HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **1890/2011**
In conjunction with Case No: **5217/2010**
And in conjunction with Case No: **20738/2008**

In the matter between:

MARC SCHOEMAN	First Applicant
MARC SCHOEMAN N.O. TRUSTEE THE 52 TRUST	Second Applicant
CASPER JOHAN SCHOEMAN N.O. TRUSTEE THE 52 TRUST	Third Applicant
MARK DAWSON N.O. TRUSTEE THE 52 TRUST	Fourth Applicant
S&D CONSULTING SOMERSET WEST CA (PTY) LTD	Fifth Applicant
S&D CONSULTING CC	Sixth Applicant
HELDERSPRUIT ESTATES (PTY) LTD	Seventh Applicant

And

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

Heard: 21 May and 23 June 2014
Delivered: 23 July 2014

JUDGMENT

BUTLER, AJ:

1. This is an application for the rescission of certain orders granted by this Court in terms of the provisions of the Prevention of Organised Crime Act, 121 of 1998 ("POCA"). The orders attacked by the applicants are a provisional restraint order granted in terms of section 26(3) of POCA, the confirmation of that order on the return day, the amendment and amplification of the order, and the dismissal of an application brought by the applicants for the variation of the order.

2. The factual background of the matter is complex. Briefly, it stems from the affairs of companies that formed part of the Indo-Atlantic group of companies. Two in particular are mentioned, Indo-Atlantic Seafoods (Pty) Ltd, and Indo-Atlantic Shipping (Pty) Ltd. A third entity, Isotherm Fishing (Pty) Ltd ("Isotherm") also plays a role. I refer below to the Indo-Atlantic group as "Indo-Atlantic", unless specific reference is needed to an individual company.

3. Johan Erasmus van Staden ("Van Staden") was the chief executive officer of the Indo-Atlantic group. Carel Braam de Vries ("De Vries") and Gerhard Botha ("Botha"), an accountant, were among the employees of either Van Staden or entities within Indo-Atlantic.

4. The first applicant ("Schoeman") is an accountant and auditor by profession. Entities associated with him, in the sense that he was either a director, shareholder or otherwise closely connected to them, included the 52 Trust (represented by the second to fourth applicants before me), S&D Consulting Somerset West (Pty) Ltd (the fifth applicant – referred to below as "S&D (Pty) Ltd"), S&D Consulting CC (the sixth applicant – referred to below as "S&D CC"), Marc Schoeman and Associates CC ('Schoeman CC') and Helderspruit Estates (Pty) Ltd (the seventh applicant). Schoeman was the sole director of S&D (Pty) Ltd, and the sole member of S&D CC and of Schoeman CC.

5. During 2005 to 2008 Schoeman or one of his entities provided accounting services to, and was the auditor of, at least 10 of the entities in the Indo-Atlantic group. In his papers Schoeman uses the acronym S&D, not necessarily indicating which of the entities controlled by him was involved in

the events in question; for the purposes of this judgment it does not matter which specific entity was so involved.

6. The first respondent alleges, and the essence of the allegations is not denied by Schoeman, that Indo-Atlantic and Van Staden were parties to a fraudulent scheme involving transactions that were governed by, among other statutes, the Value Added Tax Act, 89 of 1991 ("the VAT Act"). Two companies in the Indo-Atlantic group were registered as VAT vendors under the VAT Act. The VAT fraud alleged by the first respondent involved the filing by the two companies concerned of VAT returns containing false information. Both companies claimed that they had paid input VAT when this had not occurred; and the export figures of one of the companies were vastly inflated. Because the output figures that would otherwise have attracted output VAT debits were in respect of exports, such exports qualified for zero rating under the VAT Act. The returns thus gave rise to substantial net credits, and consequential claims for refunds of VAT from the South African Revenue Services ("SARS"). Despite three audits of the affairs of the companies being carried out by SARS, nothing amiss was detected. In the years in question, approximately R248 million was paid by SARS in respect of the VAT refund claims submitted on behalf of the companies.

7. Most of the VAT fraud was committed through transactions claimed to have been concluded between two Indo-Atlantic companies on the one hand, and Isotherm on the other. The first respondent alleges, and this is also not denied by Schoeman, that the transactions in issue never took place. The two Indo-Atlantic companies claimed to have made payments to Isotherm for the purchase of frozen fish. In fact, no such payments were ever made. The claimed transactions with Isotherm were used to substantiate the VAT input credits that gave rise to the refund claims. Isotherm, it turns out, was in fact dormant. Its offices had been vacated in March 2006.

8. It is also not in dispute that Isotherm invoices, bearing the dates March to August 2006, and August 2008, were found in Schoeman's study during a search and seizure operation carried out on 27 November 2008. The invoices

implied that Isotherm fell under the Oceana group of entities. Oceana's company secretary has stated on oath that no company with the name of Isotherm ever formed part of the Oceana group.

9. It is alleged by the first respondent, and admitted by Schoeman, that in the years in question all but one of the VAT refund payments were paid by SARS into the bank accounts of S&D (Pty) Ltd and Schoeman CC, and that those entities retained or received R37 million as "facilitation fees" payable by Van Staden or the Indo-Atlantic group, in relation to the VAT refunds that were procured.

10. It is further contended by the first respondent, and disputed by Schoeman, that he and/or the entities controlled by him, were parties to the fraud and benefited from the fraud in the extent of the facilitation fees referred to above.

11. SARS eventually became suspicious and set in motion a search and seizure operation that was carried out on 27 November 2008 at Schoeman's offices. Schoeman was apparently overseas at the time that the operation was carried.

12. Extensive litigation ensued. Because of its significance to the issues that follow, it is necessary to set it out briefly:

    12.1. Following the search and seizure operation on 27 November 2008 the first respondent moved, *ex parte*, an application for a provisional restraint order in terms of section 26(3)(a) of POCA. The provisional order was granted by Traverso DJP, in chambers, on 12 December 2008.

    12.2. The attachment of assets pursuant to the provisional restraint order occurred on 17 December 2008.

    12.3. Schoeman was arrested, and released on bail, respectively on 17 and 19 December 2008.

12.4. On the return day of the provisional restraint order, 29 April 2009, the provisional order was confirmed by Meer J. There was no opposition by Schoeman or the entities related to him.

12.5. On 12 March 2010 Schoeman launched an application for the release of funds held by the second respondent ("the curator") for legal expenses. Schoeman also complained that assets in excess of what had been authorised by the restraint order had been attached and the release of those assets was sought.

12.6. On 18 May 2010 the first respondent delivered a counter application to Schoeman's application for legal expenses. The counter application sought the variation of the restraint order to increase the value of assets permissibly attached, and joining the 52 Trust and S&D CC as respondents.

12.7. There were delays in the filing of papers for the purposes of Schoeman's main application. In the interim, the first respondent set down and moved the counter application. The counter application was granted, without opposition, on 25 August 2010, by Allie J.

12.8. Schoeman's main application was heard by Steyn J in November 2010. On 10 December 2010 she handed down her judgment dismissing the main application.

12.9. Schoeman's co-accused in criminal proceedings which have since been instituted, Van Staden, successfully challenged the grant of the restraint order. On 25 November 2011 Blignault J handed down judgment rescinding the restraint order insofar as it related to Van Staden and the entities connected with him. Blignault J criticised the conduct of the first respondent in procuring the restraint order, a finding that the first respondent sought to challenge. An application for leave to appeal was refused by Blignault J.

12.10. The first respondent successfully sought leave from the Supreme Court of Appeal ("the SCA") to appeal, and Blignault J's judgment was set aside on 28 November 2012 by the SCA: National Director of Public Prosecutions v Van Staden and Others (730/2011) [2012] ZASCA 171 (28 November 2012).

12.11. In the interim, Schoeman had launched his own application for the rescission of the restraint order ("the first rescission application"). The first rescission application was withdrawn on 13 February 2013. This was about two and a half months after the judgment by the SCA in Van Staden's case was handed down.

12.12. On 19 March 2013 the Constitutional Court refused Van Staden's application for leave to appeal against the SCA decision.

12.13. This application was launched on 27 May 2013.

13. Against that background the following relief is sought by the applicants:

> "1. That the provisional restraint order granted in favour of the First Respondent against the Applicants in case number 20738/2008 on 12 December 2008 and confirmed on 25 August 2010 under case number 5217/2010, in conjunction with case number 30738/2008, be rescinded and set aside.
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> 2. That the First Respondent and Second Respondent be ordered to immediately restore all seized and/or attached property to First to Seventh Applicants.
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> 3. That in the event that rescission is declined the restraint order be varied to allow the First Applicant living expenses in the amount of R1.32 million per annum as well as legal expenses in the amount of R4.723 million for his criminal trial.
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> 4. That in the event that rescission is declined the restraint order be varied so as to grant the curator *bonis* power to agree and approve the following without requiring the applicant to apply to Court for relief:
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> 4.1 Pay further legal and living expenses;
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> 4.2 Make asset disposals or acquisitions in agreement with applicant;

4.3 Pay the sum of R2 205 000.00 to First Applicant for past asset maintenance costs incurred to date and to pay future asset maintenance costs as incurred.

5. That in the event that Rescission and or Legal or Living Expenses or a variation awarded is appealed then Legal and or Living Expenses in the sum prayed be released with immediate effect.

6. That the First Respondent be ordered to pay the costs of this application.

7. Further and or alternative relief."

The conditional counter application by the first respondent has by agreement between the parties stood over, pending the outcome of this judgment.

14. It will be apparent from the brief chronology above that this application was launched more than four years after the original provisional restraint order was granted, about four years after the confirmation of the restraint order, and respectively three years and a half and three years after the orders of Allie J and Steyn J were handed down. Schoeman and his associated entities did not oppose the confirmation of the provisional restraint order, nor did they oppose the amendment and amplification of the restraint order, subsequently granted by Allie J. A further unusual feature is that this application was brought after a similar application (the first rescission application) was withdrawn.

15. As discussed below, Schoeman's attacks on the four orders focus on the manner in which they were obtained, and in particular makes allegations of fraud and dishonesty against the officials of the first respondent in procuring the orders.

16. It is convenient to begin the analysis by considering what the jurisdiction of this Court is to grant a rescission or variation of the orders sought to be impugned, in the circumstances.

Jurisdiction

17. The remedies of a respondent faced with a provisional order that was granted against the respondent *ex parte* are extensive. The respondent may set the matter down for reconsideration under rule 6(12)(c). Or the respondent may

persuade the court on the return day as to why the provisional order should be discharged. In that instance the respondent has the election, in terms of rule 6(8), to anticipate the return day on not less than 24 hours' notice to the applicant, and can elect whether to file papers or to argue the matter without answering papers. On the return day the respondent has the additional string to the bow in that, apart from the merits of the matter, the respondent may point out any breach of the duty of utmost good faith that the applicant may have committed, and have the rule discharged for that reason alone, if the court in its discretion so orders: Schlesinger v Schlesinger 1979 (4) SA 342 (W); M V Rizcun Trader v Manley Appledore Shipping Ltd 2000 (3) SA 766 (C) at 794. No such advantages avail a respondent in opposed motion proceedings: Trakman NO v Livshitz 1995 (1) SA 282 (A) at 288E-F.

18. If the order is confirmed, the respondent may seek to appeal its confirmation: Phillips v National Director of Public Prosecutions 2003 (6) SA 447 (SCA) ("Phillips (1)").

19. Once the order is confirmed, the remedies of the respondent are more limited. Apart from consent (as to which see the judgment of Thring J in Vilvanathan and Another v Louw NO 2010 (5) SA 1 (WCC) at 23J to 31G) the remedies of the respondent are limited to those under the common law and rule 42 of the Uniform Rules of Court.

20. In the context of restraint orders under POCA, the court's powers of rescission include those under section 26(10), section 28(2)(a), section 28(3), and section 28(7). I revert below to the question whether those provisions are the exclusive repository of a court's jurisdiction in respect of proceedings under POCA.

The procedural complaints

21. I deal with the first group of complaints raised by the applicants. Schoeman asserts that in seeking the provisional restraint order on 12 December 2008 the first respondent ought not to have proceeded, and the court ought not to

have permitted the first respondent to proceed, *ex parte*, urgently, and *in camera*. Moreover, no record of what transpired in chambers exists, which is alleged to constitute a further procedural deficiency.

22. Assuming that there may be merit to these complaints (and I do not necessarily accept that there is), the point is that a court has permitted, in its discretion, the application to be moved as it was. The applicants must have been aware of the suggested irregularity, and Schoeman elected not to oppose the confirmation of the provisional order that was sought on the return day. I was informed by Mr Stransham-Ford, who appeared for the applicants, that Mr Schoeman was advised by senior counsel and an attorney at the time.

23. This Court does not have jurisdiction to rescind any of the orders sought to be impugned, at this stage, on this basis alone. In permitting the original application to be brought *ex parte*, urgently and in camera, Traverso DJP was entitled, in her discretion, to do so. There was no error as contemplated by rule 42(1)(a): see Lodhi Property Investements CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at [25]. Furthermore, the parties affected by the orders elected not to oppose the confirmation of the provisional order, and have abided the terms of the order for several years thereafter. In these circumstances they should not complain about the alleged procedural irregularities: see Schmidlin v Multisound (Pty) Ltd 1991 (2) SA 143 (C) at 155C – 156E, and Abrahams v RK Komputer SDN BHD 2009 (4) SA 201 (C) at 210 D-F.

24. In argument Mr Stransham-Ford sought to contend that in moving *ex parte* and urgently the first respondent had acted fraudulently and dishonesty. This was, however, not the case made out in the first part of the founding affidavit. Mr Stransham-Ford conceded this, and also accepted that no jurisdiction to interfere with the order exists, on this basis alone.

Error of law or fact

25. The second basis asserted by the applicants, and emphasised in argument, was that POCA impermissibly conflates civil and criminal proceedings. The thrust of the argument is that section 26 of POCA provides for a false dichotomy. It permits a restraint to be placed on assets another than upon proof of actual guilt on the part of the respondent concerned. This, it was argued (apart from the constitutional point that I deal with more fully below), was incorrect. No basis, accordingly, was made out for the restraint that was sought.

26. Insofar as this argument asserts that the court granting the provisional restraint committed an error of law, or one of fact and law, I have numerous difficulties with it. There is ample precedent, binding on this Court, dealing with the onus that the first respondent was required to discharge when seeking a restraint order under section 26 of POCA: see National Director of Public Prosecutions v Kyriacou 2004 (1) SA 379 (SCA) at [10]; National Director of Public Prosecutions v Rautenbach and Others 2005 (4) SA 603 (SCA) at [25] to [27]; National Director of Public Prosecutions v Van Staden (*supra*) at [10]. This Court, when granting the Orders in question, was bound by that authority. Furthermore, Schoeman and his related entities did not oppose the confirmation of the provisional order, nor did they seek to appeal the order of Steyn J. If an error was committed, their remedy lay in an appeal, if appropriate, and not in application for rescission.

27. I revert to the broader constitutional argument, developed along the same lines, below.

Fraudulent misleading of the court

28. This brings one to the heart of this case.

29. Schoeman asserts that when presenting the application for the provisional restraint order to the court, as well as when seeking its confirmation, its

variation and amplification, and when resisting the application for legal expenses, the first respondent relied upon a fraud. The fraud was committed when the original provisional restraint order was sought. At that stage the duty of utmost good faith rested upon the first respondent to disclose facts not only favourable to the first respondent's case, but also which might have influenced the court in coming to its conclusion. The relevant authorities have been referred to above. Schoeman asserts that the first respondent failed to discharge that duty. The application is not limited to aspects of suggested non-disclosure. It goes further to allege that the founding papers contain positive falsehoods, as well as innuendoes and implications of wrongdoing that were unsustainable on the facts available to the first respondent at the time. In all of those instances, Schoeman alleges, the first respondent's representatives acted dishonestly, fraudulently, and *mala fide*. Some 55 pages of the founding affidavit are dedicated to allegations of fraud and dishonesty on the part of the first respondent.

30. Those allegations are disputed by the first respondent. The disputes generated voluminous papers, running to about 1 800 pages of affidavits and annexures.

31. Before dealing with the merits of those allegations, it is necessary to revisit the question of jurisdiction relied upon by the applicants.

Section 28(2) and (3), and section 26(10) of POCA

32. In the founding affidavit two bases are referred to, being sections 28(2) and 28(3) of POCA, and section 26(10) of the same Act.

33. Subsections 28(1) to 28(3) of POCA provide as follows:

"(1) where a High Court has made a restraint order, that court may at any time—

(a) Appoint a *curator bonis* to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely—

(i) To perform any particular act in respect of any of or all the property to which the restraint order relates;

(ii) To take care of the said property;

(iii) To administer the said property; and

(iv) Where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;

(b) Order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a *curator bonis* has been appointed under paragraph (a), into the custody of that *curator bonis*.

(2) Any person affected by an order contemplated in subsection (1) (b) may at any time apply—

(a) for the variation or rescission of the order; or

(b) for the variation of the terms of the appointment of the *curator bonis* concerned or for the discharge of that *curator bonis*.

(3) The High Court which made an order contemplated in subsection (1) (b)—

(a) May at any time—

(i) Vary or rescind the order; or

(ii) Vary the terms of the appointment of the *curator bonis* concerned or discharge that *curator bonis*;

(b) Shall rescind the order and discharge the *curator bonis* concerned if the relevant restraint order is rescinded;

(c) May make such order relating to the fees and expenditure of the *curator bonis* as it deems fit, including an order for the payment of the fees of the *curator bonis*—

(i) From the confiscated proceeds if a confiscation order is made; or

(ii) By the State if no confiscation order is made."

34. Those sections do not confer an unlimited power to rescind a restraint order. The power is limited to an order granted under section 28(1) (b), being an order for the appointment of a curator. It is clear from the preamble to subsection 28(1) that section 28(1) (b) contemplates an order *additional to* a restraint order otherwise granted under section 26(3). See, in this regard, Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) ("Phillips (3)") at [26]. It is therefore clear that the jurisdiction granted under subsection 28(3) is limited to the additional order made under subsection 28(1).

35. That is, however, not the relief that the applicants seek in this matter. They seek the rescission of the restraint order (as well as of the orders of Allie J

and Steyn J) *in toto*. The reliance on section 28(3) is therefore in my view misguided.

36. For completeness, I should say that even if only rescission of the additional order appointing the curator *ad litem* were sought, I am not persuaded that it is justified on the facts of this matter. It would have the effect that there would be no curator appointed to safeguard the assets under attachment, a result that would hardly be in the interests of the applicants themselves.

37. The alternative basis relied upon is section 26(10) of POCA. It provides:

"(10) A High Court which made a restraint order—

(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

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

38. Two jurisdictional requirements must satisfied: (i) that the operation of the order will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and (ii) that the hardship outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. See further Cameron J's judgment in Naidoo and Others v National Director of Public Prosecutions and Another, CCT 112/10; [2011] ZACC 24 at [20].

39. The jurisdictional requirements can be disposed of briefly.

40. In the first instance, there is no case made out by Schoeman that the restraint order has, or will, deprive him of his livelihood. In the answering papers the first respondent asserts that Schoeman is able to continue his practice as an accountant. He points out further that in papers filed in relation to a bail application, Schoeman stated that he was able to obtain funding, by raising the necessary finance. In argument, Mr Stransham-Ford indicated that the application insofar as it related to living expenses was not persisted with. I am therefore not satisfied the applicants have satisfied the requirements of section 26(10)(a)(i).

41. Second, it is apparent from the judgment of Steyn J (which I deal with more fully below) that Schoeman has been less than candid with the curator in respect of assets potentially falling under the restraint order, and in having, on one instance at least, attempted to alienate assets. It was open to Schoeman, if he was so advised, to have challenged those findings. He has not done so. His case in response is not impressive. I am therefore not persuaded that the applicants have satisfied the pre-requisites of subsection 26(10)(a)(ii) either.

42. A further consideration is that in the heads of argument filed for the applicants no reliance was placed upon section 26(10). The only section relied upon in argument was section 28(3).

Common law?

43. At the outset of argument I invited counsel for the applicants to address me on the question of the ambit of my jurisdiction to rescind an order in these circumstances. Counsel indicated that the applicants would wish to rely on such a jurisdiction outside of section 26(10) and section 28(3), but as I understood him, considered that the judgment in Phillips (with reference, I suspect, to Phillips (3)) precluded reliance on such a ground.

44. The passages in Phillips (3) that counsel may have had in mind were those at paras [35] to [37] of the judgment. There the Constitutional Court stated:

> "[35] Both in their heads of argument and before this Court, counsel for the applicants submitted that section 26(10)(a) is capable of two possible constructions, with one being constitutionally compliant and the other not. They contend that the section is capable of a construction that allows the High Court, in the exercise of its inherent power, to set aside a restraint order made under the Act on common law grounds, and indeed this was the interpretation adopted by the High Court. The High Court took the view that it was empowered under common law (without the need to refer to section 173 of the Constitution) to set aside the restraint order on grounds other than those listed in the Act. This is the interpretation favoured by the applicants who contend that it is in line with and does not do violence to the inherent power vested in the high courts by section 173 of the Constitution.
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> [36] The second interpretation is one which holds that the grounds for rescission provided by the Act constitute a closed list and that a high court is not empowered to rescind a restraint order on grounds other than those specified in the Act. This is the interpretation which was adopted by the SCA which, it is contended, is not one that advances the values enshrined in the Bill of Rights.
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> [37] I do not think that section 26(10) is capable of the construction proffered by the applicants. It is not only about standing; it carefully regulates the substantive circumstances in which rescission of a restraint order made under the Act may be sought. It may be that on the construction adopted by the SCA it is inconsistent with the Constitution, but that case has not been made on the applicants' papers and cannot be decided here. I cannot therefore, in these proceedings, fault the approach of the SCA to section 26(10) of the Act and, given that there is no constitutional challenge to section 26(10), the SCA interpretation must stand."

45. At first blush, the passage above does appear to exclude the possibility of a jurisdiction for rescission existing outside of those expressly catered for under POCA. The passage above however needs to be read in context. For present purposes the Phillips cases began with the SCA judgment in Phillips (1). There, the first question was whether the restraint order was appealable under the principles in Zweni v Minister of Law and Order 1993 (1) SA 523 (A). To decide that question, it was necessary to consider whether the first of the three Zweni requirements (that the judgment be final in effect, final meaning that it is unalterable by the court whose judgment or order it is) was

met. Relevant to that issue was the question of the court's power to rescind or vary its own order. In dealing with that question, Howie J stated:

> "[12] A restraint order has only temporary duration. It operates pending the outcome of later events. In terms of s 26(10)(b) it must be rescinded by the High Court when the proceedings against the defendant are concluded. Conclusion, says s 17, occurs on acquittal (whether at trial or on review or appeal) or if no confiscation order is made despite conviction, or if the confiscation order is satisfied.
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> [13] Apart from rescission in those instances the Act makes provision for variation or rescission by the High Court of restraint orders and related orders in other circumstances. In terms of s 26(10)(a) the Court may vary or rescind a restraint, seizure or other ancillary order on the application of any person affected, provided it is satisfied on each of two particular grounds. The first is that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses and cause him undue hardship. The second is that such hardship outweighs the risk that the restrained assets may be destroyed, lost, damaged, concealed or transferred.
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> **...**
>
> [20] Counsel for the respondent is right, in my view, in submitting that a restraint order is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect as envisaged in Zweni. Plainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount. The crucial question, however, is whether a restraint order has final effect because it is unalterable by the Court that grants it. In this regard counsel for respondent argued that the provisions of s 26(10)(a) deprived a restraint order of the finality required for appealability because it permitted variation and even rescission.
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> [21] Orders respectively appointing curators, requiring surrender of property and burdening title deeds are all rescindable at any time. Presumably the unstated requirement is that sufficient cause must be shown but otherwise, unlike the case of s 26(10)(a), no limits are placed on their susceptibility to rescission. And in the case of a common-law interim interdict or attachment pendente lite there is no reason why, for sufficient cause, they would not, generally, be open to variation, if not rescission.
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> [22] Absent the requirements for variation or rescission laid down in s 26(10)(a) (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is,

> in my opinion, final in the sense required by the case law for appealability." (emphasis added)

46. The question of a possible challenge on the basis of fraud or error was thus expressly left open.

47. In National Director of Public Prosecutions v Phillips 2005 (5) SA 265 (SCA) ("Phillips (2)") the SCA heard an appeal from the High Court in which the High Court had held that it has an inherent jurisdiction to rescind the restraint order granted under section 26 of POCA. (See the SCA judgment at [13] and [17].) After careful analysis of the relevant provisions, Scott JA referred to the passages from Phillips (1) (see the judgment at [18]). At paragraphs [21] and [25] Scott JA summarised:

> "[21] It accordingly concluded that a restraint order can be varied or rescinded if good cause is shown and that good cause includes, among other things, the impossibility of performance by a *curator bonis* appointed under the Act. It granted the order sought by Mr Phillips and the other applicants and rescinded the restraint order that it had previously made.
>
> [25] The SCA reasoned that the restraint order is not one that may be granted at common law. It is authorised by the Act and so is the power to vary or rescind it. If there had been no provision for its variation or rescission in the Act, the order would stand until set aside either because the person was not charged, or when the proceedings against the person/s concerned were concluded."

48. It is clear from the above that in concluding that the High Court does not have inherent jurisdiction to rescind an order granted under section 26 of POCA, the SCA accepted that the court does have the power to rescind an order granted under section 26, under the common law.

49. Reverting to the judgment of Skweyiya J in Phillips (3), the only question before the Constitutional Court was whether the High Court had been correct in reasoning that it had an inherent jurisdiction to rescind the order under section 26 of POCA. In argument before the Constitutional Court the appellant (the original applicant) persisted with the contention that the court had an inherent jurisdiction: see Phillips (3) at [35]. It should thus be noted

that both in the High Court and in the SCA the appellant had limited its submissions to the proposition that the court had an inherent jurisdiction.

50. The statement in Phillips (3) at [36] that the "second interpretation" is to be preferred, which entails the conclusion that "the grounds for rescission provided by the Act constitute a closed list and that a High Court is not empowered to rescind a restraint order on grounds other than those specified in the Act" the Constitutional Court was dealing with the contention that an inherent jurisdiction to rescind the order existed. This was, after all, the only contention relied upon by the appellant. This statement, although broadly framed, did not refer to the finding of the SCA in Phillips (2) to the effect that the common law jurisdiction was also available. Had this been intended by the Constitutional Court it would surely have said so. This is reinforced by the concluding sentence of para [37] where Skweyiya J said:

> "I cannot, therefore in these proceedings, fault the approach of the SCA to s 26(10) of the Act and, given that there is no constitutional challenge to s 26(10), the SCA interpretation must stand."

51. It is hardly likely that Skweyiya J would have said that had the intention being to divert from the SCA ruling that the common law jurisdiction was available.

52. In Phillips (2) Scott JA stated that:

> "It is a well established principle that a court may always set aside its own final judgment in certain circumstances. These include situations where the judgment is founded upon fraud …".

53. Were the jurisdiction to rescind the restraint order to be limited strictly to the requirements of section 26(10) of POCA, it would have the consequence that a respondent with financial means (and therefore unable to satisfy the requirement of section 26(10)(a)(i)) would have to abide the drastic consequences of a restraint order even where it was procured by fraud. It would make the court the servant of a dishonest litigant. Such an anomalous consequence is unlikely to have escaped Skweyiya J.

54. I respectfully accept, therefore, that the Constitutional Court in Phillips (3) did not intend to qualify what was mooted by Howie P in Phillips (1), and held by Scott JA in Phillips (2), and accept therefore that I do have the jurisdiction, in my discretion, to rescind a restraint order procured by fraud.

55. In proceeding as I do below, I am mindful of the fact that the applicants did not, expressly in their founding papers, make reference to the common law as a basis for the jurisdiction to rescind. The court, however, may, in certain circumstances, permit an applicant to present the case on a further legal basis, provided that a sufficient factual basis is set out in the papers, and provided no prejudice is caused to the opposing party (Minister van Wet en Orde v Matshoba 1990 (1) SA 180 (A) at 285E-I).

56. In this matter fraud is extensively alleged, and is dealt with on its merits by the respondents. No substantial prejudice is caused to the respondents to permit the argument to proceed on this basis. Moreover, the applicants seek to protect very significant interests, partly in reliance on provisions of the Constitution. I consider that the interests of justice require that this aspect also be considered, lest it appear that it was overlooked, to the detriment of the applicants.

The case for fraud and dishonesty

57. In the presentation of the application for the restraint order to Traverso DJP, and for the confirmation of the order by Meer J the first respondent relied, among other material, on the affidavits of two witnesses, Scholtz and Rossouw. Those form the focus of Schoeman's attacks. A third affidavit, by Venter, was also attacked. The first respondent has however pointed out that Venter's affidavit did not form part of the papers before Traverso DJP (and therefore consequentially also not before Meer J).

58. The statements that are said to have been dishonestly advanced are extensive. It is convenient to deal with them in five groups.

(i) The first group

59. The first group of statements are accepted in isolation not to be offensive, but are said to be obnoxious when allied with the failure to have informed the court of other relevant matters. There are essentially three sets of allegations in this regard. It is stated in the affidavits that the frauds alleged were committed by Van Staden and the Indo-Atlantic group while Schoeman was the auditor of the group, when this was incorrect. Next, while the affidavits refer to facts giving rise to the suggested fraud, they fail to disclose that in the three years preceding the discovery of the fraud, clean VAT audit had been derived by the Indo-Atlantic group. The third set of complaints concern evidence obtained from De Vries who, at the time that the provisional restraint order was sought, had been interviewed, but from whom a statement had not been obtained. It is alleged that the first respondent was remiss in not pointing out to the court that De Vries was by then essentially a State witness, and was bias against the respondents in the application.

60. I find the logic in this aspect of the complaint tenuous. While there is no reference in the founding papers (apparently) to the proposition that it is not the duty of an auditor to satisfy himself as to the fundamental correctness of the facts presented to the auditor, this appears to be a statement of law which I suggest would probably have been clear to the court considering the matter. (See also the judgment of Howie P in Phillips (1) at [33]). The failure to have disclosed that there had been three clean VAT audits preceding the discovery of the fraud strikes me as irrelevant. It is the case of the first respondent that there was fraud. Fraud implies a deception. The SCA was unimpressed by this argument in Van Staden (*supra*) at [22]. The failure to have disclosed that De Vries was biased also has no merit. It is clear from the papers that it was disclosed that De Vries was a potential accused. This was sufficient, in my view, to warn the court hearing the application that information from De Vries would have to be treated with caution.

(ii) The second group

61. The second category of dishonesty relied by Schoeman concerns statements that were positively false. Ones that were particularly identified were the contention that Botha was the financial director of the Indo-Atlantic group, and the assertion that Schoeman was the auditor of the whole group. The correct facts appear to be that Botha was an accountant employed either by Van Staden or some of the entities, and that Schoeman was the auditor of only about 10 companies in the group. The materiality of these errors is unclear to me.

(iii) The third group

62. The third group of allegations formed the main part of the argument before me. They amount to assertions made by the first respondent using inappropriate labels for conduct, conveying by innuendo or implication that Schoeman had conducted himself irregularly or inappropriately, and failing to set the facts out neutrally and correctly. Chief among these allegations was the contention in the papers that funds had been “channelled” through the accounts of S&D, and had further been paid not to the respective VAT vendors, but to other entities in the Indo-Atlantic group. This process of payment was contended to be irregular. The system so set up was suggested to have been done with “great care”. The facts which Schoeman says were known to the first respondent included that the designation of the S&D bank account as the recipient of the VAT refunds was one approved by SARS, that SARS would have appreciated that the VAT vendor was an entity other than the recipient of the refunds, and that it were clear therefore that the process of payments was not only disclosed to SARS, but also approved by it.

63. In argument Mr Budlender, who appeared with Ms Saller for the first respondent, resisted the suggested that the expression channelling has a negative connotation. In the alternative he argued that the facts were placed before the Court, and that from the facts it was clear that the payments were made to Schoeman’s entities, to the knowledge of SARS, SASR after all was the payer of the funds. I am inclined to agree that the expression ‘channelling’ can have a stigma and that in the context of this matter (particularly when

asserted in the context of 'irregular' payments) it was prone to carry a negative connotation. However, I agree that the basic facts were disclosed and it must have been clear to the Court that the payments were made in the first instance by SARS itself.

64. A further allegation relied upon in the third category was the contention that Schoeman had "countersigned" certain VAT forms, whereas Schoeman had only signed them confirming the details of the owner of the bank account. The word "countersign" is suggested to have conveyed the innuendo that Schoeman was confirming the facts inserted in the VAT forms. While I accept that there may be some merit to this contention, its materiality strikes me as limited. As a fact, Schoeman did sign the VAT forms. The VAT forms were placed before the court as annexures. While the word "countersigned" may have been too broad, I doubt that there was any great import in this error.

65. The next area of complaint under the third category was the reference to the failure by the Indo-Atlantic group to have paid PAYE. Schoeman alleges that the failure to pay was simply a timing error, rather than a contravention of the Act. The non-payment of PAYE formed such a small element of the papers that I doubt that it had any material bearing on the judge's discretion when granting a provisional restraint order or confirming it.

(iv) The fourth group

66. The fourth category of complaints falls under the description of facts that were alleged by the first respondent whereas Schoeman and his entities had a defence to the contentions. Examples of these include the statement that 7 000 to 8 000 documents had come into the possession of the NDPP which it had not yet considered, while Schoeman says that the documents in fact do not incriminate him. Another example is the reliance on a fax sent by Van Staden, which Schoeman claims he had no knowledge of. Then there is the failure to have disclosed that Schoeman was not involved in ensuring compliance with the Income Tax Act insofar as it related to PAYE. In my view these allegations are unsupportable. It was not incumbent on the first

respondent to speculate what Schoeman would raise in the form of denials. Nor do I consider that the statements in isolation or together are misleading.

(v) The fifth category

67. Finally, Schoeman complains extensively that the NDPP delayed in obtaining a statement from De Vries, That statement, it was argued, ought to have been obtained prior to the provisional restrain order being sought.

68. It is unclear how this averment can sustain a case for fraud or dishonesty. In his papers the first respondent explains the steps that were taken to obtain De Vries's statement. If there was an error, it appears to have been bona fide rather than deliberate. Moreover, this point was argued before the SCA in Van Staden, on what appears to have been the same or very similar facts, and rejected by that Court.

69. To sum up, I am prepared to accept, for the purpose of this application, that in certain instances the averments made by the first respondent strayed beyond what was appropriate in *ex parte* motion proceedings. In particular, this includes the use of the expressions "channelling" and "irregular" in relation to the manner of payment of the VAT refunds. (I stress that I do not find that, on the basis of evidence subsequently obtained, that those descriptions are necessarily incorrect.)

70. The issue in this matter is however not whether the NDPP erred by reference to the principles applying to the disclosure of information in *ex parte* proceedings. The question is whether the applicants have made out a basis for the rescission within the exceptional jurisdiction accepted by Scott JA in Phillips (2). To succeed, it was necessary to prove, as they alleged, fraud and dishonesty. This is not a light onus. It requires evidence not only of an incorrect or misleading statement, but of a subjective intention on the part of the first respondent to mislead the court.

71. I do not believe that the papers reveal such an intention. Apart from the possibility that these allegations might in fact have been correct (to which I revert below), the statements in question strike me as overzealous argument rather than fundamentally misleading facts. Further, a curious aspect of Schoeman's challenge lies in his response to the application after the provisional order was served on him. On the advice of counsel and an attorney, he elected not to oppose the return day. He must have read the papers, and he consulted, by his admission, his counsel and attorney, who would also have studied the papers. Had Schoeman genuinely felt that the averments were false (and *a fortiori* fraudulent and dishonest) I have no doubt that he would have said this to his counsel. And had he revealed to his counsel that the statements were false and in his view dishonest, this would have presented them with an obvious basis to seek discharge of the provisional order. Inexplicably, Schoeman elected to abide the confirmation of the provisional order.

72. The same comments apply to the proceedings when the amendment and amplification of the order was sought before Allie J. There, again, an opportunity presented itself for Schoeman to have challenged the correctness of the basis upon which the application was moved, and also to assert the suggested fraud and dishonesty on the part of the first respondent. Further, in the proceedings before Steyn J, a competent basis (on the applicants' argument) for seeking the rescission, and not merely the variation, of the order presented itself. Again, inexplicably, these averments were not raised.

73. The facts, in my view, suggest strongly that Schoeman and his associated entities made conscious and informed decisions to abide those orders. Their conduct, under the circumstances, amount to acquiescence: see Abrahams (*supra*).

Rule 42?

74. Having concluded that no basis in terms of the common law is made out, it remains to consider briefly whether Rule 42 might assist the applicants. In

Phillips (2) the question whether Rule 42 might avail a respondent confronted with a restraint order under section 26 of POCA was not raised. I will assume in favour of the applicants that, insofar as Rule 42 restates the common law, the Rule may be relied on in cases of fraud.

75. The ambit of the Rule was discussed in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at [6] ff:

> "[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.
>
> [7] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case the application was, as far the Rule is concerned, only based on Rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted.
>
> [8] The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities. …"

76. Streicher JA further considered the ambit of the Rule, where a party is in default of appearance, in Lodhi (*supra*) at para [17] and following:

> "[17] In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the Judge who granted the judgment. …
>
> [25] … a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, …."

77. Given the findings that I have made above under the common law grounds, Rule 42(1) cannot avail the applicants. Traverso DJP, Meer J and Allie J were all procedurally entitled to proceed as they did. Schoeman and his entities

elected not to oppose the confirmation of the provisional order sought before Meer J and the amplification of the order sought before Allie J. And the errors in the papers relied on by Schoeman do not in my view constitute errors that would qualify as such for the purposes of Rule 42(1)(a).

Discretion

78. In case I am incorrect in my assessment of the errors in the papers and the motive on the part of the first respondent in moving the orders sought to be impugned, and accepting for the purposes of argument that the first respondent might have been motivated by zealousness or otherwise to assert facts known to be incorrect, or did so negligently as contended by the applicants' counsel in the alternative, the question arises how I should exercise a discretion to rescind the orders sought to be impugned. It is trite that I would have such a discretion if fraud as contemplated in Phillips (1) and Phillips (2) were established. In Phillips (1) Howie P expressed the discretion, in respect of the return day, at [29] as follows:

> "If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the latest Court will have regard to the extent of the nondisclosure; the question whether the first court might have been influenced by proper disclosure; the reasons for the nondisclosure and the consequences of setting the provisional order aside."

See also the judgment of Nel J in Gardener v Walters NNO (In re Ex p Walters NNO) 2002 (5) SA 796 (C) at 808F – 809A.

79. I would also have a discretion to rescind the order even if an error were to have been committed as contemplated under Rule 42 (see Colyn (*supra*) at [5], Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase 1992 (4) SA 852 (A) at 862G – 863A).

80. The background facts, relating to the fraud by Van Staden and the Indo-Atlantic group, have been discussed above. Insofar as they relate to Van

Staden and the group, they are not challenged by Schoeman. Schoeman assets his own innocence, rather than the innocence of Van Staden and his group. In Van Staden the SCA noted (at para [25]) that Van Staden did not deny that De Vries and Botha had committed fraud. The SCA however also found that Van Staden could not have been ignorant of the source of such a large amount of money. It further found (at [28]) that there is a probability that Van Staden benefited from the fraud to the extent of R100 million.

81. It is not in issue before me that Schoeman's firms were paid R37 million as "facilitation fees" in the three years in question, in relation to the VAT refunds. Those payments were made over and above fees for work done as the accountant and auditor. The question arises why Indo-Atlantic would pay such a large amount of money to Schoeman's entities in these circumstances.

82. The facts show that the VAT refunds were paid into the accounts of the S&D entities. After deduction by the S&D entities of the facilitation fee percent (between 10% and 15%) the balance was on-paid as designated by Van Staden. But only about R180 million of the R248 million was paid to one of the supposed VAT vendors, Indo-Atlantic Shipping. The balance was paid to Indo-Atlantic Holdings (Pty) Ltd, to creditors, to Van Staden personally and to Van Staden's minor son. Schoeman makes the point that the on-payments were made as instructed by Van Staden, and they are not in themselves an indication for any wrongdoing.

83. The case for the first respondent however goes further. Invoices from Isotherm for the period June to August 2006 reflect a Mauritian delivery address. Invoices for August 2008 do not do so. Email exchanges between Schoeman, Van Staden and Botha in July 2008 reflect that Shoeman asked Van Staden to:

> "please email the turnover invoices; need to remove the delivery address as the current invoices should be zero rated"

a request that was later added to by saying:

"[s]orry need purchase invoices from Isotherm".

84. The first respondent asserts that the emails make no sense. If Indo Seafoods had in fact bought fish from Isotherm and had delivered it to Mauritius, there ought to have been no input VAT reflected on the invoice. The sequence above shows, it is argued, that Schoeman was a party to the fabrication of the invoices.

85. The first respondent also points to the fact that when audit queries were raised Schoeman attended to them himself. A VAT control account was maintained by staff at Indo-Atlantic. Botha's assistant, Claudia Mannel compiled a list of legitimate VAT input and output transactions for August 2008, and sent it to Botha. The total input VAT on the spreadsheet is R58 875.09. The content of that spreadsheet was carried over into the VAT control account submitted to SARS. The VAT control account however includes five additional entries referring to transactions with Isotherm. Those additional five entries raise the VAT input claimed to almost R11 million. Two of the invoices used to claim the additional five entries were found in Schoeman's study.

86. As far as can be ascertained, it is Schoeman's case that the facilitation fee was simply paid for the paperwork completed by Schoeman. Schoeman seeks to exculpate himself from the preparation of misleading and dishonest documentation by illustrating how little involvement he had in the affairs of the Indo-Atlantic group and in the underlying facts. He states that he has 'no knowledge of the affairs of the Indo-Atlantic group', that he had 'no insight into the Indo business' and that he never saw any VAT documentation after Indo took over the processing" (of the VAT documentation, it seems).

87. Three emails in particular appear to cast further doubt on Schoeman's version. One, dated 24 June 2008, from Botha to Schoeman reveals that Botha was 'starting to feel very uncomfortable with the whole VAT situation' and asked whether Schoeman had had any further discussions with Johan (presumably Van Staden) about the situation. Botha continued:

> "I want to know from you should something go wrong what my liability will be because I handed these things in/prepared them.
>
> I surely don't want to gain any liability for something that I had no direct gain in."

88. In a second and third email from Van Staden to Schoeman and Botha, both on 16 November 2009, Van Staden requested assistance in providing information in response to queries raised by SARS. The tone of the emails reflects anxiety. Van Staden urged that "It is time to stand together now ...".

89. Those mails, together with July 2008 correspondence and the documentation found at Schoeman's study, all seen in context, cast doubt on Schoeman's claimed lack of knowledge of, and involvement in, the underlying facts.

90. Then there is the payment of R37 million facilitation fees to Schoeman's entities. On Schoeman's version those fees are difficult to fathom. Counsel for Schoeman described them as a "windfall", and pointed out that the facilitation fee had been agreed in a letter dated 28 June 2005. However, no sensible commercial rationale for the Indo-Atlantic group giving up 10 to 15% of cash which (on Schoeman's version) it had paid out as VAT and reflected in the declared VAT inputs. I find the suggestion by Schoeman that Van Staden agreed to pay such vast sums for little discernible contribution by Schoeman improbable. The label 'facilitation', suggesting that both Van Staden and Schoeman saw Schoeman as deserving the payments because he was facilitating something, is possibly an indication of its *causa*. But the mere completion of VAT forms and making available the bank accounts of the S&D entities strikes me as unlikely to have been the extent of Schoeman's 'facilitation', given the very large remuneration. It reinforces, I think, the contention that Schoeman was more involved than he admits.

91. Schoeman's case is not assisted by his conduct in the proceedings before Steyn J. I deal below with the findings made by Steyn J, but note for present purposes that she found Schoeman not to be a credible source of information (see Steyn J's judgment at [31], [32], [35] and [36]).

92. I accept that Schoeman may in due course be vindicated in his claims. However, the threshold requirement for a restraint under section 26(3) of POCA was restated in Rautenbach and quoted in Van Staden as follows:

> "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 some other unlawful activity. What is required is only that it must appear to the court, on reasonable grounds that there might be a conviction at 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 the evidence has not been placed before it) and whether that evidence might reasonably be believed." (my emphasis)

93. In my view, on that statement of the test the facts before me justify the grant of the restraint orders, on the merits.

94. Dealing with the alleged wrongdoing by the first respondent in seeking the orders, the explanation offered by the first respondent is detailed. The suggested dishonest and fraudulent statements relied upon by Schoeman are traversed in some detail in the papers.

95. A further consideration are the findings made by Steyn J. The curator had pointed out that since August 2010 Schoeman attempted to dissipate assets. Steyn J found that Schoeman had failed to make a full and frank disclosure of property that was subject to the restraint order. She also found that, unbeknown to the curator, Schoeman had paid an amount of about R597 000 to one Lipman in the period from April to June 2009 in highly suspicious circumstances, Schoeman had put vehicles up for sale in wilful contravention of the amended restraint order. She also found that the court could not rely on information provided by Schoeman.

96. I would not have been prepared to exercise my discretion in favour of the applicants, taking into account all of the considerations above.

The execution of the order

97. This brings one to the complaints made about the manner in which the restraint order was put into effect.

98. Schoeman complains about a number of matters in this regard. He points out that, contrary to the requirements of the order, it was not served by the sheriff. He asserts that an attempt was made to procure his waiver of rights when the order was executed. It is pointed out that property in excess of the value prescribed by the provisional restraint order was attached, a defect only cured by the later amplification of the order by Allie J. He further complains that the assets have not been valued. Finally, he complains that the affidavit promised by the first respondent in respect of De Vries was only furnished 10 months later.

99. All of these complaints are dealt with comprehensively in the answering papers, and one of them is dealt with in the SCA judgment in Van Staden (see judgment at [4] to [19]).

100. Whatever merit there may be in these complaints, it is clear from the authorities that I do not have a discretion to rescind the orders based on them: see Phillips (1) [35]-[36] and Phillips (2) at [21].

Variation

101. As noted above, in the alternative to the claim for rescission, Schoeman and the other applicants seek a variation of the various orders as prayed in the notice of motion.

102. In argument before me Mr Stransham-Ford indicated that the application for variation is persisted with, but no longer in relation to living expenses, nor in relation to future legal expenses. The application is only sought in respect of past legal expenses.

103. The jurisdiction to vary the order is given under section 26(10) and subsections 28(2) and (3). They have been discussed above. For the reasons given, I am not persuaded that I should exercise the powers under those sections as prayed.

104. An additional consideration is that the restraint order already caters for the possibility of the payment of legal fees. This is contained in paragraph 1.4.1 of the order, which mirrors section 26(6) of POCA. They contain unobjectionable inbuilt mechanisms which in turn was made subject to the respondent complying with certain pre-requisites. The effect of the variation sought in this matter would be to permit the payment of monies without qualification (see para 3 of the notice of motion), which would in my view be inappropriate.

105. A further fundamental difficulty with the application is that it follows the preceding application dismissed by Steyn J. In that matter it is clear that Schoeman was given fair opportunities to place material before her to persuade her to exercise her discretion to release funds. She made extensive findings adverse to Schoeman. She refused the application. Schoeman's argument that Steyn J misinterpreted the restraint order is not impressive. There was no appeal from Steyn J's order and it accordingly stands.

106. Schoeman's obvious remedy was to comply with the requirements of the order, and to explain his prior conduct in this matter, particularly the failure to disclose his assets and his attempts to evade the effect of the order. The first respondent has pointed out that in the disclosure before me, Schoeman has made the same disclosure as he made before Steyn J. Schoeman concedes this in reply. It is therefore clear that he has gone no further than the material placed before Steyn J.

107. Insofar as the request extends to past legal expenses, these have not been articulated before me, apart from the difficulties mentioned above.

108. I am accordingly not satisfied that a basis for this aspect of the relief has been made out.

Appeal

109. The last aspect of the relief sought concerns paragraph 5 of the notice of motion, which is to the effect that I should order that in the event of an appeal from this judgment the payment of expenses should be made with immediate effect. Apart from the obvious difficulties with this prayer in the light of what I have said above, it would also appear to be in conflict with the provisions of section 29A of POCA, which provides:

> "Variation and rescission of certain orders suspended by appeal - the noting of an appeal against a decision to vary or rescind any order referred to in sections 26(10), 28(3) and 29(7) shall suspend such a variation or rescission pending the outcome of the appeal."

110. I do not have any power to deviate from the prescripts of section 29A.

The constitutional argument

111. As noted above, emphasis was placed by Mr Stransham-Ford on an argument that asserted the unconstitutionality of the provisions of POCA. By reference to statues in other countries and overseas authority, he argued that threshold test under POCA, and as accepted by our courts, is impermissibly light. It permits a restraint to be placed on assets (and thus impair a respondent's right to property), merely when a court considers that "there might be a conviction and a confiscation order". The test, he argued, should be a heavier one. It should require that there be grounds for the court to find that there permissibly may be a conviction and a confiscation order. The introduction of the underlined words would require proof beyond a reasonable doubt. The current regime, he argued, leads to a supposition of guilt on tenuous grounds which not only infringes unconstitutionally a respondent's right to property, but also infringes the right to be presumed innocent.

112. Implicit in this argument is the acceptance that higher courts have approved the threshold test as formulated (see Kyriacou, Rautenbach and Van Staden at [10]). I am therefore bound by those decisions.

113. The argument before me is at best a collateral constitutional challenge, as contemplated by Skweyiya J in Phillips (3) at [43]. This is not permissible. Before me, there is no direct challenge to the constitutional validity of the provisions of POCA. This was required had it been the applicants' intention to impugn the provisions on this basis: see Phillips (3) at [37]-[45].

114. This this argument thus does not need to entertain me any further.

Valuation

115. There is one last matter that has arisen.

116. Schoeman has complained that the curator has not valued the assets as required under the POCA regulations, an allegation that the curator admits. Before me Mr Marcus, who represented the curator, indicated that the curator has no difficulty with valuing the assets. He pointed out that this is likely to be a costly exercise, and understands that Schoeman is reluctant to bear the costs of such a valuation since (on Mr Schoeman's argument he is the victim of his assets having been restrained improperly).

117. It is no doubt cognisant of these sorts of difficulties that Skweyiya J in Phillips (3) said at [55]:

> "A final comment should be made. Given the limited powers of variation and rescission provided for in s 26(10) of the Act, courts making restraint orders should take care to ensure that their terms are sufficiently flexible to ensure that the preservation of property subject to restraint orders is not imperilled by the terms of the restraint order. The NDPP, too, in formulating draft orders should bear these considerations in mind."

118. Although referring to the preservation of assets, those comments are equally apposite to discharge of duties under the POCA regulations.

119. Mr Budlender accepted that the assets should be valued, but submitted that the costs should be paid by the second respondent, out of his fees. Unfortunately this point was raised belatedly in the matter, and no prayer for relief was sought based on it. Mr Marcus was also not present when the matter was argued on 23 June. In the circumstances I do not consider that I should intervene to grant an order in this regard.

Costs

120. There is no reason for costs not to follow the result. This matter is substantial, and the costs of two counsel have been justified.

121. The matter is unusual in a number of respects. As indicated above, Schoeman has set about making extensive allegations of fraud and dishonesty against public officials. These officials, I am satisfied, sought to discharge their public duties. I found that the allegations of fraud and dishonesty are unjustified. I have not lost sight of the fact Schoeman was perhaps buoyed by the judgment of Blignault J in Van Staden in the court *a quo*, where Blignault J accepted that the first respondent had acted improperly in seeking the restraint order. However, prior to the launch of this application on 7 May 2013, the SCA judgment in Van Staden was handed down. It is not apparent from the papers before me that any cognisable effort was made to take into account what the SCA found, when reversing Blignault J's judgment.

122. Schoeman must have appreciated that in a case of this nature the stakes are raised, at his instance. Having cast his bread on the water by making repeated allegations of fraud and dishonesty, he must bear the consequences. While I appreciate that in Phillips (1) Howie J was "only just" minded not to make a punitive costs order (see the judgment at [45]), the conduct of Schoeman in this case in my view merits such an order. The allegations have been extensive, and there was no apparent attempt made to temper the allegations given the finding of the SCA in Van Staden.

123. There one further aspect of the matter. Although in his main argument Mr Stransham-Ford withdrew allegations made by him against the first respondent's counsel, in his heads filed in reply he stated this:

> "4.6. Mr Schoeman's case for rescission is based on malfeasance and dishonesty in the representations made to the ex parte Judge as well as the conduct before, during and after restraint and seizure.
> 4.7. ...
> 4.8. There was an admitted failure of the ex parte judge to interrogate the propositions put by the Applicant or his counsel.
> 4.9. There was an admitted failure by counsel in the ex parte application to make full disclosure and properly represent the interest of the defendant as he was bound to do.
> 4.10. In the result the order sought was rubberstamped." (my emphasis)

If the words underlined were intended to refer to the first respondent's counsel, the submissions were inappropriate. No such case was advanced in the papers.

124. In the circumstances, I make the following order:

> **The application is dismissed with costs on the scale as between attorney and client, such costs to be payable by the applicants jointly and severally, and to include the costs of two counsel, and are further to include all costs reserved by previous orders in this matter.**

_____

BUTLER, AJ

Appearances:

For the applicants:	Adv. R J Stransham-Ford
Instructed by:	Willem Jacobs & Associates
For the first respondent:	Adv. G Budlender SC & Adv. K Saller
Instructed by:	The State Attorney
For the second respondent:	Mr R Marcus, Cliffe Dekker Hofmeyr