IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Date: 2008-06-03

Case Number: 39358/2007

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

VAN ZYL, SAREL JACOBUS First Defendant

FERREIRA, JEANETTE HELENA Second Defendant

JR 126 INVESTMENTS (PTY) LIMITED Respondent

JUDGMENT

SOUTHWOOD J

[1] This is the opposed return day of a provisional restraining order granted by this court on 24 August 2007 in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). The applicant seeks

confirmation of the rule. The defendants and the respondent seek its discharge.

[2] The first defendant is a dentist who has been in private practice since 1982. The second defendant is his assistant and has worked for him for about 18 years. The respondent is a company which owns the unit in the Secunda Medical Centre where the first defendant conducted his practice. The first defendant holds all the shares in the respondent.

[3] The first defendant practised as a dentist and employed a number of locums. Most of the first defendant's patients were members of medical aid schemes, including the Sasol Medical Aid Scheme ('Sasolmed'). The first defendant determined all the claims for payment by the medical aid schemes. He did so by reference to patient records which describe the work done on the patients. The second defendant processed all the claims determined by the first defendant and submitted them for payment to the medical aid schemes.

[4] Over a period which includes 2004 and 2005 the defendant submitted claims to Sasolmed for work that had not been done. Sometimes the claims were for more work than had been done, sometimes they were for more complicated work than had been done and sometimes they were for work

that had not been done at all.

[5] During 2005 this was brought to the attention of Sasolmed by patients who were dissatisfied with statements of account they received from Sasolmed which did not correctly reflect the work done by the first defendant's practice. Sasolmed, in turn, brought this to the attention of Medscheme which administers Sasolmed and an investigation commenced. It soon became apparent that the false statements were not limited to a few patients and that a large number were involved. On 24 November 2005 Sasolmed addressed a letter to the first defendant to inform him that, with immediate effect, all claims submitted for payment would be dealt with in the manner prescribed by section 59(2) of the Medical Schemes Act 131 of 1998. This meant that the patients would have to pay the first defendant and then recover the disbursement from Sasolmed. By then, at least one of the first defendant's locums had informed the first defendant that his practice was about to be investigated. Over the weekend of 25/26 November 2005 the first defendant and his brother removed and destroyed almost all of the first defendant's practice's patient records.

[6] On 13 December 2005 an investigator reported to the SAPS that the first defendant's practice had submitted false claims to Sasolmed and on 7 February 2006 the SAPS obtained a warrant to search various premises owned or

controlled by the first defendant for documents relevant to the submission of false claims to Sasolmed. During this search the SAPS found a number of patient files at the premises occupied by the second defendant.

[7] On 10 February 2006 the defendants appeared in the Secunda regional court on a charge of fraud. The amount said to be involved was R10 million. On 8 August 2007 the applicant served the charge sheet on the defendants. It alleges 1 947 counts of fraud alternatively theft and the counts relate to a total amount of R387 350,60.

[8] Sasolmed requested KPMG Services (Pty) Ltd Forensic Business Unit ('KPMG Forensic') to independently verify and substantiate the validity of the claims submitted by the first defendant and/or his practice to Sasolmed for payment. This investigation was limited because of the destruction of most of the relevant patient files and because of the expense involved. KPMG Forensic used two methods to verify the claims. The first involved comparing the notes kept by some of the first defendant's locums with claims submitted by the first defendant by Sasolmed. The second required examination of the first defendant's patients by an independent dentist, Dr Hartley, to determine the extent of the work done on them. The work determined by Dr Hartley was then compared with the work described in the claims submitted to Sasolmed.

[9] The trial of the defendants was due to commence on 5 October 2007 in the Specialised Commercial Crimes Court in Pretoria but did not do so. Because of this application the defendants were not prepared to cooperate with the prosecution and hold a pre-trial conference.

[10] The applicant approached this court *ex parte* on 24 August 2007 and obtained the provisional restraint order which it now seeks to have confirmed. The founding affidavit was deposed to by a Deputy Director of the National Prosecuting Authority, Richard James Chinner, and was supported by an affidavit by a manager of KPMG Forensic, who was involved in the investigation of the claims, Mariette Deysel Engelbrecht. The two affidavits deal comprehensively with the merits of the case against the defendants. In particular, Engelbrecht's affidavit is supported by the affidavits of many of the witnesses interviewed by KPMG Forensic and the relevant documents. The founding papers are voluminous and exceed 500 pages. It is clear that the applicant has gone to a great deal of trouble to present to the court as complete a picture as possible and to demonstrate to the defendants that the prosecution has a powerful case against them.

[11] The answering affidavit does not attempt to deal with the merits of the prosecution's case against the defendants. The first defendant states

that he has been advised that it would be futile to attempt to oppose the application on the basis that the prosecution does not have a case. It is hard to imagine what the defendants could say in the face of the overwhelming evidence in the applicant's founding affidavits. The applicant has assiduously assembled the whole case for the prosecution in the founding affidavits. The advice given to the defendant is a realistic appraisal of the prosecution's evidence. On these papers the applicant has established that the defendants committed fraud or theft and that they used the *modus operandi* already described.

[12] The applicant gave notice that at the hearing he would apply for leave to file a supplementary replying affidavit. The applicant's replying affidavit was sworn to on 16 October 2007 and filed on the same day. The applicant's supplementary replying affidavit was deposed to on 10 February 2008 and according to the affidavit of Mr Chinner the purpose of the supplementary replying affidavit is to place before the court Sasolmed's assessment of the benefit the first defendant derived from the fraud. This is said to be an extrapolation of the financial loss suffered by Sasolmed as a result of the false claims submitted. Chinner says that the evidence is relevant because it relates to the benefit which the first defendant derived from the fraud.

[13] In terms of section 13 of POCA these proceedings are civil

proceedings and not criminal proceedings. Rule 6 of the Uniform Rules of Court, which governs applications, makes provision for three sets of affidavits. In ***James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO*** **1963 (4) SA 656 (A)** at 660D-H the court said:

> 'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion court proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in ***Szarug v Parvathie*** **1962 (3) SA 872 (N)**). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an

important factor in the enquiry'

> If the evidence in the supplementary replying affidavit is relevant, it was relevant at the commencement of the proceedings. The extrapolation about which the applicant now wishes to tender evidence could and should have been done prior to the applicant launching the application. In my view the applicant's failure to do this has not been satisfactorily explained in the applicant's application to tender the further affidavit and the attempt to file the supplementary affidavit now is simply an attempt to deal with a perceived shortcoming in the application. The application for the admission of the supplementary replying affidavit will therefore not be granted.

[14] The defendants have not set up any factual defences to the application. They have simply raised a number of issues based on the applicant's application. The following points were raised in the defendants' answering affidavits and dealt with in the defendants' counsel's heads of argument and in argument at the hearing:

> (1) the applicant failed to establish all the jurisdictional facts necessary for a restraining order in terms of section 26 of POCA: the defendants contend that the applicant did not establish the

reasonable grounds for the court's belief that a confiscation order may be made against them;

(2) POCA is not applicable to the crimes with which the defendants have been charged;

(3) this application is an abuse of POCA: the defendants contend that it was not necessary for the applicant to obtain a restraint order in view of the following:

(i) the 1 947 counts of fraud or theft with which the defendants are charged involve a total of only R387 650,60;

(ii) the restraining order permitting the attachment of all the first defendant's assets to the value of R2,4 million cannot justify the attachment of assets to the value of R6 million;

(iii) Medscheme, which administers Sasolmed, holds R742 140,00 in trust pending the outcome of the criminal proceedings;

(4) the applicant failed to disclose material information which

might have resulted in the court refusing to grant the provisional restraint order and misrepresented the facts: the defendants' counsel contends that the failure to attach annexures A and B to the charge sheet (annexure RGC1 to Chinner's affidavit) and the failure to disclose that the 1 947 charges involved only R387 650,60 and not R2 404 619,05 and the misleading manner in which the founding affidavit deals with these facts might have influenced the court to grant the provisional restraint order.

It is not necessary to deal with all the points as I am of the view that there is merit in the last point: that the applicant failed to disclose material facts and in fact misrepresented certain facts to the court which granted the provisional restraint order.

[15] As pointed out in ***National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA)** in paragraph 3, Chapter 5 of POCA is designed to enable the state to divest convicted criminals of the proceeds of their criminal activities. The central provision of Chapter 5 is section 18 which empowers a court that has convicted a person of an offence to make a confiscation order. The subsection reads as follows:

'Whenever a defendant is convicted of an offence the court

convicting the defendant must, 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 effectives and fairness of that order.'

However the court does not have unlimited power in respect of confiscation orders. The amount which it may order the defendant to pay is limited by subsection 18(2) which provides:

'The amount which a court may order the defendant to pay to the State under subsection (1) –

(a) shall not exceed the value of the defendant's proceeds of

the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or

(b) if the court is satisfied that the amount which might be realised as contemplated in section 20(1) is less than the value referred to in paragraph (a), shall not exceed an amount which in the opinion of the court might be so realised.'

[16] Sections 25 and 26 of POCA are an important adjunct to section 18. They make provision for a court to make a restraint order in anticipation of a confiscation order being granted. The purpose of such a restraint order is to preserve property so that it may in due course be realised in satisfaction of a confiscation order – see ***Kyriacou supra*** para 5. The relevant provisions of sections 25 and 26 read as follows:

'25(1) A High Court may exercise the powers conferred on it by section 26(1) –

(a) when –

(i) a prosecution for an offence has been instituted against the defendant concerned;

(ii) … it appears to the court that there are reasonable grounds for believing

that a confiscation order may be made against that defendant; and

(iii) the proceedings against that defendant have not been concluded.

26(1) The National Director may by way of an *ex parte* application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with the property to which the order relates.

(2) A restraint order may be made –

(a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

(b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;

(c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.

(3) (a) A court to which an application is made in

terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule *nisi* calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.'

[17] The National Director is not required to discharge an onus in respect of the requirement that it appear to the court that there are reasonable grounds for believing that a confiscation order may be made against the defendant. In ***National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA)** at para 27 the court said:

'It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and confiscation order. While the Court, in order to make that assessment, must be appraised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (***National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) (2001 (2) SACR 712)** in para [19]) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent

confiscation order (even if all that evidence has not been place before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false and unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true. Moreover, once the criteria laid down in the Act, have been met and the Court is properly seized of its discretion, it is not open to the Court to then frustrate those criteria when it purports to exercise its discretion (cf ***Kyriacou,*** fn 6, in paras [9] and [10]).'

[18] With regard to the court's discretion the court said in ***Rautenbach's*** case at para 56:

'Where the requirements of the Act have been met a Court is called upon to exercise a discretion as to whether a restraint order should be granted, and if so, as to the scope and terms of the order, and the proper exercise of that discretion will be dictated by the circumstances of the particular case. The Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order might be made must be capable of being ascertained, nor does it require that the value of property that is placed under restraint should not exceed the amount of the anticipated confiscation order. Where there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount which an anticipated confiscation order might be granted, then clearly a

Court, properly exercising its discretion will limit the scope of the restraint (if it grants an order at all), for otherwise the apparent absence of an appropriate connection between the interference for the property rights and the purpose that is sought to be achieved – the absence of an "appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [its] intended to serve" – will render the interference arbitrary and in conflict with the Bill of Rights. To the extent that the decision in ***National Director of Public Prosecutions v Phillips and Others*** **2002 (4) SA 60 (W) (2001 (2) SACR 542)** in para [9] at 78A-B (SA) and 553g-h (SACR) might suggest that a restraint order is permissible even where it is apparent that there is no such relationship, in my view that is not correct. But in the absence of any indication of the lack of such connection I do not think the purported exercise of a court's discretion can import requirements for the grant of such order that the Act does not contain. It must also be borne in mind, when considering the grant of such an order, that once it is found that a person has benefited from an offence, and that he or she held property at any time, a court that conducts the enquiry contemplated by section 18(1) is required by section 26(2) to presume until the contrary is shown that the property was received by him or her as an advantage, payment, service or reward in connection with the offences or related activities referred to in section 18(1) (see ***National Director of Public Prosecutions v Kyriacou*** **2003 (2) SACR 524 (SCA) (2004 (1) SA 379)** in para [13]).'

(The reference to section 26(2) in this passage appears to be an erroneous reference to section 22(3) which contains the presumption referred to.)

The circumstances of the case are therefore of crucial importance.

[19] In para 87 of the minority judgment of Navsa JA and Ponnan AJA in ***Rautenbach's*** case the learned judges commented that it would be offensive to justice if the effect of a restraint order was disproportionate to the contemplated future conviction and confiscation order. In para 88 they said:

> 'This judgment should not be considered as an invitation to laxity in the presentation of an application for a provisional restraint order in terms of s26 of the Act. Every effort should be made to place sufficient information before the Court to enable it to properly engage in the judicial function envisaged in that section. The court should be vigilant to ensure that the statutory provisions in question are not used *in terrorem.* On the other hand to insist at the provisional stage on a precise correlation between the value of property restrained and the value of the alleged proceeds of criminal activity would be to render a vital part of the scheme of the Act unworkable'

[20] Having decided to bring the application *ex parte* the applicant was

obliged to observe the utmost good faith and disclose all material facts which might influence the court in coming to its decision. The withholding or suppression of material facts *per se* entitles the court to set aside the order even if the non-disclosure or suppression was not wilful or *mala fide*. These rules set out in ***Schlesinger v Schlesinger*** **1979 (4) SA 342 (W)** at 348E-349B were pertinently adopted and applied to an application in terms of section 26 of POCA by the Supreme Court of Appeal in ***National Director of Public Prosecutions v Basson*** **2002 (1) SA 419 (SCA)** para 21.

[21] In the present case it is not in dispute that the applicant did not include in the application annexures A and B to the charge sheet from which the details of each charge appear or state clearly that the 1 947 charges involved only R387 650,60. The order sought in the notice of motion (and granted) states that the order relates to the property specified in the schedule of assets (annexure A) and the affidavit of Mr Kidson, which describes all the assets listed in the annexure and gives the forced sale values of the immovable property and the market values of the movable property. The total of these values is R5 894 400. The order states in paragraph 1.2 that excluded from the restraint and surrender provisions of the order is such realisable property as the *curator bonis* in writing certifies to be in excess of R2 404 619,05.

[22] The applicant's founding affidavits did not disclose that the 1 947 charges against the defendant involved only R387 350,60 and the applicant did not attach the annexures to the charge sheet which would have revealed when the defendant allegedly committed the frauds and the amount involved in each instance. Instead Mr Chinner conveyed to the court that the defendants had benefited from the frauds to the extent of R2 404 619,05. In paragraph 25.17 of his founding affidavit he says that Engelbrecht 'states that the evidence clearly indicates that the defendants acted in concert in carrying out their criminal activities and derived a benefit of R2 404 619.65' and in paragraph 49 he says –

> 'The evidence shows that the amount of R2 404 619,05 provided by KPMG is an indication of the benefit which both parties have benefited from jointly and severally'

[23] This is not an accurate reflection of what Engelbrecht said and is misleading. In paragraph 127 of her supporting affidavit Engelbrecht says –

> 'Based on the procedures we performed, we concluded that a total Rand amount recorded by the first defendant on the Appointment Lists available to us, for the period March 2005 to August 2005 is R2 404 619,05.'

In paragraph 188 of her supporting affidavit she says –

'Our quantification can be summarised as follows:

Description	Amount
Claims identified by Dr Swart	R156 873,20
Claims identified by Dr Hartley based on his chartings	R160 683,97
Claims as determined by Hartley, based on his review of the patient files	R 7 161,63
Claims for Panoramic Radiographs, when none was taken	R 62 631,80
The cumulative rand value of irregular/false Claims	R387 350,60'

In effect Engelbrecht's evidence is that of claims totalling R2 404 619,65 only R387 650,50 was found to be a benefit derived from fraud. This is not accurately or properly conveyed in Chinner's affidavit.

[24] In view of the fact that Medscheme is holding approximately R742 140,00 in trust (in respect of monies supposedly due and owing to the first defendant for claims submitted) pending the outcome of the investigation and criminal proceedings and that the investigation of the defendants has

for all practical purposes been completed and no further charges will be added to the charge sheet, the fact that the defendants were only charged with charges involving R387 350,60 was relevant to the discretion to be exercised by the court. As stated in ***Rautenbach's*** case where the evidence indicates that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be granted a court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all).

[25] The founding affidavit therefore did not disclose material facts and in fact misrepresented the true position and the provisional order will be discharged. The request that the costs be paid on the scale as between attorney and client is justified.

Order

[26] The rule is discharged and the applicant is ordered to pay the costs of the application on the scale as between attorney and client.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 39358/2007

HEARD ON: 27 May 2008

FOR THE APPLICANT: ADV. N. DE VILLIERS
ADV. T. TONGOANE

INSTRUCTED BY: State Attorney

FOR THE RESPONDENT: ADV. S. JOUBERT

INSTRUCTED BY: Mr A. de Waal of Cronje, De Waal – Skhosana Inc.

DATE OF JUDGMENT: 3 June 2008