THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 16910/11

PIENAAR VAN HEERDEN **FIRST APPLICANT**
ANTHEA LYNETTE VAN HEERDEN **SECOND APPLICANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**
ANDRE CHARL VAN HEERDEN N.O. **SECOND RESPONDENT**

Coram: ROGERS J

Heard: **3 & 5 JUNE 2015**

Delivered: **22 JUNE 2015**

JUDGMENT

ROGERS J:

Introduction

[1] On 18 March 2011 this court (per Davis J) made an ex parte provisional restraint order against the applicants (Mr and Mrs van Heerden, who are married in community of property) in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). It was alleged that the Van Heerdens, during 2009 and while employed by British American Tobacco South Africa ('BATSA'), participated with others in the theft of cigarettes. A final order was granted by Veldhuizen J on 5 October 2011 without opposition. A Mr AC van Heerden (unrelated to the applicants) was appointed as the curator bonis ('the curator ').

[2] Following disciplinary hearings the Van Heerdens were dismissed by BATSA in February and March 2010 respectively. According to the founding affidavit in the ex parte application, the disciplinary enquiry concluded that Mr van Heerden was the mastermind behind the theft of more than 590 boxes of cigarettes worth in excess of R6,25 million. Mrs van Heerden was allegedly dismissed on the basis that she was a beneficiary of the proceeds of stolen cigarettes and failed to disclose the theft to BATSA.

[3] The Van Heerdens issued the present application on 24 April 2015, citing the National Director of Public Prosecutions ('the NDPP') as the first respondent and the curator as the second respondent. In the application the applicants seek a variation of the restraint order so as to provide that the curator pay from property under his control (i) R23 579 per month to them as reasonable living expenses, to be increased from time to time at the curator's reasonable discretion upon the applicants' providing evidence of an increase in their reasonable living expenses; (ii) R250 000 to their attorneys for their reasonable legal expenses in a proposed application for the rescission of this restraint order; and (iii) R150 000 to their attorneys to defend the criminal proceedings.

[4] The NDPP opposes the application. I heard argument on 3 and 5 June 2015. Mr King SC leading Mr Engelbrecht appeared for the Van Heerdens on the first date

while Mr Engelbrecht appeared alone on the second date. Mr Titus appeared for the NDPP.

The criminal case

[5] The applicants and their co-accused appeared for the first time in the district court on 29 August 2011. After several postponements the matter was transferred to the regional court, where the accused appeared for the first time on 23 March 2012. The matter was remanded on several occasions for the State to obtain an authorization from the NDPP to institute racketeering charges in terms of s 2(4) of POCA. The certificate was obtained. On 6 July 2012 the case was postponed to 27 September 2012 for the State to supply the defence with further particulars. The matter was thereafter postponed to 8 and 9 April 2013 for plea and trial.

[6] The charge sheet comprised 41 counts. Count 1 was a racketeering charge against Mr van Heerden alone. Count 2 was a racketeering charge against him, his wife and five other accused. Counts 3 to 11 and 14 and 15 were charges of theft of specified boxes of cigarettes on specified occasions. Mr van Heerden featured in all of these charges. Mrs van Heerden featured in none. Counts 12 and 13 were generalised charges of theft of unspecified boxes of cigarettes over a period spanning a year. Mr van Heerden featured in both of these counts while Mrs van Heerden featured only in count 13. The remaining 26 counts, which were all charges of money laundering in contravention of s 4 of POCA, were grouped into three batches (16 to 19, 20 to 30 and 31 to 41). Mr and Mrs van Heerden featured in the first two batches, the alleged property being cash of R128 500 and R306 000 respectively paid into the Van Heerdens' bank account.

[7] The trial did not get underway in April 2013 because the prosecutor was ill. The case was postponed to August 2013. It was again postponed to 10 February 2014 pending judgment from the Constitutional Court in the *Savoi* case (judgment in which was subsequently delivered on 20 March 2014: *Savoi & Others v National Director Of Public Prosecutions & Another* 2014 (5) SA 317 (CC), dismissing a challenge to the constitutional validity of various racketeering offences created by s 2 of POCA).

[8] On 4 February 2014 the Van Heerdens gave notice that on 10 February 2014 they would raise an objection to the charge sheet in terms of s 85 of the Criminal Procedure Act 51 of 1977 on the ground that it did not comply with the Act relating to the essentials of a charge and did not disclose an offence. They also gave notice of a constitutional challenge to the charges under POCA. (The latter fell away following the *Savoi* judgment.)

[9] On 7 February 2014 the Van Heerdens delivered a request for further particulars and for documentation. The first two paragraphs of the request sought to clarify the virtually unintelligible allegations in the charge sheet on the first two counts (the racketeering charges). The State's allegations included the curious assertion that the criminal enterprise for purposes of s 2 of POCA was BATSA's Quality Assurance Office and Distribution Centres. In respect of each of the theft counts, the State was asked to identify Mr van Heerden's alleged actus reus and what cigarettes he was alleged to have stolen. A large range of documentation was requested, including all emails sent or received by the Van Heerdens on their work computers over the period December 2008 to January 2010 and various BATSA records such as requisitions, transport documents, invoices, stock records, operating procedures and the like.

[10] On 10 February 2014 the trial could not begin because judgment was still awaited in *Savoi* and because of the Van Heerdens' unanswered request for further particulars. The matter was postponed by agreement to 14 April 2014. As noted, by virtue of the *Savoi* judgment delivered on 20 March 2014, the constitutional challenge fell away.

[11] On 4 April 2014 the State furnished its reply to the request for further particulars. The State persisted in the allegation that the criminal enterprise was BATSA's Quality Assurance Office and Distribution Centres. For the rest, the answers were said to appear from the statements in the docket. In regard to the request for documentation, the State said that it had requested BATSA to indicate if it was able to supply the Van Heerdens with the requested documents.

[12] On 14 April 2014 the case was further postponed so that the Van Heerdens' legal representatives could consider the reply. By agreement the matter was postponed to 4 November 2014 for plea and trial.

[13] On 17 October 2014 the Van Heerdens again gave notice of their intention to object to the charge sheet, complaining that the State's reply to the request for particulars did not identify or clarify the essential elements of the charges and that the requested documents had not been supplied.

[14] On 4 November 2014 Mr King SC appeared for the Van Heerdens. He submitted heads of argument in support of the objection to the charges. The case was postponed to 17 November 2014 to give the State opportunity to prepare its responding submissions. On that date the prosecutor opposed the Van Heerdens' objection but submitted in the alternative that the court should give an order in terms of s 85(2)(a) and/or s 87(1)(a) of the Criminal Procedure Act affording the State an opportunity to deal with the defects. The magistrate evidently regarded the objections as sound and was not prepared to accede to the State's alternative submission. On the other hand, he did not quash the charges. He simply struck the matter from the roll. Before me, counsel were in agreement that this meant that the State could reinstate the prosecution by delivering a fresh charge sheet.

[15] On 13 March 2015 the Van Heerdens' attorneys wrote to the State Attorney complaining that their clients had been deprived of their property for three and a half years, during which time the State had not been able to formulate a sustainable charge sheet against them. The letter requested a release of assets in accordance with the relief subsequently requested in the present application.

[16] In a response dated 18 March 2015 the State Attorney's office said that the prosecuting team regretted the delay in reinstituting charges against the Van Heerdens and assured them that no malice was intended. The State Attorney recorded the prosecution team's undertaking to deliver the amended charge sheet by not later than 17 April 2015.

[17] The present application followed on 24 April 2015, by which date an amended charge sheet had not been delivered. One of the affidavits in the NDPP's answering papers was an affidavit by the new prosecutor assigned to the case. He said that the State's undertaking to deliver the amended charge sheet by 17 April 2015 was 'short-sighted' because the process is 'a prolonged one that requires sufficient time for the NDPP to approve an amended racketeering charge'. He said that the State now undertook to deliver the amended charge sheet by 31 July 2015.

The restraint application and subsequent related developments

[18] The provisional restraint order was granted ex parte on 18 March 2011, shortly before the accused's first appearance in the district court. In the founding affidavit it was stated that Mr van Heerden was implicated in the theft 590 boxes of cigarettes worth R6,25 million. (One box contains 50 cartons, with 10 packs of 20 cigarettes per carton. The specified numbers of boxes featuring in the charge sheet totalled 396 though this does not take into account the two generalised charges of theft.) From certain stock sheets alone it appeared that Mr van Heerden had stolen 272 boxes. Based on a value of R10 000 per box, Mr van Heerden's 'known benefit' was said to be R2,72 million though it might turn out to be more.

[19] The founding affidavit identified the following realisable assets belonging to the Van Heerdens: (i) R270 000 in the trust account of certain attorneys, being part of the proceeds of the sale by the Van Heerdens of a property in Heidelberg which they had sold in July 2010 for R2,4 million; (ii) an unbonded property in Paarl worth R980 000; (iii) a 2008 BMW X3 with an estimated book value of R343 444; (iv) a 2006 Opel Corsa bakkie with an estimated book value of R62 064.

[20] The provisional restraint order was in standard form. Although the order referred to an annexure 'A' supposedly specifying realisable assets to be attached, there appears to have been no such annexure. The restraint order excluded such realisable property as the curator certified in writing to be in excess of R2,72 million, adjusted for fluctuations in the value of money and the expenses relating to the property.

[21] The curator was required to file his first report by 21 September 2011[1] and to file quarterly reports thereafter.

[22] The Van Heerdens were required by para 1.36 of the order to make an affidavit describing and identifying the whereabouts of all property not physically surrendered into the curator's possession, of all property which to their knowledge would be transferred to them at any time and of all affected gifts as defined in ss 12(1) and 16 of POCA. Para 1.38 required them to file with the curator monthly income and expenditure statements together with supporting documentation.

[23] Para 1.41 of the restraint order essentially incorporated the provisions of s 26(6) of POCA relating to the release of assets for reasonable living and legal expenses.

[24] On 5 September 2011 Mr van Heerden signed a sworn statement of affairs (Mrs van Heerden did not do so, but Mr van Heerden's statement covered the joint estate). In addition to the assets mentioned in the ex parte application, he disclosed, in annexure II, the following assets of the joint state: (i) a business called Coco Boutique with an estimated value of about R150 000; (ii) a food and packaging business called Lemon Tree Trading with an estimated value of about R350 000; and (iii) a fixed deposit of R100 000 with Capitec plus cash of R41 000 in three current accounts. In annexure III, dealing with outstanding claims, Mr van Heerden identified his claim and that of his wife against the 'BAT Pension Fund' (actually the BAT Retirement Fund – 'the Fund') in the amounts of approximately R1,2 million and R500 000 respectively, in respect of which he made the annotation 'Kept back by BAT'. Four specified insurance policies were said to have been paid up. The Paarl property was not included in the statement of affairs. As appears below, the Van Heerdens no longer owned it.

[25] The curator filed his first report on 20 September 2011. In relation to the Paarl property, he recorded that according to the Van Heerdens they had sold it during 2007. He had taken the remaining assets mentioned in the ex parte application into

[1] The order erroneously says 21 September 2010.

his possession. He attached the Van Heerdens' statement of affairs and said that he was currently considering, in conjunction with the NDPP, the best manner of dealing with the disclosed assets.

[26] The restraint order was made final on 5 October 2011. The order recorded that the Paarl property was excluded from the restraint as it was no longer owned by the Van Heerdens. The order stated, further, that the restrained property included the property and interests disclosed by the Van Heerdens in annexure II of the statement of affairs 'as well as the pension of [Mr van Heerden] held at Sanlam under pension fund number 12146'.

[27] On 20 December 2011 the Fund wrote to the Van Heerdens' attorneys regarding the withdrawal benefits payable to the Van Heerdens. This letter read in relevant part as follows:

'Our legal adviser have [*sic*] lodged a written application to the court that issued the restraint order on behalf of the BAT Retirement Fund confirming that the fund holds value for both respondents (Mr & Mrs van Heerden) as a result of the pending criminal matter against them.

We suggested that the value held in the retirement fund for both respondents should form part of the detention order attached hereto or that he clarifies why only Mr van Heerden's value should be held.

We have followed this up a number of times with Mr Kajee [of the State Attorney] but have unfortunately not received final feedback.

We have tried again very recently but understand that Mr Kajee will only be able to provide us with an answer early in the new year.

Apologies for the delay in your request and we endeavour to do our best to finalise this matter before the end of January 2012.'

[28] On 29 February 2012 the Van Heerdens launched their first application for a release of assets (the present application being the second). By that date the termination benefits which the Fund was holding in respect of the Van Heerdens had still not been paid out. They sought the release of R30 000 per month for reasonable living expenses and R150 000 for legal expenses. In his founding affidavit Mr van

Heerden provided information concerning Lemon Tree Trading (his business) and Coco Boutique (a business in which his wife had a 50% share). They requested the release of the Opel Corsa for their personal use and for use in their businesses. They also asked that the BMW be sold and the proceeds kept by the curator.

[29] On 12 March 2012 an order was made by agreement for the release of the Opel Corsa and the sale of the BMW. The remaining relief was to stand over for determination on 6 June 2012. Later in March an arrangement was reached in terms whereof the Fund released Mrs van Heerden's termination benefit of R736 4488 to her attorneys and paid Mr van Heerden's termination benefit of R1 396 386 to the curator. The attorneys retained R150 000 in respect of legal fees and released the balance of R586 488 to the Van Heerdens. This rendered the remaining relief sought in the first application unnecessary.

[30] The present application was launched on 24 April 2015. In essence, the applicants say that they have now exhausted the money which was released to them in March 2012. I shall refer presently to the content of the affidavits.

[31] Simultaneously with the filing of the opposing papers the curator filed a second report. (He had not filed quarterly reports in accordance with the restraint order.) The curator still holds the cash of R270 000 from the Heidelberg property and about R115 000 received from Capitec. The BMW was sold and the proceeds of R142 954 placed on fixed deposit. He confirmed receipt of Mr van Heerden's pension benefit of R1 396 386 on 30 March 2012. Inclusive of accrued interest, he was holding, at the date of his second report, R2 106 922,86.

Mr van Heerden's pension benefit

[32] I raised with counsel at an early stage on 3 June 2015 whether Mr van Heerden's termination benefit from the Fund had correctly been paid to the curator, having regard to the provisions of s 37A(1) of the Pension Funds Act 24 of 1956 ('the PFA'). If the said benefit was exempt from preservation and if it should have been paid by the Fund to Mr van Heerden, the need for a release of assets in terms of s 26(6) of the Act would fall away. After considering their positions, counsel

agreed that I should determine this question. Supplementary submissions were filed and I heard oral argument on that point on 5 June 2015. Argument on the other issues was completed on 3 June 2015.

[33] For reasons I shall explain presently, I have concluded that I should not decide the s 37A(1) issue. However, and because it was argued, I shall briefly indicate the questions relevant to this issue.

[34] Section 37A(1) reads as follows:

'Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or a right to such benefit, or a right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.'

[35] In terms of s 37A(3)(c) the above prohibition does not apply with reference to anything done towards reducing or obtaining settlement of a debt which a fund may reduce or settle under s 37D. In terms of s 37D(1)(b)(ii), one of the debts which may be set off against a pension benefit is a deduction of any amount due by the member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

'(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by

reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which –

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,…'.

[36] The first question is whether POCA overrides the protection afforded by s 37A(1). There can be little doubt, I think, that s 37A(1) of the PFA overrides other laws, whether they predate or postdate s 37A , unless the later law expressly or by necessary implication overrides s 37A(1), in which event the later legislation would be a pro tanto amendment of s 37A(1). This conclusion flows from the language of s 37A(1) and from the maxim that a later general law does not override an earlier special law (see *R v Gwantshu* 1931 EDL 29 at 31; *Consolidated Employers Medical Aid Society & Others v Leveton* 1999 (2) SA 32 (SCA) at 40J-41C; *Sasol Synthetic Fuels (Pty) Ltd & Others v Lambert & Others* 2002 (2) SA 21 (SCA) at 30I). There is nothing in Chapter 5 of POCA which expressly or by necessary implication overrides s 37A(1) of the PFA. The fact that incorporeal rights are within the broad definition of 'realisable property' as read with the definition of 'property' in POCA does not appear to be sufficient to derogate from s 37A(1).

[37] The second question is whether a restraint order in respect of a s 37A(1) benefit would be an act forbidden by that section. The purpose of a restraint order granted in terms of s 26 of POCA is to preserve property pending a possible confiscation order in terms of s 18 (see *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SACR 128 (SCA) para 4). Once a confiscation order is made, the High Court may order restrained property to be realised in terms of s 30. The realisation of property pursuant to these provisions may well be viewed as a 'form of execution under a judgment or order of a court of law' within the meaning of s 37A(1). If, by virtue of s 37A(1), a pension benefit cannot be realised in satisfaction of a confiscation order, it would appear to follow that it cannot be restrained in terms of s 26 of POCA.

[38] The third question is whether the protection accorded by s 37A(1) is lost once the benefit is paid to the member. Mr Engelbrecht very properly drew my attention to

the decisions in *Foit v FirstRand Bank Bpk* 2002 (5) SA 148 (T) and *Van Aartsen v Van Aartsen* 2006 (4) SA 131 (T) para 23 which answer this question affirmatively. In the former case Basson J cited *Gibson v Howard* 1918 TPD 185. *Gibson* concerned the analogous protection accorded to a benefit payable to a miner by the Miners' Phthisis Board pursuant to the Miners' Phthisis Act 44 of 1916. *Foit* dealt with the analogous protection afforded by s 2(1) of the General Pensions Act 29 of 1979. *Van Aarsten* dealt with s 37A(1). Mr Engelbrecht also directed my attention to the fact that the word 'benefit' is defined in s 1 of the PFA as meaning 'any amount payable to a member or beneficiary in terms of the rules of' the pension fund in question. He submitted that what was said in *Foit* and *Van Aartsen* on this question was obiter and or wrong. In regard to the statutory definition of 'benefit', he submitted that the emphasis should be placed on the notion of an 'amount' (ie a quantified sum) rather than 'payable'.

[39] The prohibition in s 37A(1) and the carefully tailored exceptions in s 37D show that the persons whose protection the lawmaker primarily had in mind were those of the member and his or her dependants (see *Absa Bank Ltd v Burmeister & Others* 2004 (5) SA 595 (SCA) para 12; *Old Mutual Life Assurance Company Namibia Ltd v Old Mutual Namibia Staff Pension Fund & Another* [2005] NAHC 45 pp 17-18). If that is so, it is legitimate to ask what the point would be of shielding from execution a member's right to receive payment of a benefit but not the benefit once received. The member's right to receive payment from the pension fund does not in itself enable the member to put food on his table or a roof over his head.

[40] It will be noted that s 37A(1) affords protection to three things: (i) a 'benefit' provided for in a fund's rules; (ii) a 'right to such benefit'; and (iii) a 'right in respect of contributions made by or on behalf of a member'. The distinction drawn between a 'benefit' and a 'right to such benefit' makes it difficult to apply the statutory definition of 'benefit', since the word 'payable' in the definition would seem to mean the same thing as a right to a benefit, ie a right to be paid a benefit. Section 37A was inserted into the Act in 1976, and its current wording predates by some years the introduction in 2007 of 'benefit' as a defined term. The defined meaning could not have been present to the lawmaker's mind when it framed s 37A.

[41] There are, however, certain difficulties which would arise if one construed the word 'benefit' in s 37A(1) as meaning the money paid to the member or dependant as distinct from such person's right to receive payment thereof at a future date. One such difficulty is that the money paid to the member could quickly lose its identity in his hands as a 'benefit'. This might simply be a question of onus (if the member cannot identify the attached cash or asset as representing the benefit he received, he would not be able to show that it is protected). Another difficulty is that if the cash in the member's hands represents a shielded 'benefit', the cash would become subject to all the prohibitions in s 37A(1) and not merely the prohibition against attachment in execution of a court order, and such prohibitions might practically prevent the member from doing anything with the money. This could be overcome by a restrictive interpretation of the concepts of reduction in transfer in s 37A(1).

[42] The present case does not directly raise the question whether the s 37A(1) protection extends to the cash proceeds of the right to claim a benefit. Mr van Heerden's withdrawal benefit did not, prior to its payment by the Fund to the curator, exist as cash in Mr van Heerden's hands. What Mr van Heerden had prior to the Fund's payment to the curator was a right to receive the benefit, a right clearly falling within the ambit of s 37A(1). However the extent of the s 37A(1) protection does arise indirectly, because if *Foit* and *Van Aartsen* are correct one might say, viewing the matter pragmatically, that no harm has been done by the Fund's payment of the benefit directly to the curator: even if the Fund should have paid the money to Mr van Heerden, he would have been obliged forthwith to pay the cash to the curator in terms of the restraint order.

[43] Another argument which Mr Titus advanced was the following. In *Highveld Steel and Vanadium Corporation Limited v Oosthuizen* 2009 (4) SA 1 (SCA) the court held that it is necessarily implicit in s 37D(1)(b)(ii) that a pension fund has a discretion to withhold payment of a pension benefit pending the finalisation of civil proceedings by the employer against the member for damages arising from the alleged theft. Mr Titus submitted that here the Fund elected, prior to paying the money to the curator, to invoke its discretion to withhold the benefit in terms of s 37D(1)(b)(ii) and that the Fund was entitled to transfer the money to the curator 'for safekeeping, pending the outcome of the criminal case', at which stage it might

be paid out (presumably to BATSA) pursuant to a compensation order in terms of s 300 of the Criminal Procedure Act or pursuant to a direction of the court in terms of s 31(1) of POCA.[2]

[44] I find this argument difficult to grasp. If the Fund wished to assert that right, it should simply have retained the money. Mr van Heerden would not have been the owner of any of the cash or investments held by the Fund and would not, in view of the exercise by the Fund of its discretionary power, have had a right to enforce payment. On what basis could his curator be in a better position? I should add that the evidence does not suggest to my mind that there was an agreement between the Fund and the curator that the latter would hold the proceeds on behalf of the Fund and I do not understand how that could properly form part of a curator's powers.

[45] The most difficult of the questions discussed above is, to my mind, whether the s 37A(1) protection extends to cash received by the member in payment of a pension benefit. The restrictive interpretation of 'benefit' seems to render the protection afforded by the section largely hollow. However, and for the following reasons, I do not think I should finally decide this or any of the other s 37A(1) questions now. Whatever the correct legal position may be, as a fact the final restraint order stipulated that Mr van Heerden's pension benefit should be paid to the curator. As far as I can see, neither Mr van Heerden nor the Fund was given notice that this amendment to the provisional order would be sought. Nevertheless, the final order was made, and both Mr van Heerden and the Fund have had knowledge of it for several years. This does not mean that Mr van Heerden waived (if he could) such rights as he had under s 37A(1). I think it is fair to say that, until I raised the issue, both sides were either unaware of, or had overlooked, the provisions of s 37A(1). The argument which took place before me regarding s 37A(1) concerned in essence a proposed variation to the final restraint order so as to exclude the pension benefit.

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[2] Section 31(1) of POCA provides that where a confiscation order has been made the following sums in the hands of a curator, namely (a) the proceeds of any realisable property realised by virtue of s 30; and (b) any other sums of money, being property of the defendant concerned, shall, 'after such payments as the High Court may direct have been made out of such sums of money', be applied in satisfaction of the confiscation order.

[46] The difficulty is that Mr van Heerden and the NDPP are not the only persons with an interest in the questions (i) whether the final order correctly required Mr van Heerden's pension benefit to be paid to the curator and (ii) if not, how the error should now be rectified. By virtue of s 37D(1)(b)(ii), the Fund and BATSA have a distinct interest in the answer to these questions.

[47] It may be assumed that neither of the conditions for deduction in terms of the latter provision has as yet been satisfied, ie BATSA does not yet have a judgment against Mr van Heerden for damages suffered in consequence of alleged theft and Mr van Heerden has not in writing admitted liability. However, in terms of *Highveld Steel* supra a pension fund has a discretion to withhold payment of a pension benefit pending the finalisation of civil proceedings by the employer against the member. It appears from the Fund's letter of 20 December 2011 that the Fund may have had in mind to withhold the pension benefits payable to the Van Heerdens pending the finalisation of the criminal matter. Although the letter does not squarely assert the discretionary power recognised in *Highveld Steel*, the Fund may have contemplated that civil liability or a written acknowledgment of liability would follow if the Van Heerdens were convicted or that the regional court might make a compensation order in BATSA's favour in terms of s 300 of the Criminal Procedure Act, which would in terms of s 300(2)(b) have the effect of a civil judgment. But the Fund was faced with a court order which stated that the restrained assets included Mr Van Heerden's pension benefit. Para 1.7 of the restraint order required and authorized the curator to take all realisable property into his possession.

[48] If it were not for this order, the Fund might have declined to pay the termination benefit to either the curator or Mr van Heerden personally and instead have asserted a discretionary power to withhold payment. If the court were now to rule that the inclusion of Mr van Heerden's pension benefit in his realisable assets was impermissible by virtue of s 37A(1), the Fund and BATSA might wish to say that the pension benefit and accrued interest should then be returned to the Fund so that it can consider its position in the light of s 37D(1)(b)(ii) and *Highveld Steel*. I do not say that the Fund and BATSA would succeed in such a contention but it is a matter on which they are entitled to be heard.

[49] In the circumstances, I think the exclusion of Mr van Heerden's termination benefit from the ambit of the restraint order is an issue which should be raised in a substantive application served inter alia on the Fund and BATSA.

Release of money for reasonable living and legal expenses

[50] I must thus consider the Van Heerdens' application for the release of funds in terms of s 26(6). I was referred inter alia to the leading judgments of the Constitutional Court in *Fraser v Absa Bank Ltd (National Director Of Public Prosecutions As Amicus Curiae)* 2007 (3) SA 484 (CC) and *Naidoo & Others v National Director Of Public Prosecutions & Another* 2012 (1) SACR 358 (CC), which dealt with restraint orders in terms of s 26, and *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC). The court's discretion in terms of s 26(6) can only be exercised if it is satisfied (i) 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 (ii) that the person cannot meet the expenses concerned out of his or her unrestrained property. These jurisdictional facts differ in formulation from those laid down in s 44(2) of POCA. In particular, s 26(6) does not state that the person must have submitted a sworn and full statement of all his or her assets and liabilities; what he must fully disclosed under oath are all his or her interests in property subject to a restraint order. However, and because the court must also be satisfied that the person cannot meet the expenses in question from unrestrained property, a full disclosure of unrestrained property is necessarily required. Furthermore, a court is unlikely to be able properly to exercise its discretion under s 26(6) unless it also has full information concerning the person's liabilities.

[51] Mr Titus emphasised in his argument the strictness of the approach laid down by the majority in *Elran* in cases falling under s 44 of POCA. His submission was that the Van Heerdens had not provided sufficiently full information and had not vouched for it sufficiently by documentation and corroborating affidavits.

[52] Although a court exercising the discretion conferred by s 26(6) must first be satisfied on the matters previously mentioned, the adequacy of the evidence is a

matter for the court's judgment, having regard to the particular circumstances of the case. I do not think that it would be right to be so severe as to make an application for the release of assets effectively impossible. More punctilious proof may be required in some cases than in others. There must be some sense of proportion in undertaking the exercise.

[53] The Van Heerdens failed to comply with the restraint order in regard to the furnishing of monthly statements of income and expenditure with supporting documentation. In their replying affidavit they admitted the 'oversight' and apologised. While their non-compliance is a factor which the court may take into account in exercising its discretion, it is not an absolute bar to the granting of relief.

[54] The curator has also failed to comply with the restraint order by not filing quarterly reports. There is nothing to indicate that he has investigated the adequacy of the Van Heerdens' disclosures or requested information about their businesses.

[55] The Van Heerdens have made three relevant sworn disclosures of their assets and liabilities. The first is contained in the statement of affairs signed during September 2011. The second is in the first release application launched in late February 2012. The third is in the present proceedings, by way of affidavits made during April, May and June 2015. In this latter regard, the applicants applied for leave to file a supplementary affidavit on 3 June 2015. Mr Titus objected on behalf of the NDPP but said that if I was minded to allow the affidavit his client did not seek an opportunity to respond to it. I reserved my decision and permitted argument to proceed.

[56] Although an applicant is required to make out its case in the founding papers, the court does have a discretion to allow new facts to be averred in reply or to allow supplementary affidavits, subject to considerations of prejudice. In the present case the Van Heerdens, while contending that they had already made sufficient disclosure, sought to meet, by way of attaching documentation, some of the particular criticisms raised in the answering papers and heads of argument. I do not think any injustice would be done by having regard to such further material.

[57] I have already summarised in broad terms the disclosures made in the statement of affairs. In the first release application Mr van Heerden said that he did not earn a salary but was trying to run a small packaging business under the name Lemon Tree Trading. He provided a brief description of its operations, saying that it had four employees. He gave particulars of their salaries, the rental for the premises and municipal services. At that stage the Van Heerdens did not have a vehicle, as a result of which the business hardly covered monthly expenses. He borrowed R30 000 from his brother, Mr WH van Heerden, to pay for the business' growing expenses. His brother extended his bond in order to assist. Although in the statement of affairs Mr van Heerden inserted the figure of R350 000 in the column for 'estimated value', his notation reflects that this was the estimated value of the stock and assets. It seems unlikely that the net value of the business as a profit-earning enterprise was as high as R350 000.

[58] He also disclosed that his wife owned a 50% share in Coco Boutique, each of the partners having contributed R150 000 to the establishment of the business during 2010. He attached what he styled a 'valuation' recently done by an auditor, though the attached documents were in fact trial balances for the years ended 28 February 2011 and 29 February 2012 and a schedule of monthly sales. In the first period the business made a net loss of R49 210 and in the second period a net profit of R44 114. This was the business valued in the statement of affairs at R150 000.

[59] The Van Heerdens alleged that they had had to cancel four specified life insurance policies and annuities due to lack of income. (They did not state whether any surrender values were paid.)

[60] In the present proceedings the Van Heerdens say that their household's only income is about R5000 per month which his wife earns from her share of Coco Boutique. One of Mr Titus' criticisms was that no updated accounting records or vouchers in respect Coco Boutique were furnished.

[61] Mr van Heerden says that Lemon Tree Trading was not a success, that it closed its doors in November 2014 and that he has been unemployed since then.

He is still trying to pay off debts in excess of R350 000 in respect of Lemon Tree Trading. These liabilities are particularised in a schedule attached to the founding affidavit, and include an FNB overdraft of about R85 000 and an indebtedness to Wesbank of R136 717 in respect of a Nissan bakkie purchased after the grant of the restraint order.[3] It appears from the supplementary affidavit that the packaging business was conducted through a company called Subiplex (Pty) Ltd of which Mr van Heerden was the owner. The supplementary affidavit stated that on 18 May 2015 Wesbank repossessed the Nissan bakkie; supporting documentation in that regard was attached.

[62] The Van Heerdens alleged in the founding papers that they had exhausted the money received in respect of Mrs van Heerden's pension benefit. Particulars of the way in which the proceeds were used were set out in a schedule attached to their attorneys' letter of 18 March 2015. The net sum they received, after their attorneys' retention of R150 000 in respect of legal fees, was R586 4882. Of this sum, R135 000 was said to have been used to buy Mrs van Heerden's half-share of Coco Boutique; R25 000 for the purchase of stock for Coco Boutique; R45 000 to repay the Absa overdraft; R30 000 and R15 000 to repay loans made to them by two identified family members; R86 700 to pay amounts in which Subiplex was in arrears to various identified suppliers; R42 000 to buy a vehicle for their daughter which she subsequently wrote off; and repayments of small debts which they could no longer recall. The balance of about R180 000 had been consumed in daily living expenses.

[63] The Van Heerdens said in their founding papers that in order to make ends meet they were being forced 'to beg for loans and handouts from family and friends' and had had to incur 'extortionately expensive credit card debt'. In regard to bank debt, the schedule to the founding affidavit reflected an Absa credit card debt of R54 000, a Sanlam loan of R25 000 and a Standard Bank Blue Bean loan of R29 000. In the supplementary affidavit they attached current bank statements for these debts, from which it appears that they are in arrears in respect of the Sanlam and Blue Bean accounts.

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[3] 'PH9' at record 73.

[64] Although the unacceptable delay in the criminal proceedings engenders some sympathy for the Van Heerdens and a concern that the continued operation of POCA's draconian provisions in their circumstances is unjust, this does not relieve the court of the task of determining whether it can be satisfied of the matters set out in s 26(6). Upon careful reflection, I have come to the view that I cannot be so satisfied. While there may be other criticisms of the information supplied by the Van Heerdens, the particular aspects which have weighed with me are the following.

[65] The first relates to the Coco Boutique business. In the earlier release application the Van Heerdens supplied trial balances for the years ended February 2011 and February 2012 and a schedule of monthly sales. Included in the trial balances were the salaries paid to Mrs van Heerden and her partner. In the present application no updated information has been supplied apart from the averment that Mrs van Heerden's monthly income from the business is about R5000. No trial balances for the years ended February 2013, February 2014 or February 2015 have been attached. These would have given one a picture of the sales and expenditure of the business, its stock on hand and Mrs van Heerden's capital.

[66] There is also an inconsistency in the Van Heerdens' evidence as to when and how Mrs van Heerden funded her half-share of the business. In the first release application, which was delivered on 29 February 2012, the Van Heerdens said that each shareholder contributed R150 000 during 2010 and that after the granting of the restraint order Mrs van Heerden tried to sell her half share to her partner without success. The business had been operating for close on two years by the time the first release application was brought. However, in their explanation as to how they dealt with Mrs van Heerden's net pension benefit of R586 488 (contained in an attachment to their attorneys' letter of 13 March 2015, which was an annexure to the founding affidavit in the present case), they said that R150 000 thereof had been used to purchase Mrs van Heerden's share of Coco Boutique. Since the net pension proceeds were only received by them during March 2012, this allegation cannot be true.

[67] I also observe that the trial balances for the year ended February 2011 and February 2012, attached to the earlier application, raise certain question marks

about the accuracy of what the court has been told. As at 28 February 2011 Mrs van Heerden and her partner Ms Marais are reflected as having loan claims against the business of R190 713 and R39 772 respectively. On the assumption that these were the contributions made by the partners, why are they so disproportionate? In the next year's trial balance Mrs van Heerden's loan account had reduced to R66 600 while Ms Marais was now indebted to the business in the amount of R339. This indicates substantial loan account repayments to the two partners.

[68] The next aspect concerns Lemon Tree Trading. The Van Heerdens say that this business closed its doors during November 2014. Apart from the statement that Mr van Heerden still owes in excess of R350 000 in respect of unpaid business liabilities, no information has been supplied regarding the results of the business prior to its closure or the manner of its liquidation. It emerged for the first time in the supplementary affidavit filed on 3 June 2015 that the business was not owned by Mr van Heerden but by a company. If Mr van Heerden personally owes money in respect of its debts, this must be because of suretyships furnished by him, yet no information regarding any suretyships has been given. The company must have kept financial records and would have been required to produce annual accounts. The most recent financial statements or management accounts would have given some sense of the business's income-generating operations and its assets and liabilities. Nothing is said about the stock and debtors on hand when the business closed down in November 2014, what was realised for these assets and so forth.

[69] Another aspect arises from the Van Heerdens' dealings in immovable property prior to the restraint order. These matters were not dealt with in the present application but I cannot close my eyes to what was said in the restraint application. The Van Heerdens are seeking a relaxation of an order granted on the basis of the information supplied in the ex parte application. If there is information in the ex parte application bearing on their financial position, it is not unreasonable to expect them to address it.

[70] At the time the restraint application was delivered, the NDPP believed that the Van Heerdens were the owners of the Paarl property which, according to deeds office information, they purchased during March 2006 for R900 000 and which was

unbonded.[4] This property was not included in the Van Heerdens' statement of affairs and it appears from the curator's first report and from the final restraint order that they sold it during 2007. There is no information as to how much the property was sold for and what became of the proceeds.

[71] In regard to the Van Heerdens' Heidelberg property, it was said in the ex parte application that they sold it to a Mr Cronje in July 2010 for R2,4 million. This was a few months after their dismissal from BATSA. Because Mr Cronje was only able to raise a bond of R2,08 million, he undertook to pay the balance of R320 000 in cash at a later stage. On 31 January 2011 he paid them R50 000 and on 26 July 2011 he paid the balance of R270 000 into their attorneys' trust account. On 12 August 2011, and before the money could be paid out to the Van Heerdens, the Financial Intelligence Centre gave instructions (presumably to the attorneys) in terms of s 34 of the Financial Intelligence Centre Act 38 of 2001 that there should be no dealings in the funds because it was suspected that such transaction would be a transaction as contemplated in s 29(2)(b) of that Act.[5] The ex parte restraint application was delivered a few days later, which is how the sum of R270 000 in the attorneys' hands came to be subject to the restraint order.

[72] In Col Barkhuizen's affidavit in support of the ex parte application, he said that in November 2007 the Van Heerdens took out with Standard Bank a 20-year mortgage bond of R1,54 million over the Heidelberg property. They repaid the bond within three years: R366 000 in 2008, R247 000 in 2009 and R1 312 001 in 2010 (this according to the deponent's examination of the relevant Absa and Standard Bank statements). Mr van Heerden's monthly salary at the time was R43 000.[6] Although Col Barkhuizen made this allegation with a view to showing that Mr van Heerden must have received significant benefits from the proceeds of theft, his allegation that the Heidelberg property was unbonded when the Van Heerdens sold it in July 2010 is obviously significant. He made this point later in his affidavit, saying that he had not yet established what the Van Heerdens did with the R2,08 million

[4] Ex parte application ('EPA') para 60.2 p 59; deed of transfer at EPA pp 152-157.
[5] EPA paras 10-13 p 25; EPA para 3 pp 43-44.
[6] EPA para 53 p 57.

received from the sale of the property,[7] ie the portion of the purchase price funded by Mr Cronje's mortgage bond which would have been registered simultaneously with transfer to him.

[73] Although this aspect was not mentioned by the respondents in the current application, it is so glaring that I do not see how I can be satisfied that the Van Heerdens have made a full disclosure where there has been no explanation in the statement of affairs or in the first application or in the present proceedings as to what became of the amount of R2,08 million which they received in the latter part of 2010 or early 2011 upon transfer of the Heidelberg property to Mr Cronje. There are no disclosed assets into which that money could to any substantial extent have plausibly been converted (the BMW was bought in April 2008 and the Opel Corsa in May 2010, prior to the sale of the Heidelberg property).

[74] The final aspect is the absence of bank statements for a reasonable period prior to the launching of the application. The Van Heerdens attached to their supplementary affidavit of 3 June 2015 the most recent monthly statements for each of their overdrawn accounts. Although the statements confirm the amounts of the indebtedness alleged by the Van Heerdens, they do not contain any history recording the transactions on the accounts. One also does not know whether, in addition to these accounts, the Van Heerdens have an ordinary bank account into which Mrs van Heerden's income and other gifts and loans from friends were paid and from which they paid expenses.

[75] Mr Titus submitted that they should have furnished their bank statements for the six months prior to the launching of the application. There is naturally no absolute rule in that regard. In particular circumstances the court might expect a longer history to be furnished or might be content with less. Here, however, there is a complete absence of bank statements showing any relevant history. The court cannot see whether the Van Heerdens' alleged income and alleged reasonable living expenses are supported by their bank statements and whether the bank statements reflect other items of income or expenditure calling for explanation.

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[7] EPA para 62 p 60.

Particularly since the Van Heerdens did not comply with their obligation to furnish the curator with monthly income and expenditure statements supported by documentation, it is not unreasonable to have expected them in the present proceedings to attach their bank statements for the last year or six months.

Conclusion

[76] Since I am not satisfied that the Van Heerdens have made a full disclosure of their restrained and unrestrained assets, I do not have jurisdiction to come to their aid.

[77] In regard to costs, I expressed concern on 3 June 2015 that the hearing of supplementary argument on 5 June 2015 in relation to s 37A(1) of the PF Act should not be allowed to result in an increased cost burden for the parties. Overall, the amount of time spent in court on the two days did not exceed the ordinary sitting hours of one court day. Since the s 37A(1) issue was raised by the court itself and since in the event I have concluded that it would not be appropriate to decide it without the joinder of the Fund and BATSA, fairness dictates that the Van Heerdens should not be ordered to pay a second day's costs.

[78] I thus make the following order: The application is dismissed with costs, such costs to exclude the costs of the additional appearance on 5 June 2015.

ROGERS J

APPEARANCES

For Applicants	Messrs W Kings SC and J Engelbrecht Instructed by Abrahams & Gross Inc 1st Floor, 56 Shortmarket Street Cape Town
For First Respondent	Mr MD Titus Instructed by The State Attorney 4th Floor, 22 Long Street Cape Town