



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 446/05

In the matter between :

**NGENGELEZI ZACCHEUS MNGOMEZULU
NONTANDO MNGOMEZULU
SECTION 13 THE AUGUSTUS CC
NORDIC SAGA INVESTMENTS 203 CC
SECTION 76 THE AUGUSTUS CC
SECTION 21 ST JAMES CC
SECTION 77 THE AUGUSTUS CC
BASFOUR 481 (PTY) LTD
GREEN MILE INVESTMENTS 277 CC
EMERALD DUNES INVESTMENTS 10 CC
NUMBER 17 ST JAMES COURT CC
SECTION 29 ST JAMES CC
SWZ FILLING STATION CC
SWZ PROPERTIES & DEVELOPMENT (PTY) LTD**

First Appellant
Second Appellant
Third Appellant
Fourth Appellant
Fifth Appellant
Sixth Appellant
Seventh Appellant
Eight Appellant
Ninth Appellant
Tenth Appellant
Eleventh Appellant
Twelfth Appellant
Thirteenth Appellant
Fourteenth Appellant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:	STREICHER, HEHER, COMBRINCK JJA, SNYDERS & MUSI AJJA
Heard:	19 FEBRUARY 2007
Delivered:	16 MARCH 2007
Summary:	Section 28 of the Prevention of Organised Crime Act 121 of 1998 – <i>curator bonis</i> may be authorized to alienate property under restraint in order to properly administer the assets under his control.

Neutral citation: This judgment may be referred to as *Mngomezulu v National Director of Public Prosecutions* [2007] SCA 11 (RSA)

STREICHER JA

STREICHER JA:

[1] This is an appeal against the confirmation by the Witwatersrand Local Division of a provisional restraint order against the appellants. The order had been granted pursuant to an *ex parte* application in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA). Leave to appeal was granted by the court a quo.

[2] The application for a restraint order was directed against the first appellant as defendant and the other appellants were joined as respondents because of their interest in the matter, more particularly their interest in the realisable property sought to be restrained. In opposition to the application the appellants filed an answering affidavit deposed to by the first appellant. He stated that he had been advised that it was unnecessary for him to deal with the merits of the application and that his failure to respond to any of the allegations contained in the founding affidavit should not be construed as an admission of the contents thereof. He then raised two points *in limine*. The first was that the provisional order should be discharged as a result of the respondent not having drawn the attention of the judge who granted the order to the fact that the order differed from previous orders granted in applications for restraint orders in terms of s 26. The second was that paragraphs 1.7, 1.8, 1.20 and 4.3.2 of the provisional order conferred powers on the *curator bonis* appointed in terms thereof which could not be conferred on him lawfully. These were the only points argued in the court a quo and also the only points dealt with in the heads of argument filed on behalf of the appellants. However, during the oral argument before us counsel for the appellants¹ abandoned the first point *in limine* and submitted that the formulation of the second point was wide enough to accommodate a submission, advanced in the alternative, that no case had been made out for the appointment of a *curator bonis* and for conferring on such curator the powers referred to.

¹ Advocate Brassey SC had by then taken over as the leading counsel.

[3] The first appellant had been charged with dealing in drugs in contravention of the Drugs and Drug Trafficking Act 140 of 1992. In terms of s 26 read with s 25 of POCA a High Court may grant an order prohibiting any person from dealing in any manner with any property to which the order relates when a prosecution for an offence has been instituted against the defendant concerned, when it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against the defendant and when the proceedings against the defendant have not been concluded. As to when a confiscation order may be made, s 18 of POCA provides that whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from that offence and, if the court finds that the defendant has so benefited, the court may make an order against the defendant for the payment to the State of any amount it considers appropriate, subject to the limit specified in s 18(2). Such an order is referred to in POCA as a confiscation order.

[4] A restraint order may be made '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'.² Realisable property is defined as:

- '(a) any property held by the defendant concerned; and
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.'³

[5] Where a High Court has made such a restraint order, that court may in terms of s 28 of POCA at any time:

² Section 26(2)(a).

³ Section 14.

- ‘(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 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*.’

[6] The restraint order made against the appellants relates to twelve immovable properties, a number of Persian carpets, works of art, vehicles and numerous bank accounts specified in a schedule attached to the order. It also relates to all other property held by the appellants excluding clothing, bedding, ordinary household furniture, kitchen and laundry appliances and utensils and other articles (other than luxuries) that the *curator bonis* may consider to be reasonably needed for the day to day use of the appellants. The appellants did not contend that any of the property so restrained did not constitute realisable property held by the first appellant within the meaning of POCA.

[7] In terms of the order the appellants, and any other person with knowledge of the order, were prohibited from dealing in any manner with the property except as required or permitted by the order.⁴ In this regard the order provided that the appellants had to surrender the restrained property to the curator but that the curator could within his discretion release any of the property back into the custody of the person who held such property, under

⁴ Para 1.3 of the order.

such conditions as the curator deemed appropriate, for the proper administration and preservation thereof.⁵ In the event of a full disclosure having been made by an appellant the curator was also authorised to release such of the realisable property within his control as may be sufficient to meet the reasonable current and prospective living expenses of the appellant concerned as well as his reasonable current and prospective legal expenses.⁶ Save as aforesaid the order did not allow the appellants to deal with the property. Theodor Wilhelm van der Heever of Deloitte & Touche Trust (Pty) Ltd was appointed as *curator bonis* subject to the provisions of the Administration of Estates Act 66 of 1965 and subject to the supervision of the Master of the High Court.⁷ He was authorized, after having obtained letters of curatorship in terms of s 32(1) of POCA, to take the property into his possession or under his control, to take care of such property and to administer it.⁸ Such powers, duties and authority as provided for or implied in the Act and such further powers as were specified or implied in the order were conferred on him.⁹

[8] Paragraphs 1.7, 1.8, 1.20 and 4.3.2 of the restraint order, being the paragraphs in issue, read as follows:

- ‘1.7 The particular *curator bonis* will be entitled to pay any expenses related to restrained assets, which would ordinarily be carried by the estate out of any assets under restraint. If no liquid assets are available to the *curator bonis* to pay these expenses the *curator bonis* will have the power to sell assets under restraint in order to properly administer the assets under his control. In such case, the owner of the relevant restrained property has to be consulted as to which assets under restraint should be sold.
- 1.8 The *curator bonis* will further be entitled to deal with any funds in any banking accounts forming part of the property and is accordingly authorized to hold the

⁵ Paras 1.21 and 1.26.

⁶ Paras 1.35 and 1.36.

⁷ Para 1.4 of the order.

⁸ Para 1.5 of the order.

⁹ Para 1.6 of the order.

necessary signing powers of such accounts and to give directions to banking institutions and other persons in control of any of those funds regarding the utilization of such funds.'

'1.20 In terms of Section 28(3)(c) of the Act, the fees of the *curator bonis* and, *ex post facto*, expenses and disbursements reasonably incurred by the *curator bonis* in the execution of his duties which have not been paid out of the estate in terms of paragraph 1.7 *supra*, shall be paid from the proceeds of any confiscation order that may be made against the Defendant failing which, by the State; provided that the *curator bonis* is entitled to recover interest not exceeding the prime lending rate of the major financial institutions on such expenses and disbursements.'

'4 In terms of section 26(4)(a) of the Act, the Applicant is directed forthwith to give notice of this order, by delivering a copy by hand, facsimile or by registered post, to the following persons:

4.1 . . .

4.2 . . .

4.3 The Registrar of Deeds directing him to endorse the title deed of any immovable property registered in the name of the Defendant and the Respondents with the following restriction, namely, the property shall not, without the consent of this Court:

4.3.1 . . .

4.3.2 Be attached or sold in execution (subject to the powers afforded to the *curator bonis* in paragraph 1.7 and 1.17 above);

4.3.3 . . .'

[9] The respondent correctly stressed in argument that :

'(a) Clause 1.7 merely permits the curator to use the resources of the estate to pay expenses which meet two requirements. They must firstly relate to the restrained assets. They must secondly be expenses "*which would ordinarily be carried by the estate*", that is, expenses which the estate would have incurred and paid in the ordinary course if the confiscation order had not been made.

(b) Clause 1.8 merely allows the curator to operate the bank accounts of the estate under his administration. It does not in any way extend the purposes for which he may use the money in those accounts. He may only use the money for purposes permitted by the remainder of the order. This clause

does not add to them. It merely says that he may operate the bank accounts for purposes of the performance of his functions.'

[10] In terms of s 28(1)(a)(i) a High Court that has made a restraint order may authorize a curator 'to perform any particular act in respect of any of or all the property to which the restraint order relates'. If interpreted according to its ordinary meaning, the section empowers a High Court to authorize a curator to, inter alia, sell property. However, the appellants argued that the section, read in its context, should be interpreted restrictively so as to exclude the power to alienate restrained property. They submitted that the purpose of a restraint order was to preserve the property to which the order related and that a provision in a restraint order entitling a *curator bonis* to sell or encumber the restrained property would defeat the purpose of POCA. They pointed out that even an eventual confiscation order would not in itself deprive the owners of property of their right of ownership but would simply constitute an order for payment of an amount of money to the State.

[11] In terms of s 33 the powers conferred upon the High Court by sections 26 to 31, or upon a *curator bonis* appointed in terms of s 28 are to be exercised 'with a view to making available the current value of realisable property for satisfying any confiscation order made or which might be made'. For the reasons that follow that purpose is not defeated by the provision entitling the *curator bonis* to sell or encumber the restrained property 'in order to properly administer the assets under his control' and 'to pay any expenses related to restrained assets, which would ordinarily be carried by the estate'.

[12] The *curator bonis* was entrusted with the administration of virtually the entire estate of the appellants. Such administration would include the maintenance of the restrained property and the payment of expenses in respect thereof. The appellants conceded that in order to properly administer

the property entrusted to him the curator would have to incur expenses but submitted that those expenses should be borne by the State. However, s 28(3)(c) provides that a court which made an order contemplated in subsection (1)(b) 'may make such order relating to the fees and expenditure of the *curator bonis* as it deems fit, including an order for the payment of the fees of the *curator bonis* –

- (i) from the confiscated proceeds if a confiscation order is made; or
- (ii) by the State if no confiscation order is made.'

Again the appellants were constrained to argue for a restrictive interpretation of the phrase 'such order . . . as it deems fit'. However, the phrase would not have been used if the intention was that the curator's expenses up to the time that a confiscation order was made could only be recovered from the State. Furthermore, the appellants will be benefited by the payment of 'expenses related to the restrained assets, which would ordinarily be carried by the estate out of any assets under restraint'. In the circumstances it is unlikely that the legislature intended to exclude an order that the curator's expenses relating to the restrained assets may be recovered from the restrained assets themselves.

[13] The legislature, by using the phrase 'such order . . . as it deems fit' clearly intended to confer a wide discretion on the High Court as to the source from which the curator could recover his expenditure in respect of the administration of the property entrusted to him. There is no reason why the High Court in the exercise of that discretion should not, in order to enable the *curator bonis* to properly administer the realisable property entrusted to him, authorize him to utilise the liquid assets in the estate or to turn non-liquid assets into liquid assets to the extent that there are insufficient liquid assets. It may be that the value of the realisable property will as a result diminish but the purpose of allowing the curator to utilize and alienate assets is to restrict that diminution in value. Should the restrained property not be administered

properly and should expenses such as rates and taxes and expenses relating to maintenance not be incurred the diminution in the value of the property of the appellants would in all probability be much greater than the amount expended. The power to sell assets under restraint is therefore required to preserve the value of the property under restraint and serves the purpose of a restraint order.

[14] Property may also depreciate in value at such a rate and to such an extent that the proper administration of an estate may require the sale thereof. Not to allow the *curator bonis* in these circumstances to alienate the property so as to preserve the value thereof would defeat the abovementioned purpose of POCA and may be unfair to the defendant concerned.

[15] For these reasons it is not surprising that it has become standard practice for a court, when appointing a curator to administer the property of a minor or of a person not able to manage his own affairs, to confer on the curator the power to alienate movable and immovable property (see *Ex parte Hulett* 1968 (4) SA 172 (D) at 175D to 176C and *Ex parte Thompson* 1983 (4) SA 392 (E) at 393E-G). Fannin J, in *Ex parte Hulett*¹⁰, referred to this power as a power 'which a curator would normally require in order fully to administer his ward's estate'. Being a power which a curator would normally require in order fully to administer his ward's estate the legislature probably intended to empower the High Court to confer this power on a *curator bonis* appointed in terms of s 28.¹¹

[16] The appellants placed reliance on the provisions of s 30 of POCA. That section provides that a High Court may, on the application of the National

¹⁰ At 175C.

¹¹ Cf *Hughes and others v Customs and Excise Commissioners* [2002] 4 All ER 633 (CA) at 648h-i.

Director, authorise the *curator bonis* to realise any realisable property when a confiscation order has been made, when such confiscation order is no longer subject to review or appeal and when the proceedings against the defendant concerned have not been concluded. The order may, however, only be made if all persons known to have an interest in the property concerned have been afforded an opportunity to make representations to the court in connection with the realisation of that property. The court may also allow a person directly affected by the confiscation order or a person who suffered damage to or loss of property or injury as a result of an offence or related criminal activity committed by the defendant concerned, to make representations. They submitted that the fact that these qualifications are not to be found in s 28 indicated that the intention was not that a *curator bonis* could be empowered to alienate restrained property.

[17] It is true that the provisions referred to are not to be found in s 28. However, the section contains other safeguards against abuse of his powers by a curator. Notice of a restraint order has to be given to persons affected by the order¹² and in terms of s 28 any person affected by an order for the surrender of property into the custody of a curator may apply for the variation of the terms of the appointment or for the discharge of the curator. In addition the actions of a curator are at all times subject to the directions of the court.¹³

[18] Confirmation that a *curator bonis* appointed in terms of s 28 may be authorised to alienate or utilize property which he has been appointed to administer is to be found in the Administration of Estates Act 66 of 1965. Section 32(2) of POCA provides that save as is otherwise provided in Chapter 5, ie sections 12 to 36 thereof, the provisions of the Administration of Estates Act shall with the necessary changes apply in respect of a *curator*

¹² Section 26(4)(a).

¹³ Section 28(1)(a).

bonis appointed under the Chapter. Section 80 of the Administration of Estates Act provides as follows:

‘80(1) No natural guardian shall alienate or mortgage any immovable property belonging to his minor child, and no tutor or curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorized thereto by the Court or by the Master under this section or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated.’

Section 82(c)(ii) of the Administration of Estates Act provides that every curator, whenever he receives any money belonging to the person concerned from any person other than the Master, must forthwith pay the money into the hands of the Master except, inter alia, if the money is immediately required for the preservation or safe custody of any property of the other person.

[19] For these reasons I am of the view that a High Court may in terms of s 28(1)(a) authorize a *curator bonis* appointed in terms of that section to alienate property under restraint in order to properly administer the assets under his control. It follows that the attack on clauses 1.7 and 1.8 was correctly dismissed by the court a quo. The appellants confined their attack on clauses 1.20 and 4.3.2 to their reference to clause 1.7. Inasmuch as clause 1.7 has been held to be valid the attack on clauses 1.20 and 4.3.2 similarly has to fail.

[20] The appellants submitted in the alternative that the respondent, in his founding affidavit, had not made out a case for the appointment of a *curator bonis* and for conferring on the *curator bonis* the powers referred to. However, the respondent did make out a case for the granting of a restraint order in respect of virtually all of the first appellant’s realisable property including a number of immovable properties, movable property and numerous bank accounts and stated that it would be in the interests of justice for the court to appoint a *curator bonis* to administer the restrained property. In terms

of the restraint order sought the appellants were prohibited from dealing with the restrained property which constituted almost the entire estate of the appellants. The nature of the restrained property is such that it requires administration. The restraint order therefore necessitated the appointment of a *curator bonis* to administer the property and the conferral on him of the powers referred to.

[21] The appeal is dismissed with costs including the costs of two counsel.

P E STREICHER
JUDGE OF APPEAL

CONCUR:

HEHER JA)

COMBRINCK JA)

SNYDERS AJA)

MUSI AJA)