSA. He did so in the following terms:

"I have been advised that it is appropriate to record, however, that I am no longer the owner of the loan account against First Respondent (FRSA). The loan account has long since been ceded and transferred to an overseas entity, being Aquilar Consulting Inc. I am advised that the underlying basis for this transaction is not relevant to, these proceedings".

[10] In a case to be heard in tandem with the contempt application brought by the NDPP against Falk, Energis seeks orders under case no 2555/09:

1. interdicting Falk and FRSA from effectively dealing with Falk's loan account in FRSA pending the outcome of the civil proceeding Energis has instituted against Falk in Germany;
2. setting aside the purported cession by Falk of his loan account to Aquilar

[11] In view of the fact that the curatorship order dated 11 September 2009 had specified that the restraint order included Falk's directors' loan account in FRSA, the NDPP sought an order that Falk provide full particulars of the purported cession on affidavit, including full particulars of Aquilar and any direct or indirect interest or involvement Falk might have in Aquilar. On 25 March 2010 the order sought by the NDPP was granted by agreement, together with other relief. The parties to the agreement included Falk. The relevant part of the order is in the

following terms:

5. By Thursday 15 April 2010 Falk must deliver an affidavit:

5.1 containing full particulars of the alleged cession to Aquilar Consulting Inc ("Aquilar") of his FRSA director's loan referred to in his affidavit dated 1 March 2010 in the application by Energis plc and Osborne One Yersey Limited under case number 2557/2009;

5.2 containing full particulars of Aquilar,including its registered address, principal place of business and the nature of its business;

5.3 containing full particulars of any direct or indirect interest or involvement he might have in Aquilar; and

5.4 if he chooses to do so (there being no compulsion that he do so), either explaining why by such alleged cession he did not unlawfully and intentionally disobey the relevant restraint order or setting out (the) steps he has taken to redress the situation".

[12] Falk did not deliver the affidavit in terms of paragraph 5 of the order by 15 April 2010. On 19 April 2010 an unsigned statement by Falk was faxed by Falk's attorneys to the State Attorneys's office where in it is contended that Falk's directors' loan account was not subject to any of the restraint orders and giving the following particulars of the cession and of Aquilar, but not of any interest he might have in Aquilar.

"4. On 13 December 2007, I by way of a discharge of pre-existing obligations towards it, ceded my claims, on loan account, against Second Respondent to

Aquilar Consulting Inc. The validity of the cession has been verified by a German legal expert.

5. Aquilar Consulting Inc is a company involved in investment and trading of 53rd Street, Obario, Swiss Town, 16th Floor, PA – Panama."

[13] On 27 May 2010 Falk delivered a signed copy of the aforementioned affidavit which included the following sentence at the end of paragraph 4:
"This cession was in substitution of an earlier cession in securitatem debiti to the same entity during 2005."

[14] On 10 May 2010, the curator bonis delivered a further supplementary report, dated 8 May 2010. He attached a revised set of unaudited financial statements for FRSA for the year ended 30 June 2008 which he had then recently obtained from FRSA's auditors. The curator bonis records that he discussed the cession with the auditors and that they had advised him that after Falk notified them of the cession in 2007 and instructed them to make provision for the cession in the financial statements for the financial year ending 30 June 2008, they only did so recently. The curator bonis points out that according to the revised financial statements the auditors were unable to verify the cession and states that he understands this to mean that the auditors have no knowledge of when, where or how such cession agreement was entered into, that the auditors have not been furnished with a copy of the cession agreement and that they could not confirm that it existed .The curator bonis further draws attention to the fact that according

to the revised 2008 financial statements, the directors' loan account had suddenly increased to R44 125 637,00. He attributes the increase to the fact that interest was calculated on the outstanding balance of the loan account from 1997 to 30 June 2008 and was added to the loan account. According to the auditors, although they were uncertain of the grounds upon which Falk sought to recover the interest and having qualified their reporting in this regard, made provision for the increase on the express instructions of Falk. The curator bonis states that in the light of the fact that interest had not previously accrued on the outstanding balance of the loan account, he is of the prima facie view that neither Falk, nor Aquilar can lawfully recover the interest lately added to the loan account.

[15] On 28 May 2010 this court heard and reserved judgment in an application by the NDPP for the issuing of a rule nisi calling on Mr Falk to show why an order committing him for being in contempt of the second Hamburg restraint order registered in this Court, should not be made. The matter was subsequently postponed several times to await the outcome of the appeals to the Supreme Court of Appeal and to the Constitutional Court against this court's judgment and orders of 10 July 2009. In the wake of the judgment of the Constitutional Court on 16 August 2011 dismissing the appeal against the judgment of this court, the contempt proceedings were re-enrolled for hearing on 23 September 2011 on which day the proceedings were postponed to 2 December 2011. On 2 December 2011 the proceedings were again postponed to 8 March 2012 to allow

for the filing of further papers.

[16] To understand the issues which came before the court on 8 March 2012, it is necessary to set out the sequence of events which occurred after the matter was postponend on 23 September 2011.

[17] The postponement on 23 September 2011 was by agreement between the parties and one of the matters to be determined on 2 December 2011 was the relief sought by the NDPP declaring Falk to be in contempt of court relating to his purported cession of his director's loan to Aquilar during 2005 and on 13 December 2007. On 25 November 2011 the NDPP received an undated signed statement by Falk wherein he alleged, among other things, that he had acted on legal advice when purportedly ceding his rights against FRSA. In response, and on the same day the NDPP gave notice of the intention to apply at the hearing on 2 December 2011 for an order: -

1. directing Mr Falk to produce documents for inspection and copying relating to legal advice he is alleged to have received regarding the purported cession; and
2. referring the question to oral evidence whether Mr Falk had wilfully and *male fide* disobeyed the second Hamburg restraint order which was registered in this court on 13 September 2004 and which was in effect against him in South Africa.

[18] Shortly before the hearing on 2 December 2011 Falk's attorney Mr van der Hoven filed an affidavit wherein, without identifying the date of the cession referred to, he: -

1. confirmed being in possession of the written opinion by an unnamed German legal expert dated 7 January 2009, relating to the validity of the purported cession; being the legal opinion referred to by Falk in paragraph 3.3 of his statement filed on 25 November 2011;
2. asserted privilege over the written opinion;
3. stated that Falk had advised him that he, Falk, received only oral advice from his German lawyer regarding the question whether the purported cession was in breach of any court order; and
4. confirmed that both he and his Counsel had advised Falk after 13 December 2007, the date of the second (2007) cession, that the cession had been lawful.

[19] On 2 December 2011 this Court again postponed the hearing of the NDPP's interlocutory application for the determination of the relief sought in its notice of motion of 25 November 2011 to 8 March 2012, to allow for the further filing of papers.

[20] On 18 January 2012 two further signed statements were filed by Falk and his German lawyer Thomas Bliwier stating that Mr Bliwier orally advised Mr Falk early in 2005 and thereafter regarding the lawfulness of the cession of

Falk's loan account to Aquilar.

[21] At the hearing on 8 March 2012 the NDPP did not seek final relief in the contempt application but asked that the application be postponed for the hearing of oral evidence. The NDPP sought the following orders:

1. that Falk produce the legal opinion dated 7 January 2009 regarding the validity of the cession to Aquilar which is currently in the possession of Mr van der Hoven;
2. that Falk produce all notes memoranda or other recordals of oral advice regarding the lawfulness of the cession to Aquilar which Falk received from Bliwier early in 2005 and thereafter to date, as well as after 13 December 2007 from Falk's South African lawyers;
3. that the dispute of fact on the papers relating to Falk's contempt of court be referred to oral evidence;
4. that the NDPP be granted further amendments of the notice of application dated 25 November 2011 to amplify the questions to be referred to oral evidence, namely whether Mr Falk wilfully and *male fide* disobeyed not only the Hamburg restraint order registered in this Court on 13 September 2004 but also, any ancillary order made by this Court and whether he did so not only by purporting to cede his loan account but also by converting FRSA's share subscription account into a director's loan in his own name during FRSA's 2005 financial year and by instructing FRSA's auditors to increase the loan account by retrospectively adding interest to the loan

account in the revised financial statements for 2008.

[22] Mr van Riet who appeared on behalf of Falk and FRSA resisted the interlocutory orders sought by the NDPP and argued strenuously that the application Falk was called upon to meet, namely that by ceding his loan account he was in contempt of court of the second Hamburg restraint registered in South Africa, should be refused with costs.

[23] Dealing with the amendment sought by the NDPP, he submitted that it should be refused mainly because it is brought at a late stage and will prejudice Falk. In terms of the amendment sought:

1. The NDPP applies to add to the order it is alleged that Falk contravened, the ancillary interdictory orders made by Veldhuizen, J under s 26(8) of POCA pursuant to the registration in this court of the second Hamburg restraint order; and
2. The NDPP wants to add to the actions apart from the cession of his loan account, which he contends constitute acts in contempt of court by Falk,
   (a) The conversion of the share subscription account to a loan account; and
   (b) The retrospective levying of interest on the loan account.

[24] Mr Breitenbach on behalf of the NDPP submitted that the application for an amendment is made bona fide and that, if allowed, there will be no irreparable

prejudice to Falk. He pointed out that the NDPP does not rely on any new facts and that the relevant facts are already to be found in the papers and that Falk has already addressed these issues in some of his answering affidavits. He submitted that the amendments should be allowed in order to obtain a proper ventilation of the dispute between the parties.

[25] It is correct as appears from the facts set out earlier that a large number of the relevant facts have been canvased in the papers. However, as Mr van Riet has pointed out, despite these facts being raised, the case Falk faced in the contempt proceedings until the amendment was sought, has been that he contravened only the second Hamburg restraint order which was registered in this court and then in one respect only, that is, by the cession of his loan account. Although the ancillary interdictory orders were made by Veldhuizen. J on 16 August 2005 and the NDPP had known of the cessions of the loan account since 2009, the relief sought was never based on an alleged contravention of the ancillary orders. Mr van Riet stated that Falk and FRSA would need to consider filing further papers if the amendment is granted and Falk then faced relief based on him having acted in contempt of the ancillary order made by Veldhuizen, J and further, that Falk would certainly be prejudiced if he should be ordered to appear to testify and to be cross-examined about his alleged contravention of the ancillary orders in the respects it is now sought to be added to the complaints against him. He pointed out further that the issue of the validity of the cessions is also to be decided by this court at the postponed hearing of this matter on 21

August 2012 and that if it should be held that the cessions are invalid, such finding of invalidity would render the contempt proceedings moot.

[26] Mr van Riet consequently submitted that the contempt proceeding which as they then currently stood, are based simply on the alleged contravention by Falk of the second Hamburg restraint order registered in this court by ceding his loan account, should proceed and be decided on the papers as they stand. The issue whether by ceding his loan account in FRSA, Falk male fide and wilfully contravened the second Hamburg restraint order must, he submitted, clearly be answered in Falk's favour on the narrow point, namely that the second Hamburg restraint as registered in this court, did not, whatever the ancillary orders may have prohibited, mention Falk's loan account or prohibit Falk from dealing with his own assets and the assets of FRSA in South Africa. Mr Van Riet submitted further that since even the ancillary interdict does not mention Falk's loan account, Falk, having acted on legal advice cannot be held beyond reasonable doubt to be *male fide* and in wilful contempt of even the ancillary interdict. Thus, even if there should be an amendment, the NDPP cannot succeed. The application should therefore be dismissed, he submitted.

[27] I found Mr van Riet's submissions compelling but after anxious consideration of the arguments on both sides, I have concluded that the interlocutory application must be granted in the interest of a proper ventilation of the disputes between the parties.

[28] I deal first with the application to compel. Once a document is referred to in an affidavit in motion proceedings there is an obligation upon a party, when called upon to do so, to produce the document for inspection and the onus is upon the party so obliged to set up facts relieving him from this obligation such as privilege, irrelevance or that the document is not in his possession and that he is unable to produce it. (Unilever v Polagric (Pty) Ltd 2001 (2) SA 329 (c) at 337 A – 338 J.)

[29] In the unattested answering statement to the contempt application Falk states as follows in paragraph 3 thereof;

'3. I have been advised that, as such, all of the following issues dealt with by the Applicant and the intervening parties in their affidavits are irrelevant to a determination of this application, namely:

3.1 The legal validity and/or enforceability of the cession;

3.2 My alleged failure (which is in any event denied) to comply with a previous order of Judge Louw made in these proceedings;

3.3 Likewise my refusal to make available to the applicant and/or the intervening parties a copy of the legal opinion of my German lawyers re the validity of the cession which is not only irrelevant in these proceedings but privileged;

3.4 Whether, as is (albeit very conditionally) contended by Attorney Rakob, I committed a crime (other than contempt of court) either in Germany or elsewhere."

[30] The opinion was also referred to by Falk in an earlier affidavit he made on 27 May 2010 in which he stated that 'the validity of this cession has been verified by a German legal expert.' Falk's attorney Mr van der Hoven in an affidavit deposed to him on 2 December 2011 in opposition to the application to compel also referred to this opinion as well as further advice given to Falk. He did so as follows:

2. The opinion of the German Legal Expert, referred to by Mr Falk in his affidavit of April 2010 is in my possession. It is dated the 7th January 2009 (after the cessions) is clearly privileged (I do not profess to pronounce herein on the matters of waiver). As stated by Mr Falk in his affidavit it relates exclusively to the question of the validity of the cession itself. More particularly the issue as to whether due consideration was given in return and whether the cessionary (Aquilar) has accordingly obtained "ownership of certain accounts receivable against Falk Real Estate Pty Ltd". It does not, to any extent, relate to the issue as to whether the cession was in breach of any restraint/court order.

3. I am instructed by Mr Falk that he never received any written (as apposed to oral) advice from his German Legal Advisors in regard to the latter issue.

4. I confirm that Counsel acting for Mr Falk (R S van Riet SC) and I, on more than one occasion, advised Mr Falk orally during consultation that the cession of the loan account, in our opinion, was not in breach of any restraint and/or court order, quite simply as no reference was ever made in any such order thereto. This advice was however, never reduced to writing. I should also point out that

this advice was given after the cessions were concluded.

5. I am further instructed by Mr Falk (who has confirmed the correctness of this affidavit) that he was orally advised by his German Legal advisors (Mr Bliwier), prior to the first cession, in the same terms, namely that there was no provision in any Court Order/restraint which prevented him from freely dealing with his loan account.

[31] In paragraph 6 of his aforementioned unattested answering statement to the contempt application, Falk refers to the fact that a statement made by the German Lawyer Rakob in an affidavit deposed to by him on behalf of Energis,

"confirms in toto the advices of my German and South African Lawyers, which has been conveyed to me..."

and in paragraph 7, that he had been advised that for as long as the restraints are operative, he is not entitled to deal in any way with the assets listed in the restraints, and in paragraph 9 thereof, that he had

"... consistently been advised by my German Lawyers and my South African Lawyers that the restraints do not pertain to my loan account....Neither I, nor any of my Lawyers, before the launch of the (contempt) application, ever even considered the possibility that I may be prohibited from dealing with any South African assets other than those stated in the South African restraint order".

[32] Pursuant to these statements the NDPP seeks the production for inspection and copying of any written opinions, memoranda, notes or other records of the

advice of the German and South African Lawyers referred to.

[33] I first consider the written opinion. Two reasons are advanced why Falk is not obliged to produce the document, viz that it is not relevant to the contempt proceedings and a secondly, that it is a privileged document.

[34] Falk and Mr van der Hoven has stated that the opinion concerns the validity of the cession and in particular whether Aquilar gave consideration for the cession and therefore obtained 'ownership of certain accounts receivable against Falk Real Estate Pty Ltd'. They contend that the validity of the cession is irrelevant to the contempt proceedings and that the written opinion is consequently not relevant to the contempt proceedings and that Falk cannot be compelled to produce the opinion for inspection and copying.

[35] Falk states in regard to his defence to the contempt claim that at the time of the two cessions, in 2005 and 13 December 2007

'(n)ot one word has ever been mentioned, in any South African restraint order, criminal or civil, about my loan account in Second Respondent .... it therefore stands to reason that I at no stage, even for a moment, contemplated that I was prohibited by the restraint order from, in any way, dealing with my loan account, which in any event, I did on a completely arms length basis.'

[36] Although he states elsewhere that he had been advised that the validity of

the cession is irrelevant, part of Falk's defence appears nevertheless to be that the cession was an arms length transaction, that is, by implication, that it is a valid transaction because Aquilar gave consideration for the cession. Whether or not this is a good defence need not be considered at this stage. By raising the validity as part of a defence, Falk has made the opinion that the cession is valid relevant to the question whether Falk is in contempt. Mr van der Hoven has given a further reason for the irrelevance of the opinion. It is dated 7 January 2009, that is, after the two cessions had already been affected. In my view the reason why Falk sought and obtained a written opinion on the validity of cessions that were effected years earlier (in 2005 and 2007) may have bearing on his state of mind at the time the cessions were effected and the written opinion is in my view relevant to the contempt application. I deal with the issue of privilege hereunder.

[37] I turn to the oral advice given to Falk by his German and South African Lawyers.

[38] Mr Bliwier the German Lawyer states that he has been advising Falk since 2004 in regard the criminal proceedings against him in Germany and the two Hamburg restraint orders, and the attachments which followed thereon and has deposed to an affidavit in which he gives an outline of the advice given by him to Falk:

"4. I advised him at the time and on an ongoing basis as to the nature and effect of the various proceedings. My advice to him was to the same effect as the

evidence which I have been advised has been put before this Court by the attorneys Rakob (on behalf of Energis) and Umbeck (on Falk's behalf) in this matter (copies of their affidavits have been made available to me) and more particularly their evidence that:

4.1 A restraint order (Arrestbeschluss) itself, such as the one of 23 August 2004, does not as yet attach or freeze any assets in itself;

4.2 It is only the attachments ("Pfändungen") which are actually made pursuant thereto, as happened in this case, and in terms whereof certain assets were indeed attached (and identified in such attachment orders) which then froze and/or attached such assets.

4.3 Until such enforcement, i.e. the attachment of the specific assets, Mr Falk retained the legal power to dispose of his assets;

5. During the early part of 2005 Mr Falk approached me and said that he urgently required funding so as to discharge various obligations. To that end, he again, but now pertinently, enquired from me whether he would be able to use unattached assets, such as his loan account in Falk Real Estate in South Africa, which was substantial, in order to raise such funding. I explained to him that to my recollection none of them refer thereto. I explained to him that I was not an expert on South African procedures / law, but that to my opinion unless there was an order which specifically referred to or placed an embargo on his dealing with the loan account, he, in my opinion, was free to do so."

[39] It was on the strength of these oral advices, Falk states, he ceded his loan

account in FRSA to Aquilar. Having acted pursuant to this advice, Falk contends that he did not contravene or wilfully act in disregard of the restraint orders. The advice given by Bliwier is therefore relevant to the question whether Falk should be held to have wilfully acted in contempt of court. I return to the issue of privilege hereunder.

[40] The advice given to Falk by his South African Lawyers was likewise given orally and was also that the cession of his loan account was not in breach of any restraint and/or court order. Mr van der Hoven points out that the advice was given after the cessions were concluded. Again the reason why Falk, after the event, sought advice regarding the question of whether he contravened the restraint and/or ancillary orders, may reflect on his state of mind at the time he ceded his loan account.

[41] I turn to the question of privilege. It is trite that legal professional privilege may be lost by the person holding it, by a waiver, which may be express or implied or it may be by imputation of law irrespective of the person's intention. The distinction between implied waiver and imputed waiver, and the principles governing imputed waiver, are described by J H Wigmore Evidence in Trials at Common Law (as revised by J T McNaughton) (1961) Vol 8 para 2327. Having posed the question: 'What constitutes a waiver by implication?', the author supplies the following answer:

'Judicial decision gives no clear answer to this question. In deciding it, regard

must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'

This passage has been cited many times with approval by South African courts. See for instance in Bank of Lisbon and South Africa Ltd v Tandrier Beleggings (Pty) Ltd and Others (2) 1983 (2) SA 626 (w) at 627 H – 828 F. The passage is also referred to with approval in Kommissaris van Binnelandse Inkomste v van der Heever 1999 (3) SA 1051 (SCA at 1060 H – 1061 D, where the following further passages from Wigmore at par 2327 are referred to:

"(4) The client's offer of his own or his attorney's testimony as to a specific communications to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

(5) The clients offer to his own or his attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication,

on the analogy of the principle of completeness."

[42] In regard to the advice received from Bliwier, the following is relevant. The date of the first cession is uncertain. All that Falk has said is that it occurred during 2005 and Bliwier advised him that he is free to deal with his loan account "during the early part of 2005". The advice received from Bliwier was that in terms of German Law, a restraint order itself does not attach and freeze any assets and that only once an attachment is actually made pursuant to the restraint order, the assets that are attached and frozen and that until such attachment of specific assets, Falk retained the legal power to dispose of his assets. As far as Falk's South African assets were concerned, the advice was that it was governed by orders made in South Africa. Bliwier explained that he was not an expert in South African procedures / law but that in his opinion, unless there was an order which specifically referred to or placed an embargo on his dealings with the loan account, Falk was free to deal with his loan account. The position regarding the legal advice Falk says he acted upon is therefore that he did not seek legal advice from his South African Lawyers who only advised him after the second cession in December 2007. He chose to rely solely on the German Lawyer who states that he is not an expert in South African Law / procedure. In any event, the German Lawyers Umbeck and Rakob appear to agree that where a person intentionally dissipates assets with the intent to diminish property - that he reasonably suspects will become subject to attachment, such person commits a criminal offence under German Law and that

unless the cessions to Aquilar was entered into at arms length and for value received, Falk would have committed an offence if the transaction had taken place in Germany and possibly even if the offence was committed in South Africa. This makes the issue of the validity of the cessions in Germany Law relevant to Falk's defence because if he had doubts as to its validity in Germany, the question may arise how he could rely on oral advice from a German lawyer who he knows is not an expert in South African Law / procedure on the question whether he may according to South African Law, cede his loan account. In this regard it must be borne in mind that assuming that the NDPP at the contempt proceedings prove the order, service or notice of the order and non-compliance with the order, Falk will bear an evidential burden in relation to wilfulness and mala fides. This means that Falk will in that event be required to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide. (Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 344 H – 345 A, par [42]. Falk, having raised the 'defence' of 'Legal advice', is required to set out all the relevant circumstances relevant to the giving of the advice. (HEG Consulting Enterprises (Pty) Ltd and Other v Siegwart and Others 2000 (1) SA 507 (C) at 533 A – B.)

[43] I agree with the submissions by Mr Breitenbach on behalf of the NDPP that Falk waived the legal professional privilege relating to the opinion and the further advices given to him by his German and South African Lawyers when he, van der Hoven and Bliwier gave an outline of the advice given to him in their various

affidavits. In doing so, they published the substance of the advice given. They thereby waived the privilege in respect of communications between Falk and his Lawyers about the validity of the cessions, the impact of the second Hamburg restraint and its registration in South Africa as well as the ancillary orders made here on Falk's entitlement to cede his loan account in FRSA. The contemporaneous notes and other documents reflecting the advices given in this regard must consequently be produced and disclosed. I conclude that Falk's legal professional privilege was waived in respect of the written opinion and other mentioned advice relevant to these proceedings.

[44] The NDPP contends that the conversion of FRSA's share subscription account during the financial year ended 30 June 2005 referred to earlier constitute a wilful and male fide contravention of the German restraint and the subsequent interdictory order. This conversion occurred during the 2005 financial year when according to Falk he urgently needed (extensive) funding for purposes of his criminal trial in Germany and when he sought Bliwier's advice as to whether he would be able to use his 'substantial' loan account in FRSA in order to raise such funding. At this time the second Hamburg restraint had been registered in South Africa (on 13 September 2004) and thereafter the ancillary orders were made, first by Hlophe JP on 7 February 2005 and confirmed by Veldhuizen, J on 16 August 2005 which interdicted Falk from dealing with FRSA's assets (apart from the E5,22m in the nostro account) other than in the ordinary course of business. The first cession, which is said to have been in

securitatem debiti was according to Falk done on an undisclosed date during 2005. It is not clear whether this is alleged to have occurred before or after 7 February 2005 or 16 August 2005. The second cession which is presumably an out and out cession occurred on 13 December 2007. In the 2000 financial statements the share subscription account appeared for the first time and is recorded to stand at R10 992 298 under non-distributable reserves and is described as 'funds received in anticipation of shares to be issued.' An analysis of the financial statements clearly demonstrate that what occurred in the 2000 financial year was that Falk converted his right to the repayment of his loan account which in the previous year stood at R7,9 m into a subscription share account giving him the right to be issued with further FRSA shares and that he provided a further some R3 m to make up the total of R10,9 m in the share subscription account, in anticipation of such shares in FRSA being issued to him. The financial statements for the year 2001 and draft statements for 2002 show that the share subscription account increased to R16,2 m and R21,5 m, while no directors' loans were recorded. The 2003 financial statement again reflect directors' loans of Louw and Falk of R17 607 and R1 021 681, respectively. The 2004 financial statements reflect Falk's loan account still to be at R1 021 681 and the share subscription account at R21,5 m. This meant that as matters stood at the end of June 2004, Falk had the right to claim repayment on due notice of the capital sum, without interest of his loan (the relevant financial statements all state that no interest is to be levied) in the account of R1 021 681. In addition he had the right against FRSA, not for the repayment of the R21,5 m in the share

subscription account, but to have additional shares in FRSA issued to him. This position changed dramatically during the 2005 financial year when the clear inference is that Falk being the sole shareholder and controlling force at the time, in FRSA, caused FRSA's liabilities to increase by R21,5 m through the transfer of the entire value of FRSA's share subscription account (bar R1) to Falk's director's loan account.

[45] The NDPP contends that this course of conduct by Falk occurred in contravention of the restraint upon him dealing with his assets in South Africa which resulted from the registration in South Africa of the second Hamburg restraint order on 13 September 2004. It may also have occurred after the order was made by Hlophe, JP on 7 February 2005. The NDPP contends that the aforesaid conversion and subsequent thereto, the two alleged cessions in 2005 and again in 2007 of Falk's loan account raise the inescapable inference that the course of conduct that was embarked upon and was carried through, was done to create the funds to cede, thereby drastically to reduce the value of FRSA by creating a major new creditor, Aquilar. According to Falk he did so (the cession) on legal advice taken from a German legal expert and not from his South African Lawyers. He also did not, it seems, seek legal advice, in Germany or South Africa regarding the conversion of the share subscription account.

[46] The NDPP contend that through the retrospective addition of interest to FRSA, Falk further acted in wilful contempt of the restraint and interdictory

orders. All financial statements of FRSA expressly stated that directors' loans were free of interest. In May 2010 amended financial statements for the year ended 30 June 2008 were submitted to the curator bonis. These statements show that interest had been added to the value of the loan of R17 218 695 in respect of which Aquilar was reflected as the creditor. The financial statements for the first time stated that the loan carried 'interest at current rates'. The auditors reported to the curator bonis that Falk informed them of the cession in 2007 and had instructed them to record the cession in the 2008 financial statements and to increase the loan by the addition of interest from 1997 to 2008. In the result, interest appear to have been calculated in respect of years when no directors' loans were recorded in the financial statements and on the balance in the shareholder's subscription account in the 2000 to 2005 financial years.

[47] The NDPP contends that the creation of the loan account in FRSA in 2005, when on Falk's version he needed extensive funds to finance his criminal trial in Germany, and thereafter the addition of interest to the loan account retrospectively, raise a strong inference that Falk deliberately acted in wilful and male fide contempt of the restraint order registered on 13 September 2004 and the ancillary interdicts made on 7 February 2005 and 16 August 2005. It is correct as pertinently pointed out and argued by Mr van Riet, that the question whether Falk acted in contempt of the orders will first of all require a finding that, properly construed, Falk contravened the orders relied upon. The ambit of the restraint order is in dispute and requires, *inter alia*, an interpretation of the

judgment of the constitutional court referred to earlier and my judgment of 11 September 2009 appointing the curator bonis. In addition it is in dispute whether the assets of FRSA mentioned in the ancillary interdict granted by Veldhuizen, J includes the capital represented by FRSA's subscription share account which was allegedly converted into Falk's loan account. These are not straight forward questions and I do not believe that I should decide these issues now and non suit the NDPP on that basis at this stage.

[48] The NDPP contends that Falk has not given a full account of what had occurred and initially the NDPP sought an order that Falk be compelled to testify. However, during argument, Mr Breitenbach did not press for an order in terms of Rule 6 (5) (g) that Falk be ordered to appear personally and to give a full verbal account in court of his version and for him to be cross-examined in order to determine whether he has discharged the evidentiary burden in order to prevent a finding that he has acted in contempt of court. Mr Breitenbach did state that if Falk should not appear to give evidence, the NDPP will contend that a negative inference should be drawn against him.

[49] The contempt proceedings were brought on notice of motion by the NDPP in accordance with the established practice in civil contempt proceedings and the NDPP should not be deprived of the opportunity to resolve the disputes of fact through oral evidence. In my view, there is not a preponderance of probabilities, to the extent that such may be determined on the papers in favour of the

respondents. (Kalil v Decotex (Pty) Ltd. And Anor 1988 (1) SA 943 (A) at 979 G-I).

[50] The following order is made:

1. The first respondent is directed forthwith to produce for inspection and copying by the applicant, the following documents:

   1.1 the legal opinion referred to in paragraph 3.3 of his undated answering affidavit delivered on 25 November 2011 ('the answering affidavit') and in paragraph 2 of the affidavit of J L U van der Hoven dated 2 December 2011;

   1.2 any written opinions, memoranda, notes or other recordals of the advice of the first respondent's German and South African lawyers referred to in paragraphs 6, 7 and 9 of the answering affidavit;

2. Paragraph 3 of the applicant's notice of application dated 25 November 2011 is amended by replacing the portion after the words *"that the issue to be referred at such hearing is"* with the following:

   " . . .*whether or not the first respondent, when at some time between 1 July 2004 and 30 June 2005 converting FRSA's share subscription account into a director's loan in the name of the first respondent, and when purporting to cede during about 2005 and on/or about 13 December 2007 to Aquilar Consulting Inc his claims, on director's loan account,*

against the second respondent, wilfully and mala fide disobeyed (a) the restraint order made by the Hamburg Regional Court on 25 August 2004 and registered in this court on 13 September 2004 in terms of section 24 of the International Co-operation in Criminal Matters Act 75 of 1996 under case number 7698/04, which since the date of its registration has had the effect of a restraint order made by this Court under section 26 of the Prevention of Organised Crime Act 121 of 1998; and/or (b) any order in effect against the first respondent ancillary to the above mentioned restraint prohibiting the first respondent from in effect dealing with the first respondent's assets (except the E5.22 million in the second respondent's bank account, which the first respondent was not allowed to deal with in any way) other than in the ordinary course of business.'

3. The respondents are given leave to file such further affidavits as they may be advised to do to deal with the fact that the applicant's notice of application is amended as set out in paragraph 2 hereof and/or to deal with the issues referred to oral evidence set out in paragraph 5 below, by 3 August 2012 and the applicants and the third parties are given leave to file further affidavits in reply thereto by 10 August 2012.

4. Subject to paragraphs 2 and 9.3 of this Court's order of 2 December 2011, the proceedings are postponend to 10h00 on 21 August 2012 for the hearing of *viva voce* evidence.

5. The issues to be resolved at such hearing is whether or not the first respondent, at some time between 1 July 2004 and 30 June 2005 converted FRSA's share subscription account into a director's loan in the name of the first respondent, and in doing so, and/or when he purported to cede during or about 2005 and on/or about 13 December 2007 to Aquilar Consulting Inc his claims, on director's loan account, against the second respondent, and/or during the 2008 financial year gave instructions to the second respondent's auditors, to retroactively add interest to his aforementioned loan account, thereby wilfully and mala fide disobeyed (a) the restraint order made by the Hamburg Regional Court on 25 August 2004 and registered in this Court on 13 September 2004 in terms of section 24 of the International Co-operation in Criminal Matters Act 75 of 1996 under case number 7698/04, which since the date of its registration has had the effect of a restraint order made by this Court under section 26 of the Prevention of Organised Crime Act 121 of 1998; and/or (b) any order in effect against the First Respondent from in effect dealing with the first respondent's assets (except the E5.22 million in the second respondent's bank account, which the first respondent was not allowed to deal with in any way) other than in the ordinary course of business.'

6. The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either party of them may elect to call,

subject however to what is provided below:

6.1 save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless;

6.1.1 he or she has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

6.1.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence;

6.2 any party may subpoena any person who is not himself a party to give evidence at the hearing, whether such person has consented to furnish a statement or not; and

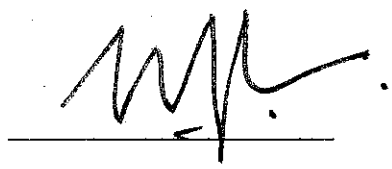
6.3 the fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

7. The parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under control of such party, by no later than 6 August 2012.

2012.

8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

9. All questions of costs shall stand over for later determination.



W. J. LOUW

Judge of the High Court