

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 626/2005

Reportable

In the matter between

**NGENGELEZI ZACCHEUS
MNGOMEZULU**

FIRST APPELLANT

NONTANDO MNGOMEZULU

SECOND APPELLANT

AND

**THEODOR WILHELM VAN DEN
HEEVER N.O.**

FIRST RESPONDENT

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

SECOND RESPONDENT

Coram: **HOWIE P, ZULMAN, CAMERON, MTHIYANE JJA
THERON AJA**

Heard: **9 November 2006**

Delivered: **29 November 2006**

Summary: Restraint order in terms of ch 5 of prevention of Organised Crime Act 121 of 1998 – the meaning of surrender as used in s 28(1)(b) – whether residential home subject to surrender

**Neutral citation: This case may be cited as Mngomezulu v Van den Heever [2006]
SCA 149 (RSA)**

JUDGMENT

THERON AJA

1] On 17 September 2004 the second respondent (the NDPP) sought and obtained an *ex parte* provisional restraint order in the Johannesburg High Court (Willis J) against the appellants in terms of the Prevention of Organised Crime Act, 121 of 1998 (POCA). The restraint order related to realisable property as defined in s 14 of the Act¹ and included the appellants' residential home (the immovable property).

[2] In terms of the restraint order the first respondent was appointed *curator bonis* of the appellants' assets subject to the restraint order. He was authorised to take possession, control, care of and administer the property specified in the order. The appellants were ordered to surrender² the specified property, including the immovable property, to the *curator bonis*.³

¹ Section 14 provides: '1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely--

a) any property held by the defendant concerned; and
 b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.

² Para 1.21 of the Order reads: 'The Defendant and Respondents are hereby ordered in terms of section 28(1)(b) of the Act to surrender all the property into the custody of the *curator bonis* forthwith after the *curator bonis* has identified himself by displaying a copy of this Order.'

³ Clothing, bedding, ordinary household furniture, kitchen and laundry appliances, utensils, and other articles (other than luxuries) as the *curator bonis* considered to be reasonably needed for the day to day use of the appellants, although bound to be disclosed and restrained, were excluded from surrender.

[3] On 21 September 2004, and immediately upon being served with the restraint order, the first appellant left custody and control of all the assets, including the immovable property, to the *curator bonis*. I deal below with the question of ‘surrender’. On 23 September 2004 the first appellant consulted with his legal representatives and instructed them to take all necessary steps ‘to protect [his] interests in this matter’. An exchange of correspondence followed between the attorneys acting on behalf of the appellants and those acting for the *curator bonis*. In a letter dated 1 October 2004, addressed to the appellants’ attorneys, the *curator bonis* acknowledged the appellants’ right to occupy the immovable property but refused to allow them to do so until agreement had been reached on various issues relating to the property .

[4] The appellants’ response, penned by their attorneys, was that it was not necessary for them to meet with the *curator bonis* before being allowed to reoccupy the immovable property. They were only prepared to meet with the *curator bonis* in order to discuss ‘how you [*curator bonis*] are going to fulfill your obligations as curator bonis’.

[5] In a letter dated 5 October 2004, addressed to the appellants' attorneys, the *curator bonis* stated:

'You are kindly requested to note that I have gone on record to state that I have no difficulty in allowing your clients to occupy the property. However, due to the history of the matter and more specifically the fact that it would appear that the property has been extensively vandalized prior to our attachment of the property, I do require a meeting in order to discuss this and related issues with your client.'

[6] In a further letter dated 6 October 2004, the *curator bonis* recorded that he had, since 22 September 2004 sought a meeting with the appellants and that he wished to be 'satisfied' on a number of matters relating to the immovable property, before he could properly exercise the discretion conferred upon him in terms of para 1.26 of the restraint order.⁴

[7] Later that same day, 6 October 2004, the appellants launched an urgent application in the court of first instance, seeking, *inter alia*, a declarator that they were entitled to occupy the immovable property pending finalisation of the proceedings instituted against them. Claasen J held that the attempts by the *curator bonis* to place conditions on the appellants' re-

⁴ Para 1.26 of the order reads: 'The *curator bonis* shall have the discretion to release any of the property back into the custody of the person who held such property, under such conditions as the *curator bonis* deems appropriate for the proper administration and preservation thereof, and subject to the *curator bonis*:

1.26.1 Retaining sufficient control over such property; and

1.26.2 Ensuring the preservation of the value and/or physical state of such property.'

occupation of the property went beyond the statutory duty imposed on him to take control of the assets and secure their preservation. This view was to a large extent informed by the acknowledgment on the part the *curator bonis* that the appellants had a right to occupy the residential property.

[8] The full court of the Witwatersrand Local Division, (*per* Joffe J (Malan and Snyders JJ concurring)), upheld an appeal, concluding that the word ‘surrender’, as used in the restraint order, encompassed the transfer of possession of the immovable property to the *curator bonis*. The full court further held that the *curator bonis* had a discretion in terms of para 1.26 of the restraint order to release the property to the appellants. According to the judgment of the full court the *curator bonis* was ‘entitled to impose [such] conditions as he deems fit ... subject to his retaining control over the property and ensuring the preservation of the value and/or physical state of the dwelling’. The appellants are before us with the special leave of this court.

[9] Chapter 5 of POCA provides for the confiscation of benefits derived from unlawful activities but its confiscation machinery only comes into

operation when the ‘defendant’⁵ is convicted of an offence. The provisions create a procedure whereby assets are placed under a restraint order, either where a confiscation order has been granted or in anticipation of the granting of such an order. The circumstances in which a restraint order may be granted are set out in s 25(1)⁶ of POCA. A restraint order such as the one granted in this matter ‘has the effect of temporarily depriving a person of property so as to preserve the property in anticipation of an order being sought for its forfeiture.’⁷ In terms of s 28(1),⁸ a High Court, in addition to the power to grant a restraint order, is also vested with the power to appoint

⁵ This is the terminology used in POCA to refer to a person against whom a restraint order is sought and made.

⁶ Section 25(1) provides: ‘A High Court may exercise the powers conferred on it by section 26 (1)

- a) when--
 - i) a prosecution for an offence has been instituted against the defendant concerned;
 - ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
 - iii) the proceedings against that defendant have not been concluded; or
- 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.’

⁷ Unreported judgment *National Director of Public Prosecutions v Van Staden* [2006] SCA 135 para 3. See also *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA) para 5.

⁸ Section 28(1) reads: ‘Where a High Court has made a restraint order, that court may at any time--

- a) appoint a *curator bonis* to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely--
 - i) to perform any particular act in respect of any of or all the property to which the restraint order relates;
 - ii) to take care of the said property;
 - iii) to administer the said property; and
 - iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
- b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a *curator bonis* has been appointed under paragraph (a), into the custody of that *curator bonis*.’

a *curator bonis* and to order that the property under restraint be surrendered into the custody of the *curator bonis*.

[10] The primary argument advanced on behalf of the appellants is that the order of the full court amounted in effect to an order of eviction. The various further ancillary submissions advanced were that: the appellants had a right in terms of s 26(3)⁹ of the Constitution not to be arbitrarily evicted from their home without an order of court, which order is to be made after the court has considered all the relevant circumstances; and that eviction had occurred without compliance with the provisions of s 4(1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE).¹⁰

[11] This case, however, is not about eviction. The first appellant states, in his affidavit, that the *curator bonis* ‘was not entitled to evict the second [appellant] and I from the residential home’. In so stating the appellants misstated the factual and legal position. On the affidavits, the *curator bonis* did not evict the appellants from the immovable property. The first appellant

⁹ Section 26(3) reads: ‘No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’

¹⁰ Section 4(1) reads: ‘Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.’

voluntarily surrendered all the restrained assets to the *curator bonis* when the restraint order was served upon him.¹¹ No allegation is made that the ‘surrender’ was other than voluntary. On the contrary, the affidavits suggest that the first appellant left to avoid the media. In consequence of such surrender, possession of the property passed to the *curator bonis*. On the facts, therefore, it follows that none of those submissions avail the appellants. In addition it is plain that the present circumstances do not fall within the ambit of PIE.

[12] Surrender of immovable property as envisaged in s 28(1)(b) of POCA would ordinarily require the person in occupation of such property to hand over possession of the property to the *curator bonis*. This court in *National Director of Public Prosecutions v Phillips*,¹² stated that ‘in the absence of an order in terms of s 28(1)(b), the impact of the restraint order, certainly in cases of immovable property, would in most cases be minimal’ and there would be no reason, in such a case, why the ‘defendant’ could not continue to live on the property.

¹¹ The first appellant unequivocally states that he ‘surrendered all property into the custody and control of the first respondent and thereafter left the residential home.’

¹² 2005 (5) SA 265 (SCA) para 15. A further appeal to the Constitutional Court was dismissed – *Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC).

[13] A ‘defendant’ against whom a restraint order has been granted has various remedies in terms of POCA. The appellants chose not to make out a case for the setting aside or variation of the restraint order on the grounds contemplated in ss 26(10)(a)¹³, 28(2)¹⁴ or 28(3)¹⁵ of POCA. The appellants sought instead to make out their case on the basis that they have an absolute right, as owners, to occupy the immovable property and that the immovable property is excluded from the surrender provisions of the restraint order. The case made out by the appellants is misconceived. The restraint order has not been challenged. Absent a challenge, that order remains extant. We do not have to decide whether, in the face of opposition from a householder, the order in such terms would require surrender of the home, since here there was no opposition, and no suggestion on the appellants’ own version of any

¹³ Section 26(10)(a) reads: ‘A High Court which made a restraint order--

- a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied--
 - i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
 - ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.’

¹⁴ Section 28 (2) reads: ‘Any person affected by an order contemplated in subsection (1)(b) may at any time apply--

- a) for the variation or rescission of the order; or
- b) for the variation of the terms of the appointment of the *curator bonis* concerned or for the discharge of that *curator bonis*.’

¹⁵ Section 28(3) reads: ‘The High Court which made an order contemplated in subsection (1)(b)--

- a) may at any time--
 - i) vary or rescind the order; or
 - ii) vary the terms of the appointment of the *curator bonis* concerned or discharge that *curator bonis*;
- b) shall rescind the order and discharge the *curator bonis* ...’

constraint in their vacating of the property. It is therefore not necessary to decide this matter on the basis propounded by the full court.

[14] On the facts, the appellants' right to occupy the immovable property is in dispute only to the extent that the *curator bonis* contends that this right is subject to his retaining sufficient control over the property and ensuring the preservation of the value of the property. The inquiry thus turns to the reasonableness of the *curator bonis*' conduct in seeking to impose conditions as a precondition to the appellants' reoccupation of the immovable property. The question, put differently, is whether the conditions sought to be imposed constitute a denial of that right. It is worth noting that the *curator bonis* had not, before the appellants' urgent application, in fact imposed any conditions.

[15] In his answering affidavit the *curator bonis* sets out the issues he wished to discuss and reach agreement on with the appellants. These include:

- Drawing up an inventory of all movable assets on and within the immovable property, recording their condition and value.
- Undertakings regarding the maintenance of the immovable property.

- The bond repayments, if applicable.
- Payment of municipal charges such as rates and taxes.
- Security of the immovable property in the absence of the appellants.
- Who would occupy the immovable property.
- Access arrangements for the *curator bonis* and his representatives in order to inspect the property.

[16] The *curator bonis* also draws attention to the fact that it appeared to him, when the restraint order was served on 21 September 2004, that the appellants had been in the process of removing and had in fact removed items from the immovable property. It is common cause that valuable assets, such as paintings and persian rugs (valued at approximately R500 000) had been removed from the immovable property. The *curator bonis* alleges that the first appellant’s initial explanation, given on 21 September 2004, was that the second appellant had sold the items ‘on the street’. In an affidavit made in compliance with para 1.31¹⁶ of the restraint order, the first appellant stated that in consequence of his arrest on 4 July 2004, it became necessary for him to generate funds for the purpose of paying bail as well as his legal expenses. To this end the paintings and persian rugs were pawned for the

¹⁶ The appellants were required, in terms of para 1.31 of the Order, to, disclose, on affidavit, a description and the whereabouts of, inter alia, all restrained property.

sum of R250 000. Whether the property was pawned or sold is immaterial, either eventuality demonstrates that the concern of the *curator bonis* over the possible dissipation of the movable assets was justified.

[17] For the *curator bonis* to have released the immovable property to the appellants without satisfying himself about the issues in para [15] above, would have constituted a dereliction of his duties. First, in terms of the restraint order the *curator bonis* is specifically authorised ‘to take care of the [restrained] property’.¹⁷ Second, the *curator bonis* is required to prepare a report recording, inter alia, a description and valuation of all the property he had taken possession or control of.¹⁸ Third, the discretion which the *curator bonis* has in terms of para 1.26¹⁹ of the order must be exercised subject to his ‘retaining sufficient control over the property’ and ‘ensuring the preservation of the value’ of the property.

[18] In my view, the conditions which the *curator bonis* sought to impose do not appear unreasonable. The conditions were intended to serve a legitimate objective, namely, the preservation of the property. This was a pivotal responsibility of the *curator bonis* and the very purpose for which

¹⁷ Para 1.9 of the Order.

¹⁸ Para 1.18.1 of the Order.

¹⁹ Above fn 4.

the restraint order had been granted. In the circumstances, the conduct of the *curator bonis* in seeking to impose conditions on the appellants' re-occupation of the immovable property was not unreasonable. A challenge to the content of the conditions is at this stage premature.

[19] For these reasons the following order is made:

The appeal is dismissed with costs.

LV THERON
Acting Judge of Appeal

CONCUR:
HOWIE P
ZULMAN JA
CAMERON JA
MTHIYANE JA