

26/8/2010

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO 77499/09

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE. YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED	
25/08/10 DATE	<i>[Signature]</i> SIGNATURE

FIRSTRAND BANK LIMITED AND OTHERS

Respondents

JUDGMENT

TUCHTEN J:

- 1 The applicants seek relief arising from a practical problem they have encountered in the exercise of their respective duties under the Prevention of Organised Crime Act, 121 of 1998 ("POCA").
- 2 The first applicant is the National Director of Public Prosecutions ("NDPP"). The deponent to the NDPP's main founding affidavit is the head of the Asset Forfeiture Unit, a division within the National

Prosecuting Authority. The second and third applicants are the curators to an estate, created by order of court, of a species described in POCA as restraint orders. I shall refer to the second and third applicants collectively as the curators.

- 3 Under Chapter 5 of POCA, the NDPP has been granted restraint orders in a number of cases in terms of which assets, which the applicant contends equate to economic benefits that the alleged criminals have allegedly derived from crime, are frozen and then preserved in the hands of curators pending either the discharge of the restraint order if the alleged criminal is found not guilty in due course, or a final confiscation order, sounding in money, if the alleged criminal is found guilty in due course, in which case the preserved assets are available to satisfy the confiscation order.
- 4 In the nature of things, the criminal trial may take many months and even years to complete and a confiscation order can only issue after conclusion of the criminal trial. During this period the assets subject to the restraint order must be preserved by the appointed curators. This often requires finance which the curators are either not able, or are not prepared, to fund from their own means.

- 5 Under the powers of the court set out in s 28(3), the State is generally declared in the restraint order to be the guarantor of last resort in respect of the fees, expenses and disbursements of curators, the contemplation of the NDPP as applicant for these restraint orders being that the curators will as first resort seek to recover these costs from the assets under their control or the fruits of such assets. Sometimes, however, in the short term the curators will be unable to fund such costs from the assets under their control and seek to borrow money in their personal capacities to fund the implementation of their duties as such.
- 6 The present is such a case. A restraint order was made in this court on 1 October 2004 following allegations that platinum group metals were exported unlawfully and a number of the present respondents were charged with a number of criminal offences. Two criminal trials began in the South Gauteng High Court in June 2006 but have been delayed for reasons which it is unnecessary to detail.
- 7 The restraint order in the present case included a provision declaring the State to be the guarantor of last resort in respect of the fees, expenses and disbursements of the curators. To perform their duties, the curators opened a bank account with the first respondent ("FNB"). They applied for and were granted an overdraft facility on the account.

This must be seen against the background of a standing arrangement which the applicant has negotiated with FNB.

- 8 Under the standing arrangement, curators open an account with FNB which provides an overdraft facility to curators in their personal capacities, the curators cede to FNB their entitlement to any payment of fees or reimbursement of expenses arising from the curatorship, the NDPP undertakes to pay any amounts due to the curator for fees and disbursements into the account so opened and draw downs under the overdraft facility are only allowed against the NDPP's written authority that the draw down requested is reasonable and necessary to enable the curators to fulfil their duties under the court order appointing them.
- 9 In the present case the curatorship has run for more than five years. The expenses of the curatorship run to over R7,6 million against assets under restraint valued at almost R50 million. The problem which has arisen is that since 2009, FNB has taken the view that the curators have no power to borrow for purposes of the curatorship and has refused to allow further draw downs against the overdraft facility. This decision has caused the NDPP considerable difficulty, particularly because there are some 110 curators in a similar position.

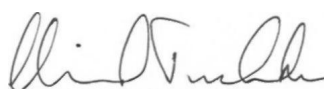
- 10 FNB's position appears from a letter dated 3 July 2009 written by FNB to the NDPP. FNB's concern quite evidently is that curators who are appointed by the court under the provisions of POCA have only the powers, duties and authority provided for or implied in POCA and such further powers as are specified or are to be implied in the order of court under which specific curators are appointed. POCA itself does not specifically authorise a curator to borrow money. FNB fears that a curator not expressly authorised in the court order under which such curator is appointed may not have the power to borrow money. It asserts that the borrowing of money is not an unavoidable or necessary consequence of a curator's office.
- 11 In order to resolve this difficulty, the NDPP and the curators seek declarators on two alternative bases: firstly, in terms of prayer 1 of the notice of motion, that the curators require no further or additional powers *as curators* to borrow money under the credit facility in place with FNB; secondly (prayer 2) that the restraint order actually issued in this case impliedly authorises the applicants to borrow money in their personal capacities for certain purposes. As a third alternative (prayer 3), the applicants seek an amendment to the restraint order to confer an express borrowing power on the curators.

- 12 The application has been served on FNB and all other persons who have an interest in the matter. Although there was initially some opposition, when the matter was called before me there was no opposition. I accordingly did not have the benefit of full argument against the relief sought. The declaration sought in prayer 1 is far reaching and in my view not necessary to enable the NDPP and the curators to solve their practical problem. In the exercise of my discretion, I therefore decline relief in terms of prayer 1 of the notice of motion as it presently stands.
- 13 As I see the matter, the concern of FNB is that *as curators*, the curators are not authorised to borrow money. But that is not what the curators seek to do in the present case and that is not the effect of their written arrangements with FNB. What the curators want to do is borrow money from FNB *in their personal capacities* and use the money so borrowed to fund their curatorships.
- 14 In my view, no restrictions are imposed by virtue of the provisions of POCA or of the restraint order on the capacity of the curators *in their personal capacities* on the one hand and FNB on the other hand to enter into the relationship of moneylender and money borrower usually contemplated in the banker/customer relationship. I am accordingly prepared to make a declaratory order to this effect. I must

make it clear that this conclusion does not address questions which arise between, on the one hand, the curators *in their capacities as such* and, on the other hand, the curators *in their personal capacities* save to say that the resolution of these questions in no way trenches upon or inhibits the ordinary freedom of contract enjoyed by bankers and their customers in their relationships as such.

15 I make the following order:

It is declared that the second and third applicants, Zakhele Sithole and Praveck Geaanpersadh, require no additional powers as curators to borrow money in their personal capacities on such terms as may be or have been agreed between themselves and the first respondent, Firststrand Bank Limited, including the terms of the credit facility agreement attached to the first applicant's founding affidavit as WH8.



NB Tuchten
Judge of the High Court
25 August 2010