



Republic of South Africa

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

[Reportable]

Case No: 11528/2011

In the application of:

**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 REPONDENT

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

ELEVENTH RESPONDENT

**ARROW CREEK INVESTMENTS 85
(PTY) LTD**

TWELFTH RESPONDENT

CLUBVIEW ONTWIKKELINGS (PTY) LTD

THIRTEENTH RESPONDENT

SIGHOMES WATERKLOOF RIDGE

FOURTEENTH RESPONDENT

SIGHOMES CONSTANTIA (PTY) LTD

FIFTEENTH RESPONDENT

SIGHOMES VREDEHOEK (PTY) LTD	SIXTEENTH RESPONDENT
SIGNATURE ACQUISITIONS (PTY) LTD	SEVENTEENTH RESPONDENT
SPRINT WEB PORTAL (PTY) LTD	EIGHTEENTH RESPONDENT
PROSPERA REALTY (PTY) LTD	NINTEENTH RESPONDENT
M I CUNNINGAHM FAMILY HOLDINGS (PTY) LTD	TWENTIETH RESPONDENT
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	TWENTY-FIRST RESPONDENT
STEVEN POWEL N.O. (in his capacity as curator bonis)	TWENTY-SECOND RESPONDENT

JUDGMENT DELIVERED ON 27 MARCH 2013

HENNEY, J:

Introduction and Background

[1] On 12 June 2012 this court confirmed a provisional restraint order granted by *Saldanha J* on 24 June 2011 against the Defendant and related Respondents in the matter of NDPP v Cunningham and others 2012(2) SACR 591 (WCC).

[2] In respect of those proceedings in which confirmation of the provisional restraint orders was sought, the court also granted interim relief against further family members whom the Applicant avers have received effected gifts. The further family members were joined in those proceedings as Respondents.

[3] The NDPP and the Fifth and Sixth Respondents have agreed that the confirmation of the provisional restraint order by this Court of 12 June 2012 in respect of property in their possession be delayed until now. This is therefore the return day of the provisional restraint order against Fifth and Sixth Respondents.

[4] The Facts Underpinning this Application

The facts giving rise to this application are based on the relationship between the Defendant ("Cunningham") and the Deveugeles. From this it will be clear why there was a joinder and a provisional order granted against them.

[5] Cunningham was a trustee of the MI Cunningham Trust ("the MIC Trust"). The MIC Trust was the majority shareholder of Webworks (Pty) Ltd, a private company. Cunningham was also the managing director of Webworks. The other shareholders were an entity by the name of 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 Price Waterhouse Cooper Corporate Finance ("PWC") which held 2% of the shares.

[6] In addition to this, either the Fifth Respondent, Hugo Gustav Remi Deveugele (“Fifth Respondent”), one Marc Sonic (“Sonic”), Cunningham personally or the trust held a loan account(s) in Webworks. This agreement provided for the conversion of the loan account into equity in the event that Webworks defaulted on the loan. 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 Mugg and Bean and others.

[7] On 13 June 2005 a company by the name of Fidentia showed an interest in acquiring Webworks. Fidentia was interested in acquiring the shares and the loan account.

Cunningham as trustee in the majority shareholder, M I Cunningham Trust negotiated the sale with Fidentia, without the knowledge of the minority shareholders. He agreed on behalf of the Trust to sell Webworks to Fidentia.

[8] Before the trust could effect the sale to Fidentia, it had to acquire the entire shareholding of Webworks from the other minority shareholders. Before the trust could enter into the sale of shares and the loan account(s), one of which was owned by the Webworks from the other minority shareholders.

[9] Cunningham had represented to the minority shareholders at that stage that the value of Webworks was approximately R41 million¹. This he did by representing to one Michael Levenstein acting on behalf of Target Equity and PWC that to buy their shares,

¹ According to the Particulars of Claim in the proceedings instituted against Cunningham by the Fifth Respondent and other shareholders the amount shared was not more than R35 million – at page 1901 record.

which represented 12% of the shares in Webworks for an amount of R4 million. Thereafter, Cunningham convinced the Fifth Respondent, who also acted on behalf of Top Dog and in his personal capacity, that the value of Webworks was worth no more than R35 million.

[10] The Fifth Respondent then reached an agreement with Cunningham, that Top Dog would sell its shares to the Trust for R5,7 million. It was agreed that Sonic and the Fifth Respondent would sell their joint interest in Webworks to Cunningham for R3,4 million. Before this, however, Cunningham had already agreed with Fidentia that it would sell the shares in and loan account(s) in Webworks to Fidentia for a sum of R160 million. (Cunningham failed to disclose fact to the other shareholders).

[11] The NDPP alleges that by doing this Cunningham committed the crime of fraud by materially misstating the financial affairs of Webworks in its financial statements and during negotiations with Fidentia. This 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.

[12] In order to fund the acquisition of the shareholding of the minority shareholders and the loan account, Cunningham, on behalf of the Trust, before acquiring the share capital of the other shareholders, concluded a loan agreement with Fidentia, on 24 March 2005 and 29 March 2005, in terms of which Fidentia loaned an amount of R25 million to the Trust.

[13] As a result of this, the entire equity stake in Webworks was consolidated into the MIC Trust. This amount of R25 million was also meant to be a deposit by Fidentia on the entire shareholding in Webworks by the trust prior to its sale or transfer to Fidentia.

[14] All this was unknown to the Fifth Respondent and the other minority shareholders. The Fifth Respondent at a later stage found out that Cunningham had misled him and the other minority shareholders, in that he had sold the shares and the loan account to Fidentia at a much higher value that was presented to them. This prompted the Fifth Respondent and the other shareholders to institute a delictual claim against Cunningham to claim the value of their shares in proportion to the price Cunningham sold them to Fidentia, due to the misrepresentations and Cunningham's failure to disclose the true facts relating to the sale of Webworks.

The Settlement Agreement

[15] In terms of a later settlement agreement, which had been rendered between the parties in respect of claims Deveugele, Sonic and Top Dog had made in respect of the sale of Webworks, the Trust agreed to pay Deveugele a total amount of R16 million. This was made up of an immediate payment of R3 million, and it was agreed that further payments would be made, totalling R3,6 million over a period between 1 September 2009 until 1 August 2012. The rest would be in the form of payment to R100 000,00 per month.

[16] Mortgage Bonds were registered in favour of Deveugele over immovable property held by Cunningham, namely, 6 Montrose Constantia, registered in the name of

Sighomes Constantia, and 41 Fishermans Bend, Llandudno (registered in Cunningham's name), both in an amount of R6,5 million. These bonds were registered on 22 July 2009. 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.

[17] In terms of the settlement agreement all payments were to be paid into 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.

[18] The Provisional Restraint Order was granted in favour of NDPP against the Fifth Respondent on the basis that the terms of the settlement agreement and the mortgage bonds which were registered in favour of the Fifth Respondent constitute an affected gift.

[19] At the commencement of the proceedings, in respect of the confirmation of the provisional order against Fifth and Sixth Respondents, the NDPP, the Fifth and Sixth Respondents agreed that the question of the confirmation of the provisional order against them would be held over until the main application was determined as against Cunningham and the other parties.

[20] This court's finding that the requirements for the making of a restraint order against Cunningham had been met, does not only have consequences for Cunningham, but also for persons holding realisable property in terms of Section 14 of the Prevention of Organisation Crime Act, Act 121 of 1998 ("POCA").

I pause here to refer to the specific provisions of the POCA which are applicable in this case.

[21] Applicable Provisions of POCA

Section 12 of Chapter 5 of the POCA defines an “*affected gift*” as

- (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 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 ...”*

Section 14 of the POCA provides a definition of realisable property. According to this provision the following property shall be realisable property in terms of chapter 5 of the POCA, 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.**

[22] Section 16 of the POCA defines gifts as follows:

- (1) For the purposes of this Chapter a Defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the Defendant.
- (2) For the purposes of Section 20(2) the gift which a Defendant is deemed to have made shall consist of that share in the property transferred by the Defendants which is equal to the difference between the value of that property as a whole and the consideration received by the Defendant in return.

[23] Applicant's Case

In this application for confirmation of the Provisional Order, the NDPP claims that Cunningham transferred property to the Fifth Respondent when he in response to a claim for damages which resulted in Cunningham and the Fifth Respondent concluding a settlement, agreed to pay a sum of R16 million to the Fifth Respondent.

[24] The property the NDPP claims that Cunningham had transferred pursuant to this settlement was; two mortgage bonds in favour of the Fifth Respondent of R6,5 million each as security for the payment of R16 million; and cash payments via the account of the Sixth Respondent in an amount of R1,1 million.

[25] The NDPP contends that the value of the Fifth Respondent's delictual claim is negated by the fact that Cunningham cannot be said to owe the Fifth Respondent a lawful duty of care to disclose his fraud on Fidentia and to share the proceeds thereof. They further argue that it would in any event have been improbable that the Fifth Respondent and the other shareholders would have a valid claim.

[26] The NDPP argues that the property transferred pursuant to the settlement agreement constitutes the realisable property of the Defendant.

Respondents' Case

[27] The Fifth and Sixth Respondents argue that there is no prima facie case for the relief sought against them. In particular they argue that the NDPP has failed to demonstrate that the mortgage bonds arising from the settlement agreement are an affected gifts since it had failed to show that the alleged property transferred (i.e. the mortgage bonds) to the Fifth Respondent was for a consideration the value of which is considerably less than the value of the consideration supplied by Cunningham, as required by Section 16 of POCA.

[28] Further, it was argued that the alleged gift can never be an affected gift arising from any alleged unlawful activity of Cunningham since it arises out of a compromise of a damages claim that was brought by the shareholders of Webworks as Plaintiffs in the North Gauteng High Court, Pretoria under case number 25288/2006, which compromise was made an order of court.

[29] The Fifth Respondent further contends that to the extent that the mortgage bonds are registered in his name as nominee for the Plaintiffs (other shareholders) in the abovementioned case, such parties have a direct and substantial interest in the subject matter of the litigation and no relief can be granted unless they are joined.

[30] The Fifth Respondent further argues that in the absence of any statutory definition or an exhaustive definition of the word “gift”, it must be determined with reference to the ordinary dictionary meaning of the word. Counsel for the Fifth Respondent argues that the definition of the word “gift” as ascribed to by the NDPP, namely, a willing transfer of property from the Defendant (Cunningham) to a third party where no consideration is given in return, without referring to the origins of the plain meaning of the word “gift”, raises several problems.

[31] According to the ordinary definition of the word, “gift” connotes a willing or ordinary transfer or giving of property to someone without payment. Therefore, according to the Fifth Respondent, if regard is to be had to the facts and circumstances of this case, there was no willing transfer of the property by Cunningham to the Plaintiffs (Fifth Respondent and the other shareholders) but only after a substantial litigation resulting in a compromise that was made a court order.

[32] Furthermore, according to the Fifth Respondent, there certainly was consideration given in return by the Fifth Respondent and the other Plaintiffs, in the form of a compromise of a substantial claim for damages ranging between approximately R14,3 million and R28 million in capital above excluding interest and costs.

[33] The NDPP's reliance on the definition of "gift" in terms of Section 16(1) of POCA, according to the Fifth Respondent, does not assist the NDPP. They argue that this provision is clear. It does not create an entirely different definition of "gift". Its purpose is to avoid a situation where a person, receiving property in an attempt to avoid the impositions of POCA, agrees to some insignificant counter performance so as not to make the property appear as a "gift" in the ordinary sense of the word.

It is argued that the consideration given as counter performance for the property transferred to the Fifth Respondent (Plaintiffs) was not significantly less than the value of the consideration supplied by Cunningham.

[34] Issues for Determination

- a) Whether any property transferred in terms of a settlement or compromise between two litigants pursuant to civil proceedings can be restrained in terms of POCA as the realisable property of the Defendant (Cunningham).
- b) If it is shown that such property is the realisable property of the Defendant, whether the property transferred between the parties pursuant to the settlement amounts to an affected gift;
- c) Whether a mortgage bond registered in favour of the Fifth Respondent utilized as security for the payment of a sum of money (in this case R16 million) due by the Defendant in terms of a settlement agreement can be regarded as property in terms of POCA;

- d) Whether the cash payments made are affected gifts and are susceptible to be restrained although the NDPP has not explicitly asked in the provisional order that they be restrained.
- e) Whether the other shareholders affected by the settlement agreement should have been joined.

I will now deal with the issues in turn.

- A. Was the property transferred in terms of the settlement agreement the realisable property of Cunningham?

[35] What is abundantly clear is that the Fifth Respondent, after it had come to his attention that Cunningham had sold the shares and the loan account in Webworks for a value much more than that which Cunningham had presented it to them, instituted proceedings for the loss of their share of the proceeds of the sale of Webworks to Fidentia.

[36] The Fifth Respondent in their Particulars of Claim in their action instituted against Cunningham alleges that Cunningham had represented and failed to disclose to them the fact that the value of shares in and the loan claim against Webworks was worth more than R35 million, and that the Fifth Respondent's share in Webworks was R5,7 million.

[37] It was furthermore stated in the Particulars of Claim by the Fifth Respondent (and other shareholders) that, at March 2005, to the best of their knowledge, the Trust did not have a buyer for all the shares and loan claims against Webworks. This whilst Cunningham had already during March 2005 agreed to sell the entire issued share capital to Fidentia for R100 million (as alleged in his Particulars of Claim)².

[38] It was also not disclosed at that stage that Cunningham on behalf of the Trust had already received a R25 million deposit from Fidentia to enable the Trust to acquire the shares of all the minority shareholders. As a result of the litigation in respect of the Plaintiffs claims against Cunningham, a settlement was reached between Cunningham and the Fifth Respondent.

[39] A term of the settlement agreement was that it was entered into on the part of Cunningham the Trust without any admission of liability. The agreement was subsequently made an order of court on 27 July 2009³.

[40] I am in agreement with the contention of Ms Saller for the NDPP that the value of the Fifth Respondent's delictual claim is negated by the fact that Cunningham cannot be said to have owed the Fifth Respondent and the other shareholders a lawful duty of care to disclose his fraud on Fidentia and to share in the proceeds thereof.

[41] The so-called delictual claim was based on misrepresentations and non-disclosure of the true facts to the shareholders during March 2005, which led to the Fifth Respondent suffering damages as set out in the Particulars of Claim which forms part of

² It is not disputed that this amount was R160 million rand.

³ Page 2083 of the record.

the Fifth Respondent's case.

[42] What the Fifth Respondent alleges is that had it not been for Cunninghams' non-disclosure and misrepresentations of the true facts when he and the Trust acquired the shares of the minority shareholders they would not have suffered the damages which resulted in the settlement.

[43] However, even if Cunningham had not represented to the other shareholders that the value of the entire shareholding was R35 million, and even if Cunningham had disclosed to them that he had entered into an agreement to sell the entire shareholding for an amount of R160 million, the other shareholders would not be able to receive their proportionate share of R160 million, because this sale was entered into, and the proceeds therefrom, acquired, by fraudulent means. As such a delictual claim based on non-disclosure and misrepresentation could not be successful as causation would have been absent. In fact their share paid out to them was paid out as part of the proceeds of the fraud perpetrated by Cunningham.

[44] Mr Botha for the Fifth Respondent argued that even if it might be so that the underlying cause which gave rise to the settlement or compromise is illegal or *contra bonos mores*, it does not affect the compromise or settlement. In this regard he referred the Court to various authorities⁴.

[45] I agree that the compromise or settlement between the Fifth Respondent and the shareholders and Cunningham can be regarded as *res iudicata*, which would mean that

⁴ Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914 (A); Karson v Minister of Public Works 1996 (1) SA 887 (E) 893; Georgias v Standard Chartered Finance Zimbabwe Ltd 2000 (1) SA 126 (ZS) 138-139.

neither Cunningham nor the Fifth Respondent would be able to reinstate any action which gave rise to such settlement. However, in my view it does not mean that any realisable property that had been transferred as a result of such settlement agreement, which forms part of the proceeds of crime within the meaning of the POCA, is insulated from restraint in terms of POCA.

[46] The settlement agreement or compromise was between the Fifth Respondent and the other shareholders on the one hand, and Cunningham and the Trust on the other hand. It does not bind a third party like the authorities and cannot exclude the operation of POCA, and the ability of the authorities to restrain or gain control of the realisable property if such property were either the proceeds of crime or the realisable property of Cunningham (“the Defendant”). I hold that the property transferred in terms of the settlement agreement is the realisable property of Cunningham.

B. Whether the Property transferred is an “affected gift”

[47] I agree with Ms Saller when she argued that if a compromise agreement were given, as she put it, special status for the purposes of the application of POCA, then the parties wishing to transfer affected gifts could simply institute action, compromise on one-sided terms and obtain an order by agreement in order to shield themselves from the ambit of Section 16(1) of POCA.

[48] Whether the Fifth Respondent or recipient of such property or payment receives it innocently in my view for the purposes of POCA is not relevant. What is relevant is whether the recipient was entitled to it. Where it was shown that such property was the

proceeds of crime, the transfer thereof to an innocent party cannot protect it from the effect or consequences of that crime. If it was the realisable property of Cunningham, the Fifth Respondent was in terms of Section 14(1)(b) of POCA not entitled to it and it is therefore an “affected gift”.

C. Was the property a “gift” for the purposes of Section 16(1) of POCA

[49] In this case it is not disputed that Cunningham had allegedly made fraudulent misrepresentations to Fidentia which led to Fidentia acquiring Webworks for a sum of R160 million. The alleged fraud was perpetrated by giving false information to Fidentia by not only misrepresentation as to the value and the worth of Webworks, but also by allegedly supplying them with inaccurate and falsified financial statements.

[50] The Fifth Respondent at the time of the Webworks sale to Fidentia was unaware of these facts and he cannot dispute them. He can therefore not dispute that Cunningham had allegedly committed an offence.

[51] At the time when Cunningham had acquired the Fifth Respondent and the other minority shareholders’ share capital during May 2005, they did not dispute what it was worth and did not request that a higher value be attributed to Webworks. They even agreed even to a lower value than that which Cunningham presented to them and their share in proportion to this value was paid out to them.

[52] According to the shareholders’ Particulars of Claim, Cunningham had represented to them that the value of Webworks was approximately R35 million.

Cunningham, however according to their Particulars of Claim convinced them that Webworks was worth no more than R35 million. Only thereafter, they found out that Cunningham sold Webworks to Fidentia for about 4 times the value he had presented to them.

[53] At that stage, it seems they never questioned how Cunningham was able to convince Fidentia to believe that the value of Webworks was worth about 4 times that which they had been led to believe it to be.

[54] Even though they did not have subjective knowledge that Cunningham had acquired this value through alleged fraud, it objectively remains so. Subsequently, the Fifth Respondent became aware of this fact. As said earlier, objectively he could never have been entitled to his share of the amount for which the total shareholding was sold, because there is *prima facie* proof that it forms part of the proceeds of the crime allegedly committed by Cunningham.

[55] What we have here is a situation where a person innocently in terms of an agreement receives a share in the proceeds of crime. Despite the Fifth Respondent's innocence, it was not something that he was entitled to and which was unjustly withheld from him, but a proportionate share in the proceeds of crime. Can it be said, given the circumstances, that it would be in the public interest that he should be successful in his claim to his share? Surely it cannot be?

[56] What he received therefore is susceptible to be restrained as part of the realisable property of Cunningham which forms part of the proceeds of his alleged crime

in terms of the provisions of POCA and is an affected gift.

[57] Under these circumstances, I am unable to agree with the argument of Mr Botha that due to the fact that there was not a willing transfer of the property, the Fifth Respondent's share cannot be regarded as a "gift", in the ordinary sense of the word. In my view, if regard is to be had to the wide reach and purpose of POCA, any transfer, of any realisable property of the Defendant to any person who would also not be entitled to such property, whether willing or not, such property would be regarded as a "gift".

[58] Such a definition would accord with what *O'Regan ADCJ* said in *S v Shaik and Other* 2008(5) 354 (CC) at paragraph [25] where she held, having regard to the purpose of POCA, that:

"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'."

Regard must also be had to the judgment of *Farlam JA* in *Procopos v National Director of Public Prosecutions* 2009 (1) SACR 468 where he said quoting from the headnote: *"[a] person shall be deemed to have made a gift, if (a) there was a transfer of property by the Defendant to another person; (b) there was a supply by such person of some consideration to the Defendant; and (c) there is proof that such counter-consideration was worth significantly less than the property in respect of which it was transferred"*.

[59] In this case, I am satisfied that there was a transfer of property by the Defendant (Cunningham) to the Fifth Respondent when the mortgage bonds were registered in favour of the Fifth Respondent as security for the payment of the amount of R16 million

in terms of the settlement.

[60] As far as the second requirement is concerned read together with the third requirement, I am satisfied that it being the proceeds of crime, that the Fifth Respondent was not entitled to such a payment, the Fifth Respondent in my view could not supply any consideration to the Defendant.

[61] It follows therefore, as far as the third requirement in terms of Section 16(1) is concerned, that such counter consideration, due to the fact that the Fifth Respondent was not entitled to the transfer of the property, is not only merely significantly less than the property in respect of which it was transferred, but also of no worth and therefore an “affected gift”.

D. Whether mortgage bonds can be considered as property that can be restrained for the purpose of POCA

As O'Regan ADCJ in *Shaik supra* held when she said at [25]:

“Section 12(3) of the Act provides that for the purposes of Ch 5, ‘a person has benefitted 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.

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'".

In this case it is common cause, and in fact one of the terms of the settlement agreement, that the two properties situated at 41 Fishermans Bend, Llandudno and 6 Montrose, Constantia, which were acquired by Cunningham, as shown in the previous proceedings, through the proceeds of crime, would be encumbered each with a bond in favour of the Fifth Respondent as security for the payment of a sum of R16 million.

[62] This sum would according to the settlement agreement constitute his portion in relation to the sum of R160 million acquired during the alleged fraudulent transaction with Fidentia.

[63] These bonds advanced in favour of the Fifth Respondent constitute the transfer of property in the form of security as referred to in Section 1 of POCA, which I already held is an "affected gift".

E. Whether cash payments are an “affected gift” which is susceptible to be restrained

[64] The next question to consider is whether the cash payments of R5,3 million, which formed part of the settlement, made to the Sixth Respondent into the bank account of an entity called Commettre should also be restrained. This question arose due to the fact that the NDPP in the provisional application only sought to restrain the mortgage bonds registered in favour of the Fifth Respondent as security for the payment of the R16 million. R5,3 million of this R16 million of which the Fifth Respondent admits that he received R1 135 419,00 as his share of the payments, can these also be placed under restraint.

[65] The Fifth Respondent argued that during the provisional application an order was never sought that the cash payments in satisfaction of the settlement agreement also be placed under restraint as an affected gift which formed of the realisable property of Cunningham (Defendant). As a result of this the NDPP cannot during the confirmation application now seek to have those payments placed under restraint. They should have made out their case in their Founding papers to the provisional application. In this regard the Fifth Respondent referred to the dictum of *Miller J* in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 D at 704 F – G*.

[66] The Fifth Respondent in relying on the decision of *Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W)* argues that the NDPP in the confirmation application can be in no better position in respect of the relief it was seeking than it was during the interim ex-parte application.

[67] They argue that the NDPP's excuse for not seeking the restraint of the cash payments earlier, ie because they did not have any evidence at the time when the founding papers were drafted, is not convincing because the Sixth Respondent was joined precisely because monies were paid into her account by Cunningham as they alleged in the founding affidavit. No provision was in any event made in the founding papers to cater for any such eventuality.

[68] I disagree with the contention of the Fifth Respondent for the following reasons. Firstly, the order that was sought (in the initial papers) was the restraint of the realisable property of Cunningham (the Defendant) wherever it is located, which would include any affected gift made to any person. As I said at paragraph 152 of the confirmation judgment in relation to Cunningham ... *"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"*.

[69] The provisional order by *Saldanha J*, in respect of the realisable property of the Defendant, cast the net very wide. The provisional order in paragraph 1.1.5 referred to *"[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"*.

[70] As I said in my earlier confirmation judgment at paragraphs 153 – 159, it is only after the provisional stage after the appointment of a Curator that the NDPP would be placed in a better position to locate and identify realisable property. If the provisional order is not couched in wide terms it would leave the door open to 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. As I said in my earlier judgment at [156] POCA seeks as its primary objective to restrain property of no one but the Defendant. It does not seek to restrain the property of any person not connected to a Defendant other than in terms of s 14.

[71] It is also not correct, as the Fifth Defendant holds, that the Curator and the NDPP knew that monies were indeed paid over to the Sixth Respondent. In support of their contention, the Fifth Respondent refers to the Founding Affidavit at page 79 at paragraph 115.3 where it was stated that the Defendant agreed to pay R3 million into an account in the name of the Sixth Respondent within 24 hours of signature of an agreement which was concluded on 22 July 2009, and further at paragraph 115.4, that the Defendant agreed to pay R100 000,00 in monthly instalments into the same account until 1 August 2012.

[72] However, what this indicates is merely a summary of the terms of the settlement agreement. This by no means indicates that payments were in fact made. Nowhere does it state that at the time of the drafting of the Founding Affidavit payments of R5,3 million were indeed made of which the Fifth Respondent received about R1,1 million.

[73] It is further clear that this R5,3 million forms part of the realisable property of the Defendant ("Cunningham"). It emanates from Cunningham and is therefore an "affected gift". Therefore as part of the original confirmation order this R5,3 million being an affected gift is subject to restraint.

[74] Furthermore, the mortgage bonds were to be utilized as security for the payment of R16 million which consisted of R13 million (R6,5 million on each property) after R3 million cash was paid on 23 July 2009 immediately after the parties agreed to settle, it would be illogical and nonsensical that any additional cash amounts paid to settle the R13 million by the Defendants, for which the mortgage bonds were to be utilized as security would not be subject to restraint. Whereas the mortgage bonds offered as security for these cash amounts as pointed out earlier, would be susceptible to be restrained.

[75] For these reasons, the application to have the cash payments restrained were indeed covered by the interim order. I therefore hold that the R5,3 million cash payment made of which the Fifth Respondent received R1,1 million as from the date of settlement as part payment of the R16 million is an affected gift.

F. Joinder of Top Dog and Sonic

[76] Mr Botha submitted that Top Dog and Sonic given the content of the settlement agreement, clearly have a direct and substantial interest in the subject matter of this litigation and should have been joined. The court can therefore not issue a final order restraining the mortgage bonds in their absence.

[77] In answer to this the NDPP argued that the mortgage bonds are registered in the name of the Fifth Respondent. No other party is capable of alienating the bonds or taking any steps relating thereto and they are accordingly “held” by the Fifth Respondent alone. Whatever Top Dog and Sonic may have in the mortgage bonds are merely personal rights against the Respondent.

[78] The NDPP throughout the proceedings did not seek any relief against Top Dog and Sonic. Their aim consistently was to restrain the mortgage bonds that were registered in the name of the Fifth Respondent and later the cash amount received by the Fifth Respondent.

[79] A party who seeks the joinder of another party should show that the other party has a direct and substantial interest in the issues involved. In this regard see *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels and Another* 1972 (4) SA 409 (C) at 415 E. Later in that same decision the court refers to a decision of *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) where it was held that a direct and substantial interest is an interest in the right which is the subject matter of litigation and it is not merely a financial interest which is only an indirect interest in the litigation. The court in *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels and Another* 1972 (4) SA 409 (C) at 415 E held that such an interest is generally accepted as a legal interest in the subject matter which could be prejudicially affected by the judgment of the court.

[80] It has been held even though a party may have an interest in the outcome of litigation, it does not warrant a non-joinder plea. See *Herbstein and Van Winsen – Civil*

Practice of the High Courts of South Africa 5th Ed Vol 1 at 239.

[81] In this case the bonds to be utilized as security for payment of the sum of R16 million were registered in the name of the Fifth Respondent. This formed part of the agreement. It was clearly the intention of the parties that the bonds be registered in the name of the Fifth Respondent. He would therefore be the only person who would acquire the right to alienate the bonds or take any steps in the event of any default to call up the security in terms thereof. No such right would reside with Top Dog or Sonic.

[82] It may well be that as a result of the settlement agreement, Top Dog and Sonic have an indirect interest to protect their claim by means of the security the mortgage bond offers in the name of the Fifth Respondent. As said earlier (at paragraph 46), however, due to the fact that the security in the form of the bonds, given the definition of property in POCA, forms part of the realisable property of the Defendant, Top Dog and Sonic therefore cannot be said to have a valid or legally enforceable interest to preclude the authorities in the form of the NDPP who has a valid interest in the subject matter of this application not to restrain the property whereas they have no such right. Even if a case is made out that they should be joined, they have no legally enforceable claim against the NDPP, that the property not be restrained.

I therefore find that it is not necessary to join Top Dog and Sonic to these proceedings.

[83] In the result therefore I make the following order:

- 1) That the mortgage bonds registered on the properties held by the Defendant,

namely 41 Fishermans Bend, Llandudno and 6 Montrose, Constantia, each to the value of R6,5 million, in favour of the Fifth Respondent are placed under restraint.

- 2) The cash amount of R1,1 million as part payment of the R16 million to the Fifth Respondent is also placed under restraint.
- 3) The provisional order on 12 June 2012 is confirmed.

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