CASE NO.: POCA 1/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE PROSECUTOR-GENERAL	**APPLICANT**

and

TECKLA NANDJILA LAMECK	**1ST DEFENDANT**
JEROBEAM KONGO MOKAXWA	**2ND DEFENDANT**
YANG FAN	**3RD DEFENDANT**
NUTECH COMPANY LTD	**4TH DEFENDANT**
FESTUS LAMECK	**1ST RESPONDENT**
TEKO TRADING CC	**2ND RESPONDENT**
LANCE HAUUANGA	**3RD RESPONDENT**
COMMON PROPERTIES NUMBER EIGHT CC	**4TH RESPONDENT**
VERONICA PANDULENI MOKAXWA	**5TH RESPONDENT**
ONGONYO TRADING CC	**6TH RESPONDENT**
STERN & BARNARD ATTORNEYS	**7TH RESPONDENT**
SMITH TABATA BUCHANAN	
BOYES ATTORNEYS	**8TH RESPONDENT**

CORAM: DAMASEB, JP *et* PARKER, J

HEARD: 15 September 2009
DELIVERED: 22 January 2010

JUDGMENT

Background

Damaseb, JP: [1] On the extended return day of an interim restraint order against all of the Defendants and Respondents, pursuant to the provisions of POCA[1], this Court then differently constituted (Damaseb, JP *et* Frank AJ), came to the conclusion that the Applicant's reliance on fraud, alternatively theft - against the Defendants and the Respondents - in connection with the contract between the Fourth Defendant and the Ministry of Finance, was not supported by prima facie evidence. The Court, however, concluded that there was prima facie evidence to found a charge of corruption in terms of the Anti Corruption Act[2] (ACA); read (in respect of s33 of the ACA) with s 3(2) of the Public Service Commission Act, No 2 of 1990 (PSCA)[3]. The connection with s33 of the ACA arises because in terms of s3 (2) of the PSCA, ''*A member of the Commission shall not without the consent of the President perform or engage himself or herself to perform any remunerative work outside the duties of his or her office''*. As the papers stood at the time[4], the Court found in the first judgment that the First Defendant, being a member of the Public Service Commission, *prima facie* failed, with the knowledge of the other Defendants and the

[1] Prevention of Organised Crime Act. No. 29 of 2004

[2] No 8 of 2003. Section 33: **Offence of corruptly accepting gratification**

''A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept for the benefit of himself or herself or any other person any gratification as-

(a) an inducement to do or to omit doing anything;
(b) a reward for having done or having omitted to do anything''.

And in terms of s 42(2) '' A person commits an offence who corruptly accepts or agrees to accept for his or her benefit or that of another any gratification as a reward for giving assistance or using influence or having done so in the execution of a contract with a public body. ''

In terms of s 32, ''corruptly'' means ''…in contravention of or against the spirit of any law, provision, rule, procedure, process , system, policy, directive, order or any other term or condition pertaining to –

(a) any employment relationship;
(b) any agreement, or
(c) the performance of any function in whatever capacity;"

[3] *PG v Teckla and Others*, Case NO. POCA1/2009, delivered on 14 August 2009

[4] The hearing on 24 July 2009 was confined to the *in limine* points raised by the defendants and the respondents. Those in limine points failed. The parties then filed further papers: The First Defendant and some of the respondents filed supplementary affidavits whereafter the Applicant and Becker filed replying papers.

Respondents, to obtain the consent of the President of the Republic to engage in remunerative work. The Court in the first judgment held that an interim restraint order was justified in terms of sections 33 and 42 of POCA on the basis that the First Defendant received remuneration in contravention of s3(2) of the PSCA. The Court also held that there was a breach by the Defendants of s42 of the ACA. On both scores the Court was satisfied that the test for granting an interim restraining order was met: that in respect of sections 33 and 42 of the ACA offences, it appeared to the Court on reasonable grounds that there might be a conviction and a confiscation order, based on evidence that might reasonably support such a conviction and a consequent confiscation order.

[2] The Court as presently constituted then proceeded to hear the remainder of the issues in the matter on 14 September 2009; the pleadings having closed. On behalf of the Defendants/Respondents it is contended that what we have to consider at this stage of the proceedings is:

> ''In the light of the ruling, there are now two main inquiries, both to be determined on the basis now of all the affidavits (opposing and replying affidavits having been filed). The first is whether the ex parte order of 6 July is to be discharged either because of irregularities preceding or following the order. The second is whether the full affidavits now filed establish that the order was indeed also erroneously granted in relation to the remaining offence of corruption.''

[3] On behalf of the Defendants/Respondents, Mr Gauntlet has submitted that since the view taken by the Court in relation to the remaining corruption charge was without the Court having had the benefit of the answering papers, it remained tentative and can be revisited at this stage of the proceedings, due regard being had to all the affidavits now forming part of the case. I did not get the impression that

counsel for the applicant took a different view of the issues that fall for decision. In fact, Mr Muller submits in his supplementary heads of argument that:

> ''Clearly, the Defendants are at liberty to attack the provisional restraint order (as they do) on the basis of procedural irregularities which this Court in deciding the in limine points in favour of the Applicant was not called upon to deal with. Equally, the Defendants would be entitled to argue on this extended return day that once their answering papers are considered in addition to the Applicants' founding papers, on which the Court in its first judgment based its decision, this Court is at large to come to a different decision on the facts''.

[4] It is common cause that the order was obtained *ex parte* against the Defendants/Respondents and for that reason is provisional only. The Appellate Division in *Pretoria Portland Cement Co Ltd v Competition Commission* 2003(2) SA 385 at 404 B cited with approval the following dictum by Nugent J (as he then was) in *Ghomesi –Bozorg v Yousefi* 1998 (1) SA 698 (W) at 696D-E:

> ''It must be borne in mind too that an order granted ex parte is by its nature provisional, irrespective of the form it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought.'' (My underlining for emphasis).

[5] The founding affidavits which formed the basis for the interim restraint order were deposed to by the Prosecutor General (PG) and Mr Nelius Becker (Becker) of the Anti Corruption Commission (ACC). Those founding papers were subsequently amplified by the replying papers deposed to by the PG and Becker after the Defendants and some of the Respondents had filed answering affidavits. The PG's affidavit was material as regards the restraint order: It is in the PG that POCA vests the power to seek an interim restraint order in terms of ss 24 and 25 on the basis that she had formed the view that *prima facie* evidence exists which justifies the granting

of an interim restraint order and that she has charged, or is going to charge, the persons against whom such order is sought with an offence contemplated in POCA. Without those jurisdictional facts an interim restraint order would not be competent. That is no longer in issue now as the restraint order had already been granted and is extant. Becker's founding affidavit was relevant in making out the *prima facie* case for the commission of an offence contemplated in POCA. In view of the objections that have now been raised on behalf of the Defendants and the Respondents to the continuation of the restraint order, Becker's initial affidavit still remains relevant. The Defendants and the Respondents have also raised certain issues relative to the conduct of the PG, Becker, the ACC and the curator bonis subsequent to the restraint order being granted by this Court. The replying papers are relevant in adjudicating those issues.

[6] I propose at this stage to deal with the alleged procedural irregularities relied on by the Defendants/Respondents as tainting the Applicant's hands which, the Defendants/Respondents maintain, necessitate the setting aside of the interim restraint order.

Alleged material non-disclosures

[7] In the main answering affidavit deposed to by the First Defendant on behalf of herself and the other Defendants and Respondents, she alleges that the Applicant materially failed to disclose in her *ex parte* application that some of the banks (where the now-frozen accounts were held), had already been served in the morning with an order freezing the accounts before a Court order was actually obtained. She alleges that this is a blatant abuse of power meriting the Court's censure. The First

Defendant also alleges that the Applicant failed to disclose to Court the fact that already on 29 June 2009 the ACC had obtained a search warrant against the property belonging to her and the other Defendants.

Alleged violation of the interim restraint order

[8] The interim restraint order was obtained late in the afternoon of 6 July 2009. In fact, I granted the order. The First Defendant's attack in this respect draws inspiration from the part of the restraint order which directed that the realizable property of the Defendants was to be seized *"under the supervision and control of the curator bonis"* and that *"representatives of the Applicant, the Anti Corruption Commission or the Namibian Police may accompany the curator bonis in order to represent the Applicant's interest in the execution of the order"*. The order also specifically directed that:

> ''Pursuant to section 25(5) of the Act it is directed that a notice pursuant to Regulation 4 of the Prevention of Organised Crime Regulations No. 78 of 2009 together with sealed copies of the notice of motion, the affidavits filed in support and these orders shall be served **as soon as practicable** upon the Defendants, the Respondents and any other person that the Applicant believes might have an interest in the property the subject of these orders.'' Emphasis supplied)

Regulation 4 states:

> ''Notice of a restraint order made pursuant to section 25(2) of the Act must be given by serving a copy of a notice, which substantially corresponds to Form 1 of the annexure-
>
> (a) Upon the respondent; or
>
> Upon any other person the Prosecutor General considers might have an interest in the property the subject of the restraint order''. ''Notice of a restraint order made pursuant to section 25(2) of the Act must be given by serving a copy of a notice, which substantially corresponds to Form 1 of the annexure-

(a) Upon the respondent; or

(b) Upon any other person the Prosecutor General considers might have an interest in the property the subject of the restraint order''.

[9] The First Defendant also alleges that the Court order was breached in that she and the Third Defendant were summoned to the office of the ACC by Becker and other agents and interrogated about corruption and fraud without being served with a copy of the interim restraint order and the application as directed by this Court, and without being allowed to consult a lawyer although they specifically requested to do so. The assumption underlying this assertion, of course, is that it was 'practicable' to serve the papers on the two Defendants at that stage. The First Defendant specifically alleges that Becker told her- when she demanded to see a lawyer - that it was not necessary at that stage. She also alleges that during the interrogation Becker and the other agents of the ACC never informed them that an interim restraint order had been obtained affecting them on the basis that they were to be charged with 'fraud, corruption and theft.' She says that had they known that an *ex parte* order had already been obtained on the basis that they were suspects who were about to be arrested for alleged criminal conduct, they would have insisted on their lawyers being present. The First Defendant describes the interrogation in the circumstances as 'patently unconstitutional, unfair and unlawful.'

[10] According to the First Defendant, Becker and the other agents then proceeded to conduct a search and seizure at her home and office, and at the home and office of the Second and Third Defendants - again without their being served with the order or being informed of its terms, or their rights under the order to consult with a lawyer. It is also alleged that they were not even informed, as directed by the order, that only

the *curator bonis* could seize their assets. It is pertinently alleged that the *curator bonis* was not even present at such search and seizure and that Becker and his associates also seized from the First Defendant documents unrelated to Second and Third Respondents. She specifically alleges:

> ‘‘Thus while Mr. Becker and the other agents of the Anti-Corruption Commission were armed with the court order, they studiously avoided producing it, so as to inform us of our rights under it, as the Court patently intended. Most basically, we were deprived of our rights to legal representation, as expressly confirmed and provided in the ex parte order. But more importantly, the said modus operandi had obviously been carefully planned in advance. Yet, when the ex parte order was obtained, it was also not disclosed to the court that search warrants were about to be abused and executed. It was only after the questioning (without legal representation, and without disclosure of the application and order) and after searches were conducted (also without legal representation and any production of the order) that the ex parte court orders and the applications were served on the Third Defendant and I.’’

That service took place on 7 July 2009 at 15H15.

[11] The First Defendant also alleges that the Applicant failed to serve the papers on several of the respondents at all, causing them immense reputational harm considering that details of the allegations of fraud and corruption on which the interim restraint order was predicated, were already out in the public domain without them having had sight of the allegations against them. Again, it is pertinently alleged by the First Respondent that the *curator bonis* informed their legal practitioner on 16 July 2009 that it was not necessary to serve the order on the respondents. The gravamen of the Defendants’/Respondents’ complaint of irregularities is that *“the fair trial guarantees as envisaged in article 12 of the Namibian Constitution have been breached, particularly given the fact that the searches were done without legal representation, material non-disclosures were made to court, arrests were made*

without legal representation, execution of orders were done without legal representation, and we were denied access to our legal representatives when we so requested".

[12] As regards the alleged non compliance with the terms of the regulation which provides for the service of a restraint order obtained in terms of s25 on persons affected thereby, the First Defendant maintains that the non-compliance constitutes a criminal offence in terms of regulation 9 which states:

> ''A person who contravenes or fails to comply with any of these regulations commits an offence and is liable to a fine not exceeding N$60 000 or to imprisonment not exceeding three years, or to both such fine and such imprisonment''.

She adds:

> ''I respectfully submit that, where the agents of the State commit a crime, while endeavouring to execute the orders, the proceedings become so tainted that the rule nisi and interim interdict should be discharged for that reason alone. I say that in any event, the scale of the failures to comply with the court order and the law amounts to an abuse, and on this basis alone, for reasons which are further a matter for argument, the interim order is properly to be discharged.''

The Applicant's position

[13] In broad terms, the attitude adopted by the Applicant and Becker is that the Defendants'/Respondents' allegations of non-compliance with the terms of the restraint order and abuse of power and or violation of their constitutional rights in the execution of the restraint order, have no merit as the search and seizure, including the interrogations, were conducted in terms of the ACA and not in terms of POCA, or, indeed, the terms of the restraint order. The Applicant states in that regard:

''I deny that the procedures set out in the interim restraining order for the conduct of searches for property which is the subject of the restraint order should have been extended to the defendants in the course of searches conducted by the Anti-Corruption Commission, which were pursuant to search warrants obtained under the Anti Corruption Act No. 8 of 2003. The search powers granted to the Curator Bonis and the Namibian Police under the restraint orders were not used for the purposes of the searches conducted by the Anti-Corruption Commission on 7 July 2009. I deny that the procedures set out in the restraint order are applicable to completely different search powers granted by a magistrate under the Anti-Corruption Act. I deny that it was not disclosed to the court that search warrants were about to be executed. I refer in this regard to paragraph 4[5] of the affidavit of Nelius Becker sworn on 6 July 2009.''

[14] Taking the cue from the learned Prosecutor General, Becker states:

''The search of premises, arrest of the Defendants and questioning by the ACC were entirely separate procedures from those initiated on behalf of the Applicant in accordance with the provisions of the Prevention of Organised Crime Act No 29 of 2004 (POCA).

…

In any event, neither knew about nor had possession of a copy of the founding affidavit sworn by Adv. Imalwa on 6 July 2009, and was in no position to advise anyone of the contents of this document.'' (My underlining for emphasis)

[15] As far as safeguards go, Becker (while denying that the Defendants were denied the right to legal representation at any stage- in fact he alleges that they were informed of the nature of the inquiry and were warned that they did not have to answer questions if they did not want to) avers that given that the search and seizures and the interrogations were conducted in terms of the ACA, the Defendants are protected against self-incrimination.[6] Becker states that the First and Third

[5] In that affidavit Becker states: ''The investigation into the activities of the Defendants is only at an early stage. No search warrants have yet been executed. However, it is planned to execute search warrants upon premises connected with the First, Second and Third defendants soon. Once the warrants have been executed there will be a risk that the assets the subject of this application may be concealed or dissipated. **For this reason it is considered prudent to apply for restraint orders pursuant to the Prevention of Organised Crime Act No. 29 of 2004. '' (**Emphasis supplied**)**

[6] S21 (7): ''any self-incriminating answer given or statement made by any person to the Director or other authorized officer in terms of this section is admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings (a) for perjury; or (b) for an offence referred to in section 29, and then only to the extent that

Defendants chose not to have legal representation when initially questioned, and that the interrogation of the Third Defendant was discontinued as soon as he demanded access to a lawyer.

Discussion

[16] It is now common cause between the parties that, contrary to the Defendants' and Respondents' complaint, the restraint order was not served on the financial institutions before the Court was approached on 6 July. The complaint based on that ground therefore falls away. The Applicant maintains, correctly in my view, that service of the order upon third parties in control of mobile assets of the Defendants, prior to service on the Defendants, was entirely appropriate. How else could the Applicant avoid the risk of dissipation of assets or destruction of evidence? As regards the allegation that the restraint order was publicized before the Defendants and Respondents were served with the papers, contrary to what was ordered by the Court, I must say that I have great sympathy for the Defendants and the Respondents, but there simply is no evidence that the Applicant (or anyone acting on her behalf) leaked the proceedings against the Defendants and Respondents to the media who publicized it. As I suggested during argument, the culprits could even have been Court staff or those responsible for recording the proceedings as the Applicant was not the only one who had access to the order.

[17] The complaint that requires serious consideration is generally whether the Applicant failed to execute the order in the manner directed by the Court, or committed any other material abuse of the process associated with the s25 proceedings as would merit the Court's censure. Specifically, we have to consider,

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the answer or statement is relevant to prove the offence charged.''

(a) whether there was failure of service on some of the affected persons, (b) whether there was material non-disclosure before the order was obtained, and (c) whether there was a violation of the Defendants' constitutional rights in the execution of the order, and (d) whether or not the order was executed as directed.

Alleged failure of service

[18] The First Defendant alleges that as at 22 July 2009[7], *"some of the Respondents have still not been served with the application papers in terms of the court rules. This is so despite the fact that their assets were already frozen, and extensive media publication of fraud and corruption were made against them in the newspapers. The Court order directed the Applicant to serve the order 'as soon as practicable'*." With proof of the Deputy Sheriff's returns, the Applicant in her replying affidavit stated that First, Second and Third Defendants were served with copies of the application papers and the order no later than 10 July. Fourth Defendant was served with the papers by leaving same with the Third Defendant on 7 July. Again with similar proof, the Applicant alleges that the First and Second Respondents were served respectively on 8 and 7 July, while the Third Respondent was served on 21 July although the order only was served on 9 July. The Fourth, Fifth and Seventh Respondents initially were served with the restraint order on 7 July and with the rest of the papers on 15 July. The Fifth Respondent was also served with the order on 7 July and the rest of the papers on 14 July, while the papers were served on the Sixth Respondent on 15 July. It is further alleged, with proof, that the Eighth Respondent had the order faxed to it. Save that the order was publicized before they had knowledge thereof, in view of the explanations now given by the Applicant I do not

[7] The return day was 24 July. On the Court's direction, alleged procedural irregularities were not argued on 24 July. This gave time to the applicant to file replying papers. She did so on 25 August 2009 in advance of the extended return day devoted to the hearing of the balance of the issues not argued on 24 July.

consider it far-fetched that the papers were served on the Defendants and Respondents as soon as it was practicable. Where there was some delay I am satisfied that it did not serve to the prejudice of the party affected.

Alleged material non-disclosure

[19] The first complaint here is that the Applicant failed to disclose to the Court on 6 July that there was in existence a search warrant obtained on 29 June 2009 by Becker of the ACC. The relevance of this is not immediately apparent to me from a reading of the affidavit of the First Defendant. The search warrants annexed to the papers authorize the ACC, in connection with suspected 'corrupt practice' to search and seize ''*Computers (laptop and, desktops —including external hard drives and/or removal storage and,/or storage devices as well as cell phones and their contents and documentation (financial or otherwise) and/or correspondence pertaining in relation to and relevant to transactions and contact between Teko Trading, Nuctech Company Limited, Nuctech Hong Kong (or any of its affiliates) and the Ministry of Finance of Namibia."* Further the search warrants were to be executed at the named "*premises and any person found in or upon such premises and to seize the mentioned goods/articles /documents, if found and to deal with it in terms of section 24 and 25 of the Anti-Corruption Act No.8, 2003''.*

[20] On the contrary, the order obtained in terms of s25 was directed at taking control, by the *curator bonis*, of bank accounts and assets which are listed in the interim order. That order does not authorize the *curator bonis* to seize the items and documents covered by the ACC search warrants. I will accept for the sake of argument, without deciding, that the Applicant failed to disclose the existence of the

search warrants. Be that as it may, I find no merit in the Defendants' argument that the warrants under the ACA and the process under s25 of POCA are one and the same: they deal with two different subject matters. The ACA process was aimed at seizing documents and computers that could prove the commission of a corrupt practice. There could in my view therefore not have been any material non-disclosure which could have led the Court to exercise its discretion differently if the existence of the search warrants had been brought to its attention. For this reason it was not necessary for the *curator bonis* to be present when the ACC executed its search warrants on 7 July.

Alleged sidelining of the curator bonis

[21] Reading the papers of either side, it is not clear to me just at what stage the restraint order was executed, either taking control of the assets listed in the restraint order, or just when (if at all) a 'search and seizure' was conducted by the *curator bonis*. The search and seizure by the *curator bonis* was only contemplated in terms of the s25 POCA process in the event of any person failing to surrender assets covered by the order.[8] My understanding of the complaint is that the *curator bonis* was not present when Becker executed the ACC warrants and that Becker failed to inform the First and Third Defendants during their interrogation that a restraint order had been obtained *ex parte*. I have already found that the *curator bonis* did not need to be present when the ACC warrants were executed. I however still need to consider if Becker was obliged to disclose the terms of the order to the two defendants and/or to show it to them during their interrogation. This issue is bound up with the Defendants' allegation that had they been aware that a restraint order had been obtained *ex parte* on the basis that they are going to be arrested for fraud and

[8] S25(3) of POCA

corruption (as alleged in the s25 founding papers), they would have insisted to have access to a lawyer. Becker's attitude, as I have shown, is that the execution of the order was a matter for the PG; that he knew not of her affidavit, and that when he executed the ACC warrants he did not have a copy of the restraint order with him. First of all, nowhere is it alleged by the Defendants or the Respondents that (at whatever juncture) Becker and or the ACC seized the assets covered by the order. The complaint is directed at the search and seizure of documents and an interrogation conducted by Becker. Had Becker in fact seized assets covered by the order- without service of the order and not by the *curator bonis*- he would have acted in violation of the restraint order. The restraint order did not relate to and did not set up a regime for the interrogation of persons suspected of corruption, theft or fraud, or for the seizure of documents and computers suspected to be related to those offences. Although I have grave doubts about the *bona fides* of Becker's claim that he did not have the order with him when he interrogated the two defendants[9], I cannot see how the circumstances in which the interrogation took place and the ACC warrant was executed amount to a violation of the restraint order. In any event, Defendants and the Respondents were required to surrender the assets covered by the order as soon as the order was served on them. That service took place. It is only if they refused to do so that search and seizure would have been necessary. There is no evidence on the record which points to the assets covered by the order having been taken control of by a person other than the *curator bonis*, or contrary to the safeguards in the order meant for the benefit of the Defendants and the Respondents. Similarly, the allegation relating to Becker's refusal to allow the two defendants access to a lawyer when acting as an official of the ACC, although raising an important issue, does not

[9] He sat in Court when the order was moved and obtained and it is his investigation and the resultant supporting affidavit he deposed to on which the applicant's relief under s 25 is based.

advance the Defendants' and Respondents' case that the Applicant or any person acting on her behalf acted improperly in the execution of the restraint order obtained on 6 July. There is just no evidence that the order was executed by Becker on 7 July. I therefore come to the conclusion that the allegations of impropriety by the Applicant or those acting on her behalf in the execution of the order have no merit.

Non-disclosure of the First Defendant's letter to the President

[22] There is however one other important issue that requires consideration: It relates to the non-disclosure of a letter written in December 2008 by the First Defendant to the President of the Republic of Namibia, concerning her involvement with Second Respondent in which she is one of only two members. It is through the Second Respondent that she received over N$9m which has led to the present POCA proceedings against her and others. The letter in question is annexed to her answering affidavit as 'T18'.

[23] It is common cause that on 11 December 2008, the First Defendant wrote 'T18' to the President in the following terms:

> ''DECLARATION OF INTEREST
> I hereby declare my interest in the following companies according to Section 3(2) of The Public Service Commission Act, 1990 (Act 2 of 1990):
> Road fund Administration Director
> August 26 Director
> NAMDEB Director
> The above are government appointments.
> Namib Contract Haulage Director
> Financial Insurance Services Director
> Kunene Energy Shareholder
> TEKO Trading CC Shareholder

Naapapje Trading CC Shareholder
Part-time Farming''.

The effect of material non-disclosure

[24] A party approaching Court *ex parte* must make a full and frank disclosure of all the relevant facts and must act bona fide. Le Roux J deals with the effect of material non-disclosure in *ex parte* applications in the case of *Schlesinger v Schlesinger* 1979 (4) SA 342 at 449A as follows:

> ''(1) in ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;
> (2) the non- disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and
> (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it''.

He then adds (at 350B):

> ''It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same Applicant''.

[25] The following *dictum* by Smallberger JA *in Trakman NO v Livshitz and Others*[10] merits consideration:

> 'It is trite law that in ex parte application the utmost good faith must be observed by an Applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the Court's discretion, to the dismissal of the application on that ground alone (see, for example, Estate Logie V Priest 1926 AD 312 at 323; Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-350B). I know of no authority, and Mr Pincus was

[10] 1995 (1) SA 282(A) at 288E-G.

> unable to refer us to any, which extends that principle to motion proceedings and would justify the dismissal of an opposed application (irrespective of the merits thereof) for the reasons given by the Judge a quo. Nor is there any sound reason for so extending the principle. Material non-disclosure, mala fides, dishonesty and the like in relation to motion proceedings may, and in most instances should, be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant substantive relief to which he would otherwise have been entitled. No justification therefore existed for the dismissal of the application on the alternative basis.''

[26] *Trakman* was decided in 1995 and is authority emanating from a high source, but it is not binding on this Court. In any case, it certainly does not address the critical issue why motion proceedings are or ought to be treated differently. I prefer the *dictum* of Le Roux J in *Schlesinger supra* which was made in the context of *ex parte* motion proceedings. The rule about material non-disclosure seems in my view to have greater applicability in motion proceedings, and, *a fortiori* in *ex parte* motion proceedings, in view of the fact that such matters are ordinarily decided solely on the papers without the benefit of cross-examination, and what is more, without the benefit of hearing the other party, which in itself offends the fair trial provisions of Article 12 of the Namibian Constitution. That makes the *Schlesinger* proposition more in tune with the Court's sense of justice.

The applicable factual background

[27] As the authority vested under the Constitution with the power to prosecute persons for the alleged commission of offences, the PG stated under oath in her founding affidavit, as amplified in her replying affidavit, that based on the investigation conducted by Becker of the ACC, she is satisfied that prima facie evidence exists on the strength of which she has charged the Defendants with the offence of corruption under the ACA. In his founding affidavit, in so far as it is relevant to the issue of corruption, Becker testified that the First Defendant accepted

remunerative work as a public officer without the President's consent contrary to s33 of the ACA, read with s3(2) of the PSCA. He supports this allegation as follows:

> ''I am informed by Dr Albert Kawana the Acting Minister of Presidential Affairs of the Office of the President and truly believe that the First Defendant (Lameck) has not received the consent of the President to engage in remunerated work in relation to Teko Trading CC or Teko Investment Holdings Pty Ltd in accordance with section 3(2) of the Public Service Commission Act No.2 of 1990.''

[28] It is now common cause that 'T18' was never disclosed in the s25 proceedings that led to the interim restraint order being granted. It is necessary to quote the First Defendant's allegation on this aspect:

> 'To the extent it matters, in any event, before the Agency and Consultancy Agreement contracts were entered into, I informed the President of the Republic of Namibia in writing about my involvement in the Second Respondent, and I declared my interest. I annex a copy of that letter hereto marked annexure "T18". Thus here too the inference the Applicant strove to draw is even factually misconceived, and the Court was consequently misled.''

[29] Absence of consent is the all-important consideration in determining whether or not the First Defendant performed remunerative working contrary to law. Evidence which was readily available when the *ex parte* application was brought and could negative the allegation of absence of consent was therefore of crucial importance. As Mr Gauntlet correctly submits in the supplementary heads of argument, *mens rea* remains an important element of the offence of corruption created by s33 of the ACA, read with s 3(2) of the PSCA. If 'T18' was disclosed to Court on 6 July 2009, showing that the First Defendant had ''declared'' her financial interest in the Second Respondent ''in accordance with s 3(2) of the PSCA'', the Court might very well have formed the view that a person who plays open cards in

such a way could not have had the necessary *mens rea* to commit the implicated offence? That is the test for determining the materiality of 'T18'.

[30] In addition to disclosing 'T18', the First Defendant testified that sometime in June 2009 she was contacted by Mr Ndali Kamati, Executive Director in the Office of the President, and asked if she had ''declared'' her ''interest'' in any private business. She informed Kamati that she did so in December 2008 and forwarded to Kamati a signed copy of 'T.18'. This averment is very significant, yet remains unchallenged by either the Applicant or Becker. As it happens, Kamati has not filed any affidavit contradicting it. The Applicant's only reply to the averment about the contact between Kamati and the First Defendant and what was exchanged between them, is that the paragraph in which it appears contains a lot of hearsay. This particular averment is certainly not hearsay in terms of our law. As far as Becker is concerned he states in paragraph 34 of his replying affidavit (confirming the same allegation made by the Applicant in paragraph111 of her replying affidavit):

> ''A more likely explanation arises from the fact that the date of the letter T18 (12 December 2008) was in fact shortly after the First Defendant was interviewed by the Anti-Corruption Commission on 11 November 2008. During this interview (dealing with her involvement in August Holding Company, Namdeb Diamond Corporation (Pty) Ltd, Road Fund Administration and Namibia Contract Haulage) **it was specifically pointed out to her that she had to obtain the express permission from the President to do outside remunerative work.** She was requested to **provide documentary proof of the President's consent in terms of section 3(2) of the Public Service Commission Act, 1990**. I submit that on the probabilities, this letter was an attempt to provide a cover for her activities.''(Emphasis supplied)

[31] Becker's reply is revealing: it establishes that there was contact between him and the First Defendant on the very issue which is the subject of the present case, i.e.

her state of mind in respect of the offence of engaging in remunerative work without the President's consent. Yet it was not disclosed to the Court in the 6 July proceedings. No wonder therefore that the First Defendant wants to have it struck as introducing new matter in reply. The request to strike paragraph 34 of Becker's replying affidavit and paragraph 111 of the Applicant's replying affidavit is therefore a very a good one; and I strike them. The averments are so prejudicial to the First Defendant and ought properly to have made their way in the founding papers to enable her deal with those allegations in her answering papers.[11] My striking those averments however does not detract from the reality that it demonstrates that Becker was in possession of very important information likely to impact on the POCA s25 proceedings which was not disclosed to the Court. It certainly strengthens the probability that he was aware of the existence of 'T18' because, if, as is alleged, 'T18' was written to cover First Defendant's tracks, officials in the President's office must have disclosed it to him at the time of his investigation in June of 2009. Becker's reply also does not tell us what the attitude of the First Defendant was when ''*it was pointed out to her that she had to obtain the express permission from the President to do remunerative work*''. For reasons that will become apparent shortly, it is important to point out that the ''consent'' the President may give is in terms of s 3(2) of the PSCA not adjectively qualified, *pace* Becker, who introduced the adjectival qualification ''express'' in his affidavit with the view to possibly strengthening the case against the First Defendant. The attitude she took at the time would have been helpful to the Court as regards her state of mind in respect of the alleged offence of corruption. Thus, assuming that the averment of the First Defendant is true, it shows that Kamati, an official in the Office of the President, did not ask if the First Defendant had the requisite "consent of the President" for any

[11] *Coin security Namibia (Pty) Ltd v Jacobs and Another*, 1996 NR 279 HC at 287-288

business interest.

[32] The probabilities are overwhelming that Kamati of the President's Office initiated the contact with the First Defendant as part of Becker's investigation. We know that Becker had obtained the search warrants from a magistrate in the same month of that contact. (On Becker's own admission, the investigation into the corruption and fraud allegations were conducted in June 2009.) First Defendant's undisputed co-operation when so asked by the State House official shows that she was not hiding her involvement with the Second Respondent – a fact which, if the Court had been fully informed, might have placed a completely different complexion on the allegation that she did remunerative work without the President's consent. The materiality of the non-disclosure of 'T18must be assessed against the test: How could it have influenced the Court on 6 July 2009 had the Court been made aware of its existence? In answering that question one cannot ignore the contact made by Kamati with the First Defendant; from which it is clear that she conveyed to him that she had declared her interests in Second Respondent to him.

[33] Perhaps the most critical consideration in this whole matter of non-disclosure, is the fact that the allegation on which the absence of consent was based, was supported by the unconfirmed hearsay evidence of Dr Kawana which the Court held in the first judgment as not having been unfairly received in the circumstances.[12] Had the contact made by Kamati, the First Respondent's response thereto, and the existence of 'T18' been disclosed to the Court on 6 July, it might very well have taken the attitude that it would be unfair to receive the hearsay evidence of Dr Kawana on such

[12] Section 91(3) of the POCA permits the court to have regard to hearsay provided that it would not render the proceedings unfair.

a crucial issue. That might have led to the Court not having regard to Dr Kawana's hearsay evidence, in terms of s91 (3) of POCA – on the ground that it would be unfair to do so in the face of what would be potentially relevant evidence of absence of a guilty mind to commit the corruption offence of engaging in remunerative work without the President's consent. There would then have been no admissible prima facie evidence that the First Defendant engaged in remunerative work without the consent of the President, and no restraint order could conceivably be made.

[34] It is a reasonable inference on the facts of this case that either an official in the President's Office withheld 'T18' from Becker, or, Becker having received it, withheld it from the Applicant. Although I have no reason to doubt that the PG was not aware of 'T18' as is suggested by Mr Muller on her behalf, either scenario does not absolve the Applicant. It does not assuage the genuine concern that its non-disclosure rendered the reception of Dr Kawana's hearsay evidence unfair as contemplated in s 91(3) of the POCA, particularly when no evidence was placed before the Court to show, for instance, that it was not practicable to obtain a confirmatory affidavit from Dr Kawana.

[35] In the nature of things, in matters under POCA and in the exercise of her powers and duties under POCA, the PG must rely on information obtained from third parties - in this case it happened to be functionaries of the State. It cannot be emphasized enough that the powers under ss24 and 25 are so invasive of people's constitutionally guaranteed rights and, potentially, their dignity and ultimately freedom, that this Court must exact the highest standard of propriety from those whose interventions might affect those rights. There is no plausible and reasonable explanation on the

record why 'T.18' was not disclosed to the Court on 6 July 2009, or why the contact between the First Defendant and Kamati was not disclosed to Court; yet both represent very important evidential material which could very well have influenced the Court in finding that no sufficient case was made out that a conviction might follow for the offence of corruption and that a confiscation order might be made in due course.

[36] I find it implausible that Becker, save for deposing to an affidavit, had only a passing interest in the POCA ss24 and 25 proceedings against the affected persons, as suggested by him in the replying affidavit as follows:

> ''In any event, **I neither knew about nor had possession of a copy of the founding affidavit sworn by Adv. Imalwa on 6 July 2009**, and was in no position to advise anyone of the contents of this document.'' (My emphasis)

That allegation sits uncomfortably with his allegation in the initial affidavit in the following terms:

> ''The investigation into the activities of the First, Second and Third Defendants has so far focused on what has happened to the N$42,061,859 after it was deposited into the account of the Second Respondent. It has not been possible to identify fully all the assets that have been acquired with this money**, nor has it been possible so far to identify other realizable assets that the First, Second and Third Defendants own that might be made the subject of restraint under the Prevention of Organised Crime Act No.29 of 2004.** I believe that it is probable that such assets do exist. As I do not believe that the value of the assets sought to be restrained pursuant to this application will be sufficient to cover the confiscation order that may ultimately be made in these proceedings. **I submit that it would be appropriate for this honourable court to order the defendants and the First to Sixth Respondents to make discovery of the particulars and location of all their property pursuant to section 25(7) of the Prevention of Organised Crime Act, 2004.**
>
> **I therefore request this Honourable Court to order the First to Third Defendants and the First to Sixth Respondents, in terms of section 25(7) of the Prevention of Organised**

> **Crime Act**, to disclose, on affidavit within 10 days of becoming aware of this order, the existence and all relevant details of any property in which those parties have an interest and of affected gifts made by the said Defendants.'' (Emphasis supplied)

[37] In her affidavit in support of the restraint order the Applicant states:

> ''The Defendants are **to be charged with fraud, corruption and theft**. In this regard **I refer to the facts that gives rise to this application to which the investigating officer, CHIEF NELIUS BECKER {"Chief Becker"), deposes**. The affidavit of Chief Becker is annexed hereto marked OMI1.
>
> It is submitted that there are reasonable grounds for believing that the Defendants may be convicted of the offences of which they will be charged. In this regard I refer this honourable Court to the affidavit of Chief Becker. I submit that there is sufficient evidence contained in the affidavit of Chief Becker, to conclude that the Defendants may be convicted''. (Emphasis supplied)

[38] The above references in the evidence make it clear that the Applicant and Becker cooperated in the POCA proceedings. Becker knew that the information obtained by him as an ACC official was necessary for the POCA proceedings. To suggest otherwise stretches credulity a bit too far. Precisely because the law requires that before a restraint order could be made the Court had to be satisfied that the First Defendant may be convicted in due course on the basis of the absence of such consent and the necessary *mens rea* on her part accompanying such absence of consent, evidence in the possession of the Applicant and/or those on whose evidence she relied - pointing to the possibility that the First Defendant might not have had the necessary guilty mind for the commission of the offence - ought to have been disclosed to the Court. That is the basis for the conclusion to which I have come in this case. Besides, and even more importantly, the disclosure of that information might have resulted in the Court concluding that it would render the proceedings unfair to have regard to hearsay evidence on the crucial question of absence of consent in terms of s3(2) of the PSCA.

[39] The assertion by the Applicant and Becker that 'T.18' was unhelpful to the First Defendant because the agreements which resulted in a financial benefit to her through the Second Respondent post-date 'T18', cannot hold as I see nothing in the language of s3(2) of the PSCA that consent cannot be given retroactively.

[40] For the avoidance of doubt I want to make it clear that I am not here deciding that based on 'T18' the First Defendant had the President's consent to engage in remunerative work. That is a matter which the criminal Court in the fullness of time will decide. Whether or not she had implied consent by virtue of the fact of 'T18', and the conduct of Presidents (past and present), generally, and specifically in this case, are all matters having a bearing on the presence or absence of Presidential consent, and the First Defendant's state of mind in relation to it.

Conclusion

[41] I have come to the conclusion that the non-disclosure of 'T18' to the Court on 6 July 2006 and the non-disclosure of the contact between the First Defendant and Kamati of the Office of the President in June 2009 were material as they had the potential to mislead the Court in the way that I have described. I am also satisfied that it is a non-disclosure that is sufficiently serious as to lead, in the exercise of the Court's discretion, to the discharge of the interim restraint order. Mr Muller submits that *"To set aside the provisional order on the basis of the failure to disclose annexure "T18" would manifestly not be an equitable or proportional consequence of such failure. It will result in the assets acquired directly and indirectly from a substantial payment made by the Government of Namibia being dissipated, and the*

defendants being able to, as it were, make off with the spoils of what by any common sense evaluation of the facts amounted, in effect, to a diversion of public monies for personal gain on a grand scale.'' For the reasons I have given, I take the opposite view.

[42] Although 'T18' was relevant only to the accusation arising from alleged corruption in failing to obtain Presidential consent before engaging in remunerative work - and not to the corruption offence under s42 of the ACA - the failure to disclose, such as I have described, is so serious that justice demands that the restraint order be discharged as a mark of the Court's disapproval of the material non-disclosure. Where the law allows, as it does in POCA, for the Court to be asked effectively to denude people of the enjoyment of their property rights, even if temporarily, the Courts expect to do so on the basis of full information being given to them, especially information which is potentially favourable to the person whose property is sought to be restraint. Invariably, applications under POCA will be sought without notice to affected persons. The consequences upon the lives of such persons flowing from such relief are bound to be drastic. The well-established common law rule that full and frank disclosure must be made in *ex parte* applications therefore assumes even greater importance, particularly if regard is had to our Constitutional Bill of Rights.

Trakman distinguishable

[43] If I am wrong and it is found that the *Trakman* decision is good law, it would not apply to the facts of this case as the non –disclosure of the information which I find objectionable, i.e. 'T18' and the contact between Kamati and the First

Defendant, had the effect of rendering the POCA s25 proceedings unfair contrary to s91(3) of POCA, in that had that information been disclosed, the hearsay allegation concerning the crucial absence of consent by the First Defendant would most likely have been excluded in the face of such information. *Trakman* itself recognises in my view that in an exceptional case, non- disclosure could result in the setting aside of an order obtained *ex parte* in motion proceedings. In the present case, the prejudice suffered by the First Defendant from the material non- disclosure is not curable simply by a punitive costs order.

Remaining notices to strike

[44] I have specifically dealt with the First Defendant's notice to strike paragraphs 111 and 34 in the respective replying affidavits of the Applicant and Becker because they impact on the non-disclosure of 'T18'. In view of the conclusion to which I have come, it becomes unnecessary for me to deal with the rest of the parties' respective notices to strike certain matter from the affidavits of the other side. The preponderance of factors I have taken into consideration are unaffected by those matters.

Order

[45] Accordingly I make the following order:

(i) The interim restraint order and the rule nisi granted on 6 July 2009 against the First to Fourth Defendants, and against the First to Eight Respondents, are discharged;

(ii) The Applicant and or the *curator bonis* are ordered to return all and any property of the said Defendants and Respondents taken control of in furtherance of the interim restraint order, including restoring to the control of such Defendants and Respondents all bank accounts and other mobile assets seized in consequence of the restraint order.

(iii) The Applicant is ordered to pay the costs of the Defendants and the Respondents (including reserved costs), occasioned by the employment of one instructing counsel and two instructed counsel.

DAMASEB, JP

I agree

PARKER, J

ON BEHALF OF THE APPLICANT: Adv J Muller, SC

Assisted by: Adv O Sibeya

Instructed by:	**Prosecutor-General**
ON BEHALF OF 1ST, 2ND, AND 3RD DEFENDANTS:	Adv J Gauntlet, SC
Assisted by:	Adv R Heathcote
Instructed by:	**Sisa Namandje & Co**
ON BEHALF OF 4TH DEFENDANT:	Mr S Hohne
Instructed by:	**Stern & Barnard**

ON BEHALF OF 1ST, 2ND, 3RD, 4TH, 5TH & 6TH RESPONDENTS: Adv J Gauntlet, SC

Assisted by:	Adv R Heathcote
Instructed by:	**Sisa Namandje & Co**