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

Case no: 2109/11
Date Heard:15/9/11
Date Delivered:22/9/11

In the matter between:

LOUISE NATALIE BOWKER **APPLICANT**

Versus

NARDUS FERREIRA N.O **1ST RESPONDENT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **2ND RESPONDENT**

JUDGMENT

SMITH J:

[1] On 15 June 2011 the Second Respondent obtained an order in terms of s. 26 of the Prevention of Organized Crime Act, 121 of 1998 ("the Act") to restrain the Applicant from dealing with her assets and compelling her to disclose and surrender such assets.

[2] Apart from clothing, bedding and other ordinary household furniture and appliances, the only property which were excluded from the restraint order were any realizable property owned by the Applicant and valued to

be in excess of R2 604 090.20.

[3] In terms of paragraph 1.10 (b) of the order, the First Respondent, being the duly appointed *curator bonis* appointed to take control of the Applicant's assets in terms of s. 28 of the Act, is authorized to release such property which may be subject to the restraint order and as may be required by the Applicant for reasonable legal expenses in connection with the restraint proceedings, provided that she has disclosed, to the satisfaction of the court, all her interests in the properties subject to the restraint order and she cannot meet such expenses out of property which are not subject to the restraint order.

[4] During July 2011 the Applicant applied for funds in the amount of R98 931.85 to be made available to her in respect of legal expenses relating to this application and her opposition in the main application. She did so on the basis that she does not own property in excess of R2 604 090.20 and that she earns only R1 500 per month. She is therefore not able to pay her legal expenses out of assets which are not subject to the restraining order.

[5] The First Respondent refused to release the funds on the basis that it would "*further jeopardize the position of the victim."* The victim which is being referred to is one Phillip Mounsey Gilfillan ("Gilfillan"), both in his personal capacity and also as the owner of Cancri Tropicus 144 CC, a close corporation of which he is the sole member. The restraint

application was precipitated by allegations that the Applicant had misappropriated an amount of R192 588.00 from Gilfillan and another R3 143 796.88 from the close corporation.

[6] Although Gilfillan was not cited in this application, he filed an affidavit wherein he, *inter alia*, stated that the Applicant had admitted in sequestration proceedings that she is indebted to him in the amount of R1 264 332.51. She has disputed the balance which has been revealed as a result of the forensic investigation. By February 2011 she had repaid R653 000.00 of the amount which she had admitted was owing to Gilfillan.

[7] Gilfillan further stated that the amount of R81 500.00 which is held in trust by her attorneys are proceeds of the sale of a horse trailer which the Applicant had bought with money misappropriated from either his or the close corporation's funds. She has stated in the sequestration proceedings that her attorneys had been instructed to offer the aforesaid amount as part payment to him.

[8] Gilfillan is therefore opposed to funds being released to the Applicant for legal expenses because it would effectively mean that she would be using money which she had admittedly stolen from him and which she had undertaken to pay back to him in order to reduce her indebtedness. It will also have the effect of dissipating the restrained

assets to his prejudice.

[9] Mr *Ronaasen* who appeared for the Applicant, submitted that a refusal to release the funds to the Applicant will effectively amount to ignoring her constitutional right to legal representation.

[10] He submitted also that it is common cause that the Applicant had borrowed an amount of R441 749.81 from family members, which amount is being held in trust by her attorneys, and which had been offered to Gilfillan as settlement of the balance admitted by her to be due and payable. He submitted that under these circumstances there can be no conceivable prejudice to Gilfillan if the requested amount is released to the Applicant to cover her legal expenses.

[11] Mr *Smuts SC,* who appeared for the Respondents, submitted however that it is admitted by the Applicant that the amount of R81 500.00 which is held in trust by her attorneys are proceedings from the sale of a horse trailer which she had purchased with money misappropriated from Gilfillan. He submitted therefore that the overwhelming amount of cash which is available to be released to the Applicant is admittedly derived from assets stolen from Gilfillan. The Applicant has also not made any attempt to obtain legal representation at state expense which is her right in terms of the Constitution and advanced no basis why she would not receive such assistance if she were

to apply for it. He submitted that, having regard to the Applicant's asset base and the amount admittedly owing to Gilfillan, there can be little doubt that she would qualify for legal aid. He submitted further that the value of the restrained assets is in any event insufficient to cover the full extent of the Applicant's indebted to Gilfillan and the close corporation.

[12] In **Fraser v Absa Bank Limited (Director of Public Prosecutions as *Amicus Curiae)* 2007 (3) SA 484 (CC),** at 507 paragraph 62 Van der Westhuizen, J held that:

> "When a defendant estate is under a restraint order and thus beyond the reach of creditors, it remains in their interest that as much of the estate as possible be preserved, because part or all of it might still become available to them for the satisfaction of their claims. If the defendant is paid a living and or legal expense allowance from his or her estate while it is under restraint, the effect is to dissipate the estate and so reduce or even destroy creditor's prospects of recovery. It is accordingly usually in their interest to oppose any application in terms of s. 26 to persuade the court not to allow the Defendant to draw legal expense allowance."

When considering an application for the release of restrained assets for the purposes of legal expenses an applicant's constitutional right to legal representation must be given due recognition. The court should however not be oblivious to the interests of the creditors.

See in this regard **Fraser v Absa Bank Limited** (supra, paragraph 69) where Van der Westhuizen J held as follows:

> "A defendant's need to access funds for reasonable legal expenses is an important factor to be taken into account by a High Court faced with an application to intervene. The High Court is to be commended for interpreting POCA in the light of constitutionally protected fair trial right. However, the Supreme Court of Appeal is correct in its view that the relevant provision of POCA could not be understood to mean that a restraint order could necessarily elevate

a defendant's legal expenses to a similar status to that of secured or preferent obligations.

[13] On a conspectus of all the facts in this matter I am of the view that I cannot exercise my discretion in favour of the Applicant. I agree with *Mr Smuts* that the cash which will be available for these purposes almost entirely constitute monies which had been misappropriated from Gilfillan and his close corporation. The Applicant has admitted indebtedness in the amount of some R1 264 332.51 and a substantial amount exceeding some two million rands still remains in dispute. There is compelling evidence that Gilfillan may eventually be able to lay claim to the total value of the restrained assets in order to recover monies that the Applicant owes him and the close corporation. It appears furthermore that these assets may well not be sufficient to cover the outstanding debt. The Applicant is now effectively seeking an order which would allow her to use money which has admittedly been stolen from Gilfillan and his close corporation for legal expense to oppose the main application. Such an order will in my view inevitably result in the dissipation of the retrained assets to the Gilfillan's prejudice. I agree also with *Mr Smuts* that, given the Applicant's precarious financial situation in the light of her admitted indebtedness to Gilfillan, there can be no conceivable reason why she should not be entitled to legal aid. She has however not applied for legal assistance at state expense and appears to be set on employing counsel of her own choice. She is clearly not entitled to do so in circumstances where substantial prejudice to Gilfillan will be inevitable. For these

reasons I am of the view that the application cannot succeed.

[14] In the result the application is dismissed with costs, including the costs occasioned by the employ of two counsel.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Ronaasen
Attorneys for the Applicant	:	Borman and Botha Attorneys 22Hill Street GRAHANSTOWN 6140 Ref: Mr J Powers
Counsel for the Respondent	:	Advocate Smuts
Attorneys for the Respondent	:	NN Dullabh Attorneys 5 Betram Street GRAHAMSTOWN Ref: Mr Wolmarans
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