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BACKGROUND

On 18 November 2019 the National Director of Public Prosecution (“**the Applicant**”) obtained a provisional restraint order (“**the provisional order**”) against the parties’ pursuant to the provisions of Section 26 of the Prevention of Organised Crime Act, No 121 of 1998¹ (“**POCA**”).

Magandheran Pillay (“**the First Defendant**”) and Litha Mveliso Nyhonyha (“**the Third Defendant**”) are the sole directors of the Regiments companies (“**Regiments**”). Eric Anthony Wood (“**the First Defendant**”) was a director of Regiments until 13 October 2016 when he was removed by a resolution of shareholders. The Applicant alleged that Regiments committed the offences of corruption, fraud and money laundering in relation to Transnet SOC Ltd (“**Transnet**”) and the Transnet Defined Benefit Fund (“**the Fund**”). It was further alleged that Regiments Capital Pty Ltd (“**the Fourth Defendant**”) obtained contracts unlawfully from Transnet, it implemented those contracts and their proceeds illegally. The Applicant specified that Transnet paid the Regiments more than R 1 billion arising from the unlawful contracts.

The provisional order was granted which coupled a *rule nisi*, calling upon the Defendants to show cause why the provisional order should not be made final. In terms of the provisional order, the Defendants and Respondents were prohibited from disposing or dealing with any of the realisable property held or controlled by them. In light thereof, a *curator bonis* was appointed to take possession of all such property pending the finalisation of an application for a confiscation order in terms of section 18 of POCA².

The Applicant submitted that she complied with the requirements for the confirmation of the *rule nisi* as set out in Section 25³ of POCA. Regiments denied their involvement in the crimes alleging that there was no wrongdoing on their part. Regiments questioned the Applicant’s intention to charge them and they disputed that they may be convicted, and that they had received or retained a benefit. They further averred that the Applicant failed to meet the jurisdictional requirements of Section 25 of POCA in that on the evidence she has presented, they argued, there are no grounds reasonably to believe that a confiscation order may be made against them. It was contended that

the provisional order was improperly sought and obtained on an ex parte basis and that the Applicant offended against the trite principles of full disclosure when an Applicant approaches Court on an ex parte basis. In other words, the Applicant failed to disclose material facts to the Court granting the ex parte order.

COURT HELD

The Court held that Section 26(1) permits the Applicant to approach Court on an ex parte basis. The term “may” confers a discretion on the Applicant to follow the ex parte route. The Court was therefore satisfied that the Applicant was justified in approaching the Court on an ex parte basis. The Court agreed with Regiments in that it was not appropriate for the Applicant to “pick and choose” what should be drawn to the attention of the ex parte Court.

The legal question was whether there has been a serious non-disclosure as would entitle the Court to discharge the *rule nisi*. The Court considered the following factors when exercising its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose:

1. The extent to which the rule has been breached;
2. The reasons for such non-disclosure;
3. The extent to which the first Court might have been influenced by proper disclosure; and
4. The consequences from the point of doing justice between the parties.

In considering the aforementioned factors, the Court held that if the failure to disclose one element stood alone, it might have been persuaded to exercise his discretion in favour of the Applicant. If material facts are not disclosed in an ex-parte application or the facts are deliberately misrepresented, the Court order will be erroneously granted. The Court held that the non-disclosure on the part of the Applicant in this instance was therefore material.

In closing, the Court ordered as follows:

1. The provisional order including the rule nisi was to be discharged; and
2. The Applicant is ordered to pay costs of the application and such costs will include costs consequent upon employment of two counsel where applicable and the costs of senior counsel where applicable.

VALUE

This case illustrates the impartiality of the courts when dealing with organs of state and ensuring even-handedness in Court proceedings.

[1] Section 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 any property to which the order relates.”*

[2] Section 18 of POCA is designed to enable the court to deprive a convicted person of the proceeds of crime.

[3] Section 25 (1) *A High Court may exercise the powers conferred on it by section 26(1) - (b) When- (i) that court is satisfied that a person is to be charged with an offence; and (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.”*

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