



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]**

Case No.: 13327/09

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

and

**FRANCOIS EMIL JACQUES KLEINHANS
HILDA GRACE KLEINHANS
AQUILA HOLDINGS (PTY) LTD
FINISHING TOUCH TRADING 75 (PTY) LTD
t/a AQUILA PROPERTY SOLUTIONS
RICH REWARDS TRADING 52 (PTY) LTD
t/a AQUILA FINANCIAL SERVICES
GLOBAL PACT TRADING 73 (PTY) LTD**

and in the related application of

**CHRISTIAN FINDLAY BESTER N.O.
GERARD LEONARD PARIS N.O.**
(in their capacity as joint provisional liquidators
of Aquila Holdings (Proprietary) Limited (in
provisional liquidation))

Applicant

Defendant

First Respondent
Second Respondent

Third Respondent

Fourth Respondent
Fifth Respondent

First Intervening Applicant
Second Intervening Applicant

JUDGMENT DELIVERED: 9 DECEMBER 2010

FOURIE, J

[1] This is the return day of a provisional restraint order granted by this court on 3 July 2009, in terms of section 26 of the Prevention of Organised Crime Act No. 121 of 1998 ("POCA"). The order makes provision for the restraint of assets of defendant and his wife (first respondent), as well as the assets of some of the other respondents who are entities linked to defendant.

[2] Defendant and the first to fifth respondents gave notice of their initial intention to oppose the confirmation of the provisional restraint order, the return day of which has been extended at their instance in order for them to file opposing papers. No opposing papers have been filed and applicant now seeks the confirmation of the provisional restraint order. Save for the intervention application, referred to hereunder, the relief sought by applicant is not opposed.

[3] Subsequent to the granting of the restraint order on 3 July 2009, second respondent was liquidated, the final winding-up order being granted on 10 May 2010. On 24 May 2010, the provisional liquidators of second respondent brought an intervention application, seeking a variation of the provisional restraint order. The intervention application relates solely to the question whether or not 490 shares in Optipharm Health Care (Pty) Limited ("Optipharm"), held by second respondent, ought to be excluded from the ambit of the restraint order.

[4] For the sake of convenience, I firstly deal with the intervention application. In so doing, I will refer to the intervening applicants as "the liquidators". I should add, that it appears to me that the liquidators do not formally require leave to intervene in these proceedings. Second respondent is a party thereto and the liquidators, having stepped into second respondent's shoes, are entitled, in terms of section 28 (2) (a) of POCA, to apply for the variation of the restraint order. Be that as it may, the liquidators contend that the 490 shares in Optipharm ("the shares"), held by second respondent, fall to be excluded from the restraint order by the operation of section 36 (2) of POCA.

[5] Section 36 of POCA deals with the effect of the winding up of a company, on realisable property of the company that may be restrained in terms of POCA. The relevant parts of section 36 of POCA read as follows:

- “(1) When any competent court has made an order for the winding-up of any company...which holds realisable property...-*
- (a) no property for the time being subject to a restraint order made before the relevant time;...*
- shall form part of the assets of any such company or juristic person.*
- (2) Where an order mentioned in subsection (1) has been made in respect of a company or other juristic person ...the powers conferred upon a High Court by sections 26 to 31 and 33 (2) or upon a curator bonis appointed under this Chapter, shall not be exercised in respect of any property which forms part of the assets of such company or juristic person.*
- (3) Nothing in the Companies Act, 1973 (Act 61 of 1973), or any other law relating to juristic persons in general or any particular juristic person, shall be construed as prohibiting any High Court or curator bonis appointed under this Chapter from exercising any power contemplated in subsection (2) in respect of any property or proceeds mentioned in subsection (1).*
- (4) For the purposes of subsection (1), ‘the relevant time’ means-*
- (a) where an order for the winding-up of the company or juristic person, as the case may be, has been made, the time of the*

presentation to the court concerned of the application for the winding-up; or... ”

[6] It is clear from the foregoing, that section 36 of POCA deals with different scenarios, based on the dates when particular events relating to the winding up of a company and the granting of restraint orders in terms of POCA, took place. In the instant matter the relevant events and their dates, are the following:

- (i) On 19 November 2008, the application for the winding-up of second respondent was presented to the court. This is the “relevant time” in terms of section 36 (1) and (4) of POCA.
- (ii) On 3 July 2009, the provisional restraint order was granted.
- (iii) On 10 March 2010, second respondent was provisionally wound up.
- (iv) On 10 May 2010, second respondent was finally wound up.

[7] In considering the different scenarios catered for in section 36 and interpreting the provisions thereof, one has to apply the “golden rule” of interpretation, viz. the language used by the legislature is to be given its grammatical and ordinary meaning, unless this would result in some

absurdity or some repugnancy or inconsistency with the rest of the statute.

See **Coopers & Lybrand v Bryant**, 1995 (3) SA 761 (A) at 767E.

[8] The first scenario is found in section 36 (1), read with section 36 (4), of POCA. It applies in the case where a restraint order has been made before the “relevant time” stipulated in section 36 (4), i.e. before the application for liquidation was presented to the court. Section 36 (1) provides that in that case, no property being subject to the restraint order shall form part of the assets of the company in liquidation. It is common cause that in the instant matter this first scenario does not apply, as the provisional restraint order was made after the relevant time, i.e. after the date of the presentation of the liquidation application to the court on 19 November 2008.

[9] The second scenario is addressed by section 36 (2) of POCA. It provides that, where a winding-up order has been made, the powers conferred on the court and the curator bonis in terms of POCA, shall not be exercised in respect of any property which forms part of the assets of the company concerned.

[10] In construing section 36 (2), applicant argues that, where a winding-up order has been made prior to a restraint order, the assets form part of the assets of the company in liquidation and are, accordingly, not subject to the restraint order. Therefore, in the instant matter, applicant contends that, as no winding-up order had been made at the time when the provisional restraint order was granted, section 36 (2) of POCA does not apply.

[11] The liquidators, on the other hand, contend that section 36 (2) does not refer to the time when the winding-up order was actually made, but rather to the date when the application for the winding-up of the company was presented to court. They accordingly argue that, as in this instance, where the application for the winding-up of second respondent had been presented to the court before the date upon which the restraint order was made, the assets of second respondent are not subject to the restraint order.

[12] I do not agree with the liquidators' interpretation. Firstly, section 36 (2) refers in terms to a winding-up order which "has been made". As submitted on behalf of applicant, that is plainly a reference to an event which had actually taken place at the time when the restraint order is made. It is not a reference to the deemed date of commencement of the winding-up, as

contended for by the liquidators. Had the latter been the intention of the legislature, I would have expected it to have been expressly stated in section 36 (2), or have been incorporated by reference to section 36 (4) (a), which deals with the concept of the "relevant time", i.e. the time of the presentation to the court of the application for the winding-up of the company. This was not done and, in my opinion, there is, upon a proper interpretation of section 36 (2), no room for the incorporation of a provision of this nature.

[13] Secondly, this contention of the liquidators, despite the denial by their counsel, seems to be based on section 348 of the Companies Act No. 61 of 1973, which provides that a winding-up is deemed to commence at the time of the presentation of the winding-up application to the court. However, section 36 (3) of POCA expressly provides that nothing contained in the Companies Act shall be construed as prohibiting the court from making an order in terms of sections 26 to 31 and 33 (2) of POCA in respect of realisable property held by a company. It follows, in my view, that the deeming provision in section 348 of the Companies Act, cannot be utilised to exclude assets of the company in liquidation from the provisional restraint order.

[14] I have also been referred to authority which appears to support my interpretation of the provisions of section 36 (2) of POCA. This is the judgment of Mynhardt J in **Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd** 2001 (3) ALL SA 15 (T) at 27-28, where the interplay between liquidation proceedings and restraint proceedings in terms of POCA, was explained as follows:

"In the event of a winding-up order becoming effective on a date before the date upon which a restraint order is granted, section 36 (2) of Act 121 of 1998 precludes a court from granting a restraint order which will have effect on, and will relate to, 'any property which forms part of the assets of such company...' This will of course only be the position if the winding-up order has in fact been granted by the court before the date upon which the restraint order is granted. This is borne out by the wording of subsection (2) of section 36 which refers to a winding-up order which 'has been made' and then goes on to decree that certain powers of the court 'shall not be exercised' by the court in respect of property which forms part of the assets of the company. Those assets will already fall under the control of the liquidator by the time that the court considers exercising its powers under the sections mentioned in subsection (2) of section 36. The deeming provisions of section 348 of the Companies Act cannot be applied in such an instance and that is why subsection (4) refers only to subsection (1) of section 36".

I am in respectful agreement with this reasoning of Mynhardt J.

[15] In view of the aforesaid, I conclude that section 36 (2) does not apply to the present case, as the relevant winding-up orders were only made after the provisional restraint order was made on 3 July 2009. I agree with the submission made on behalf of applicant, that, in the present case, the assets of second respondent are no different from the assets of any other person whose estate has not been sequestrated or liquidated. If they are “realisable property” in terms of section 14 of POCA, the assets are liable to be restrained. If the provisional restraint order is made at a time when a winding-up order has not been made, the date of commencement of the liquidation is of no relevance to the terms of the provisional restraint order. This interpretation does not, in my opinion, result in any absurdity, or some repugnancy or inconsistency with the rest of the provisions of POCA.

[16] I accordingly find that the liquidators’ contention that the shares ought to be excluded from the restraint by virtue of the provisions of section 36 (2) of POCA, is without merit. The intervention application accordingly falls to be dismissed. As regards the costs of the intervention application, I am satisfied that the matter warranted the appointment of two counsel.

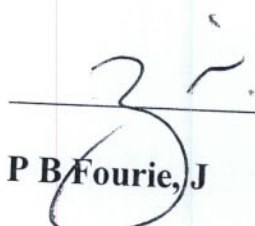
[17] This brings me to the main application for the confirmation of the provisional restraint order. As mentioned earlier, this application is unopposed. I am satisfied that, on the papers before me, applicant has made out a case for the relief sought. In particular, applicant has shown that there are reasonable grounds for believing that a confiscation order may be made against defendant at the conclusion of the criminal trial, in an amount roughly equivalent to the amount sought to be restrained, namely R4 810 953.88, calculated as at June 2010. I should add that the criminal trial is part-heard and set to continue on 13 December 2010.

[18] I therefore conclude that it is appropriate to confirm the provisional restraint order made on 3 July 2009, in order that assets of defendant and the other entities linked to him, may be available for realisation once a confiscation order is made by the trial court.

[19] In the result the following orders are made:

1. The intervention application brought by the joint provisional liquidators of second respondent, is dismissed with costs, including the costs of two counsel.

2. The provisional restraint order granted on 3 July 2009, is confirmed in accordance with the draft order which I have initialed and marked X.



P B Fourie, J