



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not reportable
CASE NO: 75/06

In the matter between :

| | |
|--|----------------------------|
| PAUL ABRAHAM JANSE VAN RENSBURG | 1 st Appellant |
| WILLEM JACOBUS JANSE VAN RENSBURG | 2 nd Appellant |
| LEON LODEWIKUS OLIVER | 3 rd Appellant |
| MELISSA DE BRUTO | 4 th Appellant |
| INVICTA KONSTRUKSIE CC | 5 th Appellant |
| LAMSO CONSTRUCTION CC | 6 th Appellant |
| ANNAMARIE OLIVER | 7 th Appellant |
| PAUL ABRAHAM JANSE VAN RENSBURG | 8 th Appellant |
| WILLEM JACOBUS JANSE VAN RENSBURG | 9 th Appellant |
| WILLEM JACOBUS JANSE VAN RENSBURG | 10 th Appellant |

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Before: **STREICHER, HEHER, COMBRINCK JJA, SNYDERS
& MUSI AJJA**

Heard: **20 FEBRUARY 2007**

Delivered: **23 MARCH 2007**

Summary: Section 26 of the Prevention of Organised Crime Act 121 of 1998 – no facts alleged from which reasonable grounds for believing that a confiscation order might be made appear - case for relief to be made out in founding affidavits – respondent not called upon to deal with facts contained in attachments not referred to and not relied upon in the founding affidavit.

Neutral citation: **This judgment may be referred to as *Janse van Rensburg v NDPP* [2007] SCA 23 (RSA)**

STREICHER JA

STREICHER JA:

[1] The appellants appeal against a restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA) granted against them in the Transvaal Provincial Division upon an application by the respondent. Leave to appeal to this court was granted by the court below.

[2] In terms of s 26 read with s 25 of POCA a competent High Court may upon an application by the National Director of Public Prosecutions (the respondent) make a restraint order prohibiting any person from dealing in such realisable property as may be specified in the order and which is held by the person against whom the order is being made, when that court is satisfied that a person is to be charged with an offence and it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person. A confiscation order means an order in terms of s 18. The section provides that whenever a defendant is convicted of an offence and the court convicting him upon enquiry finds that he has derived a benefit from that offence, or from any other offence of which he has been convicted at the same trial and from any criminal activity which the court finds to be sufficiently related to those offences, the court may make an order against the defendant for the payment to the State of any amount it considers appropriate.

[3] Upon the application of the respondent for a restraint order against the first to fourth appellants the court below was satisfied that the first to fourth appellants were to be charged with fraud alternatively theft and that a case had been made out from which it appeared that there were reasonable grounds for believing that they might be convicted and that a confiscation order might be made against them. The court below therefore confirmed a rule nisi in terms of which a provisional restraint order had

been granted and granted the restraint order. The order was granted in respect of all realisable property¹ held by the first to fourth appellants, excluding such realisable property as the *curator bonis* appointed in terms of the order might certify in writing to be in excess of R19 181 330.20² and ‘expenses related to restrained assets which would ordinarily be carried by the estate’. The appellants contend that the court below erred in finding that there were reasonable grounds for believing that a confiscation order might be made against them, more particularly in finding that there were reasonable grounds for believing that any of the first to fourth appellants might be convicted of the offences of fraud or theft.

[4] In the application for the restraint order the first to fourth appellants were cited as defendants and the fifth to tenth appellants, being persons who may be affected by the restraint order, as respondents. The first appellant, P A Janse van Rensburg and the second appellant, W J Janse Van Rensburg, each hold a 50% member’s interest in the first respondent, Invicta Konstruksie CC. The third appellant, L L Olivier, holds a 20% member’s interest and the seventh appellant, A Olivier, who is married in community of property to the third appellant, holds an 80% member’s interest in the sixth appellant, Lamso Construction CC. The fourth appellant is married to the first appellant. The first and second appellants, in their capacities as trustees of the Nicpaul Trust, are cited as the eighth and ninth appellants respectively and the second appellant in his capacity as trustee of the Willem Jacobus Janse van Rensburg Trust is cited as the tenth appellant.

¹ Realisable property is defined in s 14 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.’

² Adjusted to take into account fluctuations in the value of money as calculated in terms of sections 15 and 20 of POCA.

[5] In regard to the contention that there are reasonable grounds for believing that the first to fourth appellants may be convicted of fraud or theft, the respondent relies on an affidavit by Skuto David Mfopha a special investigator in its employ attached to the Directorate of Special Operations (DSO). The DSO instituted an investigation in order to investigate suspected fraudulent conduct in respect of tenders issued and awarded by the Gauteng Department of Education (GDE) and that investigation gave rise to these proceedings.

[6] The offences of fraud alternatively theft with which the first to fourth appellants were charged were allegedly perpetrated in connection with tenders submitted by and awarded to six close corporations namely Johannes Maja CC, Mathekga & Olivier CC, Thandi NG CC, T N T Trading 60 CC (trading as Techni Paint), Micromath Trading 112 CC and Ali Builders CC. In the light of the conclusions to which I have come I will, unless indicated otherwise, set out the facts as alleged by the respondent.

[7] Johannes Maja Construction CC was registered in the names of Johannes Maja and his wife Disego Julia Moseri. Each of them held a 50% member's interest in the close corporation. The registration was attended to by the third appellant who had encouraged Maja to register a close corporation. The third appellant accompanied Maja and Moseri to a bank where they opened a bank account for the close corporation. Although they were the only signatories on the account the third appellant kept the cheque book and controlled the account. The third appellant assisted them to complete the tender documents. Tenders were awarded to the close corporation. An allegation that Maja and Moseri had not benefited financially from the tenders is disputed by the appellants.

[8] Mathekga and Olivier Construction CC is a close corporation in which Jeffrey Phuti Mathekga held 80% and the third appellant 20% of the members' interest. The third appellant suggested to Mathekga that a close corporation be formed and that they should share the profits of the undertaking in the ratio 80/20. The third appellant provided the funds initially required and he was responsible for managing the close corporation while Mathekga was going to be in charge of the employees on the sites where work had to be done. They opened a bank account in respect of which they were to be co-signatories but the third appellant controlled the chequebook in respect of the account. The third appellant completed tender documents and arranged for Mathekga to sign them but at times signed such documents on behalf of Mathekga. A tender or tenders in respect of two projects at the Moretele School were awarded to the close corporation. One project was for renovations in the amount of R1 091 139 and the other for the erection of a palisade fence in the amount of R165 834. According to Mathekga money was paid into the close corporation's bank account but he has no knowledge as to how the money was utilised. He was at times asked to sign cheques which were blank or had the figures inserted concealed.

[9] Encouraged by the first and fourth appellants to start her own business, Thandi Nokulunga Nkosi acquired a close corporation and changed its name to Thandi NG Construction CC. She did so with the financial assistance of the first and the fourth appellants. A bank account was opened on behalf of the close corporation and Nkosi, the only member of the close corporation, was also the only signatory on the account. With the assistance of the first appellant Nkosi submitted a tender by the close corporation for the renovation of Tenekolonga Primary School in

Katlehong. The tender was awarded to the close corporation and the security required by the GDE, being 2% of the tender value, was provided by the fifth appellant. The fifth appellant did part of the work for which it submitted an invoice to the GDE. As a result R220 000 was paid into the close corporation's bank account. An amount of R200 000 was thereupon transferred to the bank account of the fifth appellant. Notwithstanding the allegation by the respondent that Nkosi was the only signatory on the close corporation's bank account the respondent alleges that it was the first appellant who transferred the amount to the fifth appellant's bank account. The relationship between Nkosi and the first appellant was thereafter terminated due to the fact that Nkosi was not actively involved in the work. Nkosi thereupon entered into an agreement with one Lunga in terms of which it was agreed that Lunga would complete the work and that payment for the work would be shared between Lunga and Nkosi on an equal basis.

[10] Techni Paint is the name under which T N T Trading 60 CC traded. Each of the fourth appellant and Thomas Mtsweni held a 50% interest in the close corporation. Although it is alleged that Mtsweni was not advised of the interest he held in the close corporation it is clear that he knew that he and the fourth appellant were co-owners of Techni Paint and that their purpose was to obtain tenders from the GDE. The fourth appellant tendered for work on behalf of Techni Paint and a tender in an amount of R945 864,84 for work in respect of the Monde Primary School was awarded to it. Techni Paint used the equipment, material and staff supplied by the fifth appellant to execute the work. Again an allegation that Mtsweni did not benefit from the awarding of the tender is disputed by the appellants.

[11] Micromath Trading 112 CC is a close corporation in which Kgosi Jack Kgare holds a 75% member's interest and Catherine M E van Nieuwenhuizen a 25% interest. Kgare, an employee of the fifth appellant, must have signed the necessary documents when he, at the request of the first appellant, during 2000, accompanied Van Nieuwenhuizen to the registrar of companies but he does not know that he became a member of the close corporation. The close corporation obtained a tender to renovate Bhukuleni Secondary School in Soweto. The first appellant promised him a bonus in respect of the work that was being done at the school. He had no control over the close corporation and did not know that it had a bank account.

[12] Ali Building Construction CC is a close corporation in which Alpheus Legutso (later called Lehutso) holds a 100% member's interest. According to the respondent the first appellant registered this close corporation in Lehutso's name without Lehutso being aware thereof. Lehutso eventually got control of the close corporation. Tenders in an amount of R3 767 700 were awarded to the close corporation but it is not stated when that happened.

[13] Mfopha explained the tendering process that was employed, as follows: An invitation to tender was advertised in newspapers whereupon tenders were submitted. Upon receipt of tenders they were taken to a compliance office where they were checked for compliance with the requirements set out in the tender documents. Thereafter the tenders were submitted to a tender committee. Only tenders within 10% of the estimated cost of the project were considered. They were evaluated in terms of criteria based on price, technical competence and a preference point system in accordance with the Preferential Procurement Policy Framework

(‘PPPF’) introduced in terms of the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations. In terms of the PPF a company that was wholly or partly owned by black people or which had appointed a female or a disabled person as a shareholder scored additional points on the basis of their status as ‘Historically Disadvantaged Individuals’ (‘HDI’s). It was standard procedure that in all tender documentation submitted to the GDE the tendering company should declare all partners, proprietors and shareholders by name, identity number, home address, citizenship, previously disadvantaged individual (‘PDI’) status, shareholding percentage and date of acquisition, time devoted to the entity, interests in other entities and length of service of individuals. The price tendered was allocated 90% of the total score and preference points made up the balance. Only the tender with the highest score could be selected. The tender committee’s selection was then submitted for approval to the GDE’s Acquisition Council headed by the Chief Executive Officer of the GDE.

[14] The names of the members of the close corporations and the amount allegedly involved in respect of each close corporation are set out by Mfopha in a table called Schedule A, as follows:

| COLUMN 1 | COLUMN 2 | COLUMN 3 |
|---|-------------------------------------|------------------------|
| Name of the CLOSE CORPORATION | Owner(s) | Amount involved |
| Johannes Maja Close Corporation | Johannes Maja & Disego Moseri | 4 324 983.28 |
| Mathekga & Olivier Close Corporation | Jeffrey Mathekga & Leon Olivier | 1 742 650.62 |
| Thandi NG Close Corporation | Thandi Nkosi | 883 094.00 |
| Techni-Paint Close Corporation | Melissa De Bruto & Mtsweni | 7 613 166.30 |
| Micro Maths Trading 112 Close Corporation | Cathrine Niewenhezen & Kgoshi Kgare | 849 736.00 |
| Ali Builders Close Corporation | Alpheus Lehutso | 3 767 700.00 |
| Total | | 19 181 330.20 |

[15] Numerous documents comprising 475 pages, including extracts from the record of the investigation conducted by the respondent were attached to Mfopha's affidavit. He concluded:

'55 Throughout the investigation, I have established that the First Respondent through the Defendants employed a number of people, most of whom were African, and most of whom were current or previous employees of First Respondent.

56 The Defendants would facilitate the creation of a close corporation in which some of their African employees would be the sole members or would hold at least a 50% member's interest.

57 The Defendants would then use the status of the black owned companies to secure tenders with the GDE.

- 58 The First Respondent would in turn perform the work as per the tender specifications and payment from the GDE would then be made to “the black owned entity which they had formed”.
- 59 The Defendants would then withdraw the money from the bank account of the respective close corporations.
- 60 I respectfully submit that there are reasonable grounds to conclude that **FRAUD** has been committed by the Defendants in that³:
- 58.1 They did have *de facto* control of the entities listed in Column 1 of Schedule A, which were used to apply for certain tenders from the said GDE; and/or
- 58.2 The Defendants had financial control and/or control of the bank accounts and/or access to the bank accounts and/or access to the finances that were paid by GDE to the entities mentioned in Column 3 of Schedule A which were owned by their black employees; and/or
- 58.3 That the entities mentioned in Column 1 of Schedule A were owned and/or controlled wholly or in part by persons mentioned in Column 2 of Schedule A; and/or
- 58.4 That the monies paid by GDE would be used to the benefit of persons mentioned in Column 2 of Schedule A; and/or
- 58.5 That the money paid to the GDE as security for the tenders awarded, to at least one of the entities mentioned in Column 1 of Schedule A were monies paid by the Defendants; and/or
- 58.6 The Defendants through the tenders submitted to the GDE stated that the entities mentioned in Column 1 of Schedule A were the owners of resources such as machinery and trucks, financial independence and operational structures in order to perform the work that they were tendering for.
- 58.7 The Defendants through the tenders submitted to the GDE stated that the entities mentioned in Column 1 of Schedule A implied that they had staff, financial independence and independent operational structures in order to perform the work that they were tendering for.’

³ I retained the following incorrect numbering.

[16] In order to satisfy the requirements of s 25(1)(b)(ii) it was necessary for the respondent to allege facts from which it appeared that there were reasonable grounds for believing that the first to fourth appellants might be convicted of the offences of fraud or theft and that a confiscation order might be made against them. 'Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'⁴ It is not contended that a case had been made out in respect of theft and nothing further need be said in this regard. In regard to the charge of fraud, and in the light of the conclusion that I have reached, only the question of misrepresentation needs be addressed.

[17] Paragraphs 58.1 and 58.3 are contradictory. Mfopha probably intended to say that the first to fourth appellants misrepresented the ownership and control of the entities mentioned in Column 2 of Schedule A. However, no factual basis for that conclusion is to be found in his affidavit. That the first to fourth appellants used the close corporations concerned in order to secure work from the GDE is clear but it does not follow that they misrepresented the ownership and control of the corporations to the GDE.

[18] The mere fact that the first to fourth appellants had financial control and/or control of the bank accounts of the close corporations and that they had access to the funds that were paid by the GDE to the entities concerned, as alleged in paragraph 58.2, did not constitute a fraud. Mfopha probably intended to allege that the first to fourth appellants misrepresented to the GDE that the people mentioned in column 2 had such control and

⁴ Jonathan Burchell *Principles of Criminal Law* 3ed p 833.

access. Again no factual basis for that conclusion is to be found in the founding papers.

[19] In paragraph 58.4 it is alleged that the first to fourth appellants committed a fraud in that ‘the monies paid by GDE would be used to the benefit of persons mentioned in Column 2 of Schedule A’. Mfopha probably intended to say that the first to fourth appellants committed a fraud in that they misrepresented that the monies paid by the GDE would be used for the benefit of those persons. Again no factual basis for that conclusion is to be found in Mfopha’s affidavit. Nowhere in the affidavit does he say when, where, how and to whom this alleged misrepresentation or the misrepresentations alleged in paragraphs 58.1, 58.2 and 58.3 were made.

[20] In paragraph 58.5 it is alleged that defendants committed a fraud in that ‘the money paid to the GDE as security for the tenders awarded, to at least one of the entities mentioned in Column 1 of Schedule A were monies paid by the Defendants’. No basis for an allegation that such action would have been fraudulent is to be found in Mfopha’s affidavit.

[21] The misrepresentations alleged in paragraphs 58.6 and 58.7 are not relied upon in a provisional charge sheet served on the appellants. In argument before us counsel for the respondent nevertheless relied upon them. In paragraph 58.6 Mfopha alleges that express representations were made by the appellants in tender documents submitted to the GDE ‘that the entities mentioned in Column 1 of Schedule A were the owners of resources such as machinery and trucks, financial independence and operational structures in order to perform the work that they were tendering for’. In paragraph 58.7 he probably intended to allege that the appellants by

implication misrepresented in the tenders to the GDE that the entities mentioned in Column 1 of Schedule A ‘had staff, financial independence and independent operational structures in order to perform the work that they were tendering for’.

[22] However, although there are a number of tender documents among the 475 pages attached to Mfopha’s affidavit, neither the tender documents in which these representations are alleged to have been made nor the passages in these tender documents relied upon by the respondent, are referred to in the affidavit. With two exceptions the tender documents attached to the affidavit are attachments to other documents and are not referred to in the affidavit. One of the exceptions is a tender document attached as an example of a tender document. The other exception is a tender document which is attached in support of the allegation that ‘Techni Paint submitted a tender to the GDE and gave out that it is a registered close corporation’. Like the other alleged misrepresentations no basis for the representations alleged in paragraphs 58.6 and 58.7 are therefore to be found in the affidavit.

[23] The respondent submits that a basis for Mfopha’s conclusion of fraud appears from passages in the 475 pages annexed to his affidavit. However, an applicant for relief has to make out a case for the relief he is seeking in his founding affidavits ie he should, in his founding affidavits, set out the facts relied upon by him. A respondent is not called upon to deal with facts contained in attachments to the founding affidavits not referred to and not relied upon in the founding affidavits. For this reason an applicant cannot be allowed to rely on such facts. In this regard I fully agree with the following statement by Joffe J in *Swissborough Diamond*

Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324F-G:

‘Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See *Lipschitz and Schwartz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H and *Port Nolloth Municipality v Xahalisa and Others ; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B-C.’

In *Lipschitz and Schwartz NNO* at 775H-776 Coetzee J said:

‘A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed.’

[24] The respondent failed to allege facts from which it appears that there are reasonable grounds for believing that the first to fourth appellants may be convicted of fraud or theft. The respondent therefore failed to make out a case that there are reasonable grounds for believing that a confiscation order may be made against them. It follows that the appeal should succeed.

[25] The following order is made:

- 1 The appeal is upheld with costs including the costs of two counsel.
- 2 The order of the court a quo is set aside and replaced with the following order:

‘The rule nisi is discharged and the application is dismissed with costs.’

P E STREICHER
JUDGE OF APPEAL

CONCUR:

HEHER JA)
COMBRINCK JA)
SNYDERS AJA)
MUSI AJA