REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7907/20

(1) Reportable: ~~No~~ YES
(2) Of interest to other Judges: ~~No~~ YES
(3) Revised

10/12/2020

In the matter between:

ELIZABETH WILLANDA PRINSLOO N.O.	First applicant
MAHIER MOHAMED TAYOB N.O.	Second applicant
CORNELIA CAROLINA MIENIE N.O.	Third applicant
LUCAS MBENGENI MUNDALAMO N.O.	Fourth applicant
ADRIAAN WILLEM VAN ROOYEN N.O.	Fifth applicant
HLAMALANE JERRY MUSI N.O.	Sixth applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First respondent
THE NATIONAL PROSECUTING AUTHORITY	Second respondent
DINESH APPAVOO N.O. (*curator bonis*)	Third respondent

In re the application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
JOHANNES ADRIAAN SMIT	First defendant
RIAAN SMIT	Second defendant
QSG Consult Middle East Ltd	Third defendant

In re an application in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998

And also in the opposed application of:

CASE NO: 46882/17

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
ELIZABETH WILLANDA PRINSLOO N.O.	First respondent
MAHIER MOHAMED TAYOB N.O.	Second respondent
CORNELIA CAROLINA MIENIE N.O.	Third respondent
LUCAS MBENGENI MUNDALAMO N.O.	Fourth respondent
ADRIAAN WILLEM VAN ROOYEN N.O.	Fifth respondent
HLAMALANE JERRY MUSI N.O.	Sixth respondent

In re: All funds in Mercantile Bank account number 4000630342 in the name of Rialis Consultants (Pty) Ltd, Standard Bank account number 263190396 in the name of QSG Consult International (Pty) Limited and Standard Bank account number 026165244 in the name of QSG Consult International (Pty) Limited

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J U D G M E N T

Asset forfeiture under Prevention of Organised Crime Act 121 of 1998 (POCA) – Criminal asset forfeiture under Chapter 5 – powers and duties of liquidators under Companies Act – NDPP and liquidators both seeking to exercise their powers in respect of disputed funds – common objective to compensate victims of unlawful investment scheme – constitutional injunction against arbitrary deprivation of property – application of this principle in exercise of the court's discretion to confirm or refuse restraint order – HELD: even if disputed funds were realisable property, and could be included in restraint order, confirmation of restraint over the disputed funds would deprive investors of their proprietary rights to pursue their claims against the estate in winding up – such deprivation would not advance the objectives of POCA and would amount to arbitrary deprivation of property – Court declined to confirm restraint order over disputed funds – funds to be dealt with by liquidators in winding up.
Asset forfeiture under Prevention of Organised Crime Act 121 of 1998 (POCA) – Civil asset forfeiture under Chapter 6 – proceeds of unlawful activities - powers and duties of liquidators under Companies Act – pre-existing preservation of property order over funds held by liquidated companies – NDPP seeking forfeiture order - liquidators opposing forfeiture on basis that they should be permitted instead to distribute the preserved funds to creditors under winding up – consideration of proportionality principle in civil asset forfeiture involving proceeds of unlawful activities - NDPP v Botha 2020 (1) SACR 599 (CC) considered and discussed – proportionality principle applied – HELD: investors in unlawful investment scheme had legitimate interest in the preserved funds – liquidators acting to facilitate their legitimate interest – case distinguishable from Botha – appropriate to apply proportionality principle – forfeiture or preserved funds would deprive the investors of the right to have their claims processed through the insolvency regime – this would not serve the objectives of POCA, and would amount to arbitrary deprivation of property – forfeiture application dismissed.

KEIGHTLEY, J:

INTRODUCTION

1. This judgment involves a consideration of two different statutory schemes. The first is the well-established scheme for the winding up of companies under our company and insolvency laws. The second is the less common, but nonetheless established scheme of asset forfeiture under the Prevention of Organised Crime Act[1] (POCA).

2. The National Director of Public Prosecutions (NDPP), who is the main applicant, derives her powers from POCA. The opposing parties, who are the joint liquidators of certain companies (the liquidators), derive their powers from our company and insolvency law. The subject matter of the parties' contestation is a pool of substantial assets (mostly liquid funds) linked to an unlawful investment scheme that was conducted by the alleged rogues in the gallery, Mr Johannes Smit (Mr Smit),

[1] Act 121 of 1998

and his son, Mr Riaan Smit, (Mr Smit junior). Each party claims that under their respective statutory authority, they ought to be granted lawful control over the funds, as opposed to that control being extended to the other party.

3. The companies associated with the investment scheme have been wound up, save for one company, QSG Consult Middle East Ltd (QSG-D), which is domiciled in Dubai in the United Arab Emirates. Thus, it is not subject to the winding-up jurisdiction of a South African court. However, QSG-D is one of the accused in the criminal prosecution associated with the unlawful investment scheme. It is also cited as a third defendant in one of the applications pending before me. The liquidators appointed in the winding up are cited as the first to sixth respondents.

4. Three South African companies associated with the Smits are under liquidation, viz, QSG Consult International (Pty) Ltd (QSG-I), Johan A Smit and Associates (Pty) Ltd (JASA) and Rialis Consultants (Pty) Ltd (Rialis). QSG-I was placed under final winding up on 14 May 2019; and JASA and Rialis on 28 January 2020. The liquidators launched an application under s 20(9) of the 2008 Companies Act[2] on the basis that the three companies had been used in such a manner as to constitute an unconscionable abuse of their separate juristic personality. The court granted an order under that section declaring the three companies to be a single entity, known as the QSG Investment Scheme, and directing that they would be administered in all respects as one single company under the Companies Act. The

[2] Act 71 of 2008. Section 20(9) reads:
"If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

(a) Declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
(b) Make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)"

order was granted on 2 December 2019, while JASA and Rialis were under provisional liquidation. For simplicity's sake, I will refer to the s 20(9) collective entity as QSG-SA.

5. This judgment covers two cases, both of which were instituted by the NDPP under POCA. By agreement between the parties they were consolidated for purposes of a single hearing before me.

6. The first is case number 46882/17 under which, on 4 December 2017, the NDPP was granted an *ex parte* preservation order (the preservation order) in terms of s 48(2) of POCA. The preservation order is limited in its extent to certain specified assets. These are a Mercantile Bank account held in the name of Rialis, and two Standard Bank accounts held in the name of QSG-I. The accounts remain frozen under the preservation order, pending the finalisation of an application for forfeiture of the affected assets under s 53 of POCA. The forfeiture application was instituted on 15 March 2018 (the forfeiture application).

7. The liquidators have sought leave to intervene in the forfeiture proceedings. Effectively, they ask that the application should be dismissed so that the funds can be released and dealt with by the liquidators under the liquidation process.

8. The second case involves an application for a restraint order in terms of s 26 of POCA. On 10 March 2020, under case number 7907/2020, the NDPP was granted an *ex parte* restraint order, in the form of a rule *nisi*. Mr Smit, Mr Smit junior and QSG-D are cited as defendants in that application. The restraint order is broader in reach than the preservation order. Although it identifies specific assets that are restrained, it is not limited to those assets. Instead, it covers all realisable property, as defined in POCA, linked to the three defendants. A schedule of known assets is attached to the restraint order. Of significance for the present case are various

foreign bank accounts, including what I will later refer to as those holding "the Perazim funds". An amount held in the SARB Suspense Block Account is also listed.

9. The liquidators initially launched an urgent application for leave to intervene in the restraint proceedings and to anticipate the return day of the rule *nisi*. The matter was ultimately heard in the ordinary course, by agreement between the parties, at the same time as the forfeiture application. The liquidators seek the release of most of the funds from restraint in order that they, too, may be dealt with as part of the liquidation process.

10. The restraint order does not cover the assets preserved under the preservation order. This is in line with the relevant provisions of POCA. Nor does it cover those assets that were placed under the control of the liquidators prior to the restraint order being granted. This is also in line with POCA which, as I discuss in more detail later, recognises that a pre-existing liquidation takes precedence over restraint. However, certain of the funds, which are substantial, fall into a grey area between control by the liquidators and control by the *curator bonis* appointed under the restraint order. It is these assets that are under the spotlight in the restraint application.

11. A final point worth noting in this introduction is that the funds that are the subject matter of the dispute in both cases emanate from investments made by a large number of people (mostly South Africans) who allegedly were inveigled into depositing money against the false promise of good returns from the investment scheme. An important feature of both cases is that the opposing parties each recognise that these funds ultimately should be returned to these victims of the unlawful investment scheme. The question is what mechanism should be used to give effect to this objective. The liquidators say that the victims can be recompensed

as creditors through the liquidation process. The NDPP's stance is that she ultimately does not seek to have the assets paid over to the state. She wants to compensate the victims, and says that she can do so under the provisions of POCA. To this end, the NDPP asks the court to confirm the restraint order, and to grant a forfeiture order.

BACKGROUND FACTS

12. It is necessary to sketch the background facts relevant to both cases, particularly insofar as they relate to the unlawful investment scheme. These facts are largely common cause between the NDPP and the liquidators. The Smits have not actively participated in the proceedings. Consequently, at this stage, there is no contrary version before this court. It should be noted that both the NDPP and the liquidators state that the Smits contend that there was nothing unlawful about their investment scheme. This remains to be tested in criminal proceedings, and I make no determination on the lawfulness of the scheme in this judgment. Where I refer to "the unlawful investment scheme" I do so with the caveat that from a criminal law point of view, whether it was lawful or not has yet to be determined.

13. The investment scheme came to the attention of the authorities in 2017, after First National Bank, Mercantile Bank and the Financial Intelligence Centre reported suspected suspicious transactions to the South African Reserve Bank (SARB). Both the SARB's Financial Surveillance Department and Bank Supervision Department conducted investigations. As part of these investigations they interviewed both Mr Smits and certain investors, and they conducted an extensive analysis of the flow of funds between identified bank accounts, both in South Africa and in, among others, Dubai, Namibia and Luxembourg.

14. The liquidators have also instituted an enquiry as part of the winding-up proceedings. The Smits have already appeared and given evidence, and the enquiry is ongoing.

15. The liquidators call the investments scheme a “Ponzi scheme” and the NDPP agrees with this description. A Ponzi scheme is one in which investors are fraudulently lured into investing in a scheme with a promise of often unrealistic returns. Investors are made to believe that the profits will come from legitimate business activities. However, in reality, such activities are absent. In effect, early investors are paid from later investors’ payments into the scheme. The scheme relies on a constant flow of new investments in order to sustain the repayment of “profits” to earlier investors. Inevitably, the scheme is unsustainable, and either collapses in the ordinary course or, as in this case, is stopped in its tracks as a consequence of law enforcement authorities becoming involved.

16. The outcome of the investigations conducted by the SARB, which are summarised in the NDPP’s affidavits filed in both matters before me, show all the hallmarks of a Ponzi scheme. The information gleaned by the liquidators confirms this. Investors were told by the Smits that they were investing “seed funding” in trading activities in Dubai. They were told that Mr Smit had an exclusive business relationship with a Sheik in Dubai, which allowed him to buy and sell commodities, mainly oil.

17. Of course, this was not so. The SARB found no evidence in its financial analysis of the accounts involved that indicated any legitimate trading activities at all. The accounts seemed overwhelmingly to have received only funds from investors, or intra-transfers from other affected accounts that had received investor funds. The scheme ran from 2013 until 2017. The SARB determined that the bank accounts associated with the scheme received a total amount of R381 316 393.57 (R383.3

million) from investors over this period. The total possible payments to investors was R174 624 551.42 (R174.6 million). The SARB concluded that: "*No significant amount in funds was received into the bank accounts, both local and foreign, other than that received from investors.*" Further, it found that the bank accounts revealed no transactions related to investments or oil trading activities for purposes of generating an income. It concluded that the repayments to the investors, the payment of profits and the payments to partners were funded by payments received from other QSG-SA investors.

18. The funds in the bank accounts were also used to pay for the purchase of immovable properties, motor vehicles, payments for vacation clubs, payments of debit orders for insurance, purchases of food, fuel and the Smits' other private purposes.

19. The SARB's extensive financial analysis of the bank accounts reveals details showing that there were flows into the accounts from investors (both into the South African accounts and into the Dubai accounts), as well as intra-account transfers of funds. It is not necessary to repeat the details here. For present purposes, the following are the relevant identified bank accounts held by one or other of the QSG-SA entities or QSG-D:

    19.1. Standard Bank account number 283190396, held by QSG-I (the Standard Bank 1 account);

    19.2. Standard Bank account number 026165244, held by QSG-I (the Standard Bank 2 account);

    19.3. Mercantile Bank account number 4000630342, held by Rialis (the Mercantile Bank account);

19.4. Noor Bank account number 00110742560038, held by QSG-D (the Dubai 1 account);

19.5. Noor Bank account number 00110742560016, held by QSG-D (the Dubai 2 account).

20. At different stages of the scheme, other South African bank accounts were used for the receipt and transfer of funds by the different entities. However, by the time the authorities became involved, the above-identified accounts were active in the scheme. A Luxembourg bank account was also identified and is included in the NDPP's list of assets.

21. It is necessary to refer to two other accounts that are relevant. First, what I referred to earlier as the Perazim funds, which are held in a HSBC Bank account in the United Kingdom under account number 52779013 (the Perazim account). It holds approximately £3.2 million. These funds emanated from one of the Dubai accounts held by QSG-D and were transferred by Mr Smit through various other entities and accounts. Ultimately, the funds were deposited in the HSBC account held by a trading entity called Perazim, which was under the control of one Mr Van Blankenberg. The money was intended to be used to make an investment on behalf of QSG-D. The investment was never effected, because the United Kingdom Metropolitan Police Service obtained an order under the UK Proceeds of Crime Act, 2002 to freeze the account. Although the liquidators subsequently succeeded in obtaining an order to uplift the freezing order, it was reinstated at the request of the NDPP. The Perazim funds remain under the UK restraint order.

22. Mr Van Blankenberg has participated in the winding-up enquiry. The liquidators say that he has agreed to co-operate with them. To this end, he has provided the liquidators with an irrevocable payment instruction undertaking that once the UK

restraint order is uplifted, the Perazim funds will be transferred to the liquidators UK attorneys. Thereafter, the liquidators intend to have the funds transferred to South Africa for distribution among the creditors. Both Mr Smit and Mr Van Blankenberg admitted to the enquiry that the Perazim funds emanated from QSG-D.

23. It should also be recorded that Mr Van Blankenberg initially claimed a deduction of $500 000 from the Perazim funds as his fee for the investment transaction. These are held in a bank account held at the Bank of America (the Bank of America account). The liquidators say that he has undertaken to re-pay this amount to them. He has made a similar undertaking to the SARB.

24. The NDPP and the liquidators are of the same mind that the QSG-SA entities, and QSGD were used as vehicles through which the Smits operated the scheme. There is sufficient evidence from all the investigations that have been conducted to proceed on the basis that, for present purposes, it is accepted that the scheme was unlawful. It is also plain that all of the funds that passed through the various bank accounts, and which remain in those bank accounts, derive from the investors in the scheme.

25. As I have already indicated, the authorities and the liquidators have taken steps to rectify the consequences of the unlawful scheme. The SARB has placed the Standard Bank accounts 1 and 2, and the Mercantile Bank account under a SARB freezing order. Those accounts are also subject to the preservation order obtained by the NDPP.

26. The Smits and QSGD have been charged with various offences, including (but not limited to) fraud, contraventions of the Exchange Control Regulations, and money laundering. The Smits left South Africa after the Preservation Order was granted. Their version is apparently that they went to Dubai for purposes of trying to facilitate

the trading activities they claim they were cultivating there. The law enforcement authorities are less sanguine: they say that the Smits fled the country. Warrants of arrest were issued. However, the Smits subsequently came back to South Africa, and they have appeared in the Commercial Crimes Court. The NDPP was unable to tell me whether the trial has yet commenced.

27. The Smits have also apparently agreed to co-operate with the liquidators. As I have mentioned, they have testified before the enquiry. Mr Smit has conceded under oath that the assets associated with QSG-D and QSG-SA come from investors' money. The liquidators say that the Smits have conceded that these assets belong to QSG-SA, and that they have undertaken to assist the liquidators to recover the assets to the benefit of the investors. As part of this undertaking, Mr Smit, who is the sole shareholder, Director and company secretary of QSG-D, has signed a cession in terms of which he has ceded, transferred and made over to the liquidators all of his right, title and interests in QSGD to the liquidators (the cession). I will deal in more detail with the cession later, as it is relevant to the restraint application. The liquidators also record that QSG-D has been deregistered as a company in Dubai.

THE RESTRAINT APPLICATION

28. Chapter 5 of POCA deals with restraint and confiscation orders. It is often referred to as "criminal asset forfeiture" because it is associated with a criminal prosecution. The key purpose of this Chapter is to ensure that no person can benefit from her wrongdoing.[3] To this end, POCA permits the NDPP to apply for a restraint order so as to preserve sufficient property to satisfy a confiscation order that may be made

[3] *S v Shaik & Others* 2008 (5) SA 354 (CC) at 376B

once a person is convicted. In terms of s 25(1)(b), a restraint order may be made when:

> "(i) (the) 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."

29. A confiscation order may be made by the court convicting an accused person. Section 18 permits the court to enquire into any benefit which she may have derived from the offence. If the court finds that she has so benefited the court may, in addition to any punishment which it may impose, make an order against the accused for the payment to the State of any amount it considered appropriate.[4] POCA places some limitation on the discretion of the court as to the amount the accused may be ordered to pay under a confiscation order. That amount may not exceed the monetary value of the proceeds of the offences in question or what POCA refers to as "related criminal activity", or the net value of the sum of the accused's property and "affected gifts", whichever amount is the lesser.[5] A confiscation order has the same status as a civil judgment of the relevant court.[6]

30. Unlike preservation orders under Chapter 6, restraint orders are not directed at specific, tainted property. Instead, they may be granted over what POCA defines as "realisable property". This is <u>any</u> property "held by" the accused, or "defendant" as she is termed in the Act, or any property held by a person to whom the defendant

[4] Section 18(1)
[5] Section 18(2)
[6] Section 23

made an affected gift.[7] A person "holds" property if she has "any interest" in it.[8] The effect of a restraint order is to prohibit any person:

> "subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property which the order relates."[9] (emphasis added)

31. The prohibition on dealing with property affected by a restraint order is thus extensive. It is not only the defendant who is prohibited from dealing with it, but any person at all, unless the restraint order makes an exception. Property held by the defendant extends to property held by a liquidator of a company which is being wound up.[10] This means that liquidators may also be prevented from exercising their statutory powers over property affected by a restraint order. Significantly, however, if a winding-up order has been made prior to the grant of the restraint order, assets forming part of the estate of the liquidated company are excluded from any restraint orders. Section 36(2) provides in this regard that:

> "Where a (winding-up order) … 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."

32. The effect of this section is that the assets of a company that is wound-up before a restraint order is made may not be placed under restraint. In addition, they cannot be realised[11] in order to satisfy any confiscation order that may be made against a defendant.[12]

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[7] Section 14(1)
[8] Section 12(2)(a)
[9] Section 26(1)
[10] Section 12(2)(a)(ii)
[11] Under s 30
[12] Under s 31

33. Creditors who may have a claim against the defendant are not left entirely out of account in the sense that their claims are not subordinated to those of the State. When it comes to the execution (or realisation) of property for purposes of satisfying a confiscation order, a court is required to take into account their interests. Section 30(2) provides that before a court can authorise a *curator bonis* to realise any realisable property in order to satisfy a confiscation order, it may allow a person who is likely to be affected by the confiscation order, or who has suffered damage or loss as a result of an offence committed by the defendant, to make representations to the court in connection with the realisation of the property.[13] Further, the court may order the *curator bonis* to suspend the realisation process in order to permit that claim to be satisfied.[14]

34. Section 31(1) is important, too. It permits the court to direct that payments be made out from the proceeds of the realised property before they are applied to satisfy the confiscation order.

35. The effect of these two sections on the rights of concurrent creditors was considered by the Supreme Court of Appeal in *Absa v Fraser*:

> "But it does not follow that claims of concurrent (unsecured) creditors are thereby simply left out of account. The Act provides a mechanism for them to be taken into account, subject to the approval of the court at the time of realisation of the defendant's property but before satisfaction of a confiscation order. In this regard s 30(5) expressly authorises the High Court to delay the realisation of the property so as to enable a victim of the defendant's crimes to obtain a judgment and to satisfy that judgment from the defendant's property before the property is realised.
>
> …
>
> I can fathom no reason for this provision, other than that it is intended to provide persons with an 'indirect interest' in the restrained property, such as the defendant's concurrent creditors, to bring their claims to the court's attention to be taken into account for payment, should the court be satisfied of their validity, before satisfaction of the confiscation order. This, in my view, can only mean that the

[13] Section 304)

[14] Section 30(5)

> High Court retains the power to entertain applications by persons or entities with claims, concurrent or otherwise, in the restrained property.
>
> …
>
> It follows that the State's interest in a confiscation order cannot compete with, but is subordinate to, the defendant's concurrent obligations. After all a confiscation order is not intended to enrich the State but to divest the criminal of the benefit derived from an offence."[15]

36. In the earlier case of *NDPP v Rebuzzi*,[16] the SCA found that the two sections under discussion, viz. s 30(5) and s 31(1) of POCA:

> "…make it clear that the legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss. Not only do those sections recognise that a confiscation order might co-exist with a claim by the victim (which would hardly have been provided for if the legislature intended that to be avoided) but they provide the means to avoid the claims competing for the defendant's property."[17]

And the Court concluded in this regard that:

> "The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view it is therefore not significant that in some cases the State might end up receiving nothing."[18]

37. As a general principle, then, the fact that property is subject to a restraint order will not necessarily prevent affected creditors from prosecuting their claims against the defendant. POCA makes specific provision for creditors' claims to be considered after conviction and at the confiscation and realisation stage of proceedings. Rather than the proceeds of realisable property being used only to pay off the confiscation order debt to the State, POCA provides for a defendant's creditors' claims to be prioritised and to be paid from the realised property. In this respect, the NDPP is

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[15] 2007(3) SA 484 (SCA) at paras 20-26. Although the Constitutional Court overturned part of the judgment of the SCA, it endorsed the findings cited here. See *Fraser v Absa Bank Limited & Another* 2007 (3) SA 484 (CC) para 56

[16] 2002 (2) SA 1 (SCA)

[17] Para 17

[18] Para 19. See also *Shaik* at 376C, where the Constitutional Court endorsed the SCA's dictum as to the primary object of a confiscation order.

correct in her submission that Chapter 5 of POCA provides a path for the investors' claims ultimately to be settled from the restrained assets.

38. Having said this, however, it must also be said that there are certain peculiarities arising in this case that complicate matters. They render less clear the outcome of the application of these principles to the facts.

39. The winding-up application of the QSG-SA entities took place before the restraint order was obtained. In line with s 36 of POCA the NDPP accepts that the assets of QSG-SA do not form part of the realisable property, and that they may not be taken into account for purposes of any confiscation order that may ultimately be made if the defendants are convicted. This was expressly dealt with in the founding affidavit in the restraint application. There is no dispute that the liquidators may exercise their full statutory powers and obligations in respect of these assets. The only proviso in this regard, is that they cannot deal with the assets that remain subject to the preservation order.

40. This leaves a basket of contested assets that the NDPP has included in the list of assets to be placed under restraint. For the most part, these are assets that are linked to QSG-D specifically. They are:

40.1. the Perazim funds, held in the Perazim account (item 1.1 on the NDPP's schedule of known realisable property subject to the restraint order (the asset schedule));

40.2. the funds held by Mr Van Blankenberg in the Bank of America account (item 1.2 of the asset schedule);

40.3. the funds frozen by SARB in its Suspense Block Account (item 1.3 of the asset schedule);

40.4. the funds in the Luxembourg LeuPay account;

40.5. the R100 000 in cash seized by the South African Police Service from Mr Smit junior (item 2 on the asset schedule)

40.6. the funds in the Dubai 1 and Dubai 2 accounts (item 3.1 and 3.2 of the asset schedule);

41. I refer to these as "the disputed funds". The NDPP says that all of these assets fall within the definition of "realisable property", and that the restraint order in respect of them should be confirmed. The liquidators contend that they ought to be excluded from the restraint order so that they can be dealt with by the liquidators to settle the claims that have been lodged by the investors.

42. A complicating factor of the case is that although the winding-up of the QSG-SA entities, as well as the s 20(9) order, preceded the grant of the restraint order, it is common cause that QSG-D itself could not be wound up or included in the s 20(9) application because it fell outside the jurisdiction of the court. The liquidators say that QSG-D was an integral part of the abuse of the separate corporate personalities of all of the entities involved. As such, had it not been for the fact that QSG-D was registered, and hence domiciled in Dubai, it would have been included in the s 20(9) order and administered by the liquidators as part of QSG-SA.

43. The liquidators also say that Mr Smit conceded to them that all funds held by or on behalf of QSG-D came from investors in the scheme and thus belong to QSG-SA. To give effect to this, and with the co-operation of Mr Smit, they secured the cession referred to earlier. This cession is in the form of a formal notarised document. It records that Johannes Adriaan Smit:

> "(is) the legal holder and owner of the 1,000 issued shares of AED 1.00 ('the shares') in (QSG-D) as per the copy of the relevant share certificate, marked 'A', (and) do hereby on 6 December 2019 cede, transfer and make over the shares to (Ms Prinsloo, in her capacity as the joint liquidator of QSG-I)"

And further, that Mr Smit

> "… renounce(s) all right, title and interest of whatsoever nature that …(I) may have in respect of the shares, and authorise the agent and the transferee irrevocably and unconditionally to do all such acts and things as may be necessary or expedient in connection with the transfer of the shares and to take control of the company in accordance therewith."

44. The effect of the cession, which was concluded prior to the restraint order having been granted, is that Mr Smit's shareholding in and control over QSG-D was transferred to the liquidator of QSG-I, which subsequently became part of the s 20(9) entity, QSG-SA. As I understand it, the liquidators have acted on the cession and, using the power of control over the company, have actually had the funds in the Dubai 1 and 2 bank accounts transferred to them. They have included these funds in their draft liquidation and distribution account that they have prepared.

45. At present, and despite these facts, the disputed funds, including the Dubai 1 and 2 account funds, are subject to the restraint order that has been granted. I must determine whether they ought to remain subject to that order or not. In their application to intervene in the restraint proceedings, and to anticipate the return day of the rule *nisi*, the liquidators seek an order excluding the disputed funds from the ambit of the order, thus releasing them for processing under the insolvency regime.

46. The NDPP disputes the liquidators' right to intervene as a party, and the relief the liquidators seek. The NDPP's grounds of opposition in both respects share a common foundation. The submissions may be summarised as follows:

46.1. In order to be granted leave to intervene, the liquidators must establish a direct and substantial interest in the restraint proceedings and, more specifically, a legal interest in the disputed funds.

46.2. The liquidators have no such interest.

46.3. The evidence (particularly the SARB investigation) establishes that the investors in the unlawful scheme either made deposits into South African bank accounts, which were under the control of the QSG-SA entities, or into the Dubai 1 and 2 accounts, which were under the control of QSG-D.

46.4. No money that was paid into the QSG-SA accounts in South Africa was transferred to QSG-D's Dubai accounts and *vice versa*, and, save for one instance, there was no flow of funds in the other direction.

46.5. Thus, there is factually a clear distinction between these two categories of investment funds, and between the entities which held the funds.

46.6. There was no "co-mixing" of the investment amounts paid into the QSG-SA accounts and those paid into the QSG-D accounts.

46.7. This means that there is no legal justification for those investors who deposited money into the Dubai 1 and 2 accounts to share in the distribution under liquidation of the QSG-SA assets. In the words of the NDPP's submission: "*there is no justification for defrauded investors who made their deposit into a local account to share in the money deposited into the QSG-D account*."

46.8. As the winding-up of QSG-SA does not extend to a winding-up of QSG-D, this means that it does not extend to the QSG-D funds. This includes the

Dubai 1 and 2 accounts, as well as all the other disputed funds that are linked to QSGD.

47. The essence of the NDPP's submissions is that because of the alleged clear distinction to be drawn between QSG-SA and QSG-D as investment vehicles, the liquidators' powers do not extend over any of the disputed funds, as these fall within the separate and distinct ambit of QSG-D, which is excluded from the ambit of the winding up. As such:

47.1. the liquidators have no rights in the disputed funds, and hence no *locus standi* to intervene in the restraint proceedings; and

47.2. the disputed funds are not assets in the companies under winding-up, and hence are not affected by the provisions of s36 of POCA. This means that they are correctly to be regarded as realisable property, and subject to the restraint order.

48. I have some difficulty with the premise from which the NDPP's submissions proceed. Factually, it is so that in its analysis of all of the bank accounts the SARB investigation report found the funds in the Dubai accounts largely came from deposits by investors directly into that account. However, this was not without exception.

49. The investigation report referred to certain instances in which monies were transferred from a JASA account to the accounts of persons connected to the unlawful scheme, such as Mr Smit junior and his wife, and from there to the Dubai 1 account of QSG-D. The investors concluded that at least R4 million was deposited in this way and that the source of the funds was investor funds deposited in South

Africa.[19] Further similar transfers were made, but the SARB investigators could not conclude with certainty that the money was sourced in investor funds. The NDPP concedes that the SARB investigators also identified a transfer of R32,7 million from the Dubai 1 account into one of the local QSG-SA accounts.

50. Factually, then, it is simply incorrect to proceed from the premise that there was no interaction between the QSG-D accounts and the QSG-SA accounts. It is also factually incorrect to draw a distinction between two categories of investors, viz. those who paid their investment monies into a South African account, and those who paid their investment monies into the Dubai 1 or 2 accounts. There is no evidence that the Smits ran two separate investment schemes, one operating in South Africa and one operating in Dubai. Factually, there was one unlawful investment scheme operated by the Smits. According to the SARB investigation report, in 2013, investors were required to deposit their payments into an FNB account of JASA.[20] The investigators noted that payments into the Dubai 1 and 2 accounts only commenced in October 2015. Even then, and as late as August 2017, investors were given the option of depositing their money into either the Dubai 1 account, or the Standard Bank 1 account held by QSG-I.[21]

51. The premise from which the NDPP's submissions operates is thus factually flawed: there is no clear and separate distinction to be made between the investments of defrauded investors who deposited monies into QSG-SA accounts and those who deposited into the QSG-D accounts. The facts show that over the course of the investment scheme, from 2013 until 2017, the investors by and large made their

[19] See para 5.79 - 5.80, Caselines 001-610, and para 5.114.1-4, Caselines 001-616
[20] Para 4.120, Caselines 001-579
[21] Para 4.133.3, Caselines 001-587

investments from their own South African bank accounts (some investments were made from foreign accounts) into either QSG-SA accounts or QSG-D accounts.

52. Not only would it be factually incorrect to draw the distinction sought to be drawn by the NDPP, but it would also be highly artificial, and contrary to the NDPP's own approach to the case. The NDPP clearly treats the unlawful scheme as one unlawful scheme operated by the Smits over a period of some four years. The NDPP does not in her founding affidavit draw any distinction between assets held by QSG-SA and those linked to QSG-D, save for the fact that QSG-SA was wound up before the restraint order was filed. The NDPP was legally bound to exclude those assets, and this can be the only reason she did so.

53. The NDPP's case has never been that there were two schemes run by the Smits. It is quite clear from all the evidence that all of the entities involved, both South African and QSG-D, were used as vehicles through which the unlawful scheme as a whole operated. It is for this reason that I say that the distinction the NDPP subsequently seeks to draw in its submissions is artificial. It is not a justifiable basis on which to exclude the liquidators from participating in the proceedings, nor is it a justifiable basis on which to conclude that only those investors who deposited monies into QSG-SA accounts have the right to participate as creditors in the winding-up proceedings.

54. There is also the question of the cession, which further weakens the NDPP's case. This, too, was undertaken prior to the restraint order. On the face of it, there was thus no POCA-specific reason why the liquidators were prevented from using the mechanism of a cession in order to secure control over QSG-D in carrying out their statutory obligations. The NDPP disagrees. She says that the cession is unlawful and void *ab initio* because:

54.1. QSG-D was deregistered at the time and its re-registration was necessary before a valid cession could be effected;

54.2. Mr Smit had no lawful right to the proceeds of his unlawful activities held in the QSG-D accounts and thus could not lawfully cede them to Ms Prinsloo, as liquidator of QSG-I; and

54.3. the purpose of the cession was to gain control of QSG-D, which was an attempt to achieve that which was not legally possible, and hence it was a simulated transaction.

55. The first submission has no merit. There is no evidence before me as to what the law in Dubai says regarding the status of a company that has been de-registered there or what the consequences are of de-registration. In any event, the cession was by Mr Smit, as the sole shareholder and director of QSG-D. He ceded his shares and control of the company to Ms Prinsloo. QSG-D was not itself the cedent.

56. The cession was thus not a cession of the proceeds of crime. It was a cession of a shareholding. The NDPP's second submission fails to appreciate the distinction between the shareholding, and the funds held.

57. I also find no merit in the third submission. There is no credible suggestion that in entering into the cession agreement with Mr Smit they were doing anything but carrying out their statutory obligations as liquidators. They were not parties to any unlawful activity in becoming a party to the cession. They are statutorily obliged to collect assets and ultimately distribute these to creditors. There is nothing illegal in doing so, and thus no need for any subterfuge of simulation in the transaction.

58. It is not disputed that the cession followed Mr Smit's concession as part of the winding-up enquiry that all of the funds held in all of the accounts, including those

held by QSG-D in the Dubai accounts, emanated from investors' money and thus belong to QSG-SA. Of course, Mr Smit is not a lawyer and so he can't be bound to the legal concession involved here. However, this undisputed fact shows that the liquidators were acting in good faith, and on their reasonable understanding of what was required of them in seeking, through the cession, to obtain control of QSG-D and, indirectly, the funds held by it, for distribution to creditors. This was before the restraint order was instituted, and the existing preservation order did not cover the Dubai funds. I can see nothing unlawful or underhand in their conduct. Nor is there any taint that the cession was a simulated transaction. Moreover, the NDPP has not applied to set aside the cession. It thus remains valid and binding.

59. Applying these findings to the question of the liquidators' application to intervene, I find that none of the NDPP's submissions justifies their exclusion as parties. The liquidators clearly have a substantial and direct interest in any restraint order made in respect of assets over which the liquidators claim, and have *de facto*, exerted control. In any event, the SCA has ruled in favour of concurrent creditors having *locus standi* in restraint proceedings in appropriate cases.[22] There would seem to be no reason why the liquidators of associated companies, who represent the interests of creditors, should not equally be accorded standing to intervene.

60. Finally, QSG-D is the third defendant in the restraint proceedings. Under the cession, Ms Prinsloo has control over the company, and is its shareholder as one of the joint liquidators of QSG-SA. That, in itself, would be reason enough to accept

[22] *Absa v Fraser* para 29. In its appeal the Constitutional Court held that, although a concurrent creditor does not have a necessarily have a right in every case to intervene in an application for assets to be released from restraint to pay for a defendant's legal expenses under s 26(6), the High Court has a discretion to permit a creditor to intervene. See *Fraser v Absa (CC)* at para 63

that the liquidators have the right to intervene and to oppose the confirmation of the restraint order as it stands.

61. What of the question of whether the disputed funds ought to be included in the restraint order, as the NDPP submits, or whether they ought to be excluded?

62. I have already rejected the NDPP's premise that those investors who paid their monies into the Dubai accounts are not entitled to share in the distribution effected by the liquidators in the winding-up of QSG-SA. In exercising their powers, the liquidators have not sought to draw any such distinction, and they have included all investors who have lodged claims as being potential participants in the distribution of assets. No one has challenged the liquidators' right to do so under the insolvency regime.

63. It follows that there is no merit in the NDPP's contention that the liquidators have no power over any funds linked to QSG-D. This being so, I accept that, but for the restraint order, the liquidators would be entitled, and obliged, to deal with the disputed funds in the course of the winding up and distribution to creditors.

64. This brings me to the restraint order. Does the law require that it should be confirmed in respect of the disputed funds? If so, then although the liquidators may deal with other assets in the insolvent estate, they will not be able to do so with the disputed funds.

65. POCA permits a restraint order to be granted over any realisable property. The definition of realisable property is very wide. This is deliberately so, as it is intended to have as wide a reach as possible in order to achieve the objectives of the Act. However, depending on the facts of a particular case, it may not always be possible

to draw a bright line between what falls within and what falls outside this wide definition.

66. For example, in this case, it is arguable that because QSG-D was not itself liquidated before the restraint order was granted, all property held by it, i.e. all property in which it has any interest, falls within the broad definition of realisable property, and thus may be included in the restraint order. This approach recognises that QSG-D is a corporate entity separate from its shareholding. It is only its shareholding and control of the company that has been ceded to the liquidators. Hence, s 36 (which gives precedence to a pre-existing liquidation) is no barrier to QSG-D's property being included in the restraint order. If this is so, then the liquidators, too, would be prohibited from dealing with the property, no matter how *bona fide* their intentions may be.

67. In my view, it is not necessary for me to make a finding on whether the disputed funds, which are linked to QSG-D, are realisable property or not. Even if they are, there are other reasons, in my view, why it is justifiable to exclude those funds from the reach of the restraint order.

68. POCA does not enjoin a court to make a restraint order in circumstances where the NDPP satisfies the relevant jurisdictional requirements. Section 26 read with s 25 gives the court a discretion to grant a restraint order.[23] In *NDPP v Rautenbach*,[24] the SCA explained that:

> "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."

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[23] Section 25(1) says that: "A High Court <u>may</u> exercise the powers conferred on it by section 26(1) …" (emphasis added)

[24] [2005] 1 All SA 412 (SCA) at para 56

69. Of course, this discretion must be exercised judicially. This requires that a court ought not to exercise its discretion in a manner that would subvert the purpose of Chapter 5 of the Act.

70. At the same time, a court must be aware of the constitutional injunction against the arbitrary deprivation of property. In the context of Chapter 5, a court may, in the proper exercise of its discretion:

> "limit the scope of the restraint order (if it grants an order at all) for otherwise the apparent absence of an appropriate connection between the interference with 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 [it] is intended to serve' - will render the interference arbitrary and in conflict with the Bill of Rights."[25]

71. This was said with reference to the situation where a court is asked to grant a restraint order in circumstances where the value of the property sought to be restrained materially exceeds the amount in which the anticipated confiscation order ultimately may be made. However, the dictum has wider application. It is a reminder that courts need to balance the valid law-enforcement objectives of POCA with their duty to prevent an arbitrary deprivation of affected persons' property rights.

72. The effect of including the disputed funds in the restraint order is that the liquidators, who were appointed before the restraint order was granted, will be prohibited from dealing with them for purposes of the distribution under the winding-up. It means that those investors who have lodged their claims in the winding up, will secure a significantly lower dividend through that process. Moreover, should they wish to

[25] *Rautenbach* para 56

pursue the balance of their claims against the disputed funds, they will have to take additional steps to do so under POCA.

73. Although s 30 and s31(1) of POCA provide a mechanism for this, it creates an additional procedural burden for claimants. Significantly, that avenue will be available to them only if the defendants are convicted. This means investors run the risk of losing their claim against the disputed funds, if there is no conviction. Or the entire liquidation process will be placed on hold until there is certainty in this regard. At the very least, they will be forced to delay their claims until the criminal process is finalised (which could, of course, involve appeals).

74. In supplementary affidavits filed by the liquidators, they attach a draft liquidation and distribution account identifying over 340 investment creditors whose claims they have verified. They state that some investors have not claimed because they were paid out through the scheme, or their claims have not been verified for this reason. It is common cause that a relatively small group of investors was originally of the view that they did not want to participate in the distribution through the winding-up process. Their preference instead was to lodge their claims through the POCA process at the confiscation order stage. The liquidators state that some of these investors have since changed their minds and have lodged claims in the liquidation. Only 3 investors (some 1.2%) appear at this stage to prefer to follow the POCA route rather than the winding-up route. They may yet, of course, change their minds, and lodge claims in the winding up.

75. The liquidators base their draft liquidation and distribution account on the assumption that all of the disputed assets are included for distribution. They estimate that investors will receive about 90c in the Rand if those assets are

included. The disputed funds are substantial and there will be a significant reduction in the value of the distribution if they are not included.

76. As creditors, the investors have well-established rights to pursue their claims under the insolvency regime. The effect of retaining the disputed funds under restraint would be to deprive them of these proprietary rights, by placing hurdles and inevitable delays in their way. Is there a legitimate reason for doing so?

77. The NDPP is adamant that she does not intend to stand in the way of investors recovering what they have lost. She says she will do all in her power to assist and support the investors in their claims against realisable property at the confiscation and realisation stage of the proceedings. The NDPP vows that her purpose is not to place the rights of the State above those of the investors, and she does not require that any amount ultimately should be paid into the criminal assets recovery account.

78. This is a laudable stance on the part of the NDPP. However, it begs the question: what purpose, then, does the NDPP seek to achieve in insisting that investors' claims against the disputed funds should be processed under POCA rather than under the winding-up process managed by the liquidators? Either way, the Smits will be deprived of the benefit of their unlawful activities, which is the primary objective of restraint and confiscation. Restricting the investors to pursuing POCA in order to recover the fullest extent of their claims will not have any added law-enforcement value, as far as I can see.

79. On the other hand, the winding-up process is well advanced. The vast majority of investors have lodged their claims under that process, and stand to make a good recovery if the disputed assets continue to be dealt with by the liquidators. The shared objective of the NDPP and the liquidators, viz. to assist the investors, will be achieved through that process more speedily and with less risk to the investors

through the winding-up process. To permit the liquidators to deal with the disputed funds will also avoid the clumsy, and no doubt, more costly process of having two recovery regimes running side by side in respect of the disputed funds.

80. I conclude that there is no good reason to deprive the investors of their ordinary rights to pursue their claims through the winding-up process in this case. To retain the disputed funds under restraint would amount to an arbitrary deprivation of their property rights. It would not serve a proper public purpose in that it would place unnecessary hurdles in the path of the ongoing winding-up process, which had already commenced by the time the restraint order was granted.

81. Taking all of the above into account, in the exercise of my discretion, I find that the interests of justice are better served by the release of the disputed funds the ambit of the restraint order. The restraint order will be confirmed only in respect of the remaining assets.

82. I say this with one proviso. I am not satisfied that there is a basis to exclude the R110 000. 00 in cash seized by the South African Police Service from the restraint order. This money was seized from Mr Smit junior's safe. There is no evidence that the money was QSG-SA or QSG-D funds. It may have been that Mr Smit junior acquired the money through the unlawful investment scheme, but the liquidators do not per se have powers over his assets. For this reason, they should remain under restraint.

THE FORFEITURE APPLICATION

83. My findings in respect of the restraint application are not necessarily directly applicable to the forfeiture application, although, as will be seen, there are some underlying common factors. The forfeiture application falls under Chapter 6 of

POCA, which establishes a different regime of asset forfeiture. It is commonly referred to as "civil asset forfeiture" in that it is not necessarily linked to a criminal prosecution. Further, unlike the process under Chapter 5, the preservation and forfeiture of property under Chapter 6 involve proceedings *in rem*. The forfeiture is directed at specific assets which are alleged to be either the proceeds or the instrumentalities of unlawful activities.

84. In this case, the assets in question are the QSG-SA funds held in the Mercantile Bank account and the two Standard Bank accounts (the preserved funds). It is not in dispute that they are the proceeds of the Smits' unlawful investment scheme, representing the deposits made by investors. It is also not in dispute that the preserved funds ought not to be forfeited to the State, but that they should be paid over to the identified investors instead. Where the parties part ways is on how this should be achieved: through the winding up, or by way of the forfeiture process.

85. The NDPP instituted her forfeiture application on 15 March 2018. It seeks an order:

85.1. declaring forfeit to the state the preserved funds;

85.2. the appointment of a *curator bonis*;

85.3. payment of the preserved funds to the *curator bonis*;

85.4. directing the *curator bonis* to undertake payments from the preserved funds on a *pro rata* basis to investors, and to deposit any surplus to the criminal assets recovery account; and

85.5. directing the *curator bonis* thereafter to file a report with the court.

86. The liquidators seek leave to intervene as respondents. The primary relief they seek is for the dismissal of the forfeiture application. If the application is dismissed, the

liquidators will be able to bring the preserved funds into the insolvent estate of QSG-SA, and to distribute them to investors. This is the objective they seek to achieve in opposing the grant of the forfeiture application.

87. The first stage of asset forfeiture proceedings under Chapter 6 is the preservation of the property in question. The NDPP obtained a preservation order over the preserved funds on 2 December 2017. In accordance with the requirements of POCA, she caused a copy of the preservation order to be published in the Government Gazette, and instituted the forfeiture application on 15 March 2018. It is not disputed that this was within 90 days of the date of publication in the Government Gazette.

88. Section 48(1) provides 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."

And in terms of s 48(2):

> "The National Director shall give 14 days' notice of an application under subsection (1) to every person who entered an appearance in terms of section 39(3)."

89. Section 39(3) permits any person who has an interest in the property to enter an appearance giving notice of her intention to oppose the making of a forfeiture order or for the exclusion of her interest from the forfeiture order. It is a peculiarity of the forfeiture regime that the s 39(3) appearance is to be delivered within 14 days of service of the preservation order on them, or within 14 days of publication in the Government Gazette. This means that the appearance must be served shortly after the preservation order is granted, but <u>before</u> an application for a forfeiture order is actually instituted.

90. In this case, no party entered an appearance, although it seems some investors contacted the NDPP's office to say they intended to do so. The NDPP did not file her application on any party, and sought forfeiture by default under s 53. This section permits the NDPP to apply for forfeiture by default and, if the court is satisfied that no person has appeared on the date upon which the forfeiture application, it may grant the order.

91. The NDPP did not set the forfeiture application down for hearing. It seems that there was some delay in the process in light of the Smits having left the country on November 2017. The NDPP says she could not track them down in order to serve them with a copy of the preservation order. It was only in March 2019 that the NDPP managed to serve on the Smit's attorney. Even then, the forfeiture application does not seem to have progressed. That only happened when the liquidators sought to become involved in the litigation.

92. After the liquidation of the QSG-SA entities and the s 20(9) order, the liquidators took steps to intervene in both of the asset forfeiture proceedings then pending. Once the restraint and forfeiture applications were consolidated, the liquidators filed an answering affidavit, to which the NDPP responded. The matter was then set down for hearing together with the restraint application.

93. The liquidators formally sought leave of the court to intervene in the forfeiture application. The NDPP accepts that they have *locus standi* to do so. However, she takes issue with the fact that the liquidators have failed to follow the process for late entry of appearance outlined in s 49. That section says that:

> "(1) Any person who, for any reason, did not enter an appearance in terms of section 39(3) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for leave to enter such an appearance.

> (2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made … but shall be made before judgment is given in respect of such an application for a forfeiture order.
>
> (3) The High Court may grant an applicant referred to in subsection (1) leave to enter an appearance in terms of s 39(3) within the period which the Court deems appropriate, if the Court is satisfied, on good cause shown that such applicant-
>
> (a) has for sufficient reason failed to enter an appearance in terms of s 39(3); and
>
> (b) has an interest in the property which is subject to the preservation of property order."

94. It is so that the liquidators have not made a formal application under s 49. However, in my view, this is not fatal to their standing in the matter. Section 49 is a procedural provision, linked to the s 39(3) entry of appearance. One can understand why these provision was enacted. The NDPP explains that the purpose of the appearance under s 39(3) is to give her advance notice of prospective opposition to an intended forfeiture application. This allows the NDPP the opportunity, prior to instituting its forfeiture application, to undertake the necessary investigation to determine whether there is merit in the intended opposition or not.

95. However, the requirement that a potential litigant should enter an appearance in advance is not sacrosanct. Section 49 permits a late appearance at any stage, until judgment is handed down. The purpose of s 39 then, is not to bar the door to people who have a *bona fide* interest in the property, and who may wish to oppose its forfeiture to the State. The court is given a discretion to permit a late entry of appearance.

96. In this case, instead of following the prescribed procedure for late entry of appearance, the liquidators have instead sought leave to intervene as respondents in the forfeiture application. In their affidavit, they set out what their interest is in the property, and why they ought to be entitled to oppose the grant of forfeiture. As the

appointed liquidators, they have an obligation to recover assets for the benefit of creditors. Most of these are the investors who lost money in the unlawful scheme. The liquidators are prevented from drawing on the preserved funds, and including them in the distribution to investors while they are under the control of the NDPP.

97. The NDPP acknowledges the *locus standi* of the liquidators. Her complaint is that it is prejudiced by their failure to follow the process set out in s 39(3) and s 49, although there is no real evidence of prejudice. The NDPP has been aware of the liquidation of QSG-SA for a long time, and she has known that the liquidators wanted to distribute the preserved funds as part of the liquidation process. The liquidators' case is set out in detail in its answering affidavit, and the NDPP has taken the opportunity to reply in equal detail.

98. The liquidators' answering affidavit sets out sufficient averments to satisfy me that they have an interest in the property. As I have said, this is not disputed. As they were only appointed as liquidators long after the preservation order was granted, they could never have complied with the time periods set out in s 39(3). If the liquidators had made a formal application under s 49 for leave to enter late appearance, they would have satisfied the requirements for the grant of that relief. In substance, they have made out a case for their being admitted as respondents in the proceedings, despite the absence of a formal application under s 49(3). Their failure to do so should not prevent them from participating as a party. That would amount to an unjustifiable incursion on their powers and duties as liquidators. For these reasons, I decline to non-suit the liquidators because of their failure to apply for leave under s 49.

99. It is not only the NDPP that has raised preliminary objections. The liquidators do so as well. They contend the preservation order expired before the forfeiture

application was instituted, and that consequently, the forfeiture application is a nullity. This is because a forfeiture application may only be made if there is a preservation order in place over the affected property.

100. Section 40(a) of POCA deals with the duration of preservation orders. It says that:

> "A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless-
>
> (a) there is an application for a forfeiture order pending before the High court in respect of the property … ."

101. The liquidators say that for a forfeiture application to be "pending" not only must the NDPP have filed the application with the Registrar, but that the NDPP must also have effected proper service as required under s 48(2).[26] That section, as noted earlier, obliges the NDPP to give 14 days' written notice of a forfeiture application "to every person who entered an appearance in terms of section 39(3)".

102. As I have already indicated, no-one entered appearance under s 39(3). Accordingly, the NDPP did not serve notice on any party, and applied for a forfeiture order by default. The liquidators say that this was not proper service, as s 48(2), properly interpreted, places an obligation on the NDPP to serve the forfeiture application on all persons known to have an interest in the property, regardless of whether they had entered a s 39(3) appearance or not.

103. Regarding the proper interpretation of s 48(2) the liquidators propose that s 48(2) should not be interpreted so as to place only a limited service obligation on the

[26] See *Levy v NDPP* 2001 JDR 0823 (W), in which this court held that service of the application is necessary to make it "pending". In *NDPP v Moolla* [2010] JOL 2589 (GSJ), this court similarly held that a forfeiture application that had been issued by the Registrar on the 90th day, without service having been effected, was not a pending application for purposes of s 40.

NDPP. In other words, they say that the section does not mean that the NDPP has no service obligation other than in respect of persons who entered an appearance.

104. The liquidators argue that if the intention had been to place only a limited service obligation on the NDPP then s 48(2) would have read: "The National Director shall give 14 days' notice ….. only to every person who entered an appearance.… ". It seems the liquidators prefer to read s 48(2) as meaning that the NDPP "shall also give 14 days' notice to those who entered appearance … in addition to any other person who may have an interest in the property". This would mean that it would be necessary for the NDPP to first determine all persons who may have an interest in the property, and to effect service on them before it could be said that a forfeiture application is pending. Failure to do so within 90 days would have the effect that the preservation order would expire.

105. There is nothing in the section to support the liquidators' preferred meaning. It seems to me that s 48(2) is clear: it is only to those persons who entered an appearance that the service obligation applies. Otherwise, the section would serve no purpose. If the section required service on all persons who may have an interest in the property, there would be no need to refer specifically to those who had entered an appearance. Quite obviously they would form part of the broader pool of persons having an interest.

106. The purpose of s 48(2) is to specify, for the sake of certainty, who must be served in order to effect a valid forfeiture application. Certainty in this regard is critical because unless that service is effected, there will not be a valid forfeiture application "pending", and the preservation order will expire. Certainty is also critical because the NDPP only has 90 days from date of publication of the preservation of property order in which to apply for a forfeiture order. To leave open the question of who

must be served would introduce an element of uncertainty that would have substantive, and not only procedural implications.

107. One can understand the sense of the section within the broader scheme of Chapter 6: those who may have an interest in the property should give prior notice (at preservation stage) to the NDPP under s 39(3) that they intend to appear as a party in the forfeiture application; thereafter, when the NDPP files the forfeiture application, it is to those persons that service must be effected. If not, the NDPP runs the risk that the forfeiture application will be invalid and, in the absence of a valid and "pending" forfeiture application, the preservation order, and consequently the prospect of obtaining a forfeiture order will all fall away. This would undermine the very purpose of the Act. In this context, a limited service obligation is understandable.

108. There is thus no merit in this *in limine* point. All that s 48(2) requires is service on any person who entered an appearance. Provided service of a forfeiture application was effected on those persons (if any) and filed within the 90-day limit prescribed in s 48(1), that forfeiture application will be "pending", and the preservation order will not expire. In this case, as I have said, no-one entered an appearance. Accordingly, the fact that the NDPP did not serve on those who did not enter an appearance, but who may have had an interest in the property, does not have the effect that the preservation order expired.

109. For these reasons, I find there are no grounds for declaring that the preservation order has lapsed, and that the forfeiture order is accordingly a nullity. I am satisfied that the forfeiture application is properly before me, and I must consider its merits.

110. With these preliminary issues settled, I turn to consider the forfeiture application itself.

111. One of the purposes of forfeiture is to deprive wrongdoers of property that is involved in their wrongdoing, even in the absence of a criminal prosecution against the wrongdoer. The Constitutional Court has described civil asset forfeiture under Chapter 6 as having "worthy and noble objectives in pursuing serious crime", but with the following proviso: "there is no gainsaying that, in effect, it is draconian".[27] In particular, civil asset forfeiture has the potential to result in the unjustified incursion of property rights, and to amount to the arbitrary deprivation of property.

112. Under s 50 of POCA:

> "(1) The High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned-
>
> (a) is an instrumentality of an offence referred to in Schedule 1; or
>
> (b) is the proceeds of unlawful activity … .
>
> (2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order."

113. The Constitutional Court recently noted that:

> "The language of section 50 of POCA leaves no discretion to a court. If property has been shown, on the balance of probabilities, to fall within either section 50(1)(a) or section 50(1)(b), then the court must order its forfeiture unless section 52 can be relied upon."[28]

114. This absence of a discretion is an important distinguishing feature of civil asset forfeiture when compared with the discretionary powers afforded to the court under Chapter 5. It is for this reason that the courts have developed what has been termed the "proportionality requirement" to determine whether a particular forfeiture of

[27] *Mohunram v NDPP* 2007 (4) SA 222 (CC) at para 118

[28] *NDPP v Botha* 2020 (1) SACR 599 (CC) para 33

property would, in the circumstances, amount to an arbitrary deprivation of property contrary to s 25 (1) of the Constitution.[29] It is a constitutional requirement implicit in s 50, and requires the court to weigh the effects of the forfeiture on the owner concerned, on the one hand, against the public purposes forfeiture serves on the other.[30] The proportionality requirement is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, with the right of a property holder not to be deprived arbitrarily of her property. The effect of the requirement is that:

> "Where section 50(1) says 'shall', the court reads 'may if proportionate'."[31]

115. The proportionality requirement has been applied mostly in cases involving the forfeiture of instrumentalities. In *NDPP v R O Cook Properties*[32] the SCA recognised that the risk of an arbitrary deprivation of property arising from a proceeds forfeiture is smaller than it would be in respect of an instrumentality forfeiture. The minority judgment in *Botha* agreed, but held that the proportionality requirement applied nonetheless to the forfeiture of proceeds, and could not be left out of account.[33] The majority judgment approached the case differently and concluded that:

> "All the foregoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of a crime in circumstances where the person from whom the proceeds are taken does not have any interest which is lawfully recognised."[34] (emphasis added)

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[29] See the discussion and reference to the relevant authorities in *Botha*, paras 32 - 40

[30] *Mohunram* para 5607

[31] *Botha* para 41

[32] *R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnaravan* 2004 (2) SACR 208 (SCA) para 66

[33] Para 86

[34] *Botha* para 131

116. From my reading of *Botha*, the majority judgment does not find, as a general rule, that the proportionality requirement is not applicable in proceeds-based forfeitures. The Court went no further than saying that it would not be appropriate to consider the constitutional question of proportionality in cases where the holder has no legitimate interest in that property. This would apply, as it did in *Botha*, to the case where the NDPP seeks to forfeit the proceeds from the wrongdoer herself. One can understand the sense in the majority's stance: it is almost axiomatic that a wrongdoer can have no legitimate interest in the proceeds of her crime, and hence, cannot claim to have a right not to deprived of her property arbitrarily.

117. What are the implications of these principles for the present case?

118. I indicated earlier that there is no dispute that the preserved funds are the proceeds of the Smits' unlawful investment scheme. This does not mean that I am enjoined to declare the funds forfeit to the State just because they are indisputably the proceeds of that scheme. Echoing the words of the Constitutional Court, I may do so if such forfeiture would be proportionate. In other words, a forfeiture order will be constitutionally compliant, and hence appropriate, if the law enforcement objective served by the forfeiture is proportionate to any deprivation of legitimate property rights on the part of those affected.

119. Here, unlike the situation in *Botha*, there are numerous investors who have a legitimate interest in recovering what they lost in the investment scheme. It is common cause that the proceeds in this case actually represent those very investments. Certainly, the Smits, or indeed their vehicles, viz. the QSG-SA entities, could not be said to have, in the normal course, a right lawfully recognised that attracts the protection afforded under 25(1). The liquidators are the custodians of

the QSG-SA assets. However, as custodians they have particular statutory duties which ensure that the ultimate beneficiaries will be the creditors on distribution.

120. Again, in this particular case, it is not disputed that the vast majority of creditors are the investors, rather than general commercial creditors. In this case, therefore, the investors have a legal interest in the preserved funds, and the liquidators, in opposing the forfeiture, have a statutory duty to advance those interests. This is not a case where the wrongdoer seeks to advance an illegitimate interest in the proceeds. Instead, it is the investors, represented by the liquidators, whose rights fall to be considered. It is their interests that must be weighed against the law enforcement value of the forfeiture of those funds.

121. As I have already indicated in relation to the effect of restraint on the disputed funds, if the forfeiture order is granted, it will deprive the investors of the right to have their claims, which they have already lodged with the liquidators, processed through the insolvency regime. The investors will be forced into a separate recovery regime if they want to access the preserved funds to make good their losses. They will be faced with a two-tier system: pursuit of their claims through the insolvency process in respect of certain assets, and pursuit of a claim against a *curator bonis* under the forfeiture regime in respect of the preserved funds.

122. Almost all of the investors have lodged claims with the liquidators, and the liquidation process is well advanced. As noted earlier, the liquidators estimate that investors will recover approximately 90c in the Rand, if the disputed funds and the preserved funds are placed under the control of them. In interfering with the ordinary insolvency process, and imposing a two-tier system of recovery on the investors, the forfeiture of the preserved funds would constitute a deprivation of the investors' property rights.

123. Is that deprivation arbitrary? Here, the first question is what is the law enforcement purpose of the forfeiture? This is not a case where the forfeiture is necessary to deprive the Smits and their vehicles of their ill-gotten gains. The parties agree that whatever happens, the preserved funds will not be restored to the Smits. Each of the parties also agrees that they aim to benefit the investors, whether the insolvency route is followed or the forfeiture route is followed.

124. However, the liquidators seek to do so through the mechanism of the ongoing and advanced insolvency process. The overwhelming majority of investors are already participating in the insolvency process. If the preserved funds are released, they are estimated to be in line to receive 90c in the Rand of their original investment.

125. The NDPP wishes to effect her own distribution (via a separately appointed *curator bonis*) of the preserved funds. This will have a similar impact as that of a restraint order on the rights of those with a legitimate interest in the preserved funds. It would not be necessary for the investors to wait for a criminal conviction before they could pursue their claims, and so the delay factor would not be as great. However, the investors would still be forced into following a two-tier system of recovery. They would have to prove their claims all over again with the *curator bonis*, having already done so with the liquidators. It goes without saying that a forfeiture-based distribution would be time-consuming and costly. Not only for investors, but probably also for the State, and hence the public.

126. The next question is what law enforcement purpose is served by a forfeiture-based distribution process to weigh against this prejudice that will have to be borne by the investors? I am unable to discern any, save possibly for the general message that crime does not pay. However, in my view that is insufficient to counter the prejudice

to the investors by saddling them with an additional forfeiture-based distribution mechanism.

127. There is an added, and very important reason, why the order sought by the NDPP should not be granted. The liquidators submit that the order is not competent.

128. As I outlined earlier, the NDPP does not actually seek to forfeit the preserved funds to the State, save as a formality. Instead, the NDPP has crafted an order that would see a *curator bonis* being appointed to take custody of the preserved funds and distribute these to investors. The *curator* would in this respect undertake a similar function to that of the liquidators, albeit in respect only of the preserved funds.

129. What is significant about this relief is that, in the NDPP's own words, it would constitute a deviation from the statutory scheme of forfeiture under Chapter 6. Unlike the scheme under Chapter 5, civil asset forfeiture under Chapter 6 has no provisions similar to those in s 30 and s 31 of Chapter 5, discussed earlier. In terms of those sections, a court may order that the *curator bonis* should first pay out a creditor's claim (which could include a victim of the crime in question) from realised property before the balance is used to satisfy a confiscation order (which essentially is the State's claim against the defendant).

130. Section 56 deals with the effect of a forfeiture order. It provides that:

> "(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the *curator bonis* on behalf of the State." (emphasis added)

And s 57(1) deals with the *curator bonis* 'powers:

> "The *curator bonis* must, subject to any order for the exclusion of interests in forfeited property under section 52(2)(a) or 54(8) …-

(a) deposit any moneys forfeited under section 56(2) into the (Criminal Assets Recovery) Account." (emphasis added)

131. Sections 52(2)(a) and 54(8) refer to circumstances where an interested person has been granted an order excluding her interests in the property from forfeiture. A person who seeks such an order must make specific application for it, and must meet the jurisdictional requirements stipulated. Only if a court makes an exclusion order can the curator give effect to it. However, the *curator* has no power to act as a general distributor of forfeited funds to potential victims under Chapter 6.

132. The NDPP submits that a court may make the order she seeks in this matter under the court's power in terms of s 50(2) to grant orders ancillary to forfeiture orders. I understand that the NDPP uses this as a mechanism in cases she deems appropriate to ensure that proceeds that are forfeited to the State find their way to victims, rather than into the State's coffers.

133. It is not necessary for me in this case to make a general finding as to whether an order of this nature is competent under s 50(2). The issue was not fully advanced before me, and I expressly leave the question open.

134. In this case, there is no warrant to consider granting an order of this nature. The fact that the NDPP had to deviate from the provisions of POCA, and panel-beat the order to justify the forfeiture, is a clear indication that in this case the forfeiture would not serve the objectives of POCA.

135. I conclude that to grant the forfeiture order would undermine the rights the investors have to seek a recovery of their losses through the established insolvency process. They have a legitimate claim against the preserved funds, and rely on the liquidators, through the exercise of their statutory powers, to effect a distribution of

the funds. These rights are protected under s 25(1) from arbitrary deprivation. In this case, whatever law enforcement purpose there might be to advance the case for forfeiture is not proportionate to the consequential prejudice that would be visited on the investors, and on the liquidators in carrying out their statutory duties towards them. In these circumstances, the grant of a forfeiture order would amount to an arbitrary deprivation of property. For this reason, the application must be dismissed.

ORDER

136. I make the following orders:

Under case number 7907/2020

1. The intervening parties (the liquidators) are granted leave to intervene.

2. Save in respect of the property listed under paragraph 2 below, the restraint order granted on 2 December 2019 (the Order) is confirmed.

3. The Order is not confirmed as regards the property listed under the following paragraph numbers in Annexure A thereto:

    2.1 Paragraph 1.1;

    2.2 Paragraph 1.2;

    2.3 Paragraph 1.3;

    2.4 Paragraph 1.7;

    2.6 Paragraph 3.1;

    2.7 Paragraph 3.2

3. The National Director of Public Prosecutions is directed to pay the costs of the intervening parties, being the liquidators.

Under case number 46882/2017

1. The intervening parties (the liquidators) are granted leave to intervene.

2. The application is dismissed.

3. The National Director of Public Prosecutions is directed to pay the costs of the intervening parties, being the liquidators.

R Keightley
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 December 2020.

Date of virtual hearing:	14 September 2020
Date of Judgment:	10 December 2020
On behalf of the Applicants:	W Coetzer
	M Mbatha
Instructed by:	State Attorney, Johannesburg
On behalf of respondents:	P Lourens
	L Acker
Instructed by:	Roestoff Attorneys