

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING ON SUBSTITUTION OF CURATORS**

Case no: HC-MD-CIV-MOT-POCA-2020/00429

In the matter between:

**IAN ROBERT MCLAREN N.O.**

**FIRST APPLICANT**

**DAVID JOHN BRUNI N.O.**

**SECOND APPLICANT**

and

**THE PROSECUTOR-GENERAL**

**RESPONDENT**

In re

**THE PROSECUTOR-GENERAL**

**APPLICANT**

and

**RICARDO JORGE GUSTAVO**

**1<sup>ST</sup> DEFENDANT**

**TAMSON TANGENI HATUIKULIPI**

**2<sup>ND</sup> DEFENDANT**

**JAMES NEPENDA HATUIKULIPI**

**3<sup>RD</sup> DEFENDANT**

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| <b>SACKEUS EDWARDS TWELITYAAMENA SHANGHALA</b>                           | <b>4<sup>TH</sup> DEFENDANT</b>  |
| <b>BERNARDT MARTIN ESAU</b>  | <b>5<sup>TH</sup> DEFENDANT</b>  |
| <b>PIUS NATANGWE MWATELULO</b>   | <b>6<sup>TH</sup> DEFENDANT</b>  |
| <b>NAMGOMAR PESCA NAMIBIA (PTY) LTD</b>                                  | <b>7<sup>TH</sup> DEFENDANT</b>  |
| <b>ERONGO CLEARING AND FORWARDING<br/>CLOSE CORPORATION</b>              | <b>8<sup>TH</sup> DEFENDANT</b>  |
| <b>JTH TRADING CLOSE CORPORATION</b>                                     | <b>9<sup>TH</sup> DEFENDANT</b>  |
| <b>GREYGUARD INVESTMENTS CLOSE CORPORATION</b>                           | <b>10<sup>TH</sup> DEFENDANT</b> |
| <b>OTUAFIKA LOGISTICS CLOSE CORPORATION</b>                              | <b>11<sup>TH</sup> DEFENDANT</b> |
| <b>OTUAFIKA INVESTMENTS CLOSE CORPORATION</b>                            | <b>12<sup>TH</sup> DEFENDANT</b> |
| <b>FITTY ENTERTAINMENT CLOSE CORPORATION</b>                             | <b>13<sup>TH</sup> DEFENDANT</b> |
| <b>TRUSTEES OF CAMBADARA TRUST T223/08 JAMES<br/>NEPEMBA HATUIKULIPI</b> | <b>14<sup>TH</sup> DEFENDANT</b> |
| <b>OLEA INVESTMENTS NUMBER NINE CLOSE CORPORATION</b>                    | <b>15<sup>TH</sup> DEFENDANT</b> |
| <b>TRUSTEES OF OMHOLO TRUST<br/>T 118/11 MAREN DE KELRK</b>              | <b>16<sup>TH</sup> DEFENDANT</b> |
| <b>ESJA HOLDING (PTY) LTD</b>  | <b>17<sup>TH</sup> DEFENDANT</b> |
| <b>MERMARIA SEAFOOD (PTY) LTD</b>  | <b>18<sup>TH</sup> DEFENDANT</b> |
| <b>SAGA SEAFOOD (PTY) LTD</b>  | <b>19<sup>TH</sup> DEFENDANT</b> |
| <b>HEINASTE INVESTMENT (NAMIBIA) (PTY) LTD</b>                           | <b>20<sup>TH</sup> DEFENDANT</b> |
| <b>SAGA INVESTMENT (PTY) LTD</b>   | <b>21<sup>ST</sup> DEFENDANT</b> |
| <b>ESJA INVESTMENT (PTY) LTD</b>   | <b>22<sup>ND</sup> DEFENDANT</b> |

and

|   |                                  |
|---|----------------------------------|
| <b>JOHANNA NDAPANDULA HATUIKULIPI</b>           | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>SWAMMA ESAU</b>                              | <b>2<sup>ND</sup> RESPONDENT</b> |
| <b>AL INVESTMENTS NO FIVE CLOSE CORPORATION</b> | <b>3<sup>RD</sup> RESPONDENT</b> |
| <b>OHOLO TRADING CLOSE CORPORATION</b>          | <b>4<sup>TH</sup> RESPONDENT</b> |
| <b>GWAANIILONGA INVESTMENTS (PTY) LTD</b>       | <b>5<sup>TH</sup> RESPONDENT</b> |

**Neutral Citation:** *Mclaren N.O. v The Prosecutor-General* (HC-MD-CIV-MOT-POCA-2020/00429) [2024] NAHCMD 64 (19 February 2024)

**CORAM:** SIBEYA J

**Heard:** 31 January 2024

**Delivered:** 19 February 2024

**Flynote:** Prevention of Organised Crime Act 29 of 2004 (POCA) – Section 29(1)(a) and 29(3)(c) of POCA analysed – Application for removal of a *curator bonis* – Application for appointment of a *curator bonis* to replace the one to be removed restraint order – Payment of fees of the *curator bonis* in restraint applications discussed.

**Summary:** Before court is a hybrid of applications. One is an unorthodox application where, contrary to applications for appointment as curators, the applicants seek an order to be relieved of their duties as curators in this matter. The other two applications are distinct applications that are for the appointment of the *curator bonis* to replace the applicants. The applicants seek to be relieved from their duties as *curator(s) bonis* on account of frustrations with the conditions in which the properties are being administered. The application was opposed by the Prosecutor-General ('the PG').

It was not disputed that the applicants lack the necessary capacity to continue to administer the restrained assets, and further that they no longer desire to be involved in the administration of the said assets.

Upon the court being satisfied that it is undesirable for the applicants to continue to serve as the curators in this matter, the parties were invited to file applications where they nominate persons to be considered for appointment of curators to replace the applicants.

In November 2023, the PG applied for the appointment of Ms Sylvia Kahengombe as the *curator bonis* to replace the applicants. The application was opposed by the defendants. The court, in a ruling delivered on 4 December 2023, was not satisfied that

Ms Kahengombe, a sole legal practitioner at a law firm, had the capacity to carry out the duties and functions of the curator in this matter as a sole curator. The court, therefore, declined the application by the PG, but permitted the PG to supplement her papers, if she so elects, for the appointment of a curator. The court also invited the defendants to file a counter-application for the replacement of the curators, if any. Subsequently, the PG supplemented her application and the defendants filed a counter-application.

*Held:* that forcing one to work against their will offends our Constitutional values, and is prohibited in our Republic.

*Held:* that it matters not, strictly speaking, as to who of the parties nominates the person to be considered by the court for appointment as *curator bonis*. This is due to the fact that a curator must exercise the care of a prudent and careful man over the administered properties, and owes no duty or allegiance to the nominator, but is only accountable to the court and the Master of the High Court ('the Master'). A party should, therefore, not develop cold feet by the mere fact that a curator is nominated by his or her adversary.

*Held that:* appointing the PG's nominees as curators in this matter will increase the costs for the administration of the assets. This conclusion is based on the fact that the PG's nominees, who are South African based, will inevitably incur extra costs above the costs for the administration of the restrained assets.

*Held further that:* the inclusion of the appointment of Ms Kahengombe as an agent of the PG's nominees, adds no substance to the said application. This finding is premised on the fact that the PG and her nominees do not provide the details of what the said appointment of an agent entails, save to receive correspondence and legal notices on behalf of the appointed curators.

*Held:* that sight should also not be lost of the fact that curatorship is a business where services are rendered in exchange for a fee, and therefore, it is fair that fees are paid for services rendered by a curator within a reasonable time.

*Held* that: if the reasonable fees of the curator are not paid from the restrained property, or the confiscation order, same may be paid by the State. Once the State pays the fees of the curator before a confiscation order is made, the State will be entitled to claim from the confiscated proceeds, the amount paid for the fees of the curator.

The PG's application for the appointment of her nominees as curators is refused. The Defendants' application for appointment of their nominees as curators is granted, with costs subject to rule 32(11) of the Rules of this court.

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### ORDER

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1. The appointment of the applicants (Mr Ian Robert McLaren N.O. and Mr David John Bruni N.O.) as *curators bonis* in terms of paragraph 1.23 of the provisional restraint order issued on 13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively, is hereby terminated with effect from the date when the Master of the High Court ('the Master'), pursuant to order 2 below, issues to the replacement curator(s) a letter(s) of appointment, and the Court appoints the said curators in terms of the Prevention of Organised Crime Act 29 of 2004 ('POCA');
2. Mr Harald Hecht and Mr Pierre Knoetze are appointed as *curators bonis* in respect of the property restrained as per the provisional restraint order issued on 13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively;
3. The appointment of Mr Harald Hecht and Mr Pierre Knoetze is subject to the same terms and conditions, powers, duties and functions of the *curator bonis* as set out in the provisional restraint order issued on 13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively;
4. The application by the Prosecutor-General for condonation and extension of time to file her application for her nominees to be appointed as *curators bonis*, is granted;

5. The application by the Prosecutor-General for Mr Johan Francois Engelbrecht and Mr Coenaard Louwrens Stander to be appointed as *curator bonis* in this matter is refused.
6. The Prosecutor-General must pay the costs of the defendants' counter-application together with the costs of the defendants for opposing her application, and such costs to include costs of one instructing and one instructed counsel, subject to rule 32(11);
7. The interlocutory application regarding the removal of the *curators bonis* and appointment of the new *curators bonis*, is regarded as finalised.

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## RULING

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SIBEYA J:

### Introduction

[1] A *curator bonis*, appointed in terms of s 29(1) of the Prevention of Organised Crime Act 29 of 2004 ('POCA'), is an officer of the court, appointed by the court subject to the supervision and control of the Court and the Master of the High Court ('the Master') in terms of the applicable legislation and the court order.<sup>1</sup> Boshoff J in *Ex Parte Du Toit: In Re Curatorship Estate Schwab*<sup>2</sup> remarked as following regarding the duties of the curator:

'In addition to ... statutory requirements, there rests a common law obligation on the curator to observe a greater care in dealing with the property of the person under curatorship than he does with his own. The standard of care which he must observe is that of the prudent and careful man.'

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<sup>1</sup> *Ex Parte Glendale Sugar Millers (Pty) Ltd* 1973 (2) SA 653 (N) 659.

<sup>2</sup> *Ex Parte Du Toit: In Re Curatorship Estate Schwab* 1968 (1) SA 33 (T) 36B-C.

[2] It matters not, strictly speaking, as to who of the parties nominates the person to be considered by the court for appointment as *curator bonis*. This is due to the fact that a curator must exercise the care of a prudent and careful man over the administered properties, and owes no duty or allegiance to the nominator, but is only accountable to the court and the Master of the High Court ('the Master'). A party should, therefore, not develop cold feet by the mere fact that a curator is nominated by his or her adversary.

[3] Before court is a hybrid of applications. One is an unorthodox application where, contrary to applications for appointment as curators, the applicants seek an order to be relieved of their duties as curators in this matter. Although there is no serious contestation among the parties regarding the application of the applicants, I have opted to delve in the said application in order to put the live issues between the parties into context. The other two applications are distinct applications that are for the appointment of the *curator bonis* to replace the applicants.

#### The parties and representation

[4] The first applicant is Mr Ian Robert McLaren while the second applicant is Mr David John Bruni. They shall jointly be referred to as 'the applicants'. The applicants are adult male sole proprietors of Bruni & McLaren with offices situated at No. 5, 2<sup>nd</sup> Floors, Hidas Centre, Windhoek. The applicants are joint *curators bonis* of the property of the first to sixteenth defendants by virtue of an order of court issued on 13 November 2020 and the appointment letter issued by the Master dated 4 December 2020, in terms of s 76(1)(b) of the Administration of Estates Act 66 of 1965 ('the Estates Act'), read with s 29 of the POCA.

[5] The respondent in the applicants' application is the Prosecutor-General of the Republic of Namibia ('the PG'), duly appointed as such in terms of Article 32(4)(a)(cc) read with Article 88 of the Namibian Constitution, with offices situated at Corporate House, J P Karuaihe Street, Windhoek. The PG has, subsequent to the filing of the applicants' application, filed an application to have her preferred nominees to be

appointed as the curators to replace the applicants. I shall revert to the PG's application at the opportune time.

[6] The first to the twenty-second defendants and the first to the fifth respondents are referred to as they appear in the main application for a restraint application launched by the PG. Where it becomes necessary to refer to a particular defendant or respondent, he or she shall be referred to as such. The third, fourth, sixth, tenth, twelfth, fourteenth, fifteenth and sixteenth defendants, jointly referred to as 'the defendants' filed a counter-application to the PG's application, where they nominated their preferred persons to be appointed as curators to replace the applicants. I shall revert to the counter-application as the judgment unfolds.

[7] The applicants are represented by Mr Schickerling, while Ms Boonzaaier represents the PG, and Mr Soni represents the defendants, who are applicants in the counter-application, as stated above.

#### Relief sought by the applicants

[8] The applicants seek the following relief:

'1. That the applicants' appointment as *Curator Bonis* for those assets forming the subject matter of the restraint order issued by this Honourable Court on 13 November 2020, alternatively 16 November 2020, under the above-mentioned case number, ('the assets') against the above-named Defendants and First to Fifth Respondents be and is hereby terminated;

2. That pending the appointment of a *Curator(s) Bonis* as set out in order 3 below, the Applicants shall retain possession of and continue to administer the assets of the Defendants and First to Fifth Respondents;

3. That the Master of the High Court be and is hereby directed and authorized to appoint, as *Curator(s) Bonis* for the assets of the Defendants and the First to Fifth Respondents, in substitution of and in the name, place and stead of the Applicants, as *Curator(s) Bonis* such



person(s) as she may in her sole discretion deem fit, on the terms and conditions as set out in the order of this Honourable Court issued on 13 November 2020, alternatively 16 November 2020, inclusive of, and on the same terms and conditions, powers, duties and functions as set out in Annexure 'X' read with Annexures 'A' and 'B' incorporated in Annexure 'X', incorporated in such order.

4. That the Prosecutor-General be and is hereby authorized to approach this Court, in as far as may be necessary, on the same papers, amplified in so far as may be necessary, for an order confirming the appointment of the *Curator(s) Bonis* to be appointed by the Master of the High Court in terms of order 3 above, and on the same terms and conditions as set out in the order of this Honourable Court issued on 13 November 2020, alternatively on 16 November 2020, inclusive of, and subject to the same terms and conditions, powers, duties and functions as set out in Annexure 'X' read with Annexures 'A' and 'B' incorporated in Annexure 'X';

5. That the applicants be and is (sic) hereby authorized directed (sic) to forthwith upon the appointment of the new *Curator(s) Bonis* hand over and deliver to the newly appointed *Curator(s) Bonis* all files and documents of and concerning the assets of the Defendants and First to Fifth Respondents, forming the subject matter of the restraint order, currently in their possession and under their control;

6. That the applicants be and is (sic) hereby directed to, within 14 days from date on which this order is granted, deliver to the Master of the High Court a report of all which they have done until date hereof.

7. That costs of this application (if any) shall be costs in the administration of the assets of the Defendants and First to Fifth Respondents.

8. Such further and/or alternative relief as this Court may deem fit.'

## Background

[9] On 13 November 2020, the court, in an *ex parte* application by the PG, granted a provisional restraint order incorporating annexure 'X' to which annexures 'A' and 'B' were further attached. These annexures contain the list of properties subjected to restraint in the order.

[10] In the said order, particularly, order 1.23 of annexure 'X', the court, in terms of s 29(1)(a) of the POCA, appointed the applicants as *curators bonis* for the assets that are restrained in the order, subject to the provisions of the Estates Act and the POCA. The applicants had, prior to the order being issued, indicated their willingness to be appointed as curators in this matter. The *rule nisi* was confirmed, in respect of the seventh defendant on 25 August 2021, while in respect of the first to sixth defendants and eighth to sixteen defendants and the respondents, it was confirmed on 17 May 2023.

[11] The applicants presently seek to be relieved from their duties as *curators bonis* in this matter on account of frustrations with the conditions in which the properties are being administered. The application was opposed by the PG.

#### Some of the applicants' frustrations

[12] Mr Bruni, who deposed to the founding affidavit, stated that prior to the applicants indicating their preparedness to accept an appointment as curators on 10 July 2020, the Executive Director of the Ministry of Justice, Ms Gladys Pickering advised them that the Ministry of Justice has a fund from where their costs and expenses will be settled.

[13] Mr Bruni states further that on 4 December 2020, the applicants delivered the required Bond of Security of N\$10 million to the Master, who subsequently provided them with an appointment letter as curators of the assets of the defendants. The applicants state that the costs for the Bond of Security amounted to N\$58 250. The proof of this expense was submitted to the Ministry of Justice on 11 March 2021 for payment, but it took more than a year to be paid.

[14] To the above averments, the PG, in her answering affidavit, stated that the provision of security is an expense of the *curator bonis* and not that of the Ministry of Justice. She stated further that it was agreed with the applicants that if they are unable to carry out any of the expenses for the execution of their duties, the Ministry of Justice will assist to pay those expenses on their behalf and that it will be reimbursed, with interest, at the end of the case if the confiscation order is granted.

[15] Mr Bruni stated further that the applicants had an arduous task to obtain the asset declarations from the defendants within 10 days from the date of service of the order when the defendants are detained in police custody, making it difficult to obtain the required information. He deposed that on 14 April 2021, the applicants submitted the first report to the Master. The PG contends that the said report is insufficient.

[16] Mr Bruni stated further that when the curators intended to service a mortgage bond held by the third defendant at the Agricultural Bank of Namibia 'Agribank' which required annual payment, they discovered, without prior notice, that all the bank accounts of the third defendant were frozen by Bank of Namibia.

[17] Mr Bruni proceeded to state that when they wanted to fetch a Land Rover vehicle owned by the third defendant in order to have it serviced as it was under service plan, they were advised by the members of the Anti-Corruption Commission (ACC), that they could not take the vehicle as it was under attachment, and they were asked to bring a court application. In response, the PG stated that the allegations are beyond her personal knowledge, and further that the allegations pertaining to the vehicle were vague and the vehicle was serviced on 29 April 2021.

[18] Mr Bruni further stated that after their appointment as *curators bonis*, they identified the Ramatex complex as appropriate to store and safeguard the restrained assets. They proceeded to weld close all the windows at the building and put up security systems and equipment for the safety of the assets. Thereafter, they invited officials of the ACC to inspect the building and the officials were satisfied with the safety mechanisms put in place.

[19] The applicants, subsequently, requested the officials of the ACC to hand over the restrained assets to them for safekeeping and storage at the building. The request was turned down and the officials of the ACC advised them that they should bring a court application to have the assets moved to the said building. To these averments, the PG answered that: "It was agreed prior to the bringing of the restraint application that all the assets seized by Nampol or the ACC will remain in their custody subject to Bruni and McLaren's supervision. At all relevant times they were informed that those assets have been seized in terms of other applicable legislation and the restraint order did not nullify any of those seizures".

[20] Mr Bruni deposed further that the applicants initially sold cattle belonging to Mr Esau (the fifth defendant), in order to cover the monthly overheads of running Mr Esau's farming business, which is subject to a restraint order. When they later intended to sell other cattle, they discovered that the PG's officials had blocked the sale and instructed the State Veterinary not to issue the transport permit before permission was obtained from the Master. Confronted with these allegations, the PG raised a bare denial and remarked further that the allegations are vague.

[21] Mr Bruni stated further that after the applicants analysed the declarations of the defendants they, during January 2022, came to the realisation of the magnitude of the assets and businesses involved which were situated all over the country, and therefore, realised that they do not have the necessary personnel or capacity to manage the assets of the defendants. The concerns of the applicants were conveyed to the Master. The applicants, therefore, sought to have their curatorship terminated. These frustrations were also aired to the PG, and this, the PG admitted. The applicants also stated that they will not charge any fee for the work carried out thus far.

[22] Mr Bruni further stated that as soon as the new curator is appointed they will immediately hand over the files in their possession to such curator.

Messrs. Ricardo Gustavo and James Hatuikulipi

[23] Messrs Ricardo Gustavo and James Hatuikulipi filed answering affidavits in which they stated that they do not oppose the relief sought by the applicants to have their appointments of curatorship terminated. They, however, raised concerns that for the termination to occur there must be safeguards in place failing which justice may be prejudiced, and the defendants and respondents may suffer irreparable harm.

#### Analysis and findings

[24] The court may remove a curator, and for that to occur, s 54(1)(a)(v) of the Estates Act, provides as follows:

'54. Removal from office of executor

(1) An executor may at any time be removed from his office –

(a) by the Court –

(i) ...

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; ...'

[25] Van Zyl J in *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powel NNO*<sup>3</sup> remarked as follows regarding the removal of liquidator:

'It goes without saying that the removal of a liquidator is a radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out therefor.... The court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. And at the end of the day it is of cardinal importance that the Court must be satisfied that removal of the liquidator is to the general advantage and benefit of all persons concerned or otherwise interested in the winding-up of the company in liquidation.'

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<sup>3</sup> *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powel NNO* 1997 (1) SA 547 (C) at 566A-C.

[26] I am of the considered view that the above principle regarding liquidators finds equal application to curators. I find, on the basis of the above authorities that, the court can remove a curator, but to do so, it must be satisfied that it is undesirable that such person should act as a curator over the restrained assets. I find that will be undesirable for a person to continue to act as a curator in a matter where such person clearly has no capacity, human or institutional to carry out the duties and functions of the curator. The curator will further be undesirable to continue to act as such where he or she is unwilling to continue to act as a curator and reasonable grounds exists from the surrounding facts and circumstances that justify his or her unwillingness. It will further be undesirable for a curator to continue act as such where, generally, his or her removal from office is to the advantage of all persons concerned or interested in the administration of the restrained assets and there are reasonable grounds in support thereof.

[27] In *casu*, it was not disputed that the applicants lack the necessary capacity to continue to administer the restrained assets, and further that they no longer desire to be involved in the administration of the said restrained assets. It is also apparent from the papers filed that the applicants are frustrated by mainly the officers of the PG and the ACC in the process of carrying out their duties and functions set out in the relevant court orders.

[28] Forcing one to work against their will offends our Constitutional values, and is prohibited in our Republic. The Supreme Court in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others*<sup>4</sup> stated the following regarding labour hire:

‘...labour hire was likened to the sale of human beings at a profit by the broker to user companies, the House was reminded of how many thousands of Namibians had been “brought in from the North with tickets around their necks saying they are going to be sold to another” and the view was expressed that the attempt to regulate labour hire was not dissimilar to

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<sup>4</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 596 (SC) 609 para 7.

attempts made during the abolitionists' struggle against slavery to regulate slave trade "to make it a bit humane."

[29] With the above authorities kept in my mental faculties, and further considering that I hold the view that forced labour should be abhorred. It is only just to permit the applicants to be removed as curators. I find comfort in the fact that the applicants stated undisputedly that they lack sufficient capacity to administer the restrained assets and that their efforts to administer the restrained assets, although with insufficient capacity, was frustrated as alluded to above. I find that, having confessed their insufficient capacity, and some of the frustrations they faced in carrying out their duties deposed to in their affidavit, the possibility is not far-fetched that forcing them to continue to act as curators, may be detrimental to the restrained assets and, therefore, not in the benefit of the interested persons, and certainly not in the interests of the administration of justice.

[30] It is on the basis of the above findings that the court decided that it became undesirable that the applicants must continue to administer the restrained assets. The challenge to the immediate removal of the applicants as curators is that it could leave the assets in limbo, without proper control and subject to dissipation. This could defeat the whole purpose of a restraint order. As remarked in the similar matter of *Theron v Natal Markagente (Edms) Bpk*.<sup>5</sup>

'Mr Meyer's resignation as the respondent's provisional judicial manager is accepted. He is removed from office as such, with effect from the date when the Master appoints his successor. The Master shall do so as soon as possible...'

[31] Upon being satisfied that it is undesirable for the applicants to continue as the curators in this matter, the parties were invited to file applications wherein they nominate persons to be considered for appointment as curators to take over from the applicants. This is to ensure that no gap in the duration of the administration of the assets is left which may be exploited by unscrupulous persons to the detriment of the interested persons and the administration of justice.

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<sup>5</sup> *Theron v Natal Markagente (Edms) Bpk* 1978 (4) SA 898 (A) 901C-D.

[32] In November 2023, the PG applied for the appointment of Ms Sylvia Kahengombe as the *curator bonis* to replace the applicants. The application was opposed by the defendants. The court, in a ruling delivered on 4 December 2023, was not satisfied that Ms Kahengombe, a sole legal practitioner at a law firm, had the capacity to carry out the duties and functions of a curator in this matter, on her own. The court, therefore, declined the application by the PG, but permitted her to supplement her papers, if she so elects, for the appointment of a curator. The court also invited the defendants to file a counter-application for the replacement of the curators, if any. Subsequently, the PG supplemented her application and the defendants filed a counter-application. It is the said application and counter-application that I now turn to.

#### The PG's application for appointment of the *curator bonis*

[33] On 16 January 2024, the PG applied for the appointment of Messrs Johan Engelbrecht and Coenraad Louwrens Stander, South African nationals, jointly referred as the PG's nominees, as *curators bonis*, to replace the applicants in this matter, on the same terms and conditions, powers, duties and functions as set out in the restraint order.

[34] The PG's application, which was due to be filed by 5 January 2024, was filed out of time on 16 January 2024. She applied for condonation for the default and extension of time. Condonation was not opposed and, in my view, it was well motivated with a reasonable tendered explanation. The late filing of the PG's application is, therefore, condoned. The PG's application is, however, opposed by the defendants on the merits.

[35] In the application, the PG contends that she was unable to secure the nomination of a Namibian curator, hence she opted for two South African curators. The PG's nominees expressed their willingness to be appointed as curators in this matter. The PG contends further that her nominees are employed by Icon Insolvency Practitioners (Pty) Ltd t/a Icon Curatorship Services (Pty) Ltd ('Icon'), and that they have the required skills, experience and expertise to administer assets similar to the ones involved in this matter.



It is further alleged that they have been appointed as curators in terms of the South African Prevention of Organised Crime Act 121 of 1998.

[36] The PG further contends that Icon employs 38 staff members from various backgrounds. The PG's nominees further stated that they intend to appoint Ms Kahengombe as their agent in Namibia.

[37] The defendants' opposition is primarily that should the PG's nominees be appointed as *curators bonis* in this matter, it would mean that a non-Namibian firm that is neither based in nor operates in Namibia will replace the applicants.

[38] It was argued by Mr Soni that the PG did not address the question of how a curator who is not based in Namibia will administer the assets in Namibia when such curator's infrastructure and personnel are not located in Namibia. Ms Boonzaaier was not to be outsmarted. She argued that the PG's nominees stated that they will nominate Ms Kahengombe as their agent in Namibia and this should alleviate the concerns of the remote location of the PG's nominees.

#### Analysis of PG's application

[39] There are no qualms regarding the relevant skills, experience and expertise possessed by the PG's nominees to administer assets in similar matters as the present. The PG stretches this issue and makes a conclusion that, in her view, there are no Namibians who possess the same level of experience as her nominees.

[40] The difficulty that befalls the PG's application is the fact that her nominees are not based in Namibia, neither are they operational in Namibia. There is further no intention expressed by the PG's nominees to open offices in Namibia for purposes of administering the restrained assets in this matter.

[41] Appointing the PG's nominees as curators in this matter will increase the costs for the administration of the assets. This conclusion is based on the fact that the PG's

nominees, who are South African based, will inevitably incur extra costs above the costs for the administration of the restrained assets. Whenever they travel to Namibia, the curators will inevitably incur transport and accommodation costs, possible office rental, the expenses are not exhausted. The PG expressly states that the curators can rent an office if need be. I find that it requires no magnifying glasses to realise that the appointment of the PG's nominees as curators will increase the costs for the administration of the assets as aforesaid to the possible detriment of the interested parties and the administration of justice.

[42] The other difficulty with appointing foreign based curators is that, *in casu*, it is common cause that the volume of assets involved is massive and the assets are scattered all over the country. The assets include, *inter alia*, motor vehicles, houses, farms, businesses, bank accounts which all require close and constant administration. I harbour no doubt that it is not far-fetched to consider that it is very likely that the immediate and continuous attention of the curators will be required. This, in my view, will render remote administration of the restrained assets undesirable, unless if there is no suitable Namibian based curator who operates in Namibia.

[43] The averment that the PG's nominees intend to appoint Ms Kahengombe as their agent does not make the PG's application any better. Viewing the PG's application under a microscope, even with the inclusion of the intent to appoint Ms Kahengombe, I find that, it reveals that the said application maintains its content and posture in nature, form and effect. The nature being that the PG's nominees are non-Namibian based nor are they operational in Namibia.

[44] The inclusion of the appointment of Ms Kahengombe, in my considered view adds no substance to the said application. This finding is premised on the fact that the PG and her nominees do not provide the details of what the said appointment of an agent entails, save to receive correspondence and legal notices on behalf of the appointed curators. All that is provided is just a label that Ms Kahengombe will be appointed as an agent and nothing more. With respect, I find this to be highly insufficient, and, therefore, in my view, nothing turns on the alleged intention to appoint

Ms Kahengombe as an agent. I will return to the PG's application when I draw the judgment to the finishing line.

### The counter-application

[45] In the counter-application filed on 5 January 2024, which is opposed by the PG, the defendants seek the appointment of Messrs Harald Hetch and Pierre Knoetze (the defendants' nominees) as the *curators bonis* in respect of the restrained assets on the same terms and conditions, powers, duties and functions of the *curator bonis* set out in the orders of court of 13 November 2020.

[46] The third defendant who deposed to the founding affidavit in support of the counter-application on behalf of the defendants, who filed confirmatory affidavits, stated, *inter alia*, that his legal representative (Mr Ronald Kurz) informed him that on 26 September 2023, the defendants' nominees submitted to the PG, a written proposal to be considered for appointment as the new curators in this matter. The third defendant deposed further that during the interactions between the defendants' nominees and the PG, the said nominees raised that s 51 of the Estates Act provides that an executor in an estate will generally not be entitled to receive remuneration before the estate has been distributed, except if prior arrangements have been approved in writing by the Master. The defendants' curators were not prepared to wait for years for payment of their fees and they asked for reasonable payment fees to be sanctioned by the Master.

[47] The PG did not accept the proposal of the defendants' nominees, as her office would first require an opinion for the proposal and such process will take a significant period of time to be finalised. The defendants' nominees have stated that they would accept the appointment if they were to be paid their fees every second month or quarterly. It should be pointed out to all that the duties and functions of the curator are set out in the court order and the curator is answerable to nobody else except to the Master and to the Court.

[48] The defendants contend that their nominees, as per their proposal of 26 September 2023, sent to the PG, are suitable for appointment as curators to replace the applicants as they have the required skills and capacity to carry out the duties and functions of the *curator bonis* in this matter. The said nominees further have access to other professionals whom they may engage for assistance in discharging their functions. The defendants contend further that this court has the power in terms of s 29(3) of the POCA, to make an appropriate order regarding the payment of the curators' fees.

[49] In substantiation of the opposition to the counter-application, the PG, in her answering affidavit deposed to, *inter alia*, that s 29(3) of the POCA only permits the payment of the fees of the curator from confiscated proceeds and this is after finalisation of the criminal trial.

[50] Ms Boonzaaier argued that the contention by the defendants' for the payment of the curators' fees before a confiscation order is made, based on s 29(3) of POCA, does not provide a practical solution to the issue of the interim payments of fees of their nominees.

### Analysis and findings

[51] In order to resolve the impasse between the parties, in my view, I find it prudent to have regard to the affidavits filed. The third defendant deposed as follows at paragraph 7 of his founding affidavit:

'7. In this counter-application, which we bring in terms of paragraph 3 of this Court's Order of 4 December 2023, we apply for the following substantive relief:

1. Mr Harald Hecht and Mr Pierre Knoetze are appointed as the *curator bonis* in respect of the property restrained in terms of this Court's Order of 13 November 2022.
2. Their appointment is inclusive of and subject to the same terms and conditions, powers, duties and functions of the *curator bonis* as set out in the Restraint Order of 13 November 2020 and annexures thereto.'

[52] In response to the above allegations, the PG answered as follows:

'AD PARAGRAPH 7 THEREOF:

I take no issue with the proposed order, however, the nominees indicate that their willingness to accept the appointment is subject to receiving fees bimonthly or quarterly, of which such an arrangement is not contained in any written instrument as sanctioned.'

[53] The above response by the PG makes it plain that she has a bone to pick with the defendants in respect of their nominees only in relation to the condition of receiving fees on a bi-monthly or quarterly basis. In reply, the defendants with the confirmation of their nominees, stated that the nominees will accept appointment where the order provides for the payment of their fees on a half-yearly basis.

[54] Having set out the basis of the PG's opposition to the counter-application, it is critical to note that Ms Boonzaaier argued that there is no legal framework that regulates payment of the fees of the curator before finalisation of administration of the estate. She stated further that not even POCA provides for interim payment of the curator's fees in the midst of the administration of the assets. Mr Soni argued contrariwise that POCA gives the court a discretion to regulate the duties of the curator and payment of the expenses and fees of the curator.

[55] It should be clear at the outset that the dispute of the parties in the counter-application does not relate to the payment of the expenses of the curator, but is only in respect of payment of fees of the curator. In any event s 29(1)(c) of POCA puts this

issue beyond unnecessary debate as it authorises the *curator bonis*, subject to the directions of the court, to recover from the property, expenses associated with the performance of the functions that such curator is appointed for.

[56] Section 92 of the POCA regulates the functions of the curator and it provides as follows:

'92. (1) Immediately after a *curator bonis* is appointed in terms of this Act, the *curator bonis* must take into his or her custody all the property in respect of which he or she was appointed, as well as any document in the possession or custody or under the control of any person referred to in section 29(1)(b), 43(2)(c), 55(1)(b) or 67(3) if that document relates to the property.

(2) Except as otherwise provided in this Act, the Administration of Estates Act, 1965 (Act No. 66 of 1965), does, with the necessary changes, apply in respect of a *curator bonis* appointed in terms of this Act.

(3) The High Court may dispense with any requirement in terms of any law that applies to the appointment of a *curator bonis* or to the execution of any power or function by a *curator bonis*, including a requirement for a *curator bonis* to provide security.'

[57] Section 29(1)(a) of POCA empowers the court, where it made a restraint order, to appoint a *curator bonis* if deemed necessary. If appointed, the *curator bonis* must subject to the directions of the court, perform any act, take care of the property, administer the property or carry on the business where such property is a business, on behalf of the person against whom a restraint order has been made.

[58] Section 29(3)(c) which appears under the heading "Appointment of *curator bonis* in respect of property subject to restraint order" provides as follows:

'29(3) The High Court after having made an order under this section –

(a) ...

(b) ...

(c) Must make an order relating to the fees and expenditure of the *curator bonis* as it deems fit, including an order for the payment of the fees of the *curator bonis* –

(i) From the confiscated proceeds if a confiscation order is made; or

(ii) by the State if no confiscation order is made.’

[59] I agree with Ms Boonzaaier that s 29(3)(c) provides for the recovery of the fees of the curator from the confiscated proceeds if a confiscation order is made. POCA provides under s 32 that a confiscation order may be made by a court where a defendant is convicted of an offence, where he or she is found, after an enquiry, to have benefited from the offence. It is, therefore, a precondition of a confiscation order that the defendant must have been convicted of an offence from which he benefitted.

[60] In *casu*, the criminal trial is still at its infancy stage. The criminal matter is at plea stage and witnesses are yet to testify. It was conceded by Ms Boonzaaier, in response to a question by the court, that the criminal matter is highly likely to take years to reach its finality. By the argument of Ms Boonzaaier, it means that the curator appointed to administer the restrained properties will continue to administer such properties without his or her fees being paid until such time that the criminal trial is finalised and confiscation order is made.

[61] O’Regan AJA in a Supreme Court decision of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*,<sup>6</sup> para 18, said the following regarding the approach to interpretation:

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<sup>6</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paras 18-19 and 24.

[18] South African courts ... have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>7</sup> Wallis JA usefully summarised the approach to interpretation as follows –

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.”

[62] Although the above remarks were made regarding interpretation of contracts, I find that they apply with equal measure to interpretation of statutory provisions and s 29(3)(c) of POCA is no exception.

[63] The interpretation of s 29(3)(c)(i), standing alone, as Ms Boonzaaier appeared to lure the court to consider such an approach, in my view, leads to an insensible or unbusinesslike result. This is so as the criminal trial could hypothetically take nine years to be completed. The proposed interpretation would mean that the curator must wait for a period of over nine years to have his or her fees incurred to be paid, while performing work and incurring business expenses in the interregnum. In this day and age where

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<sup>7</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 604 para 19.



death can strike at any given day, waiting for a number of years for payment of fees for services rendered is, in my view insensible or unbusinesslike.

[64] Sight should also not be lost of the fact that curatorship is a business where services are rendered in exchange for a fee. I find it only fair that reasonable fees are paid for services rendered by a curator within a reasonable time. I, therefore, decline the invitation by Ms Boonzaaier to consider the interpretation of s 29(3)(c)(i) in isolation as she forcefully argued.

[65] Section 29(3)(c)(i) has to be read in its totality and that is with the inclusion of s 29(3)(c)(ii), which provides that in the event that a confiscation is not made the fees of the curator must be paid by the State.

[66] Section 29(3)(c) read with s 29(1)(a) of the POCA, read in totality, empowers the court to make an order regarding the appointed curator' fees and expenses as it deems fit. The provision does not clothe the court with such powers after the defendant is convicted, but it is at any time after a restraint order is made. I have not also not seen a provision that prohibits the curator from recovering his or her fees from the property prior to the finalisation of the criminal trial.

[67] I am of the view that the Legislature was alive to the reality that there may be instances where a confiscation order will not be made and therefore, a curator will not be able to recover his or her fees from the confiscated proceeds. In that case, the fees of the curator must be paid by the State. Similarly, I hold the view that where the criminal trial is bound to take several years to be finalised, as *in casu*, it will be in the interests of justice that the fees of the curator are paid for within a reasonable time from the income derived from the restrained property, upon taxation, approval or certification by the Master.

[68] It was also argued by Ms Boonzaaier that the payment of the fees of the curator before finalisation of his or her duties offends against s 84 of the Estates Act. The said s 84 provides as follows:

'84 Remuneration of tutors and curators

(1) Every tutor and curator shall, subject to the provisions of subsection (2), be entitled to receive out of the income derived from the property concerned or out of the property itself –

(a) such remuneration as may have been fixed by any will or written instrument by which he has been nominated; or

(b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master.'

[69] The Regulations passed in terms of the Estates Act provides, in Regulation 8(3) for the remuneration of curators which shall be assessed at six percent on income collected during the existence of the curatorship, and two percent on the value of the capital assets on distribution, delivery or payment on the termination of the curatorship.

[70] What is apparent from s 84 of the Estates Act is that, it permits the fees of the curator to be fixed in a will or other written instrument that nominates the curator. It further allows for the curator's fees to be paid from the income generated from the properties during winding-up of the estate. This, in my view, affords the court the authority, when it appoints a curator, to determine not only the duties and functions of such curator, but also the payment of such curator's fees.

[71] It should further be remembered that s 92 of POCA prescribes in no uncertain terms that the provisions of POCA takes precedence over the provisions of the Estates Act when it comes to proceedings under POCA.

[72] In a similar vein, the reliance by Ms Boonzaaier on regulation 2 of POCA Regulations which provides that the fees of a *curator bonis* should be in accordance with the Estates Act, cannot be preferred over the provisions of POCA. The Regulations

are secondary to POCA and, in my view, any interpretation of the Regulations to the effect that the *curator bonis* must wait until a confiscation order is made for payment of his or her fees, however long that may, is insensible and unbusinesslike as alluded to above. In my view, this offends the provision of POCA, particularly ss 29 and 92.

[73] I also do not find it far-fetched that in the event that the fees of the curator cannot be satisfied from the income derived from the restrained property, the State can be drawn into the fray to pay the curator's fees. This conclusion, in my view, finds support from the already existing duty on the State to pay the fees of the curator where a confiscation order is not made, as provided for in s 29(3)(c)(ii) of POCA.

[74] In order to drive the issue of the payment of the fees of the curators home, I record that the PG, in her founding affidavit filed in November 2020, in the *ex parte* application for a restraint order and the basis on which the provisional restraint order was issued, stated as follows at paragraph 402.18:

'402.18 In terms of section 29(3) of POCA, the fees of the *curator bonis* and, *ex post facto*, expenses and disbursements reasonably incurred, as certified by the Master, by the *curator bonis* in the execution of his duties which have not been paid out of the estate, shall be paid from the proceeds of any confiscation order that may be made against the defendants failing which, by the State, provided that the *curator bonis* is entitled to recover interest not exceeding the prime lending rate of the major financial institutions on such expenses and disbursements.'

[75] The above averments by the PG provide for the payment of the fees of the curator from the estate, and the remaining fees shall be paid from the proceeds of the confiscation order, failing which such fees may be paid by the State.

[76] It was on the basis of the above averments by the PG that the following order was made to form part of the provisional restraint order:

'1.41 In terms of section 29(3) of POCA, the fees of the *curator bonis* and, *ex post facto*, expenses and disbursements reasonably incurred, as certified by the Master, by the *curator bonis* in the execution of his duties which have not been paid out of the estate, shall be paid from the proceeds of any confiscation order that may be made against the defendants failing which, by the State...'

[77] The above order 1.41 of the provisional restraint order, which was confirmed with the orders of 21 August 2021 and 17 May 2023, respectively, has not been varied or set aside and, therefore, all its still stands with its force and might. On the basis of the said order of court, the curator, in my view, is entitled to claim payment of his or her reasonable fees from the income derived from the restrained property administered, *in casu*, on a half-yearly basis.

[78] I am further of the view that, if the fees of the curator are not paid from the restrained property, or the confiscation order, same may be paid by the State. Once the State pays the fees of the curator before a confiscation order is made, in my view, the State will be entitled to claim ultimately from the confiscated proceeds, the amount paid for the fees of the curator.

### Conclusion

[79] In view of the foregoing findings and conclusions stated above, I find that the applicants' application to be removed from their office as curators in this matter should be granted. The applicants did not seek legal costs in their application and therefore no related order of costs will be made.

[80] The findings made hereinabove further dictate that the PG's application for the appointment of her nominees as curators falls to be refused.

[81] The application of the defendants to have their nominees, who are Namibian based, appointed as curators in this matter to replace the applicants succeeds. I further find that the condition suggested by the defendants' nominees that they be paid their fees on a half-yearly basis is reasonable, subject to the Master certifying their fees. The appointment of the defendants' nominees as curators, is therefore, subject to the condition that their fees are paid from the income derived from the restrained properties, failing which from the confiscated proceeds or from the State.

### Costs

[82] It is trite law that costs follow the result. The defendants were successful in their opposed application to have their nominees appointed as curators and, therefore, should be awarded costs. Given the interlocutory nature of the applications before court and their narrowness, I hold the view that costs to be awarded should be limited as provided for in rule 32(11).

### Order

[70] In view of the above findings and conclusions, I am of the view that following order meets the justice of the matter:

1. The appointment of the applicants (Mr Ian Robert McLaren N.O. and Mr David John Bruni N.O.) as *curators bonis* in terms of paragraph 1.23 of the provisional restraint order issued on 13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively, is hereby terminated with effect from the date when the Master of the High Court ('the Master'), pursuant to order 2 below, issues to the replacement curator(s) a letter(s) of appointment, and the Court appoints the said curators in terms of the Prevention of Organised Crime Act 29 of 2004 ('POCA');
2. Mr Harald Hecht and Mr Pierre Knoetze are appointed as *curators bonis* in respect of the property restrained as per the provisional restraint order issued on

13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively;

3. The appointment of Mr Harald Hecht and Mr Pierre Knoetze is subject to the same terms and conditions, powers, duties and functions of the *curator bonis* as set out in the provisional restraint order issued on 13 November 2020, and confirmed on 25 August 2021 and 17 May 2023, respectively;
4. The application by the Prosecutor-General for condonation and extension of time to file her application for her nominees to be appointed as *curators bonis*, is granted;
5. The application by the Prosecutor-General for Mr Johan Francois Engelbrecht and Mr Coenaard Louwrens Stander to be appointed as *curator bonis* in this matter is refused.
6. The Prosecutor-General must pay the costs of the defendants' counter-application together with the costs of the defendants for opposing her application, and such costs to include costs of one instructing and one instructed counsel, subject to rule 32(11);
7. The interlocutory application regarding the removal of the *curators bonis* and appointment of the new *curators bonis*, is regarded as finalised.

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O S Sibeya  
Judge

APPEARANCES

APPLICANTS:

J SCHICKERLING  
Instructed by Koep & Partners

THE PROSECUTOR-GENERAL:

M BOONZAAIER  
Of the Office of the Prosecutor-General

3<sup>RD</sup>, 4<sup>TH</sup>, 6<sup>TH</sup>, 10<sup>TH</sup>, 11<sup>TH</sup>, 12<sup>TH</sup>, 14<sup>TH</sup>,  
15<sup>TH</sup> AND 16<sup>TH</sup> DEFENDANTS:

V SONI, SC  
Assisted by R Kurtz  
Instructed by Murorua Kurts Kasper Inc