

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**  
**Phillips and Others v National Director of Public Prosecutions**  
**CCT 55/04**  
**Date of hearing: 12 May 2005**  
**Date of Judgment: 7 October 2005**

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**MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This matter concerned a challenge to an order made under the Prevention of Organised Crime Act 121 of 1998 (the Act). Mr Phillips owned and operated a business known as the Ranch, which provided a venue for paying male customers to have sexual relations with female prostitutes who were not employees. The Titty Twister, which presented striptease shows, operated on the same premises in tandem with The Ranch. On 2 February 2000 a raid was conducted on the premises and as a result Mr Phillips was subjected to criminal charges. Subsequently the National Director of Public Prosecutions (NDPP) applied for and was granted a restraint order, in terms of section 26 of the Act, against the assets of Mr Phillips and the court appointed a curator to maintain the assets.

Complaining that the properties were deteriorating, Mr Phillips approached the High Court, which held in his favour that a high court that grants a section 26 restraint order has, in terms of section 173 of the Constitution, an inherent power to rescind or vary such an order on the common law ground of good cause shown. The NDPP appealed successfully to the Supreme Court of Appeal (SCA), which held that the only grounds on which a high court could vary or rescind a section 26 restraint order were those specifically listed in section 26(10) of the Act. Mr Phillips sought leave to appeal against the judgment of the SCA.

Skweyiya J, writing for a unanimous Court, dismissed the application for leave to appeal and made no order as to costs. He noted that the applicants did not challenge the constitutionality of section 26(10) of the Act directly, and that this matter was not pleaded or argued as a constitutional matter in the lower courts. It is impermissible to rely on a constitutional complaint that was not pleaded, because this results in the respondents not having been given an opportunity to deal with the allegations raised.

He held that it is not necessary to determine the extent of the powers which a court has under section 173 of the Constitution because a litigant should first exhaust the remedies provided by the statute and Mr Phillips has not done so. Where there is an Act in place which carefully regulates the circumstances in which variation or rescission may be sought, applicants should bring their case within the provisions of the Act.

The difficulties regarding the properties were caused by the lack of funds available to the curator to maintain the properties subject to the restraint. The prohibition in the restraint order which prohibits any person from dealing in the properties should be read in a narrow fashion, so as to enable the powers of the curator to be amended, empowering him to let some / all of the properties in order to generate the funds required for maintaining the properties. Mr Phillips had not invoked this remedy.