IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6277/2014

(in conjunction with) Case No: 20738/2008

Reportable

In the matter between:

MARIA NAOMI VAN STADEN First Applicant

MARIA NAOMI VAN STADEN
former representative and legal guardian of
PETER GABRIEL VAN STADEN Second Applicant

and

L KNOETZE N.O. First Respondent
Curator in the Restrained Estates
Swordfish Trust IT
Johan van Staden
DELOITE Forensic & Dispute Services Cape Town

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS Second Respondent

In re the ex parte application of

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Applicant
and	
JOHANNES ERASMUS VAN STADEN	First Defendant
GERHARD PHILIP BOTHA	Second Defendant
MARC SCHOEMAN	Third Defendant
CAREL BRAAM DE VRIES	Fourth Defendant
S & D CONSULTING SOMERSET WEST (CA) (SA) (PTY) LTD	Fifth Defendant
JOHANNES ERASMUS VAN STADEN N.O. (in his capacity as trustee of the Swordfish Trust)	First Respondent
MARIA NAOMI VAN STADEN N.O. (in her capacity as trustee of the Swordfish Trust)	Second Respondent
MARC SCHOEMAN (in his capacity as trustee of the Swordfish Trust)	Third Respondent
MARC SCHOEMAN & ASSOCIATES	Fourth Respondent
GARY WYBROW NEWMARK	Fifth Respondent
JAN GABRIEL DU PREEZ	Sixth Respondent
MARIA NAOMI VAN STADEN N.O.	Seventh Respondent
CHANTELLE VENTER	Eight Respondent
ANDEA VAN STADEN	Ninth Respondent

PIETER GABRIEL VAN STADEN (herein represented by his mother and legal guardian MARIA NAOMI VAN STADEN)	Tenth Respondent
INDO ATLANTIC MOTORCROSS (PTY) LTD	Eleventh Respondent
TRIBAL ZONE TRADING 584 CC	Twelfth Respondent
MICHELLE LE ROUX	Thirteenth Respondent
RYNO ENGELBRECHT N.O. (in his capacity as Liquidator of Indo Atlantic Group Holdings (Pty) Ltd (in final liquidation)	Fourteenth Respondent
BRYAN SHAW N.O. (in his capacity as Liquidator of Indo Atlantic Sea Foods (Pty)Ltd trading as Ocean Fishing (in provisional liquidation)	Fifteenth Respondent
CHRIS VAN ZYL N.O. (in his capacity as Liquidator of Indo Atlantic Shipping Ltd (in provisional Liquidation)	Sixteenth Respondent

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JUDGMENT DELIVERED ON 23 APRIL 2014

BOQWANA, J

Introduction

[1] The applicants lodged an application on 08 April 2014 on an urgent basis which came before me on 11 April 2014. They seek an order for payment of living expenses against assets restrained in terms of a provisional order granted *ex parte* by this Court, per Traverso DJP on 12 December 2008 and confirmed by the Supreme Court of Appeal (on petition) on 28 November 2012. That order was

granted in terms section 26 of the Prevention of Organised Crime Act[1] ('POCA'). The living expenses sought to be paid are as follows:

1.1 Travel costs of R30 000;

1.2 Removal costs of R130 000;

1.3 Salaries outstanding to farm employees at R110 500;

1.4 Relocation of farm employees and their movables at R30 000; and

1.5 Monthly living expenses of R60 800 per month with effect from 01 April 2014.

[2] The second respondent ('NDPP') filed a separate application in terms of Rule 33(4) of the Uniform Rules raising a question of law and seeking declaration that such point of law be decided separately. The legal issue raised by the NDPP is whether the applicants have sufficient interest in the property to which their application relates, to seek the relief they do.

[3] In the alternative the NDPP seeks the Court to postpone the matter to a date determined by the Court subject to an agreed timetable for filing of answering papers on the merits of the case. A similar request was made by the first respondent ('*curator bonis/ curator*') who filed an affidavit stating that he required time to deal in detail with the allegations raised by the applicants in their affidavit, but nevertheless placed some facts before the Court which he alleges were recently and co-incidentally disclosed by his investigations, which appear to undermine the allegations made by the applicants. The *curator bonis* also filed another affidavit, upon the request of the NDPP, to advise on what assets were currently under curatorship pursuant to the restraint order of 12 December 2008. I deal with that issue later on in this judgment.

[1] 121 of 1998

[4] At the hearing of this matter, Counsel for the applicants advised the Court that he was in agreement that the point of law raised by the NDPP should be heard and determined first. I adopted that approach as I found it to be the most appropriate for purposes of convenience and expediency. Parties were therefore required to address me on two issues, which were urgency and applicants' entitlement to the relief sought (i.e. the point of law). I first deal with the point of law but before I do so, it is important to briefly set out factual background to this application.

Factual Background

[5] On 12 December 2008, an *ex parte* provisional restraint order was granted by Traverso DJP in terms of section 26 of POCA against assets of various defendants, including first defendant, Johannes Erasmus van Staden ('van Staden'), and respondents related to him, including the applicants. The first applicant is van Staden's wife and the second applicant is their 21 year old son. The applicants were cited as seventh and tenth respondents in the restraint application respectively.

[6] The effect of the order was to restrain dealings with realisable property of the defendants and various respondents, disclosure and surrender of such property pending a criminal trial for alleged fraud committed against the South African Revenue Service ('SARS'). A 'defendant' as defined in Chapter 5 of POCA 'means a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not and includes a person referred to in section 25(1)(b)'

[7] Van Staden and the first applicant are trustees of the van Staden family trust, the Swordfish Trust ('the Trust'), which was created by a trust deed dated 3 March 2004. In their capacity as trustees of the Trust they were cited as first and second respondents in the restraint application respectively. The first respondent was

appointed as *curator bonis* to take care of and administer the assets that were seized.

[8] Van Staden and the respondents in the restraint application opposed confirmation of the provisional restraint order and on 09 March 2011, the provisional restraint order was discharged by Blignault J.

[9] The NDPP petitioned the Supreme Court of Appeal ('the SCA') and on 28 November 2012, the SCA upheld the appeal and confirmed the provisional restraint order of 12 December 2008.

[10] Following the discharge of the provisional restraint order by Blignault J, assets held by Van Staden or on his behalf were returned to their respective owners. Once the provisional order was confirmed by the SCA some nineteen months later the *curator bonis* again took possession of the assets held by or on behalf of van Staden. At that stage, according to the NDPP, all movable property was disposed of by Van Staden, trustees and family members leaving only three immovable properties which the *curator bonis* took control of. These properties were:

9.1 Farms Rocks Ferry and Bambata in Limpopo province ('the farms');

9.2 Sectional title townhouse unit 22 and 40 La Rouge, Parklands ('the Parklands property');

9.3 Sectional title unit 19 SS DeoFortuno, Pretoria ('the DeoFortuno property'), owned by Anndia van Staden.

[11] The farms were apparently sold. The *curator* has alleged in his affidavit that the net proceeds of the sales of the farms, Bambata and Rock Ferry, formerly owned by the Trust are in the amount of R5 985 million and were invested at Nedbank in an interest bearing account. He also confirmed the existence of two

other properties, i.e. the Parklands property and the Deo Fortuno property (owned by Anndia van Staden). He further stated that he is unaware of any other assets belonging to the Trust, Anndia van Staden, the first and second applicants, van Staden or Chantel Venter under restraint.

The point of law

[12] The point of law raised by the NDPP is that the restraint order was properly directed to van Staden and his fellow defendants and was properly directed separately to the trustees, the first and second applicants and others as respondents. The applicants seek payment of living and other expenses from assets held by the trustees and Anndia van Staden and according to the NDPP they are not entitled to that relief. The NDPP relies on the Constitutional Court decision of **Naidoo and Others v NDPP and Another**[2] to support their argument.

[13] Under the heading *locus standi*, the first applicant alleges that she brings the application as a respondent to the main application ('restraint application') with a direct link to the assets under restraint, but also as a wife of the first respondent in the restraint application (i.e. van Staden cited in his capacity as a trustee therein) and as a mother of a 21 year old son, with a granddaughter of 3. She alleges further that she has a 75 year old mother and four farm employees with minor children to care for. All of whom, she alleges, are directly impacted upon by the restraint order and have for years endured hardship.

[14] She states that the provisional restraint order of 12 December 2008, makes no provision for living expenses or for dependent members of their family and for six years they have existed with no means whatsoever, save for the period between 9 March 2011 and November 2012.

[15] In their founding papers, applicants allege that they are entitled to bring the application for reasonable living expenses in terms of sections 26(6) (a) and (10)

[2] 2012 (1) SACR 358 (CC)

(a) (i) and 28 (2) (a) of POCA which they set out. I understood Counsel for the applicants to be saying that the applicants are entitled to rely on any of the provisions mentioned above. He further submitted that the application was really based on 26(10) (a) (i) and 28(2) (a) and not necessarily on section 26(6) *per se,* as an order in terms of section 26(6) had already been made (i.e. in the provisional restraint order). That proposition, in my view, seems to contradict allegations made in the founding affidavit. Be that as it may, I shall deal with each of the provisions that have been alleged and/or submitted.

The law

[16] First I deal with Section 26(6). Section 26(6) of POCA provides as follows:

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

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

(b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate,

if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.' (Own emphasis)

[17] The meaning of this section was discussed at length by Cameron J in the unanimous decision of **Naidoo**[3] referred to above. The Court found that POCA does create a mechanism through which a person may access restrained assets held by him for reasonable legal expenses. The Court dealt extensively with the conditions that have to be met upon proper interpretation of section 26(6), before an order could be made. In essence the Court found that section 26(6) made

[3] See Naidoo supra

allowance for reasonable living and legal expenses only on limited terms. It held as follows:

> '..First, the access is granted only for the legal expenses of "a person against whom the restraint order" was made. Second, it is conditional on full disclosure. Third, the person must not be able to meet the expenses concerned out of his or her unrestrained property. Given these conditions, it is not a plausible interpretation that access can be given to property held by a person other than the person against whom the restrained order was made.' [4]

[18] In its analysis of the first condition the Court held, that the legislature envisaged individualised restraint orders and although 'realisable property' encompassed property held both by a defendant and by those to whom he has made 'affected gifts', a separate restraint order had to be obtained for each individual and the kind of property they held.[5] Secondly, the property restrained as an 'affected gift' remains property held by the person against whom the restrained order in respect of that person was made.[6] Ownership of the property is not transferred by the restraint order to any other person.[7] The second condition was that access to the assets is conditional upon full disclosure of interest in property subject to the restraint order and thirdly the person whose expense must be provided for must not be able to meet the expenses concerned from his or her unrestrained property. Affected gift in Chapter 5 of POCA is defined as:

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

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[4] See Naidoo supra at paragraph 20
[5] See Naidoo supra at paragraph 24
[6] See Naidoo supra at paragraph 22
[7] See Naidoo supra at paragraphs 22 and 24

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection, whether any such gift was made before or after the commencement of this Act'

[19] The Court found further that interpreting section 26(6) widely would run counter to the purpose of the scheme and the provision for reasonable living and legal expenses was narrowly crafted with an overall legislative purpose of discouraging defendants who faced criminal prosecution from hiding their assets. It held that if the alleged proceeds of crime are retained by the defendant, they remained available for the provision of living and legal expenses.[8]

[20] The principles in **Naidoo** were later confirmed in the majority decision of **National Director of Public Prosecutions v Elran**[9] by the Constitutional Court.

[21] Counsel for the applicants argued that **Naidoo** does not apply in the present matter because it dealt with legal expenses and not living expenses. I disagree with this submission and find it to be quite narrow. **Naidoo** pronounced on principle. To confirm this, it held as follows in paragraph 26 of the judgment:

' [26] It follows that section 26(6) empowers a court to grant provision for reasonable living and legal expenses only in respect of a person against whom the restraint order is made, and only in respect of the property held by that person. This emerges from section 26(2)(a). This permits a restraint order to be made in respect of property held by the person "against whom the restraint order is being made. Each restraint order, in other words, is individualised.' (Own emphasis)

[22] If the Court confined its findings to legal expenses, it would have referred to section 26(6) (b) only and not to 26(6) as a whole. That submission therefore has no merit and must accordingly fail.

Application of the Naidoo case to the facts of this case

[8] See Naidoo supra at paragraph 30
[9] 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) at paragraphs 78 to 81

[23] Applying the **Naidoo** principles to the facts of this case. In the present matter restraint orders were directed separately to property held by van Staden, and his fellow defendants and separately to the trustees, first and second applicants, and others as respondents.

[24] The assets remaining with the *curator* are those belonging to the Trust and to Anndia van Staden. It appears from the founding papers of the applicants that they seek funding of their living and other expenses from the proceeds of the farms which were owned by the Trust.

[25] The trustees are not before this Court, neither are all the beneficiaries of the Trust. As the papers stand, the applicants have brought this application in their individual capacities. It is not enough, in my view, for the first applicant to allege that she is a trustee and a wife of another trustee (who is not party to the application) and is linked as a respondent to the restrained property by the restraint order. It is also not satisfactory that only two beneficiaries would bring this application in an instance where more than two beneficiaries were listed in the trust deed.

[26] I am persuaded by the views submitted by Counsel for the NDPP regarding the importance of ensuring that the enjoyment and control of the trust are kept functionally separate. This, indeed, is especially so in family trusts which are susceptible to abuse. This principle was emphasised in the matter of **Land and Agricultural Bank of SA v Parker and Others**[10]. The Court further stated in that matter, that whilst a trust did not have legal personality the trust estate vested in the trustees and must be administered by them and it is through the trustees that it acts. Secondly, in the absence of authorisation in a trust deed, trustees must act jointly.[11]

[27] In view of the trustees and van Staden not being before Court they cannot be called upon to make full disclosure of their interest in the restrained property and

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[10] 2005 (2) SA 77 (SCA)at paragraph 22

[11] Land and Agricultural Bank of SA supra at paragraphs 9 and 10

to satisfy the Court that they cannot meet the expenses concerned out of their unrestrained property as required by section 26(6) before an order is made for living expenses to be paid out of the proceeds of the farms that formerly belonged to the trust. I mention van Staden not only as a trustee but also as one of the persons in whose interest the application is supposedly brought.

[28] It is common cause that the properties went back to their respective owners when the provisional order was discharged. Trustees would need to explain, amongst other matters, what happened to the assets that they held for the period of nineteen months before the provisional order was confirmed by the SCA, in order to satisfy the Court that, amongst others, they cannot meet expenses concerned out of the unrestrained property.

[29] I restrain myself from commenting on the merits of the case as I am not called upon to determine the merits of the application at this stage, but simply the point of law.

[30] Turning to the applicability of section 26(10) to the relief sought by the applicants. Section 26(10) reads as follows:

'(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; 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.' (Own emphasis)

[31] Counsel for the applicants urged the Court to look at the words 'a person affected by that order' in 26(10)(a). He argued that the applicants clearly qualify as 'persons affected by that order' and the words 'that order' refer to a restraint order which the Court can vary or rescind in terms of that section.

[32] The NDPP's argument on this aspect is this: Reliance on section 26 (10) (a) is misplaced because this section provides for the release to the defendant of property which would be 'the means to provide for his or her reasonable living expenses'. It is not concerned with the release of property which would enable him or her to generate income to cover his or her reasonable living expenses. The NDPP submits that their view on this aspect is strengthened by the condition attached to that section which is 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.*' It argues therefore that this provision addresses the risk that the property will not be preserved. It follows that this provision cannot be applied to money as cash would be spent and will therefore not be preserved.

[33] I am persuaded by the NDPP's argument in this regard, the Court in this instance will have to balance the hardships against the risk that the property concerned may be destroyed, lost, damaged, concealed or lost. The property referred to in the context of that section cannot be cash, in my view. This is because cash will be destroyed. That section in my view refers to the means to earn money so as to provide for reasonable living expenses.

[34] In any event, I do not believe that the legislature would in these circumstances allow one provision of POCA to make another provision meaningless. In other words allowing a person to choose to rely on section 26(10)

as opposed to section 26(6) would render the strict conditions required in section 26(6) redundant.

[35] The same applies to sections 28(2) (a) and 28(3) (a) which the applicants also seem to rely on. These are 'surrender provisions', they do not assist the applicants at all with their application. The relevant provisions stipulate as follows:

> '(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*;..'

[36] These sections refer to an order contemplated in subsection (1b). Subsection (1b) states that:

> '(1) Where a High Court has made a restraint order, that Court may at any time –
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> .....
>
> (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.*' (Own emphasis)

[37] It is clear from the reading of subsection (1b) that the variation or rescission of the order that s 28(2) (a) and (3) (a) refer to is the restraint order where a person has been made to surrender property and not a living or legal expenses restraint order. Furthermore, these sections do not apply to the relief sought by the applicants as shown by the wording in clause 1.25 of the restraint order which states that:

'1.25 Defendants and Respondents are hereby ordered in terms of section 28(1)(b) of the Act to surrender all the property into the custody of the *curator bonis* forthwith after the *curator bonis* has identified himself by displaying a copy of this Order.' (Own emphasis)

[38] I emphasise the point that it would be illogical for the legislature to place requirements in section 26(6) that have to be met before an order can be made for provision of reasonable living and legal expenses but then effectively enable parties who have failed to meet such requirements to obtain the same relief by relying, in the alternative, on other provisions of the same Act.

[39] I agree with the NDPP's submission that section 26(6) is the only available section for an order to be made for release of cash for living and legal expenses against restrained property in these circumstances and the conditions of that section must be met, which are that: payment may only be granted in relation to property of the person seeking the order; upon full disclosure of the interest of that person in the restrained property and that the person cannot meet expenses concerned out of his or her unrestrained property.

[40] The allegation that the restraint order makes no provision for living and legal expenses is untrue. Paragraph 1.41 clearly provides for those by stating the following:

> '1.41 if any Defendant or Respondent satisfies the Court that:
>
> 1.14.1 He/she has made full disclosure under oath of all his/her interests in the property subject to the restraint;
>
> 1.14.2 He/she cannot meet the expenses concerned out of his/her unrestrained property.

the *curator bonis* shall release such of the realisable property within his control as may be directed by the Court to meet:

....' (Own emphasis)

[41] As can be seen from above, the wording of clause 1.41 of the restraint order itself is similar to section 26(6) and places conditions as in that section. Those conditions as interpreted in **Naidoo** should have been met.

[42] In the final analysis, I find that the property from which payment is sought belongs to the Trust and not the applicants and that the conditions stipulated in section 26(6) have not been met. The point of law raised by the NDPP must accordingly succeed.

[43] For that reason, I do not need to deal with the issue of urgency in great detail, save to say that the applicants, on their own version, have known about their situation for over a period of five years. Counsel for the applicants submitted that the matter is not necessarily urgent but rather desperate. Whilst I am not satisfied that the matter deserved to be heard with such haste (not even affording enough opportunity to both respondents to file answering papers dealing in detail with the allegations made by the applicants), especially in a matter where the relevant restraint application allegedly contained some lengthy documents, I would have been persuaded that there is some urgency if one has regard to the allegations that applicants could be without accommodation at the end of April or early May 2014.

Costs

[44] I do not believe that it would be appropriate to make a cost order against the applicants in these circumstances. I therefore make no order as to costs.

[45] In the result, I make the following order:

1. The application is dismissed.

2. No order as to costs.

N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE APPLICANTS: Adv R Stransham-Ford

INSTRUCTED BY: Rob Green & Associates, Somerset West

FOR THE FIRST RESPONDENT: Mr R E Marcus, Cliffe Dekker Hofmeyr Inc., Cape Town

FOR THE SECOND RESPONDENT: Adv K S Saller

INSTRUCTED BY: State Attorney, Cape Town