



Republic of South Africa

[REPORTABLE]

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

Case No: 11528/2011

In the application of:

("the main application")

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

APPLICANT

And

MELVYN IVOR CUNNINGHAM

DEFENDANT

MELVYN IVOR CUNNINGHAM N.O.

FIRST RESPONDENT

IN HIS CAPACITY AS TRUSTEE OF THE
M I CUNNINGHAM TRUST (IT 11120/99)

ANNEMARIE CUNNINGHAM N.O.

SECOND RESPONDENT

IN HER CAPACITY AS TRUSTEE OF THE
M I CUNNINGHAM TRUST (IT 11120/99)

LOUIS MARTIN BREDELL

THIRD RESPONDENT

IN HIS CAPACITY AS TRUSTEE OF THE
M I CUNNINGHAM TRUST (IT 11120/99)

ANNEMARIE CUNNINGHAM

FOURTH REPENDENT

HUGO GUSTAV REMI DEVEUGELE

FIFTH RESPONDENT

ILONA DEVEUGELE

SIXTH RESPONDENT

BLUE BEACON INVESTMENTS 31 (PTY) LTD

SEVENTH RESPONDENT

INFO COLOUR PAGES (PTY) LTD

EIGHTH RESPONDENT

**TWIN CITY WATERKLOOF PROPERTIES
(PTY) LTD**

NINTH RESPONDENT

THE EMBASSY BROOKLYN (PTY) LTD

TENTH RESPONDENT

WEST DUNES PROP 352 (PTY) LTD

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(PTY) LTD**

TWELFTH RESPONDENT

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SPRINT WEB PORTAL (PTY) LTD

EIGHTEENTH RESPONDENT

PROSPERA REALTY (PTY) LTD

NINTEENTH RESPONDENT

**M I CUNNINGAHM FAMILY HOLDINGS
(PTY) LTD**

TWENTIETH RESPONDENT

And in the related application of

("Joinder")

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PROSECUTIONS**

APPLICANT

And

CLAYTON ARTHUR CUNNINGHAM

TWENTY-FIRST RESPONDENT

TANYA MAY CUNNINGHAM

TWENTY-SECOND RESPONDENT

MELINDA MARIE VAN ONSELEN

TWENTY-THIRD RESPONDENT

NICOLE ANN CUNNINGHAM

TWENTY-FOURTH RESPONDENT

MELVYN IVOR CUNNINGHAM N.O.

TWENTY-FIFTH

**IN HIS CAPACITY AS TRUSTEE OF THE TANYA
CUNNINGHAM SUPPORT TRUST (IT3776/10)**

RESPONDENT

**ANNEMARIE CUNNINGHAM N.O. IN HER CAPACITY AS
TRUSTEE OF THE TANYA CUNNINGHAM SUPPORT
TRUST (IT3776/10)**

TWENTY-SIXTH RESPONDENT

TWENTY-SEVENTH RESPONDENT

**LOUIS MARTIN BREDELL IN HIS CAPACITY AS
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**MELVYN IVOR CUNNINGHAM N.O. IN HIS CAPACITY
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SUPPORT TRUST (IT3777/10)**

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RESPONDENTS

AND OTHERS

Coram	:	R.C.A. Henney, J
Judgment by	:	R.C.A. Henney, J
For the Applicant	:	Adv G.M. Budlender SC and Adv K S Saller
Instructed by	:	STATE ATTORNEY 4 th Floor, 22 Long Street CAPE TOWN (Ref: M KAGEE)
For the Defendant's Respondents'	:	Adv Deon Irish SC and Adv J De Waal
Instructed by	:	KNOWLES HUSAIN LINDSAY INC. 10 th Floor, 2 Long Street CAPE TOWN (Ref: TERENCE MATZDORFF/MICU 439.005)
Date(s) of Hearing	:	13 AND 14 FEBRUARY 2012
Judgment delivered on	:	12 JUNE 2012

Summary:

Restraint of Realisable Property in terms of Section 26 of the Prevention of Organized Crime Act 121 of 1998. Where a Trustee (Defendant) allegedly commits fraud and the proceeds of the alleged fraud is distributed to a Trust and the sole beneficiaries are the

family of the Trustee, and he derives a benefit from the property belonging to the Trust, there is no functional separation of ownership and enjoyment between the Trustee (Defendant) and beneficiaries as in the case of an ordinary Trust. The Trust therefore holds the property on behalf of the Defendant.

Realisable Property in terms of Section 26 POCA

It could never have been the intention of the legislature that when the proceeds of crime are placed in the hands even of an innocent or unsuspecting third party with a separate and distinct legal identity like a Trust; that such proceeds would be out of reach of the authorities for the purposes of restraint in terms of the POCA. This would constitute realisable property, in terms of Section 14 of the POCA read with Section 26, to whom the Defendant has directly or indirectly made an affected gift.

Where any distribution of the proceeds of crime to a Trust is further distributed to its beneficiaries, it cannot be out of reach of the authorities for the purposes of restraint even though the beneficiaries were not aware that it was the proceeds of crime.

A Trust cannot be used to launder the proceeds of crime and further distribute it to its beneficiaries in order for it to be completely sanitised of the alleged crime.

Joinder

Ordinarily it is not a requirement that in proceedings against a Trust that all beneficiaries should be joined. (*Mariola v Kay-Eddie NO 1995 (2) SA 728 (W)*).

It is however, generally accepted that a party should be joined in the proceedings where a court will make a decision adverse to the interest of the party.

Even though an affected gift made to a beneficiary is regarded as the realisable property of the Defendant, for the purposes of restraint, such beneficiaries must be joined because a finding that a donation that was made to a beneficiary forms part of the realisable property of the Defendant and is to be restrained will adversely affect the rights of the beneficiary.



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JUDGMENT DELIVERED: 12 JUNE 2012

HENNEY, J:

INTRODUCTION

[1] In this matter this court is called upon to deal with 3 separate and distinct applications.

[2] Firstly, an application by the NDPP for the confirmation of a restraint order granted on 24 June 2011 by Saldanha J in terms of Section 25 and 26 of the Prevention of Organized Crime Act 121 of 1998 (POCA). The restraint order was granted against the realisable property of Mr Cunningham in an amount of R280 million. This order was later upon application reconsidered, substituted by Van Staden AJ to the amount of R230 761 188,00.

[3] Secondly, an application also by the NDPP for the joinder of Mr Cunningham's children ("**the Donees**") and two family trusts (the further family trusts) on the basis that they have received affected gifts in the alternative that they are holding assets on Mr Cunningham's behalf.

[4] Thirdly, an application by Mr Cunningham wherein the Minister of Justice and Constitutional Development as well as the *curator bonis* Mr Steven Powell had been

joined. In this application Mr Cunningham seeks a declaration of invalidity and reading into certain Sections of POCA. In the alternative, Mr Cunningham seeks that the restraint order varied in terms of Section 26(10), that would result in the discharge of the curatorship.

[5] For the sake of expediency it was agreed that this court will first deal with the two applications relating to the confirmation of the restraint order and the joinder of the donees.

APPLICABLE PROVISIONS OF POCA

[6] THE REQUIREMENTS FOR RESTRAINT

6.1 Section (25) provides as follows:

"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; and*

(iii) *the proceedings against that defendant have not been concluded; or*

(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. (our underlining)".

6.2 Section 18(1) sets out the requirements for a confiscation order.

Section 18 states: *"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."

6.3 Section 12 (1) states:

"Chapter.—(1) In this Chapter, unless the context indicates otherwise—

"affected gift" means any gift—

- (a) made by the defendant concerned not more than seven years before the fixed date; or
- (b) made by the defendant concerned at any time, if it was a gift—
 - (i) of property received by that defendant in connection with an offence committed by him or her or any other person; or
 - (ii) of property, or any part thereof, which directly or indirectly

represented in that defendant's hands property received by him or her in that connection, whether any such gift was made before or after the commencement of this Act;

"confiscation order" means an order referred to in section 18 (1);

"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);

"fixed date", in relation to a defendant—

(a) if a prosecution for an offence has been instituted against the defendant, means the date on which such prosecution has been instituted; or

(b) if a restraint order has been made against the defendant, means the date of such restraint order, whichever is the earlier date;

"realisable property" means property referred to in section 14;

"restraint order" means an order referred to in section 26 (1).

- 6.4 Section 1 states: *"proceeds of unlawful activities' means any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived".*

"unlawful activity' means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

- 6.5 Section 14 states:

"Realisable property.—(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely—

(a) any property held by the defendant concerned; and

(b) any property held by a person to whom that defendant has directly or

indirectly made any affected gift.

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

THE NDPP'S CASE

[7] The NDPP's case is based on several allegations and will be dealt with in separate headings that would be relevant and convenient in the process of adjudicating this application. Mr Cunningham is currently standing trial in the Regional Court dealing exclusively with commercial crimes. He is charged with fraud based on the fact that he knowingly and intentionally during negotiations, and in financial statements provided false and misleading information to a potential buyer, Fidentia Holdings (Pty) Ltd ("**Fidentia**") to the latter's actual or potential prejudice.

[8] As a result of which, Fidentia purchase the shares and loan account in a company namely, Webworks (Pty) Ltd ("**Webworks**"), which was owned by the M I Cunningham Trust ("**the MIC Trust**").

[9] This resulted in Fidentia paying a total of R160 million into the MIC Trust in consideration for the latter's interest in Webworks. This amount was paid over in tranches of R25 million and R135 million in March and June 2005 respectively.

[10] The Trustees of the MIC Trust are Mr Cunningham and Annemarie Cunningham his divorced wife with whom he had nevertheless been living with as man and wife for over 20 years. The other trustee is their attorney Louis Bredell ("**Bredell**").

[11] The NDPP contends that at all material times the MIC Trust is and had been under the control of Mr Cunningham who enjoys effective ownership of its assets. I will now broadly deal with the facts surrounding the Trust.

THE TRUST

[12] The Defendant together with his former wife, Annemarie Cunningham and Louis Mark Bredell are the trustees in the MIC Trust. In terms of the Deed of Trust which was concluded on 9th December 1982, the capital and income beneficiaries of the Trust are:

1. Annemarie Cunningham (ex-wife);
2. Melinda Maree Cunningham;
3. Clayton Arthur Cunningham;
4. Tanya May Cunningham.

[13] The beneficiaries of the MIC Trust are Mrs Cunningham, his ex-wife and the children of the Defendant. In a letter dated 29 April 2003 from one, Warren to ABSA it was indicated that Mr MI Cunningham (“**the Defendant**”) and Mrs AC Cunningham are the only trustees of the trust.

[14] In a later letter dated 11 April 2005, Absa responded to the Master that the Defendant and his attorney one Slabbert are the trustees. In this same letter it is stated that “MI Cunningham will have direct control over the Trust”.

[15] A further Trust Deed dated 28 September 2005, which was seized from the office of Warren, the auditor of the Trust; along with acceptance of trust as trustee forms by the Defendant, Annemarie Cunningham and Slabbert. In this Deed of Trust the Defendant, Annemarie Cunningham, Melinda Maree Cunningham, Clayton Arthur Cunningham, Nicole Ann Cunningham and Tanya May Cunningham and any descendants of Mel and/or Annemarie and/or any trust established in terms of that trust deed.

[16] Several provisions, of this Trust Deed places the Defendant in control thereof.

These are:

16.1 Clause 23.1 – which states that at the first meeting the trustees “shall elect Mel to act as the other person and he shall act in this capacity for the period as laid down by the trustees”.

16.2 Clause 5.3 – “The trustees shall have a right to nominate and appoint additional trustees of their own choice, provided that Mel, during his lifetime, accepts such appointment”.

16.3 Clause 5.5.2 ... “A trustee shall have to act as a trustee, if he is called upon to do resign by a majority resolution provided that Mel, during his lifetime, is a member of such majority”.

16.4 Clause 5.6 ... “Notwithstanding any other matter contained in this Trust Deed as a by way of and overriding provision for so long as Mel is a

Trustee, he shall be entitled to nominate additional Trustees and on his death, in terms of the provisions in 23 Mel, shall enjoy the right to nominate as Trustee as his successor”.

16.5 Clause 22.1 – under the heading Testamentary reservation reads ... “It is specifically provided that Mel shall have the right by way of his last Will and Testament to change and to prescribe the formula for the allocation and distribution of the trust properly amongst the capital beneficiaries on the vesting date, which allocations need not necessarily be equal in value or quality, and also includes the right to remove and appoint new trustees of the Trust.” (own underlining)

[17] It needs to be mentioned however, that this Trust Deed was never registered with the Master. The Court will however, refer to this document again at a later stage.

[18] The NDPP contends that there is reason to believe that at the conclusion of Mr Cunningham’s trial, he may be convicted and a confiscation order may be made against him. The NDPP is accordingly of the view, that the grounds for making a restraint order against Mr Cunningham are met. I will now deal with the events that gave rise to the sale of Webworks to Fidentia, which led to the criminal prosecution of the Defendant.

THE WEBWORKS TRANSACTION GIVING RISE TO THE PROSECUTION OF THE DEFENDANT

[19] The charges against the Defendant relates to the acquisition by Fidentia, of the shares and loan account of Webworks (Pty) Ltd, a private company registered in South

Africa. This was in terms of a Sale Agreement entered into on 13 June 2005 between Fidentia, MI Cunningham Trust ("**the Trust**"), Webworks and Mr Cunningham (the sale of shares and loan agreement).

[20] In terms of this Sale and Loan Agreement claim, Fidentia acquired the shares of and loan account in Webworks from the Trust for a total consideration of R160 million.

[21] The allegations against the Defendant are that he intentionally and materially misstated the financial affairs of Webworks in its financial statements and during negotiations with representatives of Webworks. He did this with the assistance of his auditor Warren (a co-accused in his criminal case). It is alleged that they induced Fidentia to purchase the shares and loan account in Webworks for an amount of R160 million, whereas in truth the company was worth no more than R10,5 million. Webworks also did not offer the profit earnings ratio which Fidentia had reasonably believed, based on the representations made by Defendant to Fidentia.

[22] Before the Trust could effect the sale to Fidentia it had to acquire the entire shareholding of Webworks from other minority shareholders shortly before entering into the sale of shares and loan claim agreement with Fidentia. The Defendant did not disclose to the minority shareholders about Fidentia's interest to acquire Webworks. Their shareholding was acquired based on a valuation of Webworks at most of R41 million.

[23] The minority shareholders were Top Dog ("**Top Dog**") which held 15% of the shares; Target Equity ("**Target Equity**"), a British Virgin Island company which held

10% of the shares; and Pricewaterhouse Coopers Corporate Finance (“**PWC**”) which held 2% of the shares. In addition to this either the Fifth Respondent, one Deveugele (“**Deveugele**”), one Marc Sonic (“**Sonic**”), the Defendant personally or the Trust, held a loan account in Webworks in terms of a loan agreement. This agreement provided for the conversion of the loan into equity in the event that Webworks defaulted on the loan.

[24] Webworks operated a card loyalty scheme under the name of “Infinity”, Webworks referred to its clients as partners. These included the Automobile Association (“**AASA**”), SANPARKS, the Mug and Bean and others. At the time of the transaction, AASA was the biggest Infinity partner. Its members comprised almost 50% of the cardholders. The Defendant was the Managing Director in Webworks and the Trust of which the Defendant was a Trustee, was the majority shareholder. The other directors were Anne Marie Cunningham and David Willoughby Abbott. Abbott resigned with effect from 14 June 2005.

[25] In order to fund the acquisition of shareholding of the minority shareholders and the loan account, the Defendant negotiated a loan agreement between the Trust and Fidentia to the value of R25 million. This was signed on 24 March 2005 and 29 March 2005. The entire equity stake in Webworks was as a result of this, consolidated into the Trust. This amount was also meant to be a deposit on the entire shareholding in Webworks by the Trust prior to its sale or transfer to Fidentia. At that stage, the Trust had a balance on its books of R19 535,04.

[26] The Defendant as Managing Director of Webworks and Trustee of the Trust was principally involved in the negotiations with Fidentia. On the basis of the information

given to Fidentia by the Defendant, it approved the acquisition of Webworks for an amount of R160 million.

[27] The decision by Fidentia to require Webworks was, based on the information of the Defendant, influenced by;

- (a) the memberships in the Infinity Loyalty Programme of 1 million.
- (b) the 20-30 different loyalty cards issued by more than 300 merchants.
- (c) a budgeted profit of R25 million for 2005.
- (d) the negotiations Webworks had with Standard Bank at that stage, to implement a loyalty card system for its 2,4 million which may lead to a budgeted profit of R81 million.

[28] Based on this information given to Fidentia it considered the earnings profit ratio which was further based on the budgeted minimum profit for 2005 against the asking price of R160 million. Having regard to this they judged the price of R160 million for the acquisition of Webworks to be reasonable.

[29] The Defendant further provided Fidentia only with a 3 month financial statement of 2005 dated March to May 2005. These statements were presented with other documents which reflected the financial position the company was in, if the AASA'S invoices were taken into account. Eventually on 15 June 2005 a further R135 million

was paid over to the Trust for the acquisition of Webworks.

[30] It later emerged, in 2010 after the curators of Fidentia had appointed a Chartered Accountant Bernard Levenstein, to prepare a valuation of the shares and loan amount of Webworks as at 31 May 2005, that it was only worth R10,5 million. The 2005 3 month audited Financial Statement, which was signed off by the Defendant and Annemarie Cunningham, as directors of Webworks in 2005 overstated the company profits. The 3 month financial statements according to Levenstein incorrectly entered an amount of R1,2 million as income due and payable by the AASA to Webworks. This in fact was an advanced payment on the Infinity fee payable for the 12 months ending 31 May 2006.

[31] The final conclusion Levenstein came to was that the 3 month audited financial statement overstated earnings of Webworks by a total of R6 101 346,00. The audited financial statement overstated earnings by R1 078 998,00. I will now deal with the evidence relating to the realisable property allegedly owned by the Defendant.

REALISABLE PROPERTY

[32] The NDPP contends that the Trust owns a significant shareholding in companies that make up an entity called the Signature Group. This is a group that administers the property held by the Defendant, Signature Acquisitions, Sprint Web Portal and Prospera Realty. None of these companies held immovable property in their own name. The Defendant is a director in 2 of these companies. These companies are cited as Seventeenth to Nineteenth Respondents.

[33] The Trust owns a significant shareholding in a company MI Family Holdings (Pty) Ltd cited as the Twentieth Respondent, which in turn owns significant shareholding in the light, Tenth and Thirteenth Respondents, but does not own immovable property. The Defendant owns 3000 unlisted 12% redeemable preference shares.

[34] Most of the immovable property is held by the Defendant personally or through third parties and is administered, sold or rented out by the Signature Group.

[35] At the centre of the Signature Group's ownership structure lies the Trust. This is set out in a document reflected in an organization entitled "Group Structure" under the label "Signature Label".¹

[36] All the companies set out in the organogram are either owned by the Trust, Family Holdings or Blue Beacon. The latter two are in turn also owned by the Trust. The constituent companies of the Signature Group are also owned by the Trust.

[37] According to the NDPP, erf 2372 also known as 41 Fisherman's Bend, is registered in the name of the Defendant. This property was purchased on 5 September 2005 for an amount of R6,125 million.

[38] According to the NDPP the Trust's immovable assets registered in its name are the following:

¹ Record JAK 48

- (a) 2 Crescent Road, Waterkloof, Pretoria. This was purchased on 12 September for an amount of R5,5 million. (Whilst this property is registered in the name of the Trust, it is also the address that was given as the Defendant's home address in his bail affidavit).
- (b) 45 Fisherman's Bend, Llandudno, Cape Town. This property was purchased on 22 April 1994 for a purchase price of R7,75 million. This property the NDPP alleges is currently advertised for sale on the website of the Signature Group for an amount of R45 million.

[39] The NDPP contends that when the Defendant referred in his bail affidavit where he listed his "property", he referred to "House Cape Town – value R48 million", he was referring to his property. The NDPP contends that the Trust is therefore holding the property on his behalf.

[40] The NDPP further contends that the Defendant holds properties through the following companies which are cited as the Seventh to Seventeenth Respondents. These companies are:

- (i) Blue Beacon Investment 31 (Pty) Ltd;
- (ii) Info Colour Pages;
- (iii) Twin City Waterkloof Properties;
- (iv) The Embassy Brooklyn (Pty) Ltd;
- (v) West Dune Prop 352;
- (vi) Arrow Creek Investments 85 (Pty) Ltd;

- (vii) Club View Ontwikkelings (Pty) Ltd;
- (viii) Sighomes Waterkloof Ridge;
- (ix) Sighomes Constantia (Pty) Ltd;
- (x) Sighomes Vredehoek (Pty) Ltd.

[41] The NDPP contends that on the available evidence, the Defendant holds considerable immovable property personally and through companies which he controls which may be realised if a possible confiscation order against him is given in the value of at least R249 591,45.

[42] The NDPP further alleges that the Defendant had made affected gifts to Deveugele, his ex-wife, his children and trusts created on behalf of his children. These affected gifts as defined in Section 14 of the POCA forms part of the Defendant's realisable property in terms of Sec 26 of the POCA.

[43] This also resulted in the application for the joinder of the children as the Trust is for the benefit of the children of the Defendant and his ex-wife.

AFFECTED GIFTS TO DEVEUGELE

[44] Before the sale of Webworks to Fidentia, the Defendant had represented to the minority shareholders that the value of Webworks was approximately R41 million. Firstly, the Defendant represented to Michael Levenstein who acted on behalf of Target Equity and PWC, to buy their shares which represents 12% of his shares in Webworks for an amount of R4 million. Thereafter, Deveugele acting on behalf of Top Dog, since

and in his personal capacity was informed by Mr Cunningham that Webworks was no more than R38 million.

[45] The Defendant and Deveugele reached an agreement that Top Dog sell its shares to him for R5,7 million. Sonic and Deveugele sold their joint interest in Webworks for R3,4 million.

[46] Deveugele at a later stage found out that the Defendant had sold the shares and loan account to Fidentia for a much higher value. He thereafter set a process in motion whereby he instituted legal proceedings against the Defendant to claim his shares in proportion to the price the Defendant had sold it for to Fidentia.

[47] In terms of a later settlement agreement, the Trust agreed to pay Deveugele a total amount of R16 million. This was made up of an immediate payment of R3 million and over a period between 1 September 2009 until 1 August 2012, it was agreed that further payment be made, totalling R3,6 million. Mortgage Bonds were registered pursuant to this settlement agreement between Deveugele, Sonic and Top Dog.

[48] Mortgage Bonds were registered in favour of Deveugele over immovable property held by the Defendant namely 6 Montrose Constantia, registered in the name of Sighomes Constantia and 41 Fishermans Bend, Llandudno (registered in the Defendant's name). Both in an amount of R6,5 million. This bond was registered on 22 July 2009.

[49] Despite the fact that the settlement agreement was in favour of Deveugele, Sonic and Top Dog, Deveugele is the only registered bond grantor over both properties, therefore the only party to benefit from it.

[50] In terms of the settlement agreement all payments were to be paid in the account of Ilona Deveugele, the Sixth Respondent and Deveugele's wife. Top Dog and Sonic are not mentioned as beneficiaries to whom payment should be made. This settlement agreement had been reached between the parties in respect of claims Deveugele, Sonic and Top Dog had made in relation to the sale of Webworks.

[51] The NDPP claims that the settlement amount constitutes an agreement between the Defendant and Deveugele and contributions to be paid to Deveugele from the allegedly fraudulently obtained purchase price.

[52] The NDPP contends that there is reason to believe that Deveugele did not receive the value of the respective mortgage bond in consideration for any lawful obligations owed to him by the Defendant and the Trust. The benefit according to the NDPP represents the proceeds of the Defendant's alleged offences and the value of the 2 mortgage bonds over 6 Montrose and 41 Fisherman's Bend accordingly constitute affected gifts. The Fifth and Sixth Respondents did not oppose this application.

[53] The NDPP contends that the Defendant made further affected gifts to Target Equity and for Levenstein as stated in the Affidavit of Kruger². The NDPP however does not seek any relief against these parties.

² Pg 198 Affidavit of Kruger Record

JOINDER AND AFFECTED GIFTS TO THE CHILDREN AND TRUSTS ON BEHALF
OF THE DEFENDANT'S CHILDREN

[54] In the further application for the joinder of the children of the Defendant and the respective Trust created on their behalf, namely the Clayton Cunningham Support Trust and the Tanya Cunningham Support Trust, the NDPP further alleges that the affected gifts should also be restrained. The grounds therefore is that there is reason to believe they have either received affected gifts or hold realisable property on Mr Cunningham's behalf.

[55] The NDPP argues that the provisional restraint order makes provision for a situation such as this, where the Curator identifies realisable property owned by parties who are not yet cited as Respondents.

[56] Paragraph 1.1.5 of the Provisional Order states ... 1 [a]ffected gifts not listed in Annexure A received by the Respondents or any other person or entity at any time before or after the granting of this order or any property held by any Respondent, person or entity who received such gift, to the value thereof. (My underlining)

[57] The NDPP holds the view that this paragraph of the order expressly contemplates the curator exercising his power over property owned by persons other than the Respondent, if they received affected gifts. On the basis of this, the NDPP submits that the provisional restraint order authorizes the curator to act against donees' property before they are formally joined to the main application. Mr Matzdorff ("Matzdorff") who is

also the attorney for the Defendant in the main application filed an answering affidavit on behalf of the additional Respondents in this application.

[58] It was argued by Matzdorff that the additional Respondents (the Cunningham children and the respective Trusts) are concerned that their joinder as parties to the restraint means that the NDPP may wish to achieve not merely their joinder but also substantive relief in the form of a restraint against them by this so-called joinder application. They further contend that POCA envisages individualized restraint orders. Although realisable property encompasses property held by the Defendant and by those to whom the Defendant has made affected gifts, a separate restraint order has to be obtained in respect of each individual, for a specified amount and in respect of property each individual holds. In the present application the NDPP has not specified the amount of the restraint nor the nature of the realisable property that the additional respondents are supposed to hold which is sought to be restrained. They are therefore prejudiced, because they are not in a position to contend that the amount is too high or that the property sought to be restrained is not held by them.

[59] The Application for joinder was brought during these proceedings because at the time of the application for the provisional restraint order, the NDPP did not have sufficient evidence at its disposal to indicate that it had reason to believe the donees had received affected gifts. This was only identified at a later stage by the curator after the provisional restraint order was granted.

[60] The NDPP further argues that the provisional restraint order empowers the curator to bring under his control any affected gift or any property owned by a person

who received an affected gift to the present day value of the gift. The provisional order also empowers the curator to bring an *ex-parte* application for the joinder to the restraint of any person who has received an affected gift.

[61] The NDPP argues that collectively the provisions of the provisional restraint order strike a balance between on the one hand, the underlying purpose of the restraint, which is to authorise steps to be taken to locate and secure Mr Cunningham's realisable assets in security for possible future confiscation and realisable order; or on the other hand, the rights of third parties such as the donees, who are afforded an opportunity to place before the court any evidence that may serve to refute the grounds on which the curator relies on for the proposition that affected gifts were made to the donees.

[62] The question the NDPP wants this court to answer is whether the provisional restraint order authorizes the curator to act against the donees property before they are formally joined in the main application. I will now deal with the evidence relating to this application.

[63] These are the principle evidence upon which the case of the NDPP in the main as well as the joinder application is based.

[64] The Defendant has not presented any further facts or evidence to gainsay the allegations made by the NDPP but has raised important legal arguments in respect of this application.

In the evaluation of these issues later in this Judgment, I will also extensively deal with the arguments raised by the Defendant relating to this issue.

FACTS UPON WHICH THE JOINDER APPLICATION IS BASED

[65] There is undisputed evidence that the Trust had distributed amounts of money to the children of the Defendant and to the Trusts established for their benefit. The NDPP is of the view that these distributions constitute affected gifts within the meaning of Sections 12 and 16 of POCA and/or payments intended to disguise property held by the Defendant.

The distributions that were made are the following:

(a)	Clayton Cunningham	R6 227 955,00
(b)	Nicole Cunningham	R5 523 713,00
(c)	Tanya Cunningham	R5 575 266,00
(d)	Marie Van Onselen	R5 562 001,00

[66] According to the financial statements over a seven year period from 2004 to 2011, according to the NDPP, the sale of the Webworks shares and loan account was the sole significant source of the MIC Trust's capital, with income derived mainly from dividends and interest. In the 2006 tax year, which would reflect the sale of Webworks as income, the MIC Trust changed from being a nett-borrower significant provider of inter-company loans.

[67] In the two years prior to the sale of Webworks, the Trust had negligible income. No distributions or loans to the donees are recorded in the Trust's financial statements. Thereafter however, during the period 2006 to 2008 significant loans to the additional respondents or ("donees") are recorded in the MIC Trust's financial statements. According to the NDPP, there is no indication that the donees had rendered any counter-performance.

[68] Significant distributions were made by the MIC Trust to the donees which initially offset the loan accounts in 2008 and continued as simple distributions thereafter. The NDPP further alleges that according to the Trust's financial statements, the loan payments and subsequent distributions made to the donees by the Trust from 2008 onwards were made without any counter-performance. There are payments of funds that represent the proceeds of the fraudulent Webworks transaction.

[69] The NDPP further alleges that according to the second curator's report, some distributions made to Clayton Cunningham and Tanya Cunningham may be affected gifts which were made indirectly to their respective Trusts. Alternatively that it was payments intended to disguise property held by the Defendant. It also emerged from the second curator's report, that on 11 October 2010 the Trust made a distribution to Clayton Cunningham in an amount of R2,4 million. This distribution was however as confirmed by Reddiar paid to Arrow Creek Investments (Pty) Ltd which in turn was recorded as a loan by Clayton Cunningham, which was secured by Arrow Creek's immovable property at 273 Tiam Street.

[70] The loan agreement on behalf of Arrow Creek was signed by the Defendant. It was further recorded in this loan agreement that Clayton Cunningham would inter alia transfer his rights under the loan to a Trust of which he would be a beneficiary. This cession thereafter indeed took place, which was recorded in separate cession and assignment agreement on 10 January 2011 wherein Clayton Cunningham ceded his rights at that stage in an as yet unregistered Clayton Cunningham Support Trust.

[71] The monthly repayments according to the NDPP of this purported loan amounted to R11 000,90. These repayments were made by Clayton Cunningham personally despite the cession. This fact emerged from a letter to the curator from the Defendant after the curator suspended the loan repayments. The Defendant refers to the loan repayments as a tax efficient restructuring which forms part of Clayton Cunningham's remunerate package for design services he renders to the Group as creative director to Sprint Web Portal (Pty) Ltd.

[72] Similarly on 11 October 2010, the Trust made a distribution to Tanya Cunningham in an amount of R783 820,03. This payment was made to Sighomes Vredehoek (Pty) Ltd.

[73] A loan with substantially the same terms was entered into between Tanya Cunningham and Sighomes Vredehoek. This loan was secured by that company's immovable property at 7 Bellair Vredehoek.

[74] Just as in the case of Clayton Cunningham in terms of the loan agreement, the intention of Tanya Cunningham was stipulated therein to transfer her rights under the

loan agreement to a Trust, of which she would be a beneficiary. Once again just as in the case of Clayton Cunningham, a subsequent assignment and cession agreement dated 10 January 2011 (the same day as in the case of Clayton Cunningham), Tanya Cunningham ceded her rights in terms of the loan agreement to an as yet unregistered Tanya Cunningham Support Trust. The difference however between this case and that of Clayton Cunningham is that the interest on the loan has been accrued to a value of R52 532,41.

DEFENDANT'S CASE

[75] The Defendant on the other hand is of the view that the property NDPP seeks to place under restraint is not realisable property as defined in Section 14 of POCA. He contends that the realisable property is that of the Trust of which he is a Trustee. In these proceedings Mr Cunningham does not dispute that the jurisdictional facts pertaining to subsection 1(a) (i) and (iii) of Section 25 of POCA, he disputes whether there are reasonable grounds for believing that a confiscation order be granted against him.

[76] The Defendant contends that the NDPP has failed to prove that the Defendant as described in POCA, which refers to him, benefitted from the alleged offence as required in terms of Section 18(1) and accordingly there are no reasonable grounds for believing that a confiscation order may be made. The Defendant further contends that the NDPP has averred that in the criminal trial no "proceeds" will be proven but only "potential prejudice" having no actual financial consequence.

[77] The Defendant contends that the only other hope the NDPP has in proving that he had derived a benefit lies in Section 12(3) and Section 1 of POCA and argues that *“the deeming provisions seems to extend the concept of benefit far beyond its ordinary meaning. He further argues that as far as Section 12(3) on Section 1 is concerned, a person should have derived a benefit from unlawful activities. It is clear therefore from the definition of unlawful activity in Section 1 that the concept of unlawful activity used in Section 12(3) is much broader and different from the concept of criminal activity under Section 18(1)”*.

[78] There is therefore a disconnect between Section 18(1) and Section 12(3) and Section (1), which is fatal to the NDPP’s case, because the NDPP’s case is entirely reliant on deeming provisions in Sections 12(3) and 1 of POCA in order to demonstrate that the Defendant has derived a benefit. It has not and cannot prove a benefit as the term benefit is ordinary understood.

[79] In the alternative, the Defendant argues that should the court find that the NDPP may place reliance on the deeming provisions of Section 12(3) and Section 1 of POCA for some reason, it is submitted that these requirements also have not been met. This would mean that the Defendant benefitted firstly in an indirect manner where he, due to the fact that he has an interest in a company if the proceeds of the offence enriches the company in which he has an interest.

[80] Secondly an argument raised by the NDPP is that the Trust is the alter ego of the Defendant and that he benefitted when the Trust received the purchase price into its account. The Defendant’s answer to this is that Section 12(3) does not contain the word

“indirectly”. It must be shown in terms of this provision that the Defendant (My underlining) *“received or retained proceeds of unlawful activities”*.

[81] The Defendant argues that he never received or retained the purchase price of shares and loan accounts relating to the sale of Webworks. The MIC Trust received these monies which represented the purchase price for an asset owned and held by the Trust. Furthermore, it can never be contended that a Trustee of a Trust has an interest in money received by the Trust. This is to be distinguished from the position of a shareholder that has an interest in money received by the company.

[82] In terms of Section 1 of the Trust Property Control Act 57 of 1988, the ownership of the property is transferred to the Trustees to administer control and dispose of in accordance with the provisions of the Trust Deed for the benefit of the beneficiaries. The ownership by the Trustees is not beneficial but bare ownership, because the Trustees must administer the assets in accordance with the terms of the Trust Deed. The Defendant is not a beneficiary of the Trust.

[83] The Trustee is merely a manager of the Trust assets for the benefit of another, which is similar to that of a director of a company. The beneficiary of a Trust is in a similar position to that of a director of a company. The reliance of the NDPP on the *dictum* of *S v Shaik and Others* 2008 (5) SA 354 (CC) at *para 26* is misplaced. *Shaik* was a shareholder in a company not a director. Where it was held that where a shareholder commits a crime by which his or her company is enriched, the shareholder may well benefit in two ways. The value of his shares will increase and the dividends generated by those shares will increase, because the company is more profitable.

[84] The same argument applies to the reasoning of Louw, J in *Falk and Another v National Director of Public Prosecutions (8420/03) [2009] ZAWCHC (10 July 2009)* at para 75, as relied on by the NDPP. The reasoning of *Shaik* cannot apply, because unlike beneficiaries and shareholders, the Trustee and Director may be charged in their representative capacity in terms of Section 332 of the Criminal Procedure Act 51 of 1977.

[85] It is not disputed that the Defendant acted in his representative capacity when he made the alleged fraudulent misrepresentations in connection with the sale of the shares in Webworks to Fidentia. The NDPP elected to charge the Defendant in his personal capacity as Director of Webworks or as a Trustee representing the Trust.

[86] This choice, made by the NDPP forecloses as an argument that the Defendant benefitted personally from the alleged offence because a Trustee is precluded to benefit in his personal capacity. The Defendant further argued that the NDPP has failed to establish that the MIC Trust is the alter ego of the Defendant. He argued that the NDPP's reliance on the alter ego agreement as postulated by Horn, J in *Harris and Other v Rees and Other 2011 (2) SA 294 (GSJ)* which had been overturned by the full bench of that court in *Rees and Others v Harris and Other 2011 (2) SA 294 (GSJ)*.

[87] The Defendant argued as held by the full bench that an order for the alter ego agreement to be sustained it cannot be based presumably on inferences without any primary facts being proven regarding the abuse of the Trust. The NDPP in this case relied only on two statements as its primary facts. The one is where Slabbert also a co-Trustee and an attorney referred to the Defendant in the course of the disposal of

Webworks as his “*client*”. This, the NDPP contends that Slabbert did not refer to the Trust, but to the Defendant in his personal capacity. This the Defendant holds, is that when acting as an attorney on behalf of the Trust, it would have been natural for him to the Trust as his merit.

[88] The second primary fact is the Absa letter wherein Absa addressed a letter to the Master confirming Mr Cunningham and Mr Slabbert to be Trustees of MIC Trust and stated Mr Cunningham will have direct control over the Trust. The Defendant argues that it is not known who the author of his letter was and for what purpose it was addressed to Absa.

ISSUES FOR DETERMINATION IN RESPECT OF THE MAIN APPLICATION

[89] Whether there are reasonable grounds for believing that a confiscation order may be made against the Defendant in terms of Section 25(1) of the POCA.

- (a) Whether the property that is subject to the restraint order is held by the Defendant in terms of Section 14 of the POCA.
- (b) If so, whether the Defendant had derived any benefit from the offence (Sec 18(i) and Sec 12(3)).

ISSUES FOR DETERMINATION IN THE JOINDER APPLICATION

- (c) Does the distributions made to the children and the Trust constitute affected gifts;

- (d) If so, is the curator permitted to or authorised in terms of the provisional order to act against the property of the donees before they are formally joined to the main application.;
- (e) And if it is affected gifts, can the donees be joined to the main application before the curator is permitted to exercise his power in terms of the provisional order or;

EVALUATION: RESTRAINT APPLICATION

[90] Most of the facts as presented by the NDPP are not in dispute. The question that the court will now decide is whether the facts presented by the NDPP has satisfied the requirements for the provisional restraint order as contemplated in terms of Section 25 of POCA. I will now deal with these aspects hereunder.

REASONABLE GROUNDS FOR BELIEVING A CONFISCATION ORDER MAY BE MADE

[91] There is clear evidence that the financial statements as presented to Fidentia, overstated and misrepresented the financial position of Webworks at the time of its sale. These financial statements are the strongest objective evidence, that a misrepresentation had taken place. These statements were signed by the Defendant and Annemarie Cunningham as co-directors of Webworks. This together with other information was given to Fidentia in order to convince them that the business that they were to acquire was in a sound financial position. At that stage, after the shareholding of the minority shareholders were acquired by the Trust, the Trust was the sole

shareholder of Webworks. The Defendant and Annemarie Cunningham were also Trustees to the Trust.

[92] On the nature and the tenure of the available evidence as borne out of the papers, I am satisfied that there is evidence that might reasonably support a conviction and a consequent confiscation order. On the documentary evidence relating to the overstated financial position of Webworks, there is evidence that might be reasonably believed. In *NDPP v Rautenbach and Other 2005 (4) (SCA) at (27) Nugent, JA* held that:

“It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion ... it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true”.

[93] As a result of the alleged fraud committed by the Defendant, the Trust acquired an amount of R160 million by illegal and improper means. At the time when Webworks

was acquired by Fidentia, the Trust had a mere R19 535,04 on its books.

WHETHER THE DEFENDANT DERIVED ANY BENEFIT FROM THE ALLEGED
OFFENCE

[94] It is difficult to understand why the Defendant as a mere Trustee and also while he was the Managing Director of Webworks, would have gone to such great lengths, firstly as Managing Director of Webworks by misleading the minority shareholders as to the value of Webworks. Secondly, while playing this dual role misrepresented Webworks in various ways, by allegedly committing fraud to acquire the share capital and loan account in Webworks to its detriment.

[95] Why would a person who was a mere Trustee to use the words of **Cameron, JA** in *Land and Agricultural Bank of SA v Parker and Others 2005 (2) SA 77* when ... “*the core idea of the Trust is the separation of ownership (or control) from enjoyment*”, go to such lengths to acquire a benefit for the Trust. Whilst he himself as Trustee may not benefit or gain anything by it, for what purpose would he have done this?

[96] The reasons for his actions in my view became abundantly clear on 28 September 2005, when an attempt was made to dissolve the 1982 Trust Deed in which the Defendant was not a beneficiary by trying to substitute it with a new Trust Deed. In the 2005 Trust Deed he was designated as a beneficiary as well as a Trustee. In this Trust Deed as pointed out earlier which was signed by all relevant parties (beneficiaries of Trust) he was provided with vast powers of control. He was provided with a veto over all significant decisions regarding the MIC Trust affairs. He was granted a testamentary

reservation which included the power to dispose of the Trust property in his will to the remaining beneficiaries.

[97] This 2005 Trust Deed was not brought into operation and was not lodged with the Master because it was required by means of an order of court to have the 1982 Trust Deed amended. This was the clearest evidence that there was an attempt by the Defendant to take effective control over the Trust property.

[98] This brings me to the question whether the Defendant had indeed enjoyed any benefit from the transaction which brings me back to my initial question, which is, why would the Defendant as a mere Trustee have acted in this manner? Why would he have committed this fraud he is accused of, if he did not stand to benefit?

[99] The probabilities against the Defendant are overwhelming. Furthermore, it seems on the other available evidence that he lives in a property owned by the Trust, with his ex-wife Annemarie Cunningham. This property was bought on 12 September 2005. On 28 September 2005, 16 days after this, a Trust Deed was drawn (2005 Trust) wherein he was designated as a beneficiary.

[100] In an Affidavit in his bail application in 2008, he referred to this property as "*his property*". In the Signature Group's Financial Statements it is indicated that he had received cash distributions totalling R5 382 980,00 in the period 2006 to 2011. In 2006 the loan account which has subsequently decreased stood only at R736 504,00. Why if he was only a Trustee, was such significant amounts paid out to him. These companies forming part of the Signature Group were mostly established after September 2005, and

in a two year period after the Webworks transaction.

[101] Since the Webworks transaction 10 of the 13 companies constituting the Signature Group were either incorporated or acquired as holding vehicles for property developments, or as vehicles through which administration, realty and design services are provided for the Group as a whole. To achieve this, the Defendant who was either a sole director or co-director had used the Trust as a means of financing these companies. The real property of the Trust is held in a number of companies that belonged to the Trust.

[102] We have a situation where the Defendant is one of the Trustees, the other Trustees are Mrs Cunningham and Mr Bredell. Bredell it seems was the only independent Trustee and had no other connection with the Trust. The Defendant is the sole director of nine property owning companies, with the exception of Embassy Brooklyn where he and Annemarie Cunningham are 2 of the 3 directors.

[103] The Defendant, therefore in some cases along with Annemarie Cunningham, has decision making power over all property holding companies. The Trust is the ultimate holding company serving primarily as a financing entity for the other group companies³. Of the mere property-owning companies, 7 have been incorporated or purchased as property holding vehicles since June 2005.

[104] According to the Curator on the basis of the Group's revenue profile as a whole it is similar to a property development and holding company. The financing was sourced

³ Curator's Second Report para 20 record page 12

primarily from internal funds which in some cases were also supported by finance facilities from commercial banks.⁴

[105] The funds of the Webworks sale were initially invested in listed shares held by MIC Holdings. After 2006, the share portfolio was gradually liquidated. The realised funds were used to support property developments undertaken by the various companies within the Signature Group.

[106] There are 13 companies which includes the subsidiary companies belonging to MI Cunningham Family Holding (Pty) Ltd of which the Defendant was the sole director. In this holding company, the Defendant owns 3000 unlisted 12% redeemable preference shares. Out of the 13 companies which include the holding company, he is the sole director in 5 of those companies. In 7 of those companies, he is a co-director with Annemarie Cunningham. In 3 of these companies where Annemarie Cunningham is a co-director with him, there are other directors which are in the minority.

[107] In 2 of these 3 companies, together with Annemarie Cunningham, his son Arthur Cunningham is also a director with 2 other persons. In 12 of the 13 companies, he is a director.

[108] In 1 of the companies, Marcia Van Rykswyk is a director with him and Mrs Cunningham. So here the Trustee together with a beneficiary are in the majority. In 2 of 7 companies where Annemarie Cunningham is a co-director, (Signature Acquisitions) and (Sprint Web Portal) the other directors with him and his wife are Marcia Van

⁴ Curator's Second Report para 26, record page 15

Rykswyk and Neil Reddiar and Arthur Clayton Cunningham, his son, (Signature Acquisitions). In Sprint Web Portal the other 1 of the 7, Marcia Van Rykswyk and Arthur Clayton Cunningham are once again directors. In 4 of the companies he and Annemarie Cunningham are the only directors. In the other 3 making up the 7 the majority of the directors are the Defendant and his ex-wife (a co-Trustee and beneficiary) in the Trust with his son, a beneficiary in the Trust).

[109] 12 of the 13 companies is controlled either by him, 3 in the case of the 5 companies as sole director and in the case of 7 companies in 4 of which he and Annemarie Cunningham are the only directors and in the remaining 3 companies in which he, his son (who is also a beneficiary in the Trust) and Annemarie Cunningham are holders of a majority directorship. He also not only has control with Annemarie Cunningham over the Trust as majority Trustees, but also significant control over all the companies that belong to the Trust, most of which were formed after the transaction with Fidentia.

[110] He and his family would have had significant powers of control and decision making over these companies. The influence and control of the Defendant if the facade of the legal persona is put aside, is like a golden thread.

[111] Some of these companies which belong to the Trust even though they have separate legal personality have acquired and hold substantial assets. Most of these assets which belong to the companies could not have been acquired unless it was funded by the Trust as the major shareholder.

[112] The Trust as at 31 May 2005 only had R19 535,04 in its banking account. In order for the companies to have acquired these assets, the Trust had to fund it. The Trust acquired an amount of R160 million at the end of June 2005, by alleged illegal means. This was acquired by means of improper and alleged fraudulent conduct by means of the Defendant who is a Trustee. The Trust had received the benefit of the proceeds after the Defendant had allegedly committed fraud during the transaction with Fidentia. Can the property of the Trust be regarded as insulated from the Defendant under these circumstances and did it operate entirely autonomous from the Defendant?

[113] In *Land and Agricultural Bank of SA v Parker and Others (supra)* Cameron, J further stated:

[23] "The great virtue of the Trust form is its flexibility, and the great advantage of Trusts their relative lack of formality in creation and operation: 'the Trust is an all-purpose institution, more flexible and wide-ranging than any of the others'. It is the separation of enjoyment and control that has made this traditionally greater leeway possible. The Courts and Legislature have countenanced the Trust's relatively autonomous development and administration because the structural features of 'the ordinary case of Trust' tend to ensure propriety and rigour and accountability in its administration.

[24] But this has changed in the last two decades. This is not simply because Trusts have increasingly been used to transact business. So long as the functions of Trusteeship remain essentially distinct from the beneficial interests, there can be no objection to business Trusts, since the mechanisms of the Trust form will conduce to their proper governance, which will in turn provide protection for outsiders dealing with them.

The change has come principally because certain types of business Trusts have developed in which functional separation between control and enjoyment is entirely lacking. This is particularly so in the case of family Trusts - those designed to secure the interests and protect the property of a group of family members, usually identified in the Trust deed by name or by descent or by degree of kinship to the founder".

He also states further:

"It is evident that in such a Trust there is no functional separation of ownership and enjoyment. It is also evident that the rupture of the control/enjoyment divide invites abuses. The control of the Trust resides entirely with beneficiaries who, in their capacity as Trustees, have little or no independent interest in ensuring that transactions are validly concluded. On the contrary, if things go awry, they have every inducement as beneficiaries to deny the Trust's liability. And no scruple precludes their relying on deficiencies in form or lack of authority since their conduct as Trustees is unlikely to be scrutinised by the beneficiaries. This is because the beneficiaries are themselves, or those who through close family connection have an identity of interests with them".

[114] After the alleged fraudulent Webworks deal, the Defendant clearly intended by means of the 2005 Trust Deed to benefit from the proceeds. What he is now saying is that even if the proceeds were acquired by illegal means, it does not belong to him, but to the Trust. It is therefore out of reach of the authorities. By doing this, he is clearly abusing the Trust in order to hide or shield the ill-gotten gains. This is clearly a case where the court has to remove the disguise of the Trust and haul or wrench out the person behind the Trust which is the Defendant.

[115] In *Rees and Others v Harris and Others* (supra) stated: *"Thus, in appropriate circumstances, the veneer of a Trust can be pierced in the same way as the corporate veil of a company. Consequently, where the Trustees of a Trust clearly do not treat the Trust as a separate entity, and where special circumstances exists to show that there has been an abuse of the Trust entity by a Trustee, the veneer must be pierced. It follows that if a legitimately established Trust is used or misused in an improper fashion by its Trustees to perpetrate deceit, and/or fraud, the natural person behind the Trust veneer must be personally liable".*

[116] The Defendant in the manner which he conducted himself as Trustee and the

way he dealt with the property of the Trust and the companies that belong to it, did not respect or appreciate the separate corporate identity of the Trust. As a Trustee in the true sense of the word, where the relationship between the Trustee and the Trust was not blurred such as in the case of a normal business Trust. The “functional separation” between control and enjoyment is entirely lacking. (See *Land and Agricultural Bank (supra)*).

[117] The conduct of the Trustee, the Defendant, in this case is unlikely to be scrutinised by the beneficiaries. In this case a considerable amount of money was paid over to the Trust which were the proceeds of alleged fraud, committed by one of the Trustees who is the father of the beneficiaries of the Trust together with his the ex-wife, the mother of the beneficiaries and who is a beneficiary herself; they also live together. The ex-wife therefore directly derives some benefit from the Trust.

[118] In the 1982 Trust deed the Defendant had not been designated as a beneficiary but after the Webworks transaction he sought to become a beneficiary as recorded in the 2005 Trust deed. The beneficiaries of the Trust are the heirs of the Defendant, his children and Annemarie Cunningham, the Defendant's ex-wife. As pointed out earlier, there is direct evidence that he enjoyed some of the benefits belonging to the Trust and he regarded the property as his even though he is a Trustee.

[119] Whereas in this case, a Trustee allegedly commits fraud and where there is evidence that might reasonably support a conviction, and the proceeds of the alleged fraud is distributed to the Trust where the sole beneficiaries are his family, one can hardly conclude that there is a functional separation of ownership and enjoyment,

between Trustee and beneficiary.

[120] The alleged fraud was committed to benefit his heirs when the ill-gotten gains from the Webworks transaction was transferred to the Trust. He and his ex-wife were the majority Trustees. The control of the Trust resided in him and his ex-wife. The third Trustee Bredell should, if he had known about the actions of the Defendant, have acted independently to ensure that there was a valid and lawful transaction.

[121] Annemarie Cunningham a co-Trustee, was also a co-director of Webworks and co-signed the embellished financial statements which induced Fidentia to acquire the shares and the loan account in Webworks.

[122] In such a case as this, where the Defendant claims to have no assets or realisable assets and claims that it belongs to the Trust for the benefit of his ex-wife and children, the Trust is clearly being used as a substitute for his estate. The question once again is, why would he allegedly commit fraud if he does not stand to benefit or gain by it? In this sense because there was no functional separation between ownership and enjoyment, there was a direct benefit to his estate, it is unconceivable that the Defendant would go to such lengths only to benefit his ex-wife and heirs, without any benefit accruing to his estate. His actions if he was a mere Trustee went far beyond that of a mere representative. If the functional separation between control and enjoyment had remained intact, only then could the argument have been sustained that he acted in a representative capacity. Herein lies the difference.

[123] On a conspectus of the evidence and on a balance of probabilities, it is clear that the Defendant did not merely act in a representative capacity as was argued by his counsel, but rather in a manner which shows, that he did not act merely on behalf of someone else, but for his own benefit.

[124] In the result, the evidence overwhelmingly points to the fact that the Defendant not only directly benefitted from the offence, but also benefitted in the sense that due to his actions, his children and ex-wife which are beneficiaries of the Trust benefitted by his actions.

WHETHER THE PROPERTY IS HELD BY THE DEFENDANT IN TERMS OF SECTION 14 OF THE POCA

[125] The restraint order should be made against the realisable property which is held by the person against who, the restraint order is being made.

[126] The NDPP contend that the property is held by Mr Cunningham because he exercises control over the property. The NDPP relies on the action of *Heher, J* in *NDPP v Phillips and Other 2002 (4) SA 60 (W)* at para 81 where it was held that:

“Without attempting to place strict limits on the expression ... I have no doubt that when a person exercises a power of disposal over property (which the first respondent does in respect of the properties of the other respondents) or has the exclusive use of or control over the properties (one or more of which benefits attaches to the first respondent in respect of all of the properties belonging to the other respondents) and is the real beneficiary (albeit through his shareholding) of the income from those properties or any

proceeds of disposal of them, then he 'holds' such properties within the meaning of s 14(1) of the Act and it is unnecessary to invoke the doctrine of 'lifting the veil' ”.

[127] In this court *Louw, J* in *Falk v NDPP WCHC*, case number 8420/03 delivered on 10 July 2009 at paragraph 7.5 accepted this principle that a restraint order made against assets held by a person through a company of which he is the sole shareholder. POCA does not require that there should be ownership of realisable property before it can be restrained.⁵ The holding of property can either be through ownership, possession, occupation and holding as a nominee.

[128] In *S v Shaik (supra)* it was held:

“[25] Section 12(3) of the Act provides that for the purposes of Ch 5, 'a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities'. 'Proceeds of unlawful activities' are in turn broadly defined in s 1 of the Act as -

any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.

The section is thus widely cast, something which becomes even more evident when the definition of 'property' contained in s 1 of the Act is considered. 'Property' is defined as -

money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.

⁵ NDPP v Phillips

One of the reasons for the wide ambit of the definition of 'proceeds of crime' is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of 'camouflage'.

[26] Similarly, the definition makes clear that proceeds of crime will constitute proceeds even if 'indirectly obtained'. The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime. As counsel for the NDPP pointed out, when a shareholder commits a crime by which his or her company is enriched, the shareholder may well benefit from the crime in two ways. The value of his or her shares will increase, as will the dividends generated by those shares, because the company is now more profitable. Finally, it should be noted that 'proceeds', as defined, include anything 'derived, received or retained' in connection with or as a result of the offences."

[129] The holding of property should therefore be given a wide enough meaning as intended by the legislature to curb the major evil which the legislation contemplates, in order to curb the concealment by criminals their interest in the proceeds of crime. The question is whether the *dictum* of *Heher, J* followed by *Shaik* and *Falk* is relevant or applicable in a case such as this to determine whether the Defendant, Mr Cunningham a Trustee in a Trust is the holder of the realisable property.

[130] It could never have been the intention of the legislature to permit a situation where the proceeds of the crime are placed in the hands even of an innocent or unsuspected third party with a separate and distinct legal personality like a Trust, that such proceeds would be out of reach of the authorities for the purposes of restraint in terms of POCA. The definition of realisable property also includes property to whom the Defendant has directly or indirectly made an affected gift.

[131] As pointed out earlier, the Defendant, his ex-wife and his family have exclusive use and control over the properties which ultimately belong to the Trust, even if some of the property belonged to the individual companies which formed part of the Signature Group ultimately in the end, all these companies belonged to the Trust and the Defendant and his family as shown had exercised control over it by means of directorship. It is inconceivable that any transfer or disposition of the property could have taken place without consent of the Defendant in any of the entities which make up the Signature Group.

[132] Furthermore, the proceeds of the Webworks transaction had as a result of the conduct of the Defendant been acquired by alleged fraudulent means. The Defendant as a Trustee had caused the proceeds of the transaction to be paid directly to the Trust. Even if the Trust is to be regarded as a separate and distinct entity from the Defendant, the proceeds are regarded as property that is held by a person ("**the Trust**") to whom the Defendant had directly made any affected gift. At least in the case of MI Holdings it was shown that he is a shareholder and as a result of this, in applying the *Shaik* and *Phillip's dictum* will benefit, but apart from this, the Trust was not used as a Trust in the ordinary case as pointed out by *Cameron, J* in *Land and Agricultural Bank*.

[133] This is not a case where the structural features of the Trust as it is ordinarily understood or how it ordinarily operates that ensures or guarantees the proprietary rigour and accountability in its administration.

[134] What clearly happened in this case as shown earlier, the Trustees in the person of the Defendant and his ex-wife did not regard their functions of Trusteeship as

essentially distinct from the beneficial interests of the Trust; because of the fact that this element was lacking a real Trust with a separate and distinct legal persona did not exist.

What happened in this matter is that the Defendant has weaved an intricate web of corporate entities within which properties are held on his behalf. More particularly, he ultimately held property under the facade of the Trust.

[135] The assets therefore held by all the companies belonging to the Trust are being held by the Defendant especially all those properties held by the companies as mentioned in paragraph 40 of this judgment, which includes the property held by his ex-wife. The property is therefore held by the defendant and qualifies as realisable property to be restrained in terms of POCA.

AFFECTED GIFT TO DEVEUGELE

[136] An “affected gift” means

- (a) Any gift made by the Defendant concerned not more than seven years before the fixed date, or
- (b) Made by the Defendant concerned at any time, if it was a gift –
 - (i) Of property received by the Defendant in connection with an offence committed by him or her or any other person;
 - (ii) ...

[137] There can be no doubt that Deveugele had been misled by the Defendant as to the real value of the Webworks shares, more particularly, the shares he needed and that of the shareholders he represented. He based his further claim on the value of the shares and loan account the Defendant had represented to Fidentia, which was fraudulent as alleged by the NDPP.

[138] As a result of this, he reached an agreement with the Defendant and the Trust. The benefit he acquired represented the proceeds of the Defendant's alleged offence. The value of the mortgage bonds over the properties, 6 Montrose and 41 Fisherman's Bend at R6,5 million each therefore constitute an affected gift on 22 July 2009. This was within 7 years of the fraudulent transaction. I hold that this constitutes an affected gift.

JOINDER OF CHILDREN AND TRUSTS AND AFFECTED GIFTS TO THEM

[139] The argument of the additional respondents was that they had received no affected gifts, because they had not received any distribution from the Defendant. This was due to the fact that the Defendant received no benefit, but the Trust did. Further, that the alleged fraud can have no affect on the rights of the beneficiaries of the Trust to lawfully receive capital and/or income distributions from the Trust in accordance with the provisions thereof.

[140] As regards to the first argument, the evidence clearly shows on a balance of probabilities that the Defendant in the main application had benefitted from the alleged offence which he distributed to the Trust in an attempt to insulate it. The Defendant

therefore cannot use the Trust to shield the benefit which he had acquired from the reach of the authorities.

[141] As far as the second argument is concerned, it could never have been the intention of the legislature in a case like this to permit a Trustee, who had allegedly committed an offence to distribute the proceeds to a lawful enterprise or entity such as a Trust, to place it out of reach of the provisions of POCA so that it could be distributed by the Trust to its beneficiaries. For the beneficiaries then later to argue that due to the fact that they did not know that the proceeds were the product of an alleged fraud, it cannot be an affected gift.

[142] This would mean that a Trustee may commit an offence and distribute the proceeds to a Trust, by means of the fact that the Trust has a separate legal identity, and use that as a means to launder the proceeds so that when it is further distributed to the beneficiaries, it has been completely sanitized of the alleged crime.

[143] It is irrelevant therefore whether a third person who had shared in the proceeds of crime had known whether it emanated from the commission of the crime within the wide meaning of realisable property for the purposes of Sec 26 of POCA. This would include realisable property held to whom the Defendant has directly or indirectly made an affected gift.

[144] There is evidence found in the Affidavit of Van Vuuren in the joinder application. This evidence was not disputed, that in the 2 years prior to the Webworks transaction, the Trust had negligible income. No distributions or loans were recorded. In the period

2006 to 2008 significant loans were made to the beneficiaries of the Trust.

[145] The additional respondents countered this evidence by saying it was distributions that the beneficiaries were entitled to in terms of the provisions of the Trust. It was not disputed that the primary source of these distributions to them were the proceeds of the alleged fraud.

[146] It was also argued by Matzdorff on behalf of the additional respondents' was that a separate restraint order has to be obtained in respect of each individual for a specified amount and respect of property each individual holds.

[147] The simple answer to this is that as they rightly point out as a precursor to their argument, that the realisable property encompasses property held by the Defendant and by those to whom the Defendant has made affected gifts. This fact had conclusively been shown and is undisputed. The Additional Respondents in fact contend that they were entitled to it.

[148] The further argument which is that they are not in a position to contend that the amount is too high or that the property sought to be restrained is not held by them, was never disputed. As said earlier they stated that they were entitled to the distributions. The Defendant's whole case was that the proceeds of the Webworks transaction were distributed to the Trust for the benefit of the beneficiaries.

[149] For reasons mentioned earlier, these cannot be lawful distributions if it had as its primary source, the proceeds of crime. This kind of situation was clearly foreseen by the

legislature when it enacted Sec 12 of POCA.

[150] I therefore find that these payments and loans to the children of the Defendant and to their respective Trusts constitute an affected gift as described in Subsection 12(1)(a) or (b) of POCA.

[151] The next question to consider is whether the Curator in terms of the provisional order can exercise his powers over property owned by persons other than the Defendant and Respondents, if they received affected gifts. Before property can be restraint, the NDPP has to satisfy certain jurisdictional requirements pertaining to a Defendant as set out in Sec 25 of POCA. This requirement opens the door for the NDPP before it can apply for a provisional restraint order.

[152] The primary aim is to preserve the assets of the Defendant which he might have acquired as a result of the alleged crime. The act does not draw a distinction between the realisable property of a Defendant and a donee, an affected gift of a donee is regarded as realisable property of the Defendant. A distinction is however drawn between two classes of persons that might hold realisable property on behalf of the Defendant.

[153] I understand the difficulty the NDPP has when bringing an application for a provisional restraint order. At the stage, especially where a Defendant who is intent on hiding or concealing the proceedings of his or her crime, it would not be clear, where such property that has to be restraint is located.

[154] Only after a Curator is appointed would they be placed in a better position to locate and identify the realisable property. For these reasons it would be perfectly understandable to have as part of a provisional restraint order to include such affected gifts not listed or received by any other person or entity.

[155] If an order couched in such terms is not granted during the provisional stage, it would leave the door open for the Defendant or a person who is later identified to hold property on behalf of the Defendant, to dissipate such property, before the Curator by means of an order of court can take control of such property.

[156] POCA seeks as its primary objective to restrain the property of no one else but the Defendant. It does not seek to restrain the property of any other person, not connected with a Defendant other than in terms of Section 14.

[157] The order is against the Defendant and the realisable property he or she holds, even though it is held by someone else. The restraint is not directed at a person, but against the realisable property held by a person on behalf of the Defendant.

[158] Once property is identified as realisable property of the Defendant, wherever it is located or whoever holds it, can be restrained. The provisional order was against such property even though it was unknown at that stage where it was located. That property held even though unknown at the provisional stage, had already been placed under restraint.

[159] If the provisional order is thereafter confirmed or made final it would mean that all the realisable property would be placed under restraint. The challenge or opposition against the confirmation of the order should then come from the Defendant, due to the fact that all the realisable property would be his or hers.

[160] This would mean that the court might grant a final order for the restraint of property on this basis without having granted the other persons the opportunity by means of a rule nisi to oppose the granting of the final or confirmation order. Such a procedure in my view would be procedurally unfair, without first granting such a person an opportunity to oppose.

[161] In the present matter, however, on behalf of the additional respondents' attorney, Matzdorff filed an affidavit and therein raised arguments as to why, the property which they held are not that of the Defendant as affected gifts. In effect they do not deny that the property they received was not a distribution made from the MIC Trust, but that they were legally entitled thereto, due to the fact, that it was a lawful distribution in accordance with the provisions of the Trust.

[162] They were not convincing enough to counter the evidence as presented by the NDPP as to why the distributions made to them could not be regarded as affected gifts which would form part of the realisable property of the Defendant.

[163] That being said, I am however not satisfied that it would be in the interest of justice to grant a restraint order against the additional respondents, without them being fully joined in this matter.

[164] In my view, it would be a highly unusual procedure to grant an order against a person who has a direct and substantial interest in this matter, who had not been formally joined as a party.

[165] Therefore, notwithstanding the fact that I am of the view that the additional Respondents had made submissions to court, and that the affected gifts they held, is the realisable property of the Defendant, it would be in the interest of justice that they be formally joined.

[166] Section 26(4) of POCA requires that notice be given to all parties affected by the order. The additional respondents especially the children of the Defendant are beneficiaries of the Trust. It is not a requirement in proceedings against a Trust that all beneficiaries should be joined (*Mariola v Kay-Eddie NO 1995 (2) SA 728 (W)*).

[167] It is however, generally accepted that a party should be joined in the proceedings where a court will make a decision adverse to the interest of that party. See *Associated Manganese Mines of SA v Claassen 1954 (3) SA 768 at 776 F – G*.

[168] In this present matter, the finding of this Court is that the affected gifts made to the beneficiaries, is the realisable property of the Defendant's, which can be restrained, such a decision will adversely affect the beneficiaries. In such a case a joinder would be necessary. In *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 at 659 going onto 660* it was held that:

“Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party’s interests. There may also, of course, be cases in which the Court can be satisfied with the third party’s waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.”

[169] Even though submissions had been made on their behalf by Matzdorff, I see no reason why I should not grant them a further opportunity, given the large amounts that they received from the Defendant and the direct and substantial interest they would have in the determination of this matter, by means of a rule nisi to state why the affected gifts they had received should not be restrained.

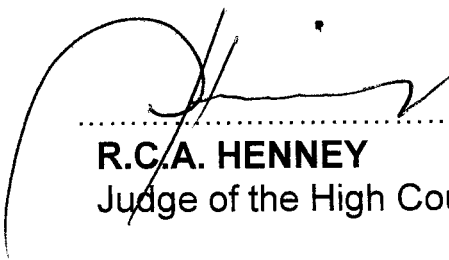
CONCLUSION

[170] In the result, I find that the Defendant has derived a benefit from the alleged fraudulent transactions and that he holds realisable property that can be restrained. The additional respondents’ (21- 30) are joined in the application and a provisional order restraining their property is made.

[171] ORDER

1. In respect of the main application, the provisional order granted by Saldanha, J on 24 June 2011 as amended by Van Staden, AJ on 8 September 2011 for the restraint of the assets of the Defendant in terms of Sec 26 of the Prevention Organized Crime Act 1988 against the Defendant and related Respondents is confirmed.
2. In respect of the related Joinder Application, I make the following order:
 - 2.1 The Twenty-First to Thirtieth Respondents ("the Additional Respondents") are joined as respondents in the restraint application under this case number.
 - 2.2 The Additional Respondents are called upon to show cause, on a date to be determined by the Court, why their property should not be subject to the restraint order made by this Court, to the extent of the value of gifts which they have received from the MI Cunningham Trust.
 - 2.3 Pending the determination of the matter referred to in paragraph 2, the property of the Additional Respondents is subject to the restraint order made by this Court, to the extent of the value of gifts which they have received from the MI Cunningham Trust.

- 3 The order to costs in respect of both applications will stand over for later determination.



.....
R.C.A. HENNEY
Judge of the High Court