

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN**

**Case no: 1785/2012
Date heard: 6.12.2012
Date delivered: 20.6.2013**

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

vs

**VUYO BENNET ZAMBODLA
AMANDA NCANYWA**

**First Defendant
Second Defendant**

JUDGMENT

TSHIKI J:

[1] On 8th June 2012 this Court granted a provisional order together with a Rule *Nisi*, calling upon the respondents to show cause on the return date, which was further extended, why the provisional order should not be made final. The provisional order was duly served on the defendants who opposed the application. In terms of the provisional order, the defendants are prohibited from dealing with realisable property as defined in sections 12 and 14 of the Prevention of Organised Crime Act, Act 121 of 1988 ("POCA"). A *curator bonis* was appointed to take possession, control and to administer the property which is the subject of the order. After all the papers were filed, this matter was argued before me for the decision whether or not the final order restraining the defendants from dealing in any manner whatsoever with the said property should be granted.

[2] The application is brought in terms of section 26 of POCA. On the date of the hearing Mr Frans appeared for the applicant and Mr Pienaar together with Mr Price appeared for the respondents.

[3] Applicant herein is the National Director of Public Prosecutions appointed in terms of section 10 of the National Prosecution Act 32 of 1998. The first defendant is an adult male person who, at the relevant time, was employed by the Buffalo City Municipality now known as the Buffalo City Metropolitan Municipality (BCMM) as a Director. The second defendant, at the time of the commission of the offence referred to hereinafter, was employed as a teacher by the Eastern Cape Department of Education. Only the first defendant has opposed the application for confirmation of the rule *Nisi*.

[4] Both defendants, in the Regional Court East London, are currently facing more than one count of corruption in contravention of the provisions of section 13(2)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004, read with sections 1, 2, 24, 26(1)(a) and (3) of the Prevention and Combating of Corrupt Activities Act 12 of 2004, section 1 of the Adjustment of Fines Act 101 of 1991, and section 269A of the Criminal Procedure Act 51 of 1977. The property referred to in the current proceedings in respect of which the defendants are being restrained relates to the offences allegedly committed by the defendants herein. First defendant has opposed the granting of the final order restraining them from dealing with the said property before the criminal proceedings against him have been finalised.

[5] Section 26(1) of the Act provides:

“26 Restraint Orders

- (1) The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.
- (2) A restraint order may be made –
- (a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
 - (b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;
 - (c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.
- 3(a) A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule *nisi* calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.”

Section 25 on the other hand provides:

“25 Cases in which restraint orders may be made

- (1) A High Court may exercise the powers conferred on it by section 26(1) –
- (a) when –
 - (i) a prosecution for an offence has been instituted against the defendant concerned.;
 - (ii) either a confiscation order has been made against that defendant or it appears to the Court that there are reasonable grounds for believing that a confiscation order may be made against the defendant; and
 - (iii) the proceedings against that defendant have not been concluded; or
 - (b) when –
 - (i) that court is satisfied that a person is to be charged with an

- offence; and
- (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.”

[6] It follows that in terms of section 18(1) of POCA the Court convicting a defendant may make a confiscation order if it finds that the defendant has derived a benefit, as defined in section 12(3) of POCA, from the offence or any other offence of which the defendant has been convicted at the same trial or any criminal activity that the Court finds to be sufficiently related to the offences. The Court must be satisfied that there are reasonable grounds for believing that the defendant(s) may be convicted and that there are reasonable grounds for believing that the trial Court may find that the defendant(s) benefited from the offence or any other relevant offence(s) as described.

[7] The provisions of Chapter 5 in particular sections 25 and 26 of POCA create a means for the preservation of assets so that any confiscation order (under part 2 of Chapter 5 of POCA) which may be granted can be effective and that these provisions are not penal. They are meant to ensure that a criminal does not benefit from crime. It matters not that Chapter 5 authorises the application of a restraint order even to a defendant’s own property which is not the proceeds of crime and this is so because the idea is to reverse whatever benefit was derived from criminal activity to which no legal entitlement can appropriately be claimed. (***National Director of Public Prosecutions v Mcasa and Another*** 2000 (1) SACR 263 (TKH) at 268 paras [7] and [8]).

[8] The facts relied upon by the applicant in support of its application are that first defendant was the director in the employ of BCMM and therefore a senior official of the said municipality. He was responsible for the management of the BCMM 210 Project Office which project was, *inter alia*, responsible for the organisation of the 2009 Confederations cup event in the BCMM region that took place from 14 to 28 June 2009. The purpose of the organisation of the event was to enable members of the general public, who were not able to watch the soccer games at the stadiums where matches were played, to watch such games in the designated public viewing areas (PVAS) that would have been erected for this purpose. BCMM was responsible for the funding of this project. First defendant's office was tasked with identifying the service providers to organise the event. BCMM identified Mdantsane as the area where the event would take place. First defendant's office was tasked with identifying the service providers to organise the event which included, *inter alia*, the provisions of security services and installation of public viewing areas.

[9] First defendant citing the shortness of time within which to organise the event owing to the unexpected withdrawal of the Department of Sport, Recreation, Arts and Culture (DSRAC) applied for the deviation from the normal procurement process for the selection of the service providers. In his deviation application, first defendant stated that in order to boost the local economy the service provider would have to be chosen from service providers coming from Mdantsane area, the same area that was identified for holding the event. It should be noted that the procedure required that at least three quotations be sourced from prospective service providers. In order to qualify, such service provider would have to be registered in the BCMM's data base. First defendant's authority was limited to only recommend the preferred service

provider to the Supply Chain Management (SCM) which had the authority to **appoint** service providers. First defendant then submitted the deviation application to the then Acting Municipal manager and to the then Acting Chief Financial Officer and advised them that the event would cost a total sum of R200 000.00. He further confirmed that such funds were available in the budget of the 2010 Project Office.

[10] On 6 June 2009, first defendant awarded the tender to the second defendant for an amount of R191 400.00. He did so with the knowledge that second defendant's company was not registered on the BCMM database and that such registration was a requirement for qualification and consequently for appointment as the successful tender for the project. In order to obviate the necessity to have been an applicant registered in the BCMM database second defendant successfully made an arrangement with Ingcango CC directors with a view to get their permission to use their close corporation's name because their company was registered in the BCMM database. They agreed that for this arrangement second defendant would pay Ingcango CC 10% of the payment due to second defendant.

[11] According to the evidence it also transpired that first defendant had misled the Acting Municipal Manager and the Acting Chief Financial Officer in that he failed to make a recommendation to the Supply Chain Management (SCM) for the appointment of the service provider and instead he made the appointment himself notwithstanding that he knew he had no authority to do so. Secondly, he knew that the second defendant did not have a company listed on BCMM's database and that Ingcango had its registered offices in Amalinda and not in Mdantsane. In addition, the amount quoted and paid by first defendant for the project was inflated from

R191 400.00 to R419 310.00 and did so to the prejudice of the BCMM. It also transpired further that the second defendant who won the tender was the girlfriend of the first defendant. Instead of doing the work herself, second defendant, through Ingcango CC, hired subcontractors to perform the work as she had no capacity to organise the event. There is also evidence to show that the second defendant informed one Ayanda Madolwana of Ingcango CC that Ingcango CC would not do anything in the project in this event and she only wanted them to provide her with their company's tax certificate and CK documents so that she could submit those documents to BCMM for the latter to award the tender to her. This was done at the expense of the second defendant who, for this arrangement, was prepared to part with 10% of the project money due to her by BCMM. Many cheques amounting to a total of R144 000.00 were also withdrawn from Ingcango's bank account in favour of the second defendant immediately after the sum of R144 000.00 was deposited to Ingcango's account.

[12] Evidence that the two defendants created a reasonable suspicion that they were acting in concert is confirmed by the fact, *inter alia*, that a cheque of R85 410.00 issued to Ingcango CC was personally collected from first defendant's office by the second defendant. Such cheque should have been collected by the directors of Ingcango.

[13] In his response to the allegations against him by the applicant, first defendant preferred not to deal specifically and in detail with damaging averments of the applicant's founding affidavit. His main contention being that the applicant has not proven that he has benefited from the alleged fraud and corruption as contemplated

by the provisions of POCA. He therefore denies that he received any benefit and further denied that he is guilty of fraud and corruption.

[14] A reading of sections 18(1) , 25(1) and 26(1) and (2) lead to the conclusion that there could be a restraint order if reasonable grounds existed for the grant of a confiscation order which , in turn , could only be granted if there had been a conviction. Such a restraint order was competent only if reasonable grounds existed for a Court to believe that the defendant(s) concerned may be convicted of an offence (**National Director of Public Prosecutions v Mcasa and Others supra**)

[15] During argument Mr Pienaar submitted, *inter alia*, that applicant has not proved that first defendant had benefited from the alleged fraud and corruption as contemplated and required by the provisions of POCA. He further submitted that the relevant section requires that it should appear to the Court itself that there are “reasonable grounds” for such a belief which requires at least that the nature and tenor of the available evidence needs to be disclosed.

[16] I do not agree with the above submission and I wish to also add that “there can be no inference (**to be drawn**) unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture.” (Per Lord Wright in **Caswell v Powell Duffryn Associated Collieries Ltd** [1939] 3 ALL ER 722 (HL) at 733) quoted by Mr Pienaar in his heads of argument on page 5. [my emphasis]

[17] Each case has to be decided according to its own merits. The legislature in terms of section 25(1) of POCA provides that it must appear to the Court that there are reasonable grounds for believing that a confiscation order may be made against such person. In *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) at para [27] Nugent JA remarked as follows:

“... It is plain from the language of the Act (*section 25(1)* of the Act) that the Court is not required to satisfy itself that the defendant is probably guilty of an offence and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of available evidence, and cannot rely merely upon the appellant’s opinion (*National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) [2001]2 SACR 712 para [19] it is nevertheless not called upon to decide upon a veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, **but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true**”. [My emphasis]

[18] In other words it must appear to the Court that there are reasonable grounds, obviously at the time of the application, to believe that a confiscation order following a conviction may, and not will be made. Naturally the law of evidence applies. However, the Court hearing the restraint order application clearly does not have to be convinced in terms of a particular burden of proof that a conviction and confiscation will follow. The Court has to form an opinion based on appearance and reasonableness as to future possibilities. At the end of the day a conviction is a *sine qua non* for a confiscation order. However, the purpose of section 25 and section 26

is to secure property to ensure that a confiscation order which may follow a conviction (in terms of section 18) can be executed.

[19] There is evidence from Ayanda Patric Madolwana (Ayanda) a shareholder of Ingcango Trading cc who states that second defendant informed them that she was offered a tender by the first defendant whom she knew very well inside BCMM. I have already been informed that the first defendant at the time was the boyfriend of the second defendant. If one has regard to all the evidence I am satisfied that there are reasonable grounds that there might be a conviction of the defendants at the trial which could lead to a confiscation order. The nature and tenure of such evidence makes me believe, on reasonable grounds, that such evidence might reasonably be believed by the trial Court. At this stage there is no reason to believe that the evidence is manifestly false or unreliable. On the nature of the evidence there are also reasonable grounds for believing that the trial Court could establish that the first defendant has probably benefited from the offence.

[20] For the purposes of these proceedings it is not necessary for this Court to prove that defendants have actually benefited from the unlawful activity or crime. It is sufficient for the Court to have reasonable grounds for believing that the defendants might be convicted and be proved to have benefited from the offence. This Court does not adjudicate the issue of confiscation. That should be left to the trial Court which has to deal with whether the defendant(s) are guilty or not and if found guilty, to enquire whether they in fact actually benefited from the crime in which event the Court would have to order confiscation. Section 18(2) of POCA provides that the amount which a Court may order the defendant to pay to the State

under section 18(1) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in section 18(1) as determined by the Court in accordance with the provisions of Chapter 5 of POCA.

[21] In the present case, I am satisfied there are reasonable grounds for believing that there might be a conviction and a confiscation order. In saying so, I am persuaded by the nature of the evidence which has been placed before me by the applicant. That evidence has not been refuted by the defendants in any manner whatsoever. Emphasis should be made to the irregularities which have been attributable to both defendants in the nature of the failure by the first defendant in following the procurement processes and requirements when the second defendant's company was appointed. First defendant having no powers to appoint the service provider he decided to do so and to appoint his girlfriend's company. His powers were merely to recommend and not to appoint.

[22] According to the evidence first defendant had advised the Acting Chief Financial Officer and the Acting Municipal Manager that the event would cost a total of R200 000.00. On the contrary a sum of R419 310.00 was paid by the BCMM. It is obvious that if the service provider's tender was awarded at the price of about R200 000.00, the trial Court has to prove in detail the necessity for the increase of the contract amount by 100%. Evidence also shows that these amounts in excess of R200 000.00 were deposited in bank accounts of the second defendant at the instance and recommendation if not on the authority of the first defendant. The nature of the evidence which would obviously be led at the trial is, on reasonable grounds, likely to prove that the first defendant had benefited from the payments

made by him to the second defendant. First defendant has not disputed most of the factual averments and evidence relied upon by the applicant which have the effect of implicating him in the commission of the offences. Such evidence clearly establishes reasonable grounds for believing that first defendant may be convicted of the offences of which he has been charged in Court. There is more to the evidence already alluded to *supra* which shows clearly that on reasonable grounds there might be a conviction followed by a confiscation against the two defendants. I do not have to be satisfied of the guilt of the defendants before I can make a final order of restraint.

[23] Therefore, I make the following order:

[23.1] The Rule *Nisi* granted on 8 June 2012 is hereby confirmed.

[23.2] First defendant is ordered to pay costs of the application.

P.W . TSHIKI
JUDGE OF THE HIGH COURT

For the applicant : Adv Z Frans
Instructed by : NN Dullabh & Co
GRAHAMSTOWN

For the respondents : Adv B.J Pienaar SC & Adv T Price
Instructed by : Nettletons
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