



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

Case No: 15403/2014

Before the Hon. Mr Justice Bozalek
Hearing: 28 November 2019
Delivered: 4 February 2020

In the matter between:

THE STANDARD BANK OF SA LTD
(Reg No: 1962/000738/06)

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
MATTHEWS TUWANI MULAUDZI
VIOLET MABONTSI MULAUDZI
MULAUDZI & ASSOCIATES CC [in liquidation]
(Reg No: 2015/04820/07)

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

LUVHOMBA LEGAL EDGE CC
(Reg No: 2001/018852/23)

5th Respondent

LUVHOMBA FINANCIAL SERVICES CC
(Reg No: 2003/048903/23)

6th Respondent

JURGENS JOHANNES STEENKAMP N.O.
OSCAR JABULANI SITHOLE N.O.
CHRISTOPHER PETER VAN ZYL N.O.

7th Respondent

8th Respondent

9th Respondent

<i>SELBY MUSA WENKOSI NTSIBANDE N.O.</i>	<i>10th Respondent</i>
<i>OLD MUTUAL LIFE ASSURANCE CO (SA) LTD</i>	<i>11th Respondent</i>
<i>NEDBANK LTD</i>	<i>12th Respondent</i>
<i>PETRUS JACOBUS CORNE VAN STADEN N.O.</i>	<i>13th Respondent</i>
<i>SOLOMON STANLEY ISAKA BOIKANYO N.O.</i>	<i>14th Respondent</i>
<i>ST. ADENS (PTY) LTD t/a ST. ADENS INTERNATIONAL</i>	<i>15th Respondent</i>

In re:

<i>THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS</i>	<i>Applicant</i>
<i>MATTHEWS TUWANI MULAUDZI</i>	<i>Defendant</i>
<i>VIOLET MABONTSI MULAUDZI</i>	<i>1st Respondent</i>
<i>MULAUDZI & ASSOCIATES CC [in liquidation]</i> <i>(Reg No: 2015/04820/07)</i>	<i>2nd Respondent</i>
<i>LUVHOMBA LEGAL EDGE CC</i> <i>(Reg No: 2001/018852/23)</i>	<i>3rd Respondent</i>
<i>LUVHOMBA FINANCIAL SERVICES CC</i> <i>(Reg No: 2003/048903/23)</i>	<i>4th Respondent</i>

JUDGMENT***BOZALEK J***

[1] The applicant, the Standard Bank of South Africa Limited, seeks leave to intervene in an application in which the National Director of Public Prosecutions (‘the NDPP’) obtained a restraint order in terms of sec 26 of the Prevention of Organised Crime Act, 121 of 1998 (‘POCA’) against the assets of Mr Matthews Mulaudzi, his wife and three companies under his control.

[2] In the event that such leave is granted, the applicant seeks a variation of the restraint order in order to secure the release of three assets amongst the many which are

subject to the restraint order. One such asset is an immovable property which serves as security for loans advanced by the applicant to one of Mr Mulaudzi's companies, Luvhomba Financial Services CC, the sixth respondent in this application. The applicant seeks the release of the other two assets, being two motor vehicles, on the basis that it is the owner thereof and has default judgments for their return.

[3] All the parties in the main application were cited and served in this application. They include the parties against whom the restraint order was made, the *curator bonis* appointed in terms of POCA, the co-trustees in the insolvent estate of the Mulaudzi's, the NDPP, the joint liquidators of one of Mr Mulaudzi's companies and two major creditors of, or claimants against, Mr Mulaudzi, Old Mutual LAC (SA) (Pty) Ltd ('Old Mutual') and Nedbank Limited ('Nedbank').

[4] The NDPP and the Mulaudzi's trustees abide by the Court's decision herein. Mr Mulaudzi's company and Mr Mulaudzi, who filed an opposing affidavit, purport to oppose the relief sought. None of the remaining parties have participated in the proceedings.

[5] It is most doubtful whether Mr Mulaudzi, his wife or any of his companies have any right to oppose these proceedings. The Mulaudzi's are insolvent and thus only the trustees of their joint insolvent estate may defend actions affecting it. Similarly, since Mr Mulaudzi's interest in his companies falls into his insolvent estate, the right or authority to represent these entities rests either with the trustees of the Mulaudzi's insolvent estate or the liquidators of the company in liquidation. Be that as it may, the Court entertained Mr Mulaudzi's submissions and I will deal with their merits in this judgment.

[6] The main application was instituted in August 2014 and led, by a long and circuitous path, to the granting of a final restraint order on 20 November 2017 by Davis, J which remains in place. The circumstances which led to the application and the course of much of the subsequent litigation is described in the reported judgment of *Mulaudzi v Old Mutual LAC (SA) (Pty) Ltd and Others, NDPP v Mulaudzi* 2017 (6) SA 690 (SCA) and I will not repeat them.

[7] The movable assets which the applicant wants released from the restraint order are two motor vehicles, a 2014 VW Golf ('the Golf') and a 2012 Toyota Hilux ('the Toyota'). The immovable property which the applicant seeks to have released from the restraint order is a residential property situated at 4 Hangklip Heights, Louis Trichardt. The registered owner of the property is the sixth respondent, Luvhomba Financial Services CC. According to a report issued by the *curator bonis*, the property has a market value of R1.2mil and a forced sale value of R800 000.00. However, it is encumbered to the applicant in an amount of not less than R1.7mil in terms of a mortgage bond registered over the property.

[8] In May 2015, in consequence of the sixth respondent's failure to make payment of the instalments due to the applicant under the home loan agreement underlying the mortgage bond, the applicant instituted action against the sixth respondent for payment of the sum of R1.28mil and an order declaring the property specially executable. Judgment has not been entered against the sixth respondent in that action which remains ongoing. According to the curator's report there is no realisable value, as defined in POCA, in the property in view of the amount owing to the applicant (and secured by the mortgage bond) as well as amounts owing in respect of arrear rates and levies. The curator's view as expressed in his report was that the property should therefore be released from the

restraint order.

[9] As far as the vehicles are concerned, the applicant and the sixth respondent concluded an instalment sale agreement in respect of the Toyota in October 2012. The principal debt was an amount of R259 000 to be repaid by the sixth respondent in monthly instalments over five years. In terms of the agreement, the applicant remains owner of the vehicle until all instalments have been paid. In November 2015, the applicant obtained summary judgment against the sixth respondent in an action brought in consequence of its failure to make payment of the instalments. The judgment ordered the return of the vehicle to the applicant. Although the vehicle has been placed under judicial attachment by the sheriff it remains in the possession of Mr Mulaudzi. As at February 2019, the sixth respondent's outstanding debt under the Toyota instalment sale agreement is approximately R220 000. Given that the vehicle is now seven years old it is most doubtful that its sale price will cover even the outstanding debt and thus there is a negligible prospect of it yielding a realisable value for the purposes of any confiscation order which may be made against Mr Mulaudzi in terms of POCA.

[10] In February 2014, the applicant and Mr Mulaudzi concluded an instalment sale agreement in respect of the Golf with the principal debt being the sum of approximately R263 000 to be repaid by Mr Mulaudzi by way of monthly instalments over a period of five years. As with the Toyota the applicant remains the owner of the Golf until such time as the final instalment is paid by Mr Mulaudzi. In February 2015, the applicant instituted action against Mr Mulaudzi in consequence of his failure to make payment of the instalments under the agreement. In June of that year, the applicant obtained summary judgment against Mr Mulaudzi, *inter alia* for return of the vehicle. The applicant issued a writ of execution in respect of the vehicle but has not succeeded in attaching it since Mr

Mulaudzi refuses to disclose its whereabouts. As with the Toyota, it is most unlikely that the Golf has any realisable value as defined by POCA since as at February 2019, Mr Mulaudzi's outstanding debt under the instalment sale agreement was approximately R357 000 whilst the vehicle is now four years old and any sale is most unlikely to realise anywhere near that amount.

[11] The facts set out above are common cause or at least have not been disputed by Mr Mulaudzi.

The Applicant's case

[12] The substantive relief sought by the applicant is a variation of the restraint order in terms of sec 28(2) and (3) of POCA, namely, the release of the three assets in question from the operation of the restraint order. The applicant's case is that it has a direct and substantial interest in the main application in that the assets in question, namely, the two vehicles which it owns and the immovable property which serves as security for a debt owing to it by the sixth respondent, are subject to the restraint order. Its case is further that the restraint order falls to be varied by the release of the three assets from the restraint order since they have no realisable value for the purposes of any confiscation order which may eventually be made. The variation sought would allow the applicant to proceed with litigation, in the case of immovable property, and, in the case of the vehicles, with execution, all with a view to recovering the debts owing to it by Mr Mulaudzi, the company in which he had an interest or the insolvent estate of the Mulaudzi's in which the applicant is a preferred or secured creditor.

[13] The applicant also relies on the interim (and only) report prepared by the *curator bonis* in July 2017 as offering some support of the relief claimed in respect of the

immovable property. In the report the *curator bonis* concluded that the only assets subject to the restraint order with any material realisable value are two Old Mutual insurance policies and a Momentum policy. As previously mentioned the *curator bonis* also concluded that the immovable property, having regard to the mortgage bond held by the applicant and the underlying debt owing to it, had no realisable value as defined in POCA and should be '*released from under the provisional restraint order*'. Clearly, however, this recommendation was not acted on in November 2017 when the provisional order was made final.

[14] Regarding the vehicles, the *curator bonis* noted in his report some months later merely that the Toyota remained in the possession of the defendant (Mr Mulaudzi) and that its realisable value, if any, still needed to be determined. Reporting on the Golf, the *curator bonis* noted that its whereabouts were unknown to him and as such he could make no recommendation.

Mr Mulaudzi's case

[15] Mr Mulaudzi filed a brief opposing affidavit and made oral submissions. In his affidavit, Mr Mulaudzi claims that the final restraint order is the subject of an appeal and that the applicant has suffered no patrimonial loss; furthermore, that the assets and related payments are subjects of dispute. Mr Mulaudzi appears to also submit that appeals are pending in relation to the three assets in question. None of these statements were substantiated and I am satisfied, are either incorrect or irrelevant for the purposes of this application.

[16] One may well ask what stage has been reached in the criminal prosecution of Mr Mulaudzi given that five years have passed since he allegedly attempted to defraud Old

Mutual and the POCA proceedings commenced. The issue is not addressed in the papers despite the fact that the possibility of a confiscation order at the conclusion of criminal proceedings is the entire rationale for a POCA restraint order. Upon enquiry Mr Mulaudzi stated from the bar that the criminal case against him had commenced earlier in 2019 and had been postponed to February 2020 for the decision of the Regional Court Magistrate on his application for discharge at the end of the State's case. In argument, the only point of any substance made by Mr Mulaudzi was that the criminal proceedings against him would conclude in a matter of months and the applicant should rather await their outcome.

[17] It is against this factual background that the parties' cases must be considered.

Discussion

[18] The effect of a restraint order in terms of POCA is to place the property of a defendant beyond his or her control and into the hands of a *curator bonis* pending the outcome of criminal proceedings. The lengthy order granted by Davis J was largely a recapitulation of the provisional order initially granted but with a number of variations. It appears to imply that all the restrained property had to be surrendered to the *curator bonis* save for such property as the *curator bonis* was '*satisfied by evidence under oath was not realizable property*', property which he certified was in excess of the quantum of the alleged fraud giving rise to the restraint order and certain necessary household items.

[19] Section 26(10) of POCA deals with applications to vary a restraint order but it provides a Court with only a limited discretion to do so, namely, where the order deprives the applicant of the means to provide for his/her living expenses. This provision appears to be directed at the protection of a person against whom a restraint order is made i.e. a

defendant but, whatever the case may be, it is certainly not a remedy to which the present applicant does or can lay claim. No doubt it is for this reason that the applicant sought to rely on the provisions of sec 28(2) and (3) of POCA. Before dealing with these provisions some consideration of our Court's approach to variations of restraint orders in terms of sec 26 of POCA is appropriate.

[20] In *Phillips and Others v NDPP* 2006 (1) SA 505 (CC), the Constitutional Court held that sec 26(10) of POCA was not capable of a construction that allowed the High Court, in the exercise of its inherent power, to set aside a restraint order on common law grounds. It found that the subsection dealt with standing, as well as carefully regulating the substantive circumstances in which the rescission of a restraint order made under POCA may be sought. The Court held further that the approach of the Supreme Court of Appeal to sec 26(10) of the Act, namely, that the grounds for the rescission of such orders constituted a closed list and that the High Court was not empowered to rescind a restraint order on grounds other than those specified in POCA, could not be faulted and given that there was no constitutional challenge to sec 26(10), the Supreme Court of Appeal's interpretation had to stand.

[21] Section 28 of POCA deals generally with the appointment of a *curator bonis* in respect of property subject to a restraint order and insofar as it is material reads as follows:

'28. *Appointment of curator bonis in respect of property subject to restraint order.* –

(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 or discharge that curator bonis;*
 - (b) *shall rescind the order and discharge the curator bonis concerned if the relevant restraint order is rescinded.'*

[22] Section (28)(1)(b) thus provides that where a High Court has made a restraint order, that Court may at any time order the person against whom the restraint order has been made to surrender any property in respect of which a *curator bonis* has been appointed, into the custody of the *curator bonis*. For present purposes, I shall term this a

surrender order albeit that it forms part of the overall restraint order. Section 28(2)(a) provides that any person affected by a surrender order contemplated by sec 28(1)(b) may at any time apply for, *inter alia*, the variation or rescission thereof whilst sec 28(3) empowers that the High Court which made the order in terms of sec 28(1)(b) to vary or rescind such order at any time.

[23] As the applicant's counsel noted in her written heads, sec 28(1)(b) of POCA contemplates an order additional to a simple restraint order granted under sec 26(3). Consequently, counsel's initial argument proceeded, the power granted to this Court by sec 28(3) of POCA is limited to the additional order made under sec 28(1)(b) of POCA, being the order to surrender property to the *curator bonis*.

[24] However, this interpretation of sections 28(1), (2) and (3), which in my view is correct, wholly undermines the relief sought by the applicant, namely, the release of the three assets from the operation of the restraint order as a whole. The applicant's case is not that it seeks a reversal of a surrender order affecting the three assets, but rather the complete lifting of the restraint order in relation to the three assets so that it may proceed with legal process and/or execution against such assets. Notwithstanding the inconvenience to the applicant, and other creditors who find themselves in a similar position to it, there appears to be no provision in POCA for a creditor to obtain what is in effect the partial discharge of a final restraint order in the circumstances found in the present matter.

[25] Nor do I see any basis for granting the relief sought by the applicant by reason of the fact that the assets in question are either not the property of Mr Mulaudzi or those of the respondent companies in which he held an interest, nor on the basis that the secured

or preferent claims the applicant has to such assets exceed their realisable value. In this regard the applicant relies on the facts that in terms of the instalment sale agreements it remains the owner of the two vehicles and as regards the immovable property, that there is no prospect of its secured claim based on the mortgage bond being met upon the sale of the property. Allied to this argument is the contention that POCA provides in effect that any confiscation order against a defendant '*may not exceed the value of the benefit that accrued to him from criminal activities, or the combined value of his property together with certain tainted dispositions that he or she might have made, whichever is the lesser. The value of the defendant's property and tainted dispositions is their value after deducting the amount of certain defined obligations, as well as his secured and preferent obligations*'. See *Absa Bank Ltd v Fraser and Another* [2006] 2 All SA 1 (SCA) at para 18.

[26] I accept these propositions from *Absa Bank v Fraser* without reservation. However, it does not follow, in my view, that a portion of a final restraint order can be varied or discharged solely on the basis of an accounting exercise which determines that certain assets subject thereto have no realisable value for the purposes of a possible confiscation order. POCA's provision do not allow for a procedure to vary or discharge the order in such circumstances and the High Court, as was held in *Phillips*, has no inherent power to vary a final restraint order. Hence, the Constitutional Court's warning in *Phillips* to the following effect: '*Given the limited powers of variation and rescission provided for in section 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 properties 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*'.

(para [55] at 523 A – B).

[27] An unfortunate consequence of the restraint order in *Phillips* was that certain businesses conducted on property placed in the possession of the *curator bonis* were closed down by him with the result that charges on such properties could not be paid and they began to deteriorate in value. This in turn also jeopardised the potential contribution of these assets to a possible confiscation order. The Constitutional Court’s warning in *Phillips* that restraint orders must be carefully worded can be equally applied to restraint orders which place assets which cannot make any contribution to a possible confiscation order beyond the reach of creditors during the currency of the order.

[28] There are several possible ways to forestall the dilemma which presents itself in the current matter. Restraint orders can be more carefully examined and worded before being made to ensure that assets which cannot contribute to any confiscation order and against which creditors should be allowed to proceed, are not frozen. Furthermore, creditors who find themselves in the position in which the applicant does need to be astute to assert their rights prior to any restraint order being made final.

Supplementary argument

[29] Since the issue of whether the provisions of POCA even allow for a variation of the restraint order in the present circumstances was not squarely addressed in argument, the parties were subsequently requested to furnish further written submissions. Specifically, submissions were invited on the question of whether the Court had the power to effect the release of the assets in question from the restraint order when its powers to grant a variation in terms of sec 28(2) and (3) of POCA appear to be limited to a surrender order.

[30] In response, the applicant's counsel contended that a necessary consequence of effecting the release of the property in question from the control of the *curator bonis* was its release from the restraint order, a submission however which takes the matter no further. Counsel further contended that interpreting of sec 28(2)(a) read with sec 28(3)(a) as creating a wide power to amend restraint orders in appropriate circumstances was the only sensible interpretation to give these provisions failing which they served no other purpose or were rendered meaningless. It was further submitted that the legislature must have intended the Courts to have the power to effect the release of properties from a restraint order at the instance of a party having rights to such property particularly where such property cannot be considered realisable property for the purposes of a confiscation order. Finally, reliance was placed on an order made by Davis J granting substantially similar relief to a creditor, Nedbank, at the time that the present restraint order matter was made final.

[31] For the reasons that follow I find myself unable to accept these submissions. As previously mentioned they in fact represent a *volte face* on the part of the applicant's counsel who initially emphasised that sec 28(1)(b) of POCA contemplates a surrender order being an element additional to a restraint order granted under sec 26(3). It follows ineluctably from this reading of these provisions and from the wording of sec 28(3), that a Court's power to vary an order in terms thereof is limited to a surrender order or to the terms of appointment of the *curator bonis*.

[32] The release of property from the provisions of a surrender order does not logically or necessarily entail its release from the restraint order as a whole. So, for example, a motor vehicle possessed by a defendant which is the subject of a restraint order and surrender order, and which has been surrendered to the *curator bonis*, could be restored

to the defendant for his or her use upon the lifting of the surrender order pursuant to a variation application in terms of sec 28(2) of POCA.

[33] Apart from the fact that the interpretation of sec 28(2) and (3) for which the applicant now contends disregards the plain wording of these sections, these provisions can indeed be sensibly interpreted as applying only to a surrender order. Adopting such an interpretation does not render the relevant provisions meaningless nor does it render any words in the relevant provisions tautologous or superfluous, as was contended by the applicant's counsel. It is so that the absence of a general power to vary or rescind a restraint order on good cause shown can lead to inequitable results and even hardship. But, as was emphasised by the Constitutional Court in *Phillips*, neither a restraint order nor the power to vary or rescind it exists in common law (para 25). Nor would it be open to a Court to give the provisions of section 28(2) and (3) in POCA a strained interpretation in order to conjure up a general power to vary or rescind a simple restraint order.

[34] Finally, no reliance can be placed on the fact that, at the time the restraint order was made final, Davis J granted Nedbank relief similar to that now being sought by the applicant. Davis J was dealing with the provisional restraint order and thus had a much wider discretion to vary its terms. At that stage Nedbank found itself in the same position as the present applicant in relation to immovable property over which it held mortgage bonds. Its secured claims over such properties were also such that no realisable value was left in them which might satisfy any confiscation order made against Mr Mulaudzi. The *curator bonis* recommended in his report that the properties '*should be released from under the provisional restraint order*' and the Court duly made such an order. It is worth noting that prior to the restraint order being made final the *curator bonis* made exactly

the same recommendation in respect of the immovable property which the applicant now seeks to be released from the restraint order. For reasons which are not explained by the applicant, it did not move at that stage for the release of the immovable property from the operation of the restraint order. It only did so some two years later, long after the provisional order had been made final, bringing to mind the maxim that the law protects those who are vigilant and not those who sleep on their rights.

[35] Finally, it needs be noted that the applicant did not make out any case for relief based on the terms of the restraint order. This in my view precludes any such relief but in any event a careful reading of the restraint order indicates that its terms do not permit of any procedure by which the applicant can unilaterally obtain such a result. For one thing although the order does permit the *curator bonis* in particular circumstances to exclude certain property from the restraint order and surrender provisions, he has not purported to do so in relation to the three assets in question. Ultimately, it seems, Mr Mulaudzi is correct when he states that, as matters presently stand, the applicant must await the outcome of the criminal proceedings against him.

[36] For these reasons, although the applicant's application to intervene must succeed, its application for substantive relief falls to be dismissed.

[37] On the questionable assumption that Mr Mulaudzi has *locus standi* to oppose these proceedings, I can see no basis for a costs order in his favour since he appeared in person and was not legally represented at any stage.

[38] In the circumstances, the Court's order is that the application for leave to intervene is granted but the application for substantive relief is dismissed, in both instances with no order as to costs.

For the 2nd Respondent : In Person
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