



CONSTITUTIONAL COURT OF SOUTH AFRICA

Alexander Gerhard Falk and Another v National Director of Public Prosecutions

**Case No: CCT 95/10
[2011] ZACC 26**

Date of Judgment: 16 August 2011

MEDIA SUMMARY

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.

On Tuesday 16 August 2011 the Constitutional Court handed down judgment in an application for leave to appeal against a decision of the Supreme Court of Appeal, concerning the interaction between two statutes, the Prevention of Organized Crime Act (POCA) and the International Co-operation in Criminal Matters Act (ICCMA), as they relate to registered foreign restraint orders.

The first applicant, Mr Alexander Gerhard Falk, is a German business man with assets in South Africa and the second applicant is the company in which he is the sole shareholder. The respondent is the National Director of Public Prosecutions (NDPP).

In June 2003 Mr Falk was arrested in Germany on charges relating to the manipulation of share prices of a German corporation. The Hamburg Regional Court issued an order authorising the attachment of assets in Mr Falk's estate to the value of at least €31 635 413,34. In September 2004 the German order was registered in the Western Cape High Court (High Court) in terms of ICCMA. According to ICCMA, a registered foreign restraint order has the effect of a South African order issued under POCA.

In August 2006 the High Court interdicted Mr Falk from dealing with €5,22 million held in a South African bank account. This interdict was granted under the ancillary order provision in POCA.

Mr Falk then approached the High Court to set aside the registration of the German order and the interdictory order subsequently granted. The application was dismissed. Mr Falk appealed to the Supreme Court of Appeal, but the appeal failed.

Before the Constitutional Court, the applicants attacked both the registration of the German restraint order under ICCMA and the ancillary order made under POCA. The applicants submitted that the order should not have been registered because it did not specify South African assets and it was not shown that the full amount had not yet been recovered in Germany. The applicants submitted that the ancillary interdictory order was not competent, because it should have been made and granted by the High Court at the same time as granting a restraint order under POCA and not after the registration of the German order.

In a unanimous judgment by Van der Westhuizen J the Court held that only ICCMA is applicable to the setting aside of the registration of a foreign order. The applicants never approached the High Court where it was registered to set it aside on the basis that the registration was not in accordance with section 26(1)(a) of ICCMA. The registration can also not be set aside in terms of section 26(1)(d) of ICCMA, because the applicants have not shown that the enforcement of the order would be contrary to the interests of justice. To set aside the registration would be contrary to the interests of justice, because of the real possibility that assets would be dissipated and because the proceedings in Germany had not been concluded at the time the setting aside of the registration was applied for. The applicants also failed to make out a case for rescinding the ancillary interdictory order in terms of section 26(10) of POCA.

The Court held that ICCMA and POCA have to be interpreted in harmony to further international co-operation in combating crime – a constitutionally legitimate goal.

Leave to appeal was thus granted, but the appeal dismissed.