THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case Nos: 657/2022 and 694/2022

In the matter between:

KURT ROBERT KNOOP NO **FIRST APPELLANT**
(in his capacity as business rescue practitioner
of Optimum Coal Mine (Pty) Ltd)

JOHAN LOUIS KLOPPER NO **SECOND APPELLANT**
(in his capacity as business rescue practitioner
of Optimum Coal Mine (Pty) Ltd)

KGASHANE CHRISTOPHER MONYELA NO **THIRD APPELLANT**
(in his capacity as business rescue practitioner
of Optimum Coal Mine (Pty) Ltd)

JUANITO MARTIN DAMONS NO **FOURTH APPELLANT**
(in his capacity as business rescue practitioner
of Optimum Coal Mine (Pty) Ltd)

OPTIMUM COAL MINE (PTY) LTD **FIFTH APPELLANT**
(in business rescue)

KURT ROBERT KNOOP NO **SIXTH APPELLANT**
(in his capacity as business rescue practitioner
of Tegeta Exploration and Resources (Pty) Ltd)

JOHAN LOUIS KLOPPER NO **SEVENTH APPELLANT**
(in his capacity as business rescue practitioner
of Tegeta Exploration and Resources (Pty) Ltd)

TEGETA EXPLORATION AND RESOURCES (PTY) LTD **EIGHTH APPELLANT**

(in business rescue)

KURT ROBERT KNOOP NO **NINTH APPELLANT**

(in his capacity as business rescue practitioner of Optimum Coal Terminal (Pty) Ltd)

KGASHANE CHRISTOPHER MONYELA NO **TENTH APPELLANT**

(in his capacity as business rescue practitioner of Optimum Coal Terminal (Pty) Ltd)

OPTIMUM COAL TERMINAL (PTY) LTD **ELEVENTH APPELLANT**

(in business rescue)

NATIONAL UNION OF MINEWORKERS **TWELTH APPELLANT**

TEMPLAR CAPITAL LTD **THIRTEENTH APPELLANT**

LIBERTY COAL (PTY) LTD **FOURTEENTH APPELLANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Neutral citation: *Knoop NO and Others v National Director of Public Prosecutions* (Case nos 657/2022 and 694/2022) [2023] ZASCA 141 (30 October 2023)

Coram: MOCUMIE, MEYER and MATOJANE JJA and KATHREE-SETILOANE and KEIGHTLEY AJJA

Heard: 22 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be 30 October 2023 at 11h00.

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – asset forfeiture – preservation of property order – Companies Act 71 0f 2008 (Companies Act) – **business rescue** – preservation of property order granted after adoption of business rescue plan under Chapter 6 of the Companies Act – whether a preservation order under s 26 of POCA is appealable – whether this Court's decisions in *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) and *Singh v National Director of Public Prosecution* 2007 (2) SACR 326 (SCA) are definitive on the issue of the appealability of a preservation order.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie and Mbongwe JJ, sitting as court of first instance):

The appeal is struck from the roll with costs including the costs of two counsel, such costs to be borne jointly and severally by the first to eleventh, twelfth and thirteenth, and fourteenth appellants respectively.

JUDGMENT

Keightley AJA (Mocumie, Meyer and Matojane JJA and Kathree-Setiloane AJA concurring)

[1] This is an appeal against the grant of a preservation of property order (the preservation order) by the Gauteng Division of the High Court (the high court) on 23 March 2022 under s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) on application by the National Director of Public Prosecutions (the NDPP).[1] The preservation order appointed a curator *bonis*[2] with designated powers in respect of the affected property. The property identified in the preservation order is:

(a) all shares held in Optimum Coal Mine (Pty) Ltd (OCM);

[1] The high court delivered a consolidated judgment in respect of two preservation applications by the NDPP under case numbers 62604/2021 and 62601/2021. The applications were heard together. Separate preservation orders were granted in respect of each application. This appeal is against the order granted in respect of case number 62604/2021 only.

[2] In terms of s 42 of POCA.

(b) the business of OCM as defined in the business rescue plan adopted by the creditors of OCM in September 2020 including, but not limited to, the assets listed in the business rescue plan; and

(c) all shares held in Optimum Coal Terminal (OCT).

[2] The shares in question are held by Tegeta Exploration and Resources (Pty) Ltd (Tegeta). OCM, OCT and Tegeta are all in business rescue. The first to fourth appellants are the appointed business rescue practitioners of OCM. The sixth and seventh appellants are the appointed business rescue practitioners of Tegeta, and the ninth and tenth appellants are the appointed business rescue practitioners of OCT. They share a common stance in the appeal. Consequently, I refer to them simply as 'the business rescue practitioners', unless there is a need to be more specific.

[3] OCM and OCT are linked companies as defined in the Companies Act 71 of 2008 (Companies Act). OCM is a coal mine which historically has mined and exported coal. OCT has a shareholding in the Richards Bay Coal Terminal that entitles it to export coal. This provides the avenue for OCM's coal exports.

[4] A business rescue plan for OCM was approved by the majority of creditors prior to the application for a preservation order. It contemplates the disposal of the business of OCM to Liberty Coal (Pty) Ltd (Liberty), which is the fourteenth appellant. Liberty is a subsidiary of Templar Capital Limited (Templar), the thirteenth appellant. OCM's business rescue practitioners have recognised Templar as the single largest creditor of OCM. Both Liberty and Templar are controlled by Daniel McGowan (Mr McGowan). Templar's claims against OCM have their origin in the claims of another entity of which Mr McGowan is a director, namely Centaur Ventures Limited (CVL). Templar took cession of CVL's claims against OCM. The business rescue plan provides that these claims

will be converted to equity in Liberty. Liberty and Templar thus have an interest in the business rescue plan being put into effect.

[5] The twelfth respondent is the National Union of Mineworkers (NUM). It is an 'affected person' in the business rescue and is entitled to participate in any related court proceedings. NUM voted in favour of the business rescue plan. Its view is that the plan offers its members who are employees of OCM their only hope of being paid the outstanding remuneration due to them, and the opportunity for re-employment at the mine as envisaged in the business rescue plan.

[6] The preservation order prohibits:

'All persons . . . other than as required and permitted by (the preservation order) from removing, taking possession of or control over, dissipating, interfering with, diminishing the value of, pledging or otherwise hypothecating, attaching or selling in execution or dealing in any other manner with any of the property unless they obtain the prior written consent of the curator *bonis* appointed under (the) order.'

[7] This prohibition is subject to a proviso which permits the business rescue practitioners to enter into and perform individual transactions with a value of less than R50 000 in the ordinary course of OCM's business. There is a further proviso recording that the prohibition against dealing with the property does not:

'Prevent the disposal of the business of OCM under circumstances where the curator *bonis* and the business rescue practitioners have agreed to do so in writing, or if there is no agreement, with the prior obtained leave of the Court, pursuant to a business rescue plan adopted after (the) order by the creditors of OCM under Chapter 6 of the Companies Act, in which event the net proceeds of such disposal of the business shall be property preserved under (the) order.'

[8] Save for the latter proviso, the preservation order expressly operates 'as a power of attorney for the curator *bonis* to deal with the property as if he himself is its owner or holder'. This includes the curator *bonis* having the power and authority to act as shareholder of the affected shares. The order retains for the

business rescue practitioners control of OCM's business, subject to the express powers of the curator *bonis*. In an attempt to harmonise the tension between the powers, authority and obligations of the curator *bonis* under the preservation order, and those of the business rescue practitioners under the Companies Act, the preservation order directs that:

(a) They (the curator *bonis* and the business rescue practitioners) shall co-operate with each other in good faith and shall use their best endeavours to attempt to find a purchaser for the business of OCM at fair value with the aim of disposing of the business pursuant to a new business rescue plan.

(b) In the event of the current business rescue practitioners being removed, the curator *bonis* will have the power to appoint their replacement.

[9] Despite these provisions, the immediate effect of the preservation order was to put a hold on the business rescue practitioners giving effect to the business rescue plan, which had an implementation deadline of 28 March 2022. Hence the opposition to the order by not only the business rescue practitioners, but also by other parties whose interests are affected, namely Liberty, Templar and NUM.

[10] One of the main bones of contention for the appellants is that the preservation order impermissibly interferes with the statutory powers and obligations of the business rescue practitioners as prescribed under the Companies Act. It does so, according to the appellants, by making the business rescue practitioners subject to the oversight of the curator *bonis* insofar as the affected property is concerned. They contend that the preservation order is incompetent as it seeks to establish an unlawful state-controlled business rescue process, which does not serve the objects of forfeiture under POCA.

[11] The NDPP disputes this. She argues that the preservation order, and the forfeiture of property order that is pending, are competent and necessary to serve

the purposes of POCA. According to the NDPP, the asset forfeiture proceedings in this case form part of her broader obligation to deal with the consequences of what has become known as State Capture. The NDPP points to the Public Protector of South Africa's State of Capture Report,[3] which found evidence of irregular conduct by a wide range of state officials. This conduct included the facilitation of the 'Optimum acquisition' by the Gupta family. It involved the acquisition by them, through Tegeta, of the shares in OCM and OCT, as well as the business of OCM through which coal was mined and exported. The State Capture Commission that followed, supported the findings of widespread criminality directly linked to the acquisition of Optimum.

[12] The NDPP explains that the preservation order, and the pending forfeiture order associated with it, are directed at recovering the proceeds of crime linked to the corrupt scheme that culminated in the acquisition of Optimum by the Gupta family. The NDPP's case is that the targeted assets are the proceeds, as well as instrumentalities of the crimes of fraud, theft and money laundering. If the business rescue plan is permitted to be put into effect, it will facilitate further money laundering. This is because Templar's claims are themselves tainted.

[13] The NDPP adduces evidence that she says demonstrates that the funds underlying the CVL claims were advanced by a Gupta family company, Griffin Line General Trading LLC, and were the proceeds of crime. In other words, the NDPP's case is that Templar acquired a tainted claim through cession, and that taint persists. The current business rescue plan if put into effect would allow Templar, which is controlled by Mr McGowan, to use the tainted CVL claims to acquire a benefit ultimately for Mr McGowan. It is for this reason, according to the NDPP, that effect cannot be given to the present business rescue plan.

[3] *State of Capture*, Report No 6 of 2016/17, dated 14 October 2016.

[14] However, the NDPP contends that this does not mean that an alternative business rescue plan, excluding Templar and Liberty, should not be pursued, with the curator and the business rescue practitioners working together as provided for under the preservation order. In that event, the proceeds from any new acquisition of OCM's business will, after the satisfaction of lawful creditors' claims, be forfeited to the state. This is assuming, of course, that the pending forfeiture application is resolved in favour of the NDPP. The purpose of the preservation order is thus to preserve the assets of OCM and OCT in the interim.

[15] As noted earlier, OCM, OCT and Tegeta were already in business rescue when the preservation application was instituted. The application was preceded by an investigation launched by the Investigating Directorate of the National Prosecuting Authority into offences perpetrated against Transnet SOC Ltd and Eskom Holdings SOC Ltd during the period covered by the State Capture Commission. The preservation application is supported by a detailed affidavit by Sibusiso Tshikovhi (Mr Tshikovhi) who was involved in the investigation.

[16] In advance of launching the preservation application the NDPP wrote to the legal representatives of the business rescue practitioners on 26 November 2021, and furnished them with an early draft of Mr Tshikovhi's affidavit. The affidavit included evidence relied on by the NDPP to show that the Tegeta shares in OCM and OCT and the business of OCM were acquired with the proceeds of crime. It also included evidence that the CVL claims (on which Templar's claims were founded) were tainted. The NDPP urged the business rescue practitioners to have regard to the evidence and the alleged criminal conduct that would be perpetrated if the business rescue plan was put into effect. The NDPP also sought

the business rescue practitioners' consent under s 133[4] of the Companies Act for the institution of the preservation application.

[17] The business rescue practitioners were not swayed by the NDPP's letter, and elected to proceed with the implementation of the business rescue plan. In addition, they refused the requested consent under s 133. Their response prompted the NDPP to launch the preservation application on an urgent, or more accurately a semi-urgent, basis as the deadline for the implementation of the business rescue plan was 28 March 2021. The NDPP also sought the requisite leave of the high court under s 133(1)*(b)* of the Companies Act to bring the application. Importantly, although s 38 of POCA permits the NDPP to apply *ex parte* for a preservation of property order, she proceeded on notice to the business rescue practitioners.

[18] The business rescue practitioners opposed the relief on several grounds including the lack of urgency in the application; the non-joinder of the creditors of OCM and OCT and other interested parties; the failure of the NDPP to obtain prior leave of the court under s 133 to institute the preservation application; the NDPP's failure to make out a case for the preservation of the shares of OCM's business; and the legal incompetence of the relief sought on the basis that it would result in an irreconcilable conflict with the business rescue provisions of the Companies Act. The defences were all dismissed by the court a quo. It subsequently granted leave to appeal to this Court. On appeal the business rescue practitioners persisted with the defences raised before the court a quo.

[4] Section 133 imposes a general moratorium on legal proceedings against a company in business rescue. It provides, in relevant part:
'(1) During business rescue proceedings, no legal proceeding, including enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced with in any forum, except-
(a) with the written consent of the practitioner;
(b) with the leave of the court and in accordance with any terms the court considers suitable; . . .'

[19] NUM contends in the appeal that the court a quo erred in granting the preservation order in that no prima facie case was made out to preserve the business of OCM. Further, that the court a quo failed to undertake a proportionality inquiry before granting the preservation order. It ought properly to have found that the preservation of the property is not reasonable and justifiable as required by s 36 of the Constitution. A further ground of appeal is that the court erred by ignoring the fact that the NDPP had used preservation of property proceedings for an ulterior purpose, namely to scupper business rescue. NUM also contends that the relief sought was *ultra vires* the Companies Act and POCA. Finally, NUM takes issue with the costs ordered against it, placing reliance on the principles laid down in *Biowatch Trust v Registrar Genetic Resources and Others*.[5]

[20] As for Liberty and Templar, the court a quo granted their application for leave to intervene in the main application, and to appeal its judgment and order in that application. Their appeal is directed at certain paragraphs of the preservation order. Essentially, like the other appellants, their complaint is that the court a quo erred in preserving the business of OCM. Further, they submit that the court a quo did not have the power to authorise the adoption of a new business rescue plan. Nor could it properly authorise the curator *bonis* to appoint new business rescue practitioners in the event that the current practitioners resign.

[21] Despite the wide-ranging defences raised by the appellants, this appeal turns on a preliminary point: whether a preservation order granted under Chapter 6 of POCA is appealable. This question was raised by the NDPP in opposing an application by NUM for condonation for the late filing of its heads of argument in the appeal. This Court issued a directive requesting the parties to

[5] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 43.

submit written submissions on the question of appealability, particularly in light of this Court's judgments in *DRDGold Limited and Another v Nkala and Others*[6] (*DRDGold*) and *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*[7] (*TWK Holdings*). In their submissions all the appellants contend that the order is appealable; the NDPP contends it is not.

[22] *TWK Holdings*[8] reconfirms the test for appealability set out in *Zweni v Minister of Law and Order*[9] (*Zweni*), namely that an appealable decision has three attributes: (a) it is final in effect and not susceptible of alteration by the court of first instance; (b) it is definitive of the rights of the parties; and (c) it has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[10] *TWK Holdings* finds, despite other judgments to the contrary, that the interests of justice do not provide a self-standing ground of appealability in this Court outside the scope of *Zweni*. While the *Zweni* test is not immutable,[11] *TWK Holdings* emphasises that any deviations from the *Zweni* test must 'be clearly defined and justified to provide ascertainable standards consistent with the rule of law'.[12] This is necessary to prevent piecemeal appeals.[13] The latter finding is consistent with what this Court has previously stated: when a decision sought to be appealed against does not dispose of all the issues, it must, if permitted, lead to a just and reasonably prompt resolution of the real issue between the parties.[14]

---

[6] *DRDGold Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA).
[7] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).
[8] Ibid para 21.
[9] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A).
[10] Ibid para 8.
[11] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (SCA) para 13; *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 19.
[12] *TWK Holdings* fn 7 para 30.
[13] Ibid para 21.
[14] *DRDGold* fn 6 para 28.

[23] The business rescue practitioners advance three reasons for why the preservation order is appealable. The first is that this Court's judgments in *Phillips and Others v National Director of Public Prosecutions*[15] (*Phillips*) and *Singh v National Director of Public Prosecutions*[16] (*Singh*) are definitive of the issue. The second is that the preservation order satisfies the *Zweni* test and the third is that the issue of the competence of the order, discussed earlier, renders it appealable.

[24] Are *Phillips* and *Singh* definitive? *Phillips* involved a restraint order granted under s 26, which is in Chapter 5 of POCA. This Court found that although a restraint order is only of interim operation, and it has no definitive or dispositive effect as envisaged in *Zweni*, it is unalterable by the court that granted it.[17] The effect of a restraint order is that a defendant is stripped of the restrained assets and any control or use of them pending the conclusion of the related criminal trial. The Court concluded: '[t]hat unalterable situation is . . . final in the sense required by the case law for appealability'.[18]

[25] As in this appeal, *Singh* involved a preservation order granted under s 38 of POCA. The NDPP in that case conceded on appeal that the preservation order was appealable. The Court noted that the concession arose from its finding in *Phillips* and commented that it was rightly made in that: 'the grant of a preservation order is "final" in the sense required for appealability – in the case of both restraint and preservation orders the court making the order may only rescind or vary it in accordance with the provisions of POCA'.[19] The Court ventured no further reasoning on the issue, and it rested there.

---

[15] *Phillips* fn 11.
[16] *Singh v National Director of Public Prosecutions* [2007] ZASCA 82; [2007] 3 All SA 510 (SCA); 2007 (2) SACR 326 (SCA).
[17] *Phillips* para 20.
[18] Ibid para 22.
[19] *Singh* para 10.

[26] The pronouncement in *Singh* (for this is essentially what it amounted to) rests on the assumption that there is material parity between restraint orders under Chapter 5 and preservation orders under Chapter 6 of POCA. It is so that they share common features. However, a closer examination of the legislative scheme underpinning each Chapter demonstrates that there are substantive differences in the remedies established under each.

[27] The Chapter 5 asset forfeiture regime, with which this Court was concerned in *Phillips*, is often referred to as 'criminal asset forfeiture'. Although POCA expressly provides that Chapter 5 proceedings are civil in nature,[20] asset forfeiture under Chapter 5 is inextricably linked to criminal proceedings against the defendant. The purpose of Chapter 5 is to ensure that criminals disgorge the benefit they have derived from the offences of which they are convicted, or related criminal activities. This is achieved by the convicting court making a confiscation order post-conviction.[21] A confiscation order is a civil judgment for payment to the state of an amount of money in addition to the criminal sentence imposed, rather than for the confiscation of a specific object.[22]

[28] As in most cases there is likely to be a delay between the institution of criminal proceedings, the conviction of the defendant and the imposition of a confiscation order, POCA provides a mechanism to preserve property in the

---

[20] Section 13(1) of POCA provides:
'For the purposes of this Chapter proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.'

[21] Section 18(1) 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-

(a) that offence;
(b) any other offence of which the defendant has been convicted at the same trial; and
(c) any criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[22] *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (2) SACR 165 (CC); 2008 (8) BCLR 834 (CC) para 24.

interim in the form of a restraint order under s 26. A restraint order acts as a form of security for the eventual satisfaction of any confiscation order that may be granted post-conviction.[23] It is not restricted to property actually tainted by the defendant's alleged criminality. A restraint order may be made in respect of realisable property, which is defined as 'any property held by the defendant concerned',[24] meaning that even lawfully-acquired property may be subject to restraint.

[29] The high court, rather than the relevant criminal court, has the power to grant a restraint order, on application by the NDPP *ex parte*. The order prohibits any person, subject to any conditions and exceptions specified by the court, from dealing in any manner with any affected property.[25] POCA expressly envisages a two-stage, rule *nisi* procedure for the grant of a restraint order, with a provisional, *ex parte* order, preceding the final grant or discharge of the provisional order on a designated return day.[26]

[30] At the same time as granting a restraint order the high court may appoint a curator *bonis* with powers to receive on surrender, and take care of and administer the property subject to restraint.[27] The court has unrestricted powers to vary or rescind the appointment and terms of appointment of a curator *bonis*.[28] However, it may only vary a restraint order if the operation of the order will deprive the applicant of the means to provide for her reasonable living expenses and cause

[23] *National Director of Public Prosecutions v Wood and Others* [2022] ZAGPJHC 272; [2022] 3 All SA 179 (GJ); 2022 (2) SACR 245 (GJ) para 30.
[24] Section 14(1).
[25] Section 26(1).
[26] Section 26(3)*(a)* provides:
'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.'
[27] Section 28(1).
[28] Section 28(2).

undue hardship, and that hardship outweighs the risk of dissipation of the property.[29]

[31] It was in large measure these features of a restraint order that led this Court in *Phillips* to conclude that despite being only of temporary duration, that is, pending the outcome of any conviction and confiscation proceedings, a restraint order establishes an unalterable situation, rendering it final and appealable. The appellants contend, as *Singh* appeared to accept, that because a preservation of property order shares these features, it too should be regarded as final and appealable.

[32] Broadly speaking asset forfeiture proceedings under Chapter 6 of POCA share a similar objective to that of criminal asset forfeiture under Chapter 5. They are aimed at depriving persons of their criminal proceeds or of property used as instrumentalities of designated offences. The end goal of Chapter 6 proceedings is the grant of a forfeiture order over specified property.[30] A preservation of property order is aimed at preserving affected property pending the outcome of a forfeiture application instituted under s 48. To this extent a preservation order may be likened to a restraint order.

[33] However, there are significant conceptual and procedural differences between the two forfeiture regimes. As the Constitutional Court explained in *National Director of Public Prosecutions and Another v Mohamed NO and Others*,[31] while under Chapter 5 the confiscation machinery can only be invoked when a defendant is convicted: 'Chapter 6 . . . provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based; it

[29] Section 26(10).
[30] Under s 50.
[31] *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (1) SACR 561; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) (*Mohamed*) para 16.

may be invoked even when there is no prosecution'. The proceedings are *in rem,*[32] aimed at the property itself: a preservation order is granted if there are reasonable grounds to believe that the property is either the proceeds or an instrumentality of an offence.[33]

[34] Thus, Chapter 6 proceeds from the fiction that the property concerned is condemned as though it were conscious instead of inanimate.[34] It is the property, rather than the person, that bears the taint of criminality.[35] This explains why although, as with restraint applications, POCA provides expressly for the NDPP to apply *ex parte* for a preservation of property order, no express provision is made for that order to be granted in the form of a rule *nisi* with a return day. This is not to say that a court cannot grant a preservation of property order in the form of a rule *nisi*. The point is that the legislative scheme does not pre-suppose that this should be the default position.

[35] This is an important distinction between restraint and preservation orders. Whereas the legislative scheme under Chapter 5 envisages that affected persons should be given an opportunity to oppose the grant of a restraint order on the return day before it is made final, the legislative scheme under Chapter 6 deliberately postpones the right to oppose until after a preservation order is granted, and the proceedings move to the forfeiture stage. This is expressed in s 39(1), which directs the NDPP, as soon as practically possible after the grant of a preservation order, to give notice of the order to 'all persons known to (her) to

---

[32] *Mohunram and Another v National Director of Public Prosecutions and Another* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC); 2007 (2) SACR 145 (CC) para 118.

[33] Section 38(2) provides:

'The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

(a) is an instrumentality of an offence referred to in Schedule 1;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities.'

[34] *Brooks and Another v National Director of Public Prosecutions* [2017] ZASCA 42; 2017 (1) SACR 701 (SCA); [2017] 2 All SA 690 (SCA) para 16.

[35] *De Vries v The State* [2011] ZASCA 162; 2012 (1) SACR 186 (SCA); [2012] All SA 13 (SCA) para 4.

have an interest in the property subject to the order' and to publish a notice of the order in the Government Gazette.

[36] Within 14 days of receiving notice, or of publication in the Gazette, any person with an interest in the property may enter an appearance by giving notice of her intention to oppose the forfeiture application that is intended subsequently to be instituted.[36] A person with an interest in the property may indicate either that they will oppose the grant of a forfeiture order, or that they will seek to have their interests in the property excluded from the operation of any forfeiture order that is granted.[37] As this Court has noted, this scheme ensures that prior to the granting of a forfeiture order (but after the preservation order), people with an interest in the property would have been given sufficient opportunity to do what they deem necessary to protect their interests, should they wish to do so.[38]

[37] The procedure encapsulated in s 38(1) read with s 39 is unique to forfeiture under Chapter 6 of POCA. This procedure deliberately positions the right to *audi alteram partem* within the post-preservation order phase. That the legislative scheme does not envisage, as a general principle, a route to opposition prior to the grant of a preservation order, is a strong indicator that preservation orders are not meant to be appealable.

[38] A further, important, indicator is that while express provision is made for appeals in respect of other orders under Chapter 6, none is made for appeals against preservation orders.[39] In instances where an appeal may be instituted against other orders, POCA makes it clear that the relevant preservation order

---

[36] Section 39(3).
[37] Section 39(5).
[38] *Ex Parte National Director of Public Prosecutions* [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) para 24.
[39] The following sections recognise appeal procedures that may be instituted under Chapter 6:
(a) Section 46(4)*(b)* recognises that there may be an appeal in respect of the taxing of legal expenses claimed by a person with an interest in the property.
(b) Section 47(4) recognises that there may be an appeal against a decision to vary or rescind an order.
(c) Section 55 recognises that there may be an appeal against the grant of a forfeiture order.

will be kept intact pending the outcome of the appeal.[40] In addition, preservation orders may only be varied or rescinded on the same limited grounds as restraint orders.[41] These features demonstrate the legislative objective of insulating preservation orders from challenge pending the forfeiture process. This is because of the indispensable role that a preservation order plays in securing proceeds and instrumentalities of crime. That objective would be compromised if preservation orders were susceptible to appeal.

[39] The Court in *Phillips* was not persuaded that this latter consideration meant that a restraint order was not appealable. The appellants urge the same conclusion in respect of preservation orders. However, what *Phillips* was not required to consider, is the unique procedure governing preservation and forfeiture orders outlined earlier. Nor did this Court's pronouncement in *Singh* follow a considered analysis of the Chapter 6 procedure. Further analysis is thus required.

[40] The Constitutional Court has recognised that the two-stage Chapter 6 proceedings are 'complex and tightly intertwined, both as a matter of process and substance'.[42] A preservation and a forfeiture order share a distinct symbiotic relationship not shared between restraint and confiscation orders. Without a preservation order in place the NDPP cannot institute a forfeiture application.[43] Conversely, if the NDPP does not institute that application within a period of ninety days of publication of the notice of the preservation order, the preservation

[40] Section 47(4) says that: 'The noting of an appeal against a decision to vary or rescind (a preservation order or an order appointing a curator *bonis*) shall suspend such a variation or rescission pending the outcome of the appeal.' In similar vein, s 55 provides: 'A preservation of property order and any order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under s 50(1) shall remain in force pending the outcome of any appeal against the decision concerned.'

[41] Section 47*(a)* permits a high court to vary or rescind a preservation order on application by a person affected if the court is satisfied that the operation of the order will deprive the applicant of the means to provide for her reasonable living expenses and cause undue hardship; and where that hardship outweighs to risk that the property may be dissipated in some manner.

[42] *Mohamed* fn 31 para 22.

[43] Section 48(1) states that: 'If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.'

order expires.[44] This has the consequence that a new preservation order would have to be sought should the NDPP wish to pursue forfeiture. By comparison, a confiscation order under Chapter 5 may be sought with or without a restraint order in place.

[41] A further feature of their intertwined relationship is that the civil high court presides over both the preservation and forfeiture stages under Chapter 6. In contrast, the civil high court only presides over the restraint proceedings under Chapter 5, confiscation proceedings being the preserve of the criminal court. Importantly, at both preservation and forfeiture stage under Chapter 6 the court is concerned with essentially the same questions: is the property the proceeds of unlawful activities or an instrumentality of an offence? However, there are two key distinctions: first, the standard of proof is lower (reasonable grounds to believe) at the preservation stage, whereas it is higher (balance of probabilities) at the forfeiture stage. Second, at forfeiture stage interested parties can oppose the application. Under Chapter 5, once a final restraint order is granted, the civil high court's involvement in the asset forfeiture process concludes.

[42] Inherent in Chapter 6 of POCA is the recognition that forfeiture should proceed without undue delay. This explains the fourteen-day limit for a person to enter an appearance after receipt of notice of the preservation order, as well as the cut-off of ninety days for the institution of a forfeiture application. The aim is to progress towards the forfeiture stage as soon as possible. In this, the scheme is pragmatic and serves the interests of justice. It is at the forfeiture stage that a person with an interest in the property has the opportunity to participate in the proceedings to defend their interests. Thus, it is to their benefit that this opportunity should not be delayed.

---

[44] Section 40*(a).*

[43] On the other hand, a defendant in restraint proceedings under Chapter 5 does not have the in-built protection of a speedy resolution to the POCA proceedings. Her rights in her property are put on hold subject to the vagaries of the criminal justice system and, if convicted, the finalisation of the complex confiscation[45] and realisation procedures[46] outlined in Chapter 5. It is in this context that this Court expressed the concern in *Phillips* that, absent the avenue of an appeal against a restraint order, a defendant subject to a restraint order is left remediless.[47] Its conclusion that a restraint order is intended to be appealable because it is final in the *Zweni* sense, should be understood with reference to the particular characteristics and consequences of Chapter 5 proceedings.

[44] When properly analysed, the time-sensitive, closely intertwined and symbiotic relationship between the preservation and forfeiture stages of proceedings under Chapter 6 leads to a different conclusion. Unlike restraint proceedings, the preservation stage, which as a rule excludes opposition, is plainly intended to be a short-term, stop-gap measure to secure tainted property pending the determination of the main issue – the forfeiture application. This demonstrates a deliberate legislative choice that runs counter to the notion that preservation orders are intended to be appealable.

[45] The practical consequences of recognising preservation orders as being appealable are also irreconcilable with this legislative scheme. With regard to the time periods for processing opposed applications and those for processing appeals, it is clear that in the ordinary course, an opposed forfeiture application will be ripe for hearing long before a notional appeal against a preservation order could ever be. Why would the stop-gap measure of a preservation order be appealable, when a respondent, acting diligently, could obtain relief at the final,

[45] In Part 2, ss 18-24.
[46] In Part 4, s 30.
[47] *Phillips* para 22.

forfeiture stage long before the finalisation of the appeal against the preservation order? To suggest otherwise, would lead to the absurd situation that the appeal against a preservation order would be rendered moot. This consideration does not apply in the context of Chapter 5 proceedings, because the restraint and confiscation stages do not share the same symbiotic relationship and are not time-sensitive.

[46] There is an additional procedural concern. If a preservation order is final and thus appealable in the *Zweni* sense, the effect of an application for leave to appeal under s 18(1) of the Superior Courts Act 19 of 2013 (Superior Courts Act) will be to suspend the operation and execution of the order unless the NDPP is able to satisfy the court on a balance of probabilities that, she will suffer irreparable harm unless the court orders otherwise and that the appellant will not suffer such harm.[48] Unless the NDPP meets this onus, an appeal against a preservation order would effectively put an end to the entire forfeiture process. Since there can be no forfeiture application in the absence of a preservation order, the main objective of the asset forfeiture provisions of POCA would be rendered nugatory. These were not considerations before this Court in *Phillips*, as that judgment preceded the enactment of the Superior Courts Act.

[47] In sum, all of these factors lead, in my view, to the conclusion that unlike the situation pertaining to restraint orders under Chapter 5, preservation orders under Chapter 6 are not intended to be appealable. It follows that neither *Phillips*, nor *Singh*, which gave no consideration to the scheme of Chapter 6 of POCA, is determinative of the issue.

[48] Moreover, contrary to the submissions by the business rescue practitioners, the preservation order does not meet the three requirements of the *Zweni* test. The

[48] Section 18(3) of the Superior Courts Act.

NDPP accepts that the order is final in the sense that it is not subject to alteration by the same court that granted it. This is so because the scope for rescission and variation of the preservation order *per se* is narrowly circumscribed.[49] However, it is clear from the above analysis of Chapter 6 proceedings that a preservation order is not definitive of the rights of the parties, nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. This Court in *Phillips* did not find these requirements to be determinative of appealability in the context of restraint orders. However, they are of material relevance in the context of preservation orders. The entire scheme of Chapter 6 is geared towards the forfeiture stage (and not that of preservation) as being the stage at which rights are definitively determined and the relief claimed either granted or dismissed.

[49] Nor is the additional requirement laid down in *Zweni* met. An appeal against the preservation order will not dispose of all the issues between the parties, nor will it lead to a just and reasonably prompt resolution of the real issues between them. As this case demonstrates, the issues on the merits are often complex. Here, that complexity extends to the overlap between the asset forfeiture and business rescue regimes. The appropriate stage for determination of the issues is the forfeiture stage, when they are fleshed out in full, and can be determined on the usual balance of probabilities standard. To permit an appeal against the preservation order would lead to results against which this Court warned in *TWK Holdings*:

'As a general principle, the high court should bring finality to the matter before it, in the sense laid down in *Zweni*. Only then should the matter be capable of being appealed to this Court. It allows for the orderly use of the capacity of this Court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before

[49] It should be noted that the same does not apply to those parts of the preservation order appointing the curator *bonis* and demarcating his powers. Under s 47(2) those orders may be varied or rescinded at any time on application of an interested party.

the high court. It reinforces the duty of the high court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires.'[50]

[50] These observations are particularly pertinent when considered in relation to the appealability of preservation orders. This is so because the whole thrust of the legislative scheme of Chapter 6 is directed at securing finality of the real issues between the parties at the forfeiture stage as promptly as reasonably possible. To permit appeals against preservation orders would fundamentally undermine this deliberate legislative choice.

[51] It was submitted on behalf of the business rescue practitioners that the appealability of the preservation order in this case should be considered differently because the NDPP elected to go on notice rather than *ex parte*. It was also submitted that consideration should be given to the fact that if the appeal succeeded, this would bring finality to the matter, as the forfeiture application would be invalid.

[52] The difficulty with these submissions is that the real inquiry is not whether *this* preservation order is appealable. The real question is whether as a matter of principle, preservation orders are appealable at all. That question goes to the DNA of preservation orders under POCA. Either they are appealable because of their particular statutory nature or they are not. This is what certainty and the rule of law require. If they are not appealable, as I have found, then it makes no difference how the NDPP elected to exercise the procedural choices she had available to her. That she chose to proceed on notice, rather than *ex parte* is neither here nor there. For the same reason it is also neither here nor there that a successful appeal would bring finality. In any event, as *TWK Holdings* points out,

[50] *TWK Holdings* para 21.

the utility of permitting an appeal cannot be assessed by recourse to its most favourable outcome.[51]

[53] Lastly, the business rescue practitioners argue that the preservation order is appealable as it is not a competent order due to the conflict between the curator's powers under POCA, and those of the business rescue practitioners under the Companies Act. This contention is not sustainable as it is based on the peculiarities of *this* case and *this* preservation order. I reiterate, the specific circumstances of a particular case have no bearing on whether a preservation order is appealable. This submission also overlooks the fact that under s 47(2), orders pertaining to the appointment and powers of a curator *bonis* may be rescinded or varied on application by an interested party.[52] Quite simply, these aspects of the preservation of property order are not final in any sense.

[54] I conclude that the preservation order is not appealable. The appeal was not properly before the court and must be struck from the roll. Costs should follow the cause, with provision made for the costs of two counsel.

[55] I make the following order:

The appeal is struck from the roll with costs including the costs of two counsel, such costs to be borne jointly and severally by the first to eleventh, twelfth and thirteenth, and fourteenth appellants respectively.

_____

R M KEIGHTLEY

ACTING JUDGE OF APPEAL

[51] Ibid para 39.

[52] Section 47(2) permits any person affected by an order for the appointment of a curator *bonis* to apply for the variation or rescission of the order, or of the terms of appointment of the curator *bonis*. The high court may so order if it deems it necessary in the interests of justice.

Appearances:

For first to eleventh appellants:	G D Wickens SC (with T Scott)
Instructed by:	Smit Sewgoolam Inc, Johannesburg
	McIntyre Van Der Post, Bloemfontein
For twelfth appellant:	C H J Badenhorst SC (with M Desai)
Instructed by:	Ulrich Roux & Associates, Johannesburg
	Symington De Kok, Bloemfontein
For thirteenth to fourteenth appellants:	A Bham SC (with P Stais SC and J Brewer)
Instructed by:	Andersen, Johannesburg
	Webbers Attorneys, Bloemfontein
For respondents:	M Chaskalson SC (with K Hofmeyr SC and M Sibanda)
Instructed by:	Kunene Ramapala Inc, Pretoria
	The State Attorney, Bloemfontein