

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Trent Gore Fraser v ABSA Bank Limited (National Director Public Prosecutions as *amicus curiae*)

Case CCT 66/05

Decided on: 15 December 2006

MEDIA SUMMARY

The following explanation is provided to assist the media in reporting this application and is not binding on the Constitutional Court or any member of the Court.

This case concerns the interpretation of chapter 5 of the Prevention of Organized Crime Act 121 of 1998 (POCA), dealing with the restraint and confiscation of property that constitutes the proceeds of crime. Section 26 of POCA authorises the High Court to issue a restraint order prohibiting a person who has, or will be charged with an offence under POCA from dealing in any manner with any property subject to the restraint order. The High Court also has a discretion in terms of section 26(6) to make provision in the restraint order for the reasonable living and legal expenses of the defendant. This case is concerned with the exercise of that discretion. Mr Fraser argued that the failure to make such provision violates his right to a fair trial including the right to legal representation.

Mr Fraser was arrested in 2003 and charged with racketeering, money laundering and drug related offences. In November 2004, the High Court ordered a provisional restraint order against his property, placing it in the hands of a curator. He subsequently applied in terms of section 26(6) to the Durban High Court for an order directing the curator to sell the property and use its proceeds for payment of the legal expenses in his criminal trial. ABSA, a creditor of Mr Fraser with a four year old default judgment against him in its favour, applied to intervene in the proceedings. It opposed the application for the provision of legal expenses on the basis that if Mr Fraser were successful, it would be unable to recover its judgment debt.

The High Court confirmed the provisional restraint order, dismissed ABSA's application to intervene and granted Mr Fraser's application. ABSA applied for and was granted leave to appeal to the Supreme Court of Appeal (SCA).

The SCA reversed the High Court's decision. It granted ABSA's application to intervene and dismissed Mr Fraser's application for provision for legal expenses. The SCA held that the legislature could not have intended that a concurrent creditor, who had pursued a claim and obtained a default judgment prior to the issuance of a restraint order, would be prevented from satisfying that judgment simply because the debtor's assets had been restrained. As a consequence of the SCA's decision ABSA's claim against Mr Fraser was secured. Mr Fraser applied for leave to appeal to this Court against the judgment and order of the SCA.

This Court upheld the SCA's decision to allow ABSA to intervene in the proceedings, but held that the SCA was incorrect in holding that ABSA's claim against the applicant is secured against the provision for his reasonable legal expenses. A decision to allow a creditor to intervene does not automatically result in an order to 'ring-fence' its claim against competing claims and the defendant's claim for reasonable legal expenses.

This Court interpreted POCA on the basis of its wording and structure, but also in the light of constitutionally protected fair trial rights. When a defendant applies in terms of section 26(6) for provision for reasonable legal expenses in a restraint order, the High Court has a discretion to provide for legal expenses. It also has a discretion to permit any creditor who applies to intervene to join the proceedings and to then grant an order which is fair under all the prevailing circumstances. In doing so the Court must take into account an accused person's right to legal representation, the interest of the state in preserving the property and the interests of creditors.

Under the circumstances of this case this Court held that it would be fair as well as practical to refer the matter back to the High Court to exercise its discretion in terms of section 26(6) of POCA.