



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 972/2022; 973/2022; 974/2022

In the matter between:

MAGDELINE SEKGOPI NYHONYHA N O

APPELLANT

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENT

(Case no 972/2022)

and in the matter between:

MAGANDHERAN PILLAY N O

FIRST APPELLANT

ERGOLD PROPERTIES No 8 CC

SECOND APPELLANT

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENT

(Case no 973/2022)

and in the matter between:

ASH BROOK INVESTMENTS 15 (PTY) LTD

FIRST APPELLANT

CORAL LAGOON INVESTMENTS

SECOND APPELLANT

194 (PTY) LTD

KGORO CONSORTIUM (PTY) LTD

THIRD APPELLANT

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENT

(Case no 974/2022)

Neutral citation: *Nyhonyha N O and Others v NDPP* (Case no 972; 973 & 974/22) [2024] ZASCA 113 (16 July 2024)

Coram: NICHOLLS, WEINER and MOLEFE JJA and COPPIN and SMITH AJJA

Heard: 7 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 16 July 2024

Summary: Prevention of Organised Crime Act 121 of 1998 – trust assets – realisable property in terms of s 14 – restraining orders in respect of property held by persons other than a defendant – unilateral powers of the defendants to dispose of trust assets – shareholding in an entity – proportional shareholding in the underlying property of a subsidiary company – consideration of other shareholders.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Keightley and Adams JJ and Randera AJ sitting as full court):

In case number 972/2022

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

In case number 973/2022

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

In case number 974/2022

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

JUDGMENT

Molefe JA (Nicholls and Weiner JJA, Coppin and Smith AJJA concurring):

[1] The crisp issue that falls for decision in these appeals is whether the appellants hold ‘realisable property’ within the meaning of s 14(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), on behalf of defendants cited in a restraint application brought by the National Director of Public Prosecutions (the NDPP) in terms of ss 25 and 26 of POCA (the restraint application). The three appeals were consequently consolidated and heard simultaneously.

[2] The NDPP alleged that the appellants are holding property for and on behalf of some of the defendants in the restraint application, namely Dr Eric Anthony Wood (Dr Wood), Mr Magandheran Pillay (Mr Pillay) and Mr Litha Mveliso Nyhonyha (Mr Nyhonyha), and accordingly sought an order restraining their property on the basis that it falls within the definition of ‘realisable property’ in terms of POCA. Those defendants (the Regiments directors) have been indicted on various charges relating to corruption, money laundering and fraud. Dr Wood was cited as the first defendant in the restraint proceedings, and Mr Pillay and Mr Nyhonyha, as the second and the third defendants, respectively.

[3] Regiments Capital (Pty) Ltd (Regiments Capital), which is in liquidation, Regiments Fund Managers (Pty) Ltd (Regiments Fund Managers) and Regiments Securities (Pty) Ltd (Regiments Securities) were also cited as the fourth, fifth and sixth defendants respectively in the restraint proceedings. I also refer to these corporate defendants collectively as the Regiments Group, or ‘Regiments’. Where appropriate, Regiments Capital is specifically referred to.

[4] On 18 November 2019, the Gauteng Division (per Wright J) granted a provisional restraint order in respect of certain property owned by the Regiments directors and their co-accused, as well as the entities which hold properties on their (the Regiments directors’) behalf. The appellants were also cited as defendants in that matter and the order consequently also implicated their property.

[5] That order was discharged on the return date, namely 26 October 2020 (per Mahalelo J). The respondent (NDPP) subsequently filed appeals against the discharge of the provisional order. The appeals were heard simultaneously by a

specially constituted full court of the Gauteng Division of the High Court, Johannesburg (per Keightley and Adams JJ and Randera AJ) (the full court).

[6] On 3 May 2022, the full court delivered its judgment in terms of which it, inter alia, upheld the appeals and confirmed the provisional restraint order, subject to a variation of the amount, and the exclusion of Regiments Capital (the fourth defendant in the restraint application), against whom liquidation proceedings had been instituted. The full court held that the appellants' property (excluding that of Regiments Capital) should be included in the restraint order in terms of s 14(1) of POCA.

[7] This Court granted the appellants special leave to appeal only on the issue 'whether the appellants hold realisable property within the meaning of s 14(1) of POCA on behalf of Mr Nyhonyha and Mr Pillay.' The restraint order against Mr Nyhonyha and Mr Pillay is final, special leave to appeal having been refused by this Court, and in the case of Mr Nyhonyha, also by the Constitutional Court.

The Parties

[8] The appellant in case no 972/2022 is Mrs Magdeline Sekgopi Nyhonyha (Mrs Nyhonyha), in her capacity as a trustee of the Nyhonyha Family Trust. Prior to October 2018, Mr Nyhonyha was a co-trustee of that trust. The beneficiaries of the Nyhonyha Family Trust are the members of the Nyhonyha family.

[9] The first appellant in case no 973/ 2022 is Mr Magandheran Pillay (Mr Pillay), in his capacity as a trustee of the Pillay Family Trust. The trust has two trustees, Mr Pillay and his brother, Mr Indheran Pillay. The beneficiaries of the Pillay Family Trust are Mr Pillay and his family. The second appellant is Ergold

Properties No 8 CC (Ergold). The Pillay Family Trust is the sole member of Ergold and Mr Pillay is in control of Ergold's affairs through authority given by the Pillay Family Trust.

[10] The first and second appellants in case no 974/2022 are Ash Brook Investments 15 (Pty) Ltd (Ash Brook) and Coral Lagoon Investments 194 (Pty) Ltd (Coral Lagoon), entities which are special purpose vehicles. Both were established in 2006 as property holding companies and for the purpose of taking advantage of a black economic empowerment (BEE) offer made by Capitec Bank Holding Limited (Capitec), to a number of blacked-owned entities, including Regiments Companies. Ash Brook has at all times housed the Capitec shares issued under the BEE transaction. Coral Lagoon is wholly owned by Ash Brook. Initially Regiments Capital owned the majority stake in Coral Lagoon. Presently Ash Brook is wholly owned by Regiments Capital after the minority shareholders were bought out for value following the provisional restraint order. Mr Nyhonyha and Mr Pillay are its directors. The third appellant in case 974/2022 is Kgoro Consortium (Pty) Ltd (Kgoro), a company which is majority owned by Regiments Capital. Its assets are regarded as part of the Regiments Group's 'primary assets'. I also refer to these appellants as the 'subsidiaries'.

Factual background

[11] The restraint application had its origins in the criminal charges preferred against the Regiments directors, namely Dr Wood, Mr Pillay and Mr Nyhonyha, relating to financial advisory services provided through the Regiments Group. Dr Wood had left the Regiments Group during late 2016 or early 2017 as a result of a fall-out between the directors.

[12] The Regiments Group provided services to state-owned entities, including Transnet SOC (Transnet) and the Transnet Second Defined Benefit Fund (the Fund). The restraint order flowed from alleged corrupt activities involving these entities, which were part of the State Capture project and enriched the defendants.

[13] Transnet had paid the Regiments Group more than R1 billion arising from the alleged corruption and unlawful contracts. All of this is alleged to constitute the proceeds of crime. The Fund sued the defendants for some R848 million in losses which it allegedly suffered as a result of the Regiments Groups' unlawful conduct. Although the defendants denied the allegations, they paid the Fund approximately R639 million in settlement of those claims.

The legislative framework

Restraining of property owned by a person other than a defendant

[14] As mentioned, this appeal concerns the circumstances in which a restraint order under ss 25 and 26 of POCA may be made in respect of property owned by a person other than a defendant, and must be determined in the context of the legal framework put in place in Chapter 5 of POCA. The material question is not who formally owns the property, but who controls it or has its use and benefit. Chapter 5 provides for conviction-based forfeiture. A confiscation order may be made against a defendant after conviction, who is found to have benefitted from an offence of which he or she is convicted¹ or to have benefitted from a sufficiently closely related offence.²

¹ S 18(1)(a) and s 18(1)(b) of POCA.

² S 18(1)(c) POCA.

[15] This Court in *National Director of Public Prosecutions v Gardener and Another (Gardener)*, explained the framework created by Chapter 5 of POCA with reference to the confiscation enquiry under s 18 as follows:

‘In the exercise of its discretion a court must bear in mind the main object of the legislation, which is to strip sophisticated criminals of the proceeds of their criminal conduct. To this end the legislature has, in Ch 5 of POCA, provided an elaborate scheme to facilitate such stripping. The function of a court in this scheme, as appears from what I have said above, is to determine the “benefit” from the offence, its value in monetary terms and the amount to be confiscated. It is undoubtedly so that a confiscation order may often have harsh consequences, not only for the defendant, but also for others who may have innocently benefited, directly or indirectly, from the criminal proceeds. This is what the legislation contemplates, and a court may not, under the guise of the exercise of its discretion, disregard its provisions – harsh as they may be’³

[16] This Court further noted that the confiscation phase involves a three-stage post-conviction enquiry under s 18 of POCA:

‘Once a defendant’s unlawful activities yield proceeds of the kind envisaged in s 12, he or she has derived a benefit as contemplated in s 18(1)(a). This entitles a prosecutor to apply for a confiscation order, and triggers a three-stage enquiry by the court. First, the court must be satisfied that the defendant has in fact benefitted from the relevant criminal conduct; second, it must determine the value of the benefit that was obtained; and finally, the sum recoverable from the defendant must be established.’⁴

[17] Section 26(2) of POCA specifies the subject matter of a restraint order. It provides:

‘(2) A restraint order may be made –

- (a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

³ *National Director of Public Prosecution v Gardener and Another* [2011] ZASCA 25; 2011 (1) SACR 612 (SCA); 2011 (4) SA 102 (SCA) para 19.

⁴ *Ibid* para 17.

- (b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;
- (c) in respect of all property which, if it is transferred to such person after the making of the restraint order would be realisable property.’

[18] Section 14(1) of POCA defines ‘realisable property’ for purposes of Chapter 5 as follows:

‘(14) Realisable property

(1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely-

- (a) any property held by the defendant concerned; and
- (b) any property held by a person to whom the defendant has directly or indirectly made any affected gift.’

[19] The purpose of a restraint order is to preserve assets pending the final determination of criminal proceedings. If the legislation did not provide for the preservation of assets, the key purpose of Chapter 5 of POCA, namely, ‘to ensure that no person can benefit from his or her wrongdoing’,⁵ could not be achieved. Assets are preserved to cater for the possibility that the criminal proceedings may culminate in a confiscation order.

[20] Section 12(3) of POCA provides that a person will have benefitted from unlawful activities if he or she has received or retained any proceeds of unlawful activities. Therefore, what constitutes a ‘benefit’ is defined by reference to what constitutes ‘proceeds of unlawful activities’.

[21] It was held in *S v Shaik*,⁶ that a court should bear in mind that the definition of ‘proceeds of unlawful activities’ in POCA makes it possible to confiscate

⁵ *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC); 2008 (1) SACR 1 (CC) para 51.

⁶ *Ibid* para 69.

property that has not been directly acquired through the commission of crimes, but through related criminal activity. A court should also bear in mind that one of the objects of the broad definition of ‘proceeds of unlawful activities’ is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs. A court should have regard to the nature of the crimes and how closely these are connected to the purpose of the statute. The reason for this is that the larger the value of the confiscation order, the greater the deterrent effect of such an order.⁷

[22] Regarding the restraining of property in the hands of third parties, it was held in *National Director of Public Prosecutions v Phillips (Phillips)* that:

‘...It is significant that the Act does not refer to the ownership of realisable property. The concept of “holding” immovable property can occupy one or more of many semantic slots in a range through ownership, possession, occupation, and holding as a nominee ... The context is decisive. In the POCA, the primary concern of the Legislature is not the title, registered or otherwise. On the contrary, one major evil which the Legislature contemplates and sets out to neutralise is the concealment by criminals of their interest in the proceeds of crime. That suggests that “holding” of property should be given a meaning wide enough to further that end. That is, no doubt, why the concept and consequences of a “gift” have been extended, as is found in ss 14 and 16...’⁸

[23] The leading authority on when property is ‘held’ by a defendant is *Phillips* where Heher J explained the approach of POCA as follows:

‘...The respondents point out that the Act does not allow the seizure of assets owned by another entity unless it is an affected gift. Only misuse or abuse of the principle of corporate personality warrants piercing the veil ...

I do not agree with these submissions. The restraint order has been made in respect of all realisable property held by the first respondent. “Realisable property” is “property held by the person concerned” (s 14(1)(a)) and “any property held by a person to whom the defendant

⁷ Ibid para 71.

⁸ *National Director of Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 81.

has directly or indirectly made an affected gift” (s 14(1)(b)) other than property in respect of which a declaration of forfeiture is in force....”⁹

[24] When a person stands in this kind of relationship to the property in question, he or she will have, in the language of s 12(2)(a), ‘any interest in the property’ and will therefore ‘hold it’. The enquiry is a contextual one, which must take into account the totality of the case in issue. To find otherwise would frustrate the purpose of POCA. Whereas the confiscation order is determined at the end stage of criminal forfeiture proceedings, POCA makes provision for the grant of a restraint order as an interim measure.

Regarding disputes of fact in restraint applications

[25] As mentioned, the NDPP’s case is that the defendants will be prosecuted, at least in respect of the offences of corruption, money laundering and fraud. The purpose of a restraint order is to preserve assets pending the final determination of a criminal prosecution, to cater for the possibility that the defendants may be convicted at the conclusion of the criminal trial, and that a confiscation order may be made against them.

[26] Counsel for the NDPP correctly submitted that this Court has repeatedly held that a restraint order is only of interim operation and like interim interdicts and attachments orders pending trial, it has no definite or dispositive effect.¹⁰ A restraint merely preserves the status quo pending the final determination of the criminal proceedings against the defendant(s). It is thus for all intents and purposes an interdict *pendente lite*. In an application for a restraint order, the NDPP need only to make out a prima facie case for granting of such an order.

⁹ *Phillips* para 80-81.

¹⁰ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 18.

Her application is not defeated merely because her prima facie evidence is disputed.

[27] It is the NDPP's contention that the purpose of a restraint order would be wholly defeated if, once the NDPP has made out a prima facie case that a defendant 'holds' property through a respondent, a court was to decline to grant the restraint order merely because the respondent disputes this allegation. Most defendants will dispute that property which they formally own is 'held' on their behalf, as will the respondent who 'holds' it. It is undoubtedly for this reason that POCA provides that the confiscation enquiry under s 18 of POCA, which determines the benefit a defendant has obtained and the appropriate amount of any confiscation order, is to be undertaken by the court that has convicted the defendant(s) having heard all the evidence. The confiscation enquiry must also determine 'the values of all realisable property held by the defendant' as well as the value of an affected gift made by the defendant.¹¹ This is because a confiscation order may not exceed the value of the realisable property.¹²

[28] The clear legislative policy in the structure of Chapter 5 of POCA is that applications for restraint orders should not be waylaid by disputes of fact that are to be properly determined by the court at the conclusion of the criminal proceedings. This includes the enquiry into what realisable property is held by the relevant defendants or on their behalf. It is inappropriate for the appellants to demand a full-scale enquiry into the realisable property held by Mr Pillay and Mr Nyhonyha, and also a judicial finding on the merits of an issue that POCA reserves for the court which holds the confiscation enquiry at the conclusion of the criminal proceedings. Thus, the NDPP need to do no more than to establish

¹¹ POCA section 20 (1)(a) and (b).

¹² POCA section 18(2)(b).

a prima facie case that the respective appellants hold property on behalf of Mr Pillay and Mr Nyhonyha, respectively.

[29] The appellants, other than the subsidiaries, rely to a greater or lesser extent on the existence of Mr Pillay and Mr Nyhonyha's respective family trusts for the submission that their property is beyond the reach of the restraint order. The trustees of the family trusts say this is so because they are separate and distinct juristic entities. Ergold says this is so because its sole member is not Mr Pillay, but the Pillay Family Trust.

[30] This Court flagged the potential misuse of the trust form as a concern in *Land and Agriculture Bank v Parker and Others*.¹³ There Cameron JA, dealt with the challenge posed in recent times by family trusts designed to secure the interest and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder. He concluded that the 'essential' notion of trust law, namely, that enjoyment and control should be functionally separate, is frequently lacking.¹⁴

[31] In *National Director of Public Prosecutions v Van Staden and Others*,¹⁵ this Court confirmed a provisional restraint order in respect of assets which the defendant controlled through his family trust, companies and his family members, which were the formal owners, and found that they were realisable assets. Counsel for the NDPP correctly argued that it is not necessary in a matter such as this, where the question is whether the defendant 'holds' the property in terms of s 14(1) of POCA, to demonstrate that a notional corporate veil should be lifted, or to show that there has been an abuse. It is sufficient to show that the

¹³ *Land and Agriculture Bank v Parker and Others* 2005 (2) SA 77 (SCA).

¹⁴ *Ibid* para 25.

¹⁵ *National Director Public Prosecutions v Van Staden and Others* [2012] ZASCA 171; 2013 (1) SACR 531 (SCA) paras 27 and 28.

defendant is, in substance, the person who controls or enjoys the property. This conclusion also flows from POCA's wide and encompassing notion of a defendant having 'any interest' in the realisable property he holds.

The appellants' submissions

Regarding the Nyhonyha Family Trust

[32] Counsel for the Nyhonyha Family Trust submitted that the evidence does not establish that the trust holds assets on behalf of Mr Nyhonyha. He asserted that Mr Nyhonyha was but one of the four trustees of the family trust until his resignation on 29 October 2018, approximately a year before the Wright J order. The allegation that Mr Nyhonyha used the cash assets of the trust for his benefit was introduced by the NDPP for the first time in her replying affidavit. It was based on the information she requested from the South African Revenue Service (SARS) on 3 February 2020, approximately three months after the *ex parte* application was launched on her behalf. Thus, so it was argued, the full court erred in allowing the introduction of new facts by the NDPP without any explanation why such evidence was not contained in the founding affidavit.

[33] Counsel also argued that the full court's conclusion that the cash assets of the trust were being used consistently for the benefit of Mr Nyhonyha is not supported by the evidence. The NDPP persisted with her submission adopted in the full court based on loans allegedly advanced by the trust to various individuals, including Mr Nyhonyha, between 2011 and 2019. However, she could only point to loans advanced during 2014 to 2017, accounting for only four of the nine years during which the trust is alleged to have advanced loans to him.

[34] Counsel further argued that Mr Nyhonyha was not in exclusive control of the trust as there were three other independent trustees when loans were allegedly advanced to him. Mr Nyhonyha resigned as a trustee on 29 October 2018, eighteen months before the provisional restraint order. In the circumstances, the NDPP did not make out a case that Mr Nyhonyha had exclusive use or effective control over the assets of the trust, and the full court therefore erred in finding that the trust holds assets for Mr Nyhonyha.

[35] Regarding affidavits previously filed by Mr Nyhonyha and relied upon by the NDPP for the assertion that he is a shareholder in Regiments and owned and managed Regiments either directly or through the trust, counsel submitted that the quoted extracts were taken out of context by the full court. Mr Nyhonyha owns 15% shares in Regiments in his personal capacity and the Family Trust owns 20% shares in Regiments. Counsel submitted that those affidavits were deposed to by Mr Nyhonyha in his capacity as a Regiments director and as a trustee looking after the interests of the trust.

[36] Finally, the thrust of the Nyhonyha Family Trust's contention is that a defendant must have the exclusive use and effective and unilateral control over the property in question before he can be found to 'hold' the property. It argued that the NDPP has not advanced any facts supporting the full court's finding that it held property on behalf of Mr Nyhoyha within the meaning of s 14(1) of the POCA and the provisional restraint order against the trust should therefore not have been confirmed.

Regarding the Pillay Family Trust and Ergold

[37] The submissions by counsel for the Pillay Family Trust and Ergold were as follows. The trust was registered in 2003 and has always had at least two

trustees. Until 7 August 2019, the trust had three trustees, one of whom was an independent trustee, who later resigned. Mr Pillay and his brother Mr Indheran Pillay remained the only two trustees. The trust owns 100% shareholding in Ergold and 33% shareholding in Regiments Capital. The trust's purchase of Mr Pillay's shares in Regiments Capital was funded by a loan from Mr Pillay, which was repaid in full. The trust also purchased Mr Pillay's shareholding in Ergold, using a loan advanced by Mr Pillay, which has also been repaid over time.

[38] Mr Pillay, his wife and their descendants are beneficiaries of the trust. Mr Pillay did not participate in the day-to-day management of the trust, nor did he enjoy any type of majority or veto vote when it came to making decisions for the trust.

[39] According to this argument, Ergold is a property-owning entity in which Mr Pillay acquired the controlling interest around September 1997. Ergold continued to run a rental portfolio for more than 20 years and evolved to include property development, property trading, and share trading. It built its assets over time and these acquisitions were purchased using its own resources and by way of loans from Mr Pillay, the Pillay Family Trust and Standard Bank. It did not receive any donations from Mr Pillay for these acquisitions.

[40] Counsel for the Pillay Family Trust and Ergold submitted that neither appellant received any realisable property as defined in POCA from Mr Pillay or any of the defendants, nor do they possess any realisable property as defined in POCA. It is contended that the trust is not a defendant as contemplated in POCA, nor is it alleged that the trust received a gift from a defendant, namely Mr Pillay. It was argued that the only basis on which the assets of the trust, which are its shareholding in Ergold and Regiments, can be made subject to the

restraint, is if the NDPP could show that, despite the existence of the trust, Mr Pillay in fact holds its assets as contemplated in POCA.

[41] It was further argued that the Pillay Family Trust is a discretionary trust of which a beneficiary may only claim a distribution to the extent that the trustees have exercised their discretion in favour of that beneficiary.¹⁶ Mr Pillay was therefore not guaranteed anything from the trust and there is no evidence or allegation that the income of the trust was used to benefit him exclusively or disproportionately in relation to the other beneficiaries. It therefore cannot be said that the trust's assets and income were administered for the sole benefit of Mr Pillay.

[42] The submissions made concerning Ergold were as follows. Other than the fact that the Pillay Family Trust is the sole member of Ergold, a factual basis was never laid for the restraint of Ergold's assets. Ergold is not a defendant as defined by POCA, or an entity that received a gift from Mr Pillay. There is no evidence that Ergold benefitted or was enriched by proceeds of crime. It is a property-owning entity and was registered on 20 May 1997, long before any of the alleged offences occurred. The business activities of Ergold were completely distinct from the business activities of Regiments or Mr Pillay, and Ergold did not receive any donations from Mr Pillay or any of the defendants.

[43] Counsel for Ergold argued that the full court misdirected itself when it restrained the assets of the appellants. On the full court's approach, every property held by a third party in which a defendant can be said to have an interest would be susceptible to restraint by virtue of that fact only. That approach, it was argued, is inconsistent with the import and purpose of POCA.

¹⁶ *Commissioner for Inland Revenue and Others v Sive's Estate* 1955 (1) SA 249 (A) at 258 and 266.

Regarding Ash Brook, Coral Lagoon and Kgoro

[44] Counsel for Ash Brook, Coral Lagoon and Kgoro (the subsidiaries) submitted that the full court confirmed the restraint order which included, inter alia, all the assets of the subsidiaries, without catering for the third parties who owned shares in Ash Brook and Kgoro. At the time the provisional restraint order was granted, Ash Brook had shareholders unrelated to the defendants. The minority shareholders, Lemoshanang Investments (Pty) Ltd and Rorisang Basadi Investment Holdings (Pty) Ltd held approximately 18% of Ash Brook shares. Regiments thus held approximately 60% of the issued share capital of Ash Brook. Regiments held approximately 84% shares in Kgoro, while various minority shareholders held approximately 16%.

[45] Counsel submitted further that the effect of a finding that a defendant 'holds' realisable property, formally owned by a third party, is that the property is, in all relevant respects, considered to be the property of the defendant and not of the third party. The property may be restrained until confiscation proceedings in respect of the defendants are completed, and the value of the restrained property may be used to satisfy a confiscation order. For these reasons it was submitted that the meaning of 'holding' realisable property should not be extended any further than what was accorded to it in *Phillips*, despite textual indications in the POCA to the contrary. The defendants, whether through the family trusts or otherwise, were not the sole shareholders in Ash Brook, Coral Lagoon and Kgoro.

[46] It was further argued that the NDPP has not shown that, first, the defendants, had the power to dispose of the Capitec shares or the Sandown property. Second, that the defendants were 'the real' beneficiaries of the income

from that property, and third, that the defendants treated the subsidiaries' property as their own. According to this argument, the full court therefore erred in finding that shareholding in an entity equated to having a proportional interest in the underlying property of a subsidiary of that entity, several layers removed, and failing to pay attention to other minority shareholders. The full court's test therefore results in an irrational and arbitrary application of POCA, which in turn results in an arbitrary deprivation of property, contrary to s 25(1) of the Constitution.

[47] According to the subsidiaries, the effect of the final winding-up of Regiments Capital is that the court had no power to make a restraint order against its assets as those assets are dealt with by the liquidators of Regiments Capital. For that reason, the full court correctly did not confirm the restraint order as against Regiments Capital. The subsidiaries contend that the full court failed to consider the effect of the liquidation of Regiments Capital on the test for 'holding' property as set out in *Phillips*.¹⁷

[48] Finally, counsel for the subsidiaries argued that the full court erred in failing to recognise that the effect of the liquidation was to sever any link between the defendants and the appellants which could establish the defendants' power of disposal, control, use and enjoyment over the assets of the appellants. It thus bypassed the *Phillips* test. The liquidators will control Regiment's 60% shareholding in Ash Brook and its 84% shareholding in Kgoro. By including the subsidiary companies in the restraint order, and concomitantly excluding the

¹⁷ In this regard the full court held:

'However, what are the assets of these subsidiaries? They do not fall under the control of the liquidators and there is no impediment to confirming the restraint order in respect of those assets. The NDPP submitted that the assets of the subsidiaries could however, fall under the curator. This because, although those assets are not owned by Regiments Capital (or for that matter the Regiments Capital shareholders), they are 'held' by the ultimate shareholders as envisaged in s 14(1)(a) of POCA, and therefore constitute realisable property vis-à-vis Dr Wood, Mr Nyhonyha and Mr Pillay. This seems to us to be consistent with the broad definition of realisable property, and its interpretation in jurisprudence. The assets of the subsidiaries ought properly to be placed under restraint'.

income or proceeds on disposal of their assets from the effects of the *concursum creditorum*, it was argued that the full court preferred the NDPP, a non-creditor of the subsidiaries, above the creditors of Regiments Capital and that this negates the purpose of s 36(2) of POCA. In addition, for policy reasons, the full court should have held that the necessary implication of s 36 is to exclude from a restraint order the subsidiary companies of a company liquidated before the restraint order was granted.

The NDPP's submissions

Regarding the Nyhonyha Family Trust

[49] The NDPP contended first, that the Nyhonyha Family Trust's cash assets have consistently been used by Mr Nyhonyha for his personal benefit. Second, Mr Nyhonyha and Mr Pillay previously filed affidavits on behalf of Regiments stating that they are shareholders in Regiments, directly or through their family trusts and confirmed the use of the family trusts to hold their respective shareholdings in Regiments Capital on their behalf. And third, Mr Nyhonyha stated under oath that Regiments was owned, managed and funded by himself, Mr Pillay and Mr Wood, either directly or through their family trusts.

[50] In her founding papers, the NDPP put up several affidavits previously filed on behalf of Regiments Capital by Mr Nyhonyha and Mr Pillay, which referred to the use of the respective family trusts to 'hold' their respective shareholdings in Regiments Capital on their behalf. The NDPP referred in particular to:

(a) Mr Nyhonyha's answering affidavit on behalf of the Regiments Companies in an application launched by Dr Wood, in which he said that after the initial shareholders in Regiments Capital had been bought out, he, Dr Wood and Mr

Pillay ‘were the only remaining shareholders, either directly or through our family trusts.’

- (b) In an affidavit filed in an application for the removal of Dr Wood as a delinquent director, Mr Nyhonyha said that he, Mr Pillay and Dr Wood had managed and owned Regiments Capital through their respective trusts and ‘[s]ince then, Regiments has been owned, managed and funded by the three of them’.
- (c) In an answering affidavit in opposition to an Anton Pillar application brought by the Fund, Mr Pillay said that he and Mr Nyhonyha (and not the trusts) had caused Dr Woods to be removed as a director at a shareholders’ meeting.

[51] The NDPP’s argument is that neither Mr Pillay nor Mr Nyhonyha has denied or attempted to explain these statements, beyond Mr Nyhonyha’s complaint that they have been taken out of context. The NDPP submits that, contrary to their bare disavowals, these affidavits are borne out by the facts.

[52] The NDPP submitted further that, although Mr Nyhonyha alleged that he resigned as a trustee on 29 October 2018 and Mrs Nyhonyha confirmed that she is a trustee, neither of them disclosed if there are other trustees and who they are. The NDPP argued that it must accordingly be assumed that Mrs Nyhonyha is the sole trustee of the Nyhonyha Family Trust.

[53] According to the NDPP, Mr Nyhonyha’s assertion that the trust is there to provide for the Nyhonyha family has been shown to be untrue through the trust’s financial statements for the 2015 and 2017 financial years. Those statements show:

- (a) Substantial interest-free loans to unidentified persons totalling some R50 million.

(b) During the 2015, 2016 and 2017 financial years all but a small amount thereof was lent to Mr Nyhonyha.

(c) Apart from the trust's shares in Regiments Capital, almost the entire assets of the trust had been disbursed, interest-free, to Mr Nyhonyha.

[54] Mr Nyhonyha has thus benefitted, not only from the use of the capital sums lent to him, but also because he was exempted from paying any interest on those substantial loans. In addition, no repayment date was specified. The NDPP argued that it is thus undisputable that the trust assets have and are being used for Mr Nyhonyha's benefit. The inference is therefore ineluctable that the trust holds its assets on his behalf.

Regarding the Pillay Family Trust

[55] Regarding the assets of the Pillay Family Trust, the NDPP contended that:

(a) The two trustees, namely Mr Indheran Pillay and Mr Tewodros Gebreselasie are not independent trustees. Mr Indheran Pillay is Mr Pillay's brother. Both he and Mr Gebreselasie have represented Regiments in a related corrupt locomotives project and received payments from Regiments.

(b) Ergold's company documents show that Mr Pillay has been involved in the running of the trust, since in those documents he is listed as the representative of the Pillay Family Trust.

(c) Ergold's registered address is Mr Pillay's home address.

(d) Mr Indheran Pillay and Mr Gebreselasie appointed Mr Pillay as their agent for the purposes of dealing with the trust's member's interest in Ergold.

(e) Mr Indheran Pillay has been unable to provide the financial statements reflecting that loans had been repaid to Mr Pillay.

(f) Mr Pillay is a beneficiary of the trust along with his wife and descendants. The financial statements show that some R1.75 million of the trust assets had

been distributed to unidentified beneficiaries and some R591 405 was disbursed in respect of school fees.

- (g) The financial statements of the trust for the 2019 financial year show that it made an interest-free long-term loan to Ergold with no repayment date. In 2019, the outstanding loan amount was some R103 million.

[56] The NDPP argued that the evidence thus established that Mr Pillay had acquired the shareholding in Regiments Capital through the trust and the latter holds those shares on his behalf. He and his family have enjoyed the fruits of that shareholding. It is also undisputable that Mr Pillay is in control of Ergold through the trust. There can accordingly be little doubt that the trust holds property on his behalf as contemplated in terms of s 14(1) of POCA. This includes interests in the subsidiaries, namely Ash Brook, Coral Lagoon and Kgoro.

[57] The NDPP argued that, save for the implications of the liquidation of Regiments Capital, Mr Pillay and Mr Nyhonyha have always been in control of Ash Brook and Coral Lagoon and had caused their assets to be distributed to entities under their control. It is common cause that Regiments Capital owns 84.36% of its share capital and its assets have always been regarded as part of the Regiments Group's primary assets. Insofar as the interests of minority shareholders are concerned, the NDPP submitted that they are recognised and protected by s 30(3) of POCA.¹⁸

¹⁸ Section 30(3) reads as follows: 'A High Court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property. (4) If the court referred to in subsection (2) is satisfied that a person – (a) is likely to be directly affected by the confiscation order: or (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 18(1) which was committed by 10 the defendant, the court may allow that person to make representations in connection with the realisation of that property.'

Discussion

[58] The appellants each put forward a narrow and decontextualised version of what they describe as the ‘*Phillips* test’, which they say limits the property which a defendant can be said to ‘hold’ indirectly. The Nyhonyha Family Trust says that a defendant must have the exclusive use and effective control over the property in question before he can be found to ‘hold’ the property. Ergold and the Pillay Family Trust say that before property can be said to be ‘held’ for the purposes of s 14(1)(a), the defendant must narrowly meet what they say is the test communicated in *Phillips*. They effectively treat the circumstances in *Phillips* as a prescriptive closed list. The subsidiaries say that what *Phillips* requires is that the defendant must meet at least one of the four requirements: he or she must be the sole shareholder or member of the respondent; he or she must have provided the funds for the acquisition of the property; he or she must have control over the assets and treat them as their own; or the defendant must have used the trust form as a substitute for his or her own estate.

[59] Heher J in *Phillips* explained the approach of POCA as follows:

‘Without attempting to place strict limits on the expression, I have no doubt that when a person exercises *control* over the disposal of property... or has the exclusive use of or control over the property... and is the *real beneficiary* (albeit through shareholding) of the income from those properties or any proceeds of disposal of them, then he “holds” such properties within the meaning of s 14(1) of the Act and it is unnecessary to invoke the doctrine of “lifting the veil”....’¹⁹ (Emphasis added.)

[60] I agree with the NDPP’s submissions that *Phillips* does not support the approach of the appellants. The evidence does indeed make out a prima facie case that Mr Nyhonyha and Mr Pillay have control over the assets of each of the

¹⁹ *Phillips* para 81.

appellants; that they are the real beneficiaries of those assets and the income generated thereby, and that they have treated them as their own.

[61] The Pillay Family Trust and Ergold, as well as the subsidiaries, further complained of the full court's use of the phrase 'any' to denote the kind of interest which a defendant has in the realisable property and submitted that this amounts to a misdirection because it is not what *Phillips* required. There is no merit in this submission as these are the very words which s 12(2)(a) of POCA employs to determine when a person holds property.

[62] The subsidiaries also contended that s 15 of POCA assists in determining what kind of interest will suffice before a defendant can be said to 'hold' property. They contended that it must be a proprietary interest, but do not state what consequences flow from this. The definition of 'property' in POCA is expansive and includes 'any rights, privileges, claims and securities, and any interest therein and any proceeds thereof'. It is not limited to ownership and includes other forms of possessing, holding, enjoying and using. Counsel for the NDPP correctly submitted that this is the kind of interest which Mr Pillay and Mr Nyhonyha have in the appellants' property.

[63] Mrs Nyhonyha argued that the Nyhonyha Family Trust has never been used as Mr Nyhonyha's alter ego and has been established and managed in the interest of the beneficiaries. The trust is there to provide for the Nyhonyha family. The NDPP however demonstrated through the trust's income tax returns from the years 2011 to 2019, and its financial statements for the 2015 and the 2017 financial years, that the trust holds its assets for Mr Nyhonyha. Each year since 2015, including the 2019 financial year, the trust's income tax returns record outstanding interest-free loans to Mr Nyhonyha exceeding R50 million.

In 2015, 2016 and 2017 financial years, the trust's financial statements show that all but R16 903 of the trust's assets was loaned to Mr Nyhonyha.

[64] The result is that since at least 2011, virtually all the assets of the Nyhonyha Family Trust, save for the shares in Regiments Capital, have been loaned to Mr Nyhonyha indefinitely and interest-free. For practical purposes, Mr Nyhonyha has, for eight years, been the sole beneficiary of the trust. Evidence therefore shows that the Nyhonyha Family Trust holds its assets on behalf of Mr Nyhonyha. The NDPP's contention that it is therefore not necessary to pierce the trust's corporate veil in those circumstances is well founded.

[65] Mr Pillay denied that he is in control of the assets of the Pillay Family Trust and states that he does not involve himself in the day to day running of the trust. However, the evidence shows that in 2012, the trustees appointed Mr Pillay as the trust's agent for the purpose of holding and dealing with the trust's interest in Ergold, and he is listed as the representative of the trust in Ergold. Mr Pillay's brother Mr Indheran Pillay, who is not an independent trustee, stated under oath that Mr Pillay had placed funds in the trust by way of loans that have been repaid over time and that the repayments are 'reflected in the financial statements'. However, upon request by the NDPP for financial statements in terms of rule 35(12) of the Uniform Rules of Court, the trust was only able to provide financial statements dated after Mr Indheran Pillay's affidavit was deposed to. The trust's attorneys say there are no other financial statements.

[66] The statement by Mr Indheran Pillay regarding the fact that the financial statements reflect the repayment of loans over time by Mr Pillay must in the circumstances be disregarded. The most recent financial statements for the Pillay Family Trust show that in 2019 the trust distributed R1.72 million to 'beneficiaries' who are not identified, and R591 405 in respect of school fees.

[67] Mr Pillay acquired the shareholding of Regiments Capital shares through the trust, and the trust holds those shares on his behalf. He controls the Pillay Family Trust's shareholding in Regiments, and has enjoyed the fruits of that shareholding, both personally and by providing for his family.

[68] The sole member of Ergold is the Pillay Family Trust, represented by Mr Pillay. Ergold contended that the NDPP did not make out a case for the restraint of Ergold's property on the basis that it was not under the control of Mr Pillay. This even though the Pillay Family Trust's financial statements record an interest-free long-term loan to Ergold, with no repayment date. The loan stood at nearly R114 million in 2018 and nearly R103 million in 2019. Mr Pillay plainly holds his assets through Ergold (as well as the Pillay Family Trust) as contemplated by POCA.

[69] I now come to the subsidiaries which stand on a somewhat different footing, not least because their formal ownership structure has shifted significantly over the years that this matter has been pending. Save for the potential implications of the liquidation of Regiments Capital, Mr Pillay and Mr Nyhonyha have been in control of Ash Brook and Coral Lagoon at all relevant times and caused its assets to be distributed to entities under their control. In regard to Kgoro, it is common cause that Regiments Capital owns 84.36% of its share capital, and its assets have been regarded as part of Regiments Group's 'primary assets'. Kgoro, too, holds assets on behalf of Mr Pillay and Mr Nyhonyha.

[70] As for Kgoro's minority shareholders, their rights are recognised and protected by s 30(3) of POCA. The court which is ultimately seized with an application for the realisation of the defendants' property, including that of

Kgoro, must afford all persons with an interest in the property a hearing before exercising its powers, and may recognise their interest for this purpose.

[71] In essence, Mr Pillay and Mr Nyhonyha's argument is that the intercession of their family trusts places their shareholding in Regiments beyond the reach of the court and that an order restraining the assets of the trust is not permissible. Sophisticated criminals will rarely permit the benefits they obtain to be linked to them directly or hold their realisable assets in their own names. POCA recognises this and casts its net widely to answer the two questions. Did the defendants benefit? And do the defendants hold realisable property? If the legislation did not provide for the preservation of assets, the key purpose of Chapter 5 of POCA to 'ensure that no person can benefit from his or her wrongdoing' could not be achieved.²⁰

[72] The full court's findings on the principles set out in *Phillips* and the proper interpretation of s 14(1)(a), read with s 12(2)(a) of POCA, that the appellants' property is held on behalf of Mr Nyhonyha and Mr Pillay, are well founded. The NDPP has met the case she is required to make, namely, prima facie showing that the appellants' assets are held by Mr Nyhonyha and Mr Pillay as envisaged by s 14(1) of POCA.

Order

[73] In the result, the following order is made:

In case number 972/2022

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

In case number 973/2022

²⁰ *S v Shaik* para 51.

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

In case number 974/20222

The appeal is dismissed with costs, such costs to include those of two counsel where so employed.

D S MOLEFE
JUDGE OF APPEAL

Appearances

Case no 972/2022

For appellant: D Dorfling SC (with him G Ngcangisa)

Instructed by A B Scarrott Attorneys, Sandton
Moroka Attorneys, Bloemfontein

For the respondent G M Budlender SC (with him K Saller)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein.

Case no 973/2022

For 1st and 2nd appellants: M du P van der Nest SC (with him AC
Mckenzie)Instructed by A B Scarrott Attorneys, Sandton
Moroka Attorneys, Bloemfontein

For the respondent G M Budlender SC (with him K Saller)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein.

Case no 974/2022

For 1st, 2nd and 3rd appellants: D Smit (with him T Scott)Instructed by Sewgoolam Incorporated, Johannesburg
McIntyre Van der Post, Bloemfontein

For the respondent G M Budlender SC (with him K Saller)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein.