



CONSTITUTIONAL COURT OF SOUTH AFRICA

Naidoo and Others v National Director of Public Prosecutions and Another

**Case No: CCT 112/10
[2011] ZACC 24**

Date of Judgment: 10 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 10 August 2011 the Constitutional Court handed down judgment in an application for leave to appeal against a decision of the Supreme Court of Appeal which interpreted the Prevention of Organised Crime Act 121 of 1998 (POCA) to mean that an accused defendant cannot draw on property restrained as an “affected gift” in another person’s hands for his legal and living expenses.

Mr Rajan Naidoo, the first applicant, is charged with 119 counts of dealing in unwrought metals. In 2004 the National Director of Public Prosecutions (NDPP), the first respondent, obtained a restraint order against him. At the same time, the NDPP obtained a provisional restraint order against his former spouse, the second applicant, Mrs Dolly Naidoo, with whom he still lives. The order against Mrs Naidoo was obtained on the basis that the assets were an “affected gift” to her by Mr Naidoo. Later, the order was extended to cover two companies in which Mrs Naidoo is the sole director and shareholder, the third and fourth applicants.

Mr Naidoo applied to the High Court for an order that his reasonable legal expenses be paid not from his own restrained assets, but from the restrained assets held by Mrs Naidoo and the two companies.

The High Court concluded that the property held by Mrs Naidoo and the two companies belonged to Mr Naidoo, since it was restrained only because it constituted an “affected gift” from Mr Naidoo.

The Supreme Court of Appeal reversed this decision. The SCA held that the fact that the property was an “affected gift” did not mean it was Mr Naidoo’s. POCA spread the net wide, but its definition of property that can be restrained “does not alter the law as to ownership”. The SCA held that a restraint order may make provision for the legal expenses of only “a person against whom the restraint order is being made” – not for the legal expenses of a third person against whom a restraint order is also made.

In this Court the applicants submitted that the SCA failed to give effect to the Bill of Rights and that the provisions of POCA can be interpreted broadly to give greater effect to Mr Naidoo’s right to a fair trial.

In a unanimous judgment by Cameron J, this Court held that the nub of the matter is that POCA does create a mechanism through which an unconvicted accused may access restrained assets held by him or her for reasonable legal expenses. Yet the express terms of the provision make allowance for reasonable living and legal expenses only on limited terms. First, access to the assets is granted only for the legal expenses of “a person against whom the restraint order” is made. Second, it is conditional on full disclosure. Third, the person must not be able to meet the expenses concerned out of his or her unrestrained property.

Given these conditions, it is not plausible that access can be given to property held by a person other than the person against whom the restraint order has been made.

Statutorily, an “affected gift” remains property held by the person against whom the restraint order was made. It is not transferred to any other person.

The Court endorsed the reasoning and judgment of the SCA. It held that there were no prospects of success, and dismissed the application for leave to appeal.