IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE CASE NO.: 25395/04
In the matter between: DATE: 10/4/2006

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

KEVIN NAIDOO 1st Defendant
SELVARANI GOVENDER 2nd Defendant
VIJAYANRAKUMAR NAIDOO 3rd Defendant
RAJAN NAIDOO 4th Defendant
EBRAHIM MAHAMED HOOSAN 5th Defendant
HAWA HOOSAN 6th Defendant
TASNEEM BISMILLA 7th Defendant
ZIYAAD MOOSA BISMILLA 8th Defendant
TERENCE RHYS JAMES 9th Defendant
ANDRE JOHAN WEPENER 10th Defendant
NADINE WEPENER 11th Defendant
SEAN STANFORD 12th Defendant
BRONWYN STANFORD 13th Defendant
WEPELEC TRADING CC 14th Defendant
REGAN MARK CARTER 15th Defendant
UTILITY RESOURCES CC 16th Defendant
MICHAEL RICHARD LISTER GLOVER 17th Defendant
DAVID BARRY FINK 18th Defendant
HENDRICK LOURENS JACOB BOEKHOUD 19th Defendant
JUST REFINERS AND TECHNOLOGIES LTD UK 20th Defendant
JUST REFINERS AND TECHNOLOGIES SA (PTY) LTD 21st Defendant
AEROTRADE NO. 62 (PTY) LTD 22nd Defendant
SUBITHRY JACOBA NAIDOO 1st Respondent
DOLLY NAIDOO 2nd Respondent
ZAHEEDA HOOSAN 3rd Respondent
MOHAMED EBRAHIM HOOSAN 4th Respondent
HILLARY YEAMAN JAMES 5th Respondent

ELIZABETH HERMINE CARTER	6th Respondent
NOCOLA DAGMAR GLOVER	7th Respondent
BEVERLY GALE FINK	8th Respondent
BEVERLY YEAMAN BOEKHOUD	9th Respondent
SHAELIN RESOURCES CC	10th Respondent
JUSTSTAT AND PRINTING CC	11th Respondent
TRADE PROPERTY VENTURES NO 9 CC	12th Respondent
ERF TWO NINE SEVEN PAGEVIEW CC	13th Respondent
ARM SYSTEM INVESTMENT CC	14th Respondent
STANMET METAL PROCESSORS CC	15th Respondent
PTN 55 OF ERF 129 ORIEL CC	16th Respondent
STAND 79 BASSONIA CC	17th Respondent
LETAMO LA KGOTSO PROPERTIES CC	18th Respondent
MUTHALL MOTORS CC	19th Respondent
FAMILY CASH AND CARRY CC	20th Respondent
MIDLAND LIVESTOCK SALES CC	21st Respondent
VIJRAND CC	22nd Respondent
THE TRUSTEE(S) OF THE BIG JOHN TRUST NO (in his/her/their capacity as trustees of the Big John Trust)	23rd Respondent

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J U D G M E N T

RABIE J:

This is the extended return day of a rule *nisi* granted by this Court on 1 October 2004 in terms of section 26(3)(a) of the Prevention of Organised Crime Act, 121 of 1998 (as amended) (hereinafter "the Act"). This provisional restraint order was granted *ex parte*

and operated with immediate effect. The order was lengthy and contained detailed provisions which are not necessary to repeat at this point. Twenty two defendants were cited as persons or entities who stood to be prosecuted and another twenty three respondents were cited as persons or entities who allegedly hold an interest in or are in possession of realisable property that the applicant sought to restrain and who may therefore be affected by the restraint order sought. The defendants and the respondents were, in terms of the provisional order, *inter alia*, prohibited from disposing or dealing in any manner with any of the realisable property held or controlled by them and two *curatores bonis* were appointed to take possession of all such property pending the finalization of an application for a confiscation order in terms of section 18 of the Act.

The Parties Before the Court:

The founding papers filed by the applicant comprise 500 pages. Certain of the defendants and respondents filed answering papers and some filed substantive applications. Some did not file answering papers. In response the applicant filed a so-called consolidated reply in respect of some defendants and respondents and in respect of other parties the applicant filed additional replying papers relating more particularly to such parties. The applicant stressed, however, that there is in reality one application before the court and that all the documentation should be read in conjunction. The papers mentioned thus far comprise almost 6 000 pages. Added thereto are two separate applications. The first is the so-called Twoline Trading 87 (Pty)Ltd application which had its origin in the Witwatersrand

Local Division and the so-called Govender application. Both these applications relate to the issues in question and were placed before this court for adjudication.

The Papers Before the Court:

For practical purposes and reasons of convenience the applicant divided the papers before the Court by grouping certain interest groups together. The founding papers were contained in a bundle marked "Main Application". The 1st, 2nd and 3rd defendants were grouped together as group C. This group filed an answering affidavit and also launched a constitutional attack on the provisions of the Act. The 1st defendant did not, however, file an answering affidavit on the merits of the application. The answering papers of the 4th defendant was regarded

as the "A(b) Application". The answering papers of the 5th to the 8th defendants were grouped together as the "E Application". The 9th defendant's papers was contained in a bundle marked "H Application". The applicant replied to the so-called A(b), E and H applications in a consolidated reply contained in three files paginated from page 1 to 1260. The 10th to the 14th defendants did not file answering papers. The answering papers of the 15th and the 16th defendants and a reply thereto were contained in a bundle marked "D Application". The answering papers of the 17th and 18th defendants were contained in a bundle marked "B Application". The answering papers of the 19th to 22nd defendants and a reply thereto were contained in a bundle marked "F Application". The 2nd respondent and certain other persons joined in a substantive application in

anticipation of the return day in which application, *inter alia*, the release of certain restrained property was sought. This application and the answer and reply thereto was contained in a bundle referred to as the "A Application".

Orders by Agreement:

During the course of the two week-long hearing of this application some of the defendants and respondents reached settlement agreements with the applicant which settlement agreements were made orders of court. I shall refer to them in the order that they were made. In terms of the order marked "X1", the rule *nisi* was confirmed against 10th to 14th defendant and 15th respondent. In terms of the order marked "X2", an order was made in respect of 1st, 2nd, 3rd, 5th, 6th, 7th and 8th defendant and 1st, 3rd, 4th, 10th 13th, 17th, 19th 20th, 21st and 22nd respondent. The

order, *inter alia*, confirmed the rule *nisi* in certain specific terms. In terms of the order marked "X3", the rule *nisi* was confirmed against 17th and 18th defendant and 8th respondent subject to certain variations. In terms of the order marked "X4", the rule *nisi* was extended against 15th and 16th defendant and 6th respondent subject to the said defendants and respondent complying with certain provisions of the order. In terms of the order marked "X5", the rule *nisi* was confirmed against 4th defendant and 2nd, 18th and 23rd respondent and certain additional orders were made. The order marked "X6" related to the aforesaid "A Application" launched by the 2nd Respondent and certain other persons and entities. The order, *inter alia*, declared certain assets to be subject to the restraint order and others not. The order marked "X7", related to the

aforesaid application by Twoline Trading 87 (Pty)Ltd. The order declared the property of this company to be subject to the restraint order in terms of the rule *nisi* and certain additional orders were made. The order marked "X8" also related to the aforesaid "A Application" launched by the 2nd Respondent and certain other persons and entities. The orders marked "X9" and "X10" related to the Govender Application and settled that application.

The Remaining Parties:

The effect of the aforesaid orders was that the only remaining parties in respect of which this court had to adjudicate the application, were the 9th defendant (referred to in the H Application), the 19th to the 22nd defendants (referred to in the F Application), and the 5th, 9th, 11th, 12th, 14th and 16th respondents. These respondents are related to the aforesaid defendants.

Although this judgment would, therefore, in reality only pertain to the aforesaid parties, the totality of the documentation filed in respect of all the parties had to be considered for purposes thereof.

The Act:

According to its preamble, the Act aims, *inter alia*, to introduce measures to combat organized crime, money laundering and criminal gang activities; to provide for the recovery of the proceeds of unlawful activity; and for the civil forfeiture of assets that are the proceeds of unlawful activity. A further aim of the Act is that no person convicted of an offence should benefit from the fruits of that or any related offence and, in order to achieve that aim, the Act provides for the restraint, seizure and confiscation of property which forms the benefits derived from such an offence. In order to achieve this purpose at the

conviction stage, the Act provides for a civil remedy for the seizure and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.

In summarising the salient features of the Act, reference should first be made to sec 18 which is designed to enable a trial court to deprive a convicted person of the proceeds of crime. The section permits a court which has convicted a person of an offence, to make a confiscation order which has the effect of a civil judgment. The order made against a convicted person is for the payment to the State of any amount the court considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness

and fairness of that order. The amount relates to the benefit a person has derived from illegal activities and in terms of sec 12(3) a person has "benefitted from unlawful activities" if "he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities". The amount for which a confiscation order may be made may not exceed the lesser of the value of the defendant's proceeds of the offences or related criminal activities referred to in sec 18(1) or the net value of the sum of the defendant's property and certain defined gifts made by the defendant. Section 19(1) defines the "value of a defendant's proceeds of unlawful activities" to be "the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or

after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person".

Part 3 of Chapter 5 of the Act deals with "restraint orders" which are designed to ensure that property is preserved so that it can be realised in satisfaction of a confiscation order which the trial court may make after conviction of the accused. Section 26(1) authorises the National Director of Public Prosecutions to apply to a High Court on an *ex parte* basis for an order prohibiting any person from dealing in any manner with any property to which the order relates. Part 3 of Chapter 5 also confers wide powers upon the court as to the terms of any restraint order and, *inter alia*, provide for the appointment of a *curator bonis* to take charge of the

property that has been placed under restraint, the seizure of property by the police and restrictions to be placed on the encumbering or transferring of immovable property. The main feature of these provisions is that the Court may make a provisional restraint order having immediate effect and simultaneously grant a rule *nisi* calling upon the defendant to show cause on a return day why the order should not be made final. In this regard sec 26 provides as follows:

"26 Restraint orders:-

(1) The National Director may by way of an ex parte application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(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;
  (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.

(3) (a) A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.
  (b) If the defendant has been absent during a period of 21 days from his or her usual place of residence and from his or her business, if any, within the Republic, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the Gazette, or may direct some other mode of service."

Section 25 of the Act provides for the circumstances in which a restraint order may be made. The relevant portions of section 25 reads as follows:

"25 Cases in which restraint orders may be made:-
(1) A High Court may exercise the powers conferred on it by section 26 (1)-
(a) when-
(i) a prosecution for an offence has been instituted against the defendant concerned;
(ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
(iii) the proceedings against that defendant have not been concluded; or

(b) when-
(i) that court is satisfied that a person is to be charged with an offence; and
(ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person."

The Approach on the Return Day:

This Court must, on the return date of the rule *nisi*, consider whether the rule should be confirmed or not. In doing so this Court rehears the matter and must be satisfied that the defendants are to be charged (insofar as it has not been done) and that there are reasonable grounds for believing that a confiscation order may be made against them (Sec 25(1)(a)(ii) and Sec 25(1)(b)(ii)). In National Director of Public Prosecutions v Basson 2002 (1) SA 419

(SCA) on p 428 paragraph [19] the Honourable Nugent AJA, as he then was, said the following in this regard:

> "[19] Section 25(1) of the Act does not permit a court to grant a restraint order upon nothing more than a summary of the allegations made against the defendant concerned and an expression of opinion by members of the appellant's staff that a confiscation order will be granted (which is all that was before the Court in the present case). The section requires that it should appear to the court itself, not merely to the appellant or his staff, that there are 'reasonable grounds' for such a belief, which requires at least that the nature and tenor of the available evidence needs to be disclosed. Precisely what evidence is required, and the form that it should take, is not necessary to decide in the present case, because the punitive costs order was in any event justified on other grounds."

In National Director of Public Prosecutions v Kyriacou 2003 (2) SACR 524 (SCA), the Honourable Mlambo AJA, who wrote the majority judgment of the Court, said the following at p 529 C:

> "[9] Furthermore, approaching Van Wyk's disputed evidence relating to the further alleged criminal activity of the respondent in accordance with the principles set out in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) and Plascon- Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A), the learned Judge concluded that the order sought by the appellant could not be granted 'if the truth cannot be established from the papers'. He went on to say that the 'discretion to grant a restraint order is to be sparingly exercised and then only in the clearest of cases and where the considerations in favour substantially outweigh the considerations against', relying in this regard on what was said in National Director of Public Prosecutions v Mcasa and Another 2000 (1) SACR 263 (Tk) at 275e - f.
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> [10] In my view, the learned Judge's approach to the matter was incorrect as was the Court's approach in Mcasa's case. Section 25(1)(a) confers a discretion upon a court to make a restraint order if, inter alia, 'there are reasonable grounds for believing that a confiscation order may be made. . .'. While a mere assertion to that effect by the appellant will not suffice (National Director of Public Prosecutions v Basson 2001 (2) SACR 712 (SCA) (2002 (1) SA 419) para [19] at 428B - C (SA)), on the other hand the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order."

In National Director of Public Prosecutions v Rautenbach 2005(4)SA 603 (SCA) at 613 H from paragraph [25], the Honourable Nugent JA stated the following:

> "[25] A Court from which such an order is sought is called upon to assess what might occur in the future. Where it is 'satisfied that a person is to be charged with an offence' and that there are 'reasonable grounds for believing that a confiscation order may be made against such person' (s 25(1)) it has a discretion to make a restraint order.
> [26] The Court *a quo* approached the matter as follows:
> 'The Act requires that it must be shown that "grounds" exist which grounds appear to a court to be of such a nature that they would support a future confiscation order. This means that, as a first requirement, the applicant has to prove the existence of such "grounds". That is a factual question and according to s 13(5) of the Act, the onus of proving such facts must be discharged by the applicant on a balance of probabilities.'
> [27] In my view, that is not correct. It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assesment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (National Director of Pblic Prosecutions v Basson 2002 (1) SA 419 (SCA) (2001 (2) SACR 712 in para [19]) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true."

Consequently the dual process proposed by the court *a quo* in the Rautenbach matter namely to first establish on a balance of probabilities the existence or otherwise of "grounds", and thereafter, secondly, to ask the question whether such grounds as have been found to exist, are such that they might

reasonably support a conviction and a consequent confiscation order, has been found by the Supreme Court of Appeal to be the wrong approach. The correct approach would seem to be, in summary, to, firstly, rule out evidence which is manifestly false and unreliable and, secondly, to decide whether there remains evidence that might reasonably be believed and which evidence might reasonably support a conviction and a consequent confiscation order. The court does not decide upon the veracity of the evidence. Furthermore, in order to make the assessment as to whether the evidence might reasonably support a conviction and a consequent confiscation order, the court must be appraised of at least the nature and tenor of the available evidence (although all the evidence need not have been placed before it) and cannot rely merely upon the

appellant's opinion in regard thereto.

Background of the Present Application:

During 1999 representatives of one of South Africa's largest Platinum mines approached the Directorate of Special Operations to investigate the theft of Platinum from the mines. Earlier operations in this regard had not been particularly successful as only low-level thieves and smugglers could be brought to justice. This new investigation, later named "Project Yield", was intended to be of a different nature. The principal objective was to target syndicates and/or individuals operating as national buyers and exporters of illicit platinum group metals ("PGM") from South Africa. The project was planned as a long-term investigation, aimed at securing evidence to support a successful prosecution of identified suspects involved in the illicit PGM market.

The platinum group metals consist of Platinum, Palladium, Iridium, Tuthenium and Rhodium and are all precious metals. Gold is also present in mined ores. Platinum has a value of more than double of that of gold. The legal trading in unwrought precious metals in South Africa is regulated by the Mining Rights Act, 1967. That Act was, except for certain sections, repealed by the Minerals Act, 1991 which was in turn replaced, also with some exceptions, by the Mineral and Petroleum Resources Development Act 28 of 2002 which came into operation on 1 May 2004. The provisions of the Mining Rights Act which are still operative relate, *inter alia*, to offences relating to the dealing in unwrought precious metal. According to the applicable legislation, and in this regard I refer to the Mining Rights Act, nobody is

allowed to trade in or possess any unwrought precious metal otherwise than as prescribed or authorised by the applicable legislation.

From the moment the mining process starts, the ore becomes "categorised" as unwrought precious metal as prescribed by the Mining Rights Act. It then goes through a very long process involving various stages of milling, concentration, extraction, refining and purifying. The end product will be one of the aforesaid PGM in a purified form or a combination thereof. This end product at the refinery is still in such a form that it falls within the definition of an unwrought precious metal. Unmanufactured precious metal in the form of bars, ingots, buttons, wire, plate, granules or in solution or in whatsoever form or any article or substance containing such

precious metal which although manufactured is not as such an article of commerce or a work of art or an article of archaeological interest, is defined in the said legislation as unwrought precious metal. The aforesaid operations towards purifying the material are undertaken in many different plants and buildings on mine premises. Most of South Africa's mining of PGM occur to the west of Pretoria towards Rustenburg and also to the north. It contains the world's largest reserves of PGM and chromium.

Security investigations over the years have shown that mined PGM are stolen in any form in which they are available. This is due to the fact that a great demand exists in the underworld for PGM in any of its forms, varying from low grade to high grade material. PGM thus became susceptible to theft

throughout all the processing stages. Ultra high security measures are normally in place towards the final stages of processing where smaller volumes of higher value of PGM are produced, but over the years an increased level of thefts developed of lower grade material which is available in larger volumes but has a lower value. The value of the product increases as it progresses through the system with a corresponding reduction of the volume of the product. Many tonnes of original ore may eventually only result in a few grams of purified unwrought precious metal.

The South African mines spend millions of rand annually on security but due to the nature of the process its is impossible to prevent all thefts from occurring. Theft during the early stages of mining is

also profitable to thieves and criminal syndicates notwithstanding that raw material will need to be purified at a later stage. Apart from the loss suffered by the mining sector, the government also suffers large revenue losses due to taxes and royalties which are not paid by criminals in respect of stolen product. Platinum is an extremely valuable commodity as its unique physical and chemical properties lend themselves to unlimited different applications. Platinum is sought after worldwide. Precious metals are a national asset of South Africa and earns a large amount of foreign currency and provides substantial employment opportunities.

In terms of the applicable legislation no one may buy, sell, deal in, receive or dispose, either as principal or agent, any unwrought precious metal

unless he is a Banker in terms of sec 148 of the Mining Rights Act or is a refining business with a Recovery Works Licence issued in terms of the Mining Rights Act or possesses a certificate from the Mining Commissioner, or, in certain other instances, is in possession of the necessary permit. It is also required that proper records be kept.

According to the affidavit of mr D.J. van Tonder, which was attached to the founding papers, he discovered during his investigations over the past fifteen years that the theft of unwrought precious metals is directly linked to a chain of well organised criminal activities involving the movement of the stolen product from the thief who acquires the product at its source, to various levels of receivers, until it reaches its final destination which is usually outside the borders of the country. The theft and the

further on-selling of the product, in whatever form, are committed in a syndicate driven environment. According to mr van Tonder there are five clearly distinguishable levels in the hierarchy of this type of syndicated driven crime which had been identified by law enforcement agencies operating in this field. I shall, in what follows, briefly refer to the evidence of mr van Tonder in this regard.

The first level involves the theft which occurs at the source which is mostly the mines themselves. Mine employees individually or in groups are mostly involved at this level and their activities are facilitated by huge amounts spent by the syndicates on corruption of officials and the breaching of security systems.

The second level consists of buyers and "runners".

They mostly operate in specific regions where producers are situated and have permanent networks in place. They communicate with the members of the first level and remove the product as soon as it becomes available. They are also responsible for the corruption of level one operatives and establish and maintain corrupt contacts within the SAPS to ensure the smooth running of their operations. These operatives are also involved in the smelting of stolen product through illegal smelting houses. They also put the product together in larger quantities and sell same to the different level three operatives or sometimes directly to the level four operatives.

The third level operatives maintain permanent contact with the level two operatives and turn over

stolen product on a daily basis with large amounts of cash resources on hand to facilitate their activities. Millions of rand are made available by syndicates to obtain the stolen product and also to corrupt and encourage mine employees and others to assume the risk and participate in the enterprise. The level three operatives are national buyers situated in South Africa and mainly operate from Gauteng and adjacent areas. They operate at a high level of sophistication and maintain high level contact in the SAPS and other institutions. They rely on assays of product for business purposes and will often use selected laboratories for this purpose. They rely on others to do the actual work and to assume the risk and will seldom be in possession of unwrought precious metal. These operatives build up a substantial asset base and may have overseas bank

accounts, often in the name of third parties. They reap the rewards of large volumes of stolen product and sell to higher levels or even local refineries and jewelers.

Level four operatives are also based in South Africa but they mostly sell their product on the international market, mostly refineries or level five operatives operating in foreign countries They sometimes use other African countries as a springboard to export their stolen product to buyers on the European market. They operate at a high level of sophistication due to the high volume of product they turn over and due to the high prices paid on the international market. These operatives also enjoy a high standard of living and have a substantial asset base. It is common for these operatives to have both

local and overseas bank accounts and often hold assets in the name of third parties. They use various forms of money-laundering schemes to enable them to "clean" the proceeds of their illegal business and to maintain their high standard of living in South Africa. Like level three operatives they only conduct business with selected people and do not commonly participate in that part of the business that carries a high degree of risk. They also contact and influence law enforcement agencies at high level and this makes it particularly difficult to investigate level four operatives successfully.

Level five operatives are generally international buyers who are situated abroad and operate abroad although they may also have a level of operation in South Africa. They are usually foreign citizens or

South Africans who have settled abroad. They purchase mainly from level four, and sometimes level three, operatives in South Africa and usually sell their product to foreign refineries. They also use the springboard technique and influence high level law enforcement personnel. They operate on a large scale, purchasing and on-selling high volumes of stolen product and also assist South African level four suppliers in laundering the proceeds of the transactions through so-called "currency movers".

The applicant also annexed to its founding affidavit the affidavit of mr Peter Gastrow, a Director of the Cape Town office of the Institute of Security Studies. Mr Gastrow is an expert in the field of organised crime both nationally and internationally and has published extensively on this subject. Based on his

extensive research and experience in this field he deposed to the affidavit setting out and explaining the nature of organised crime, that South Africa is regarded as an attractive location for organised crime groups to operate from, the threat posed by organised crime to South Africa, the international response to organised crime and organised crime in respect of gold and precious metals. In regard to theft of Platinum, mr Gastrow stated that the detected thefts alone of Platinum from South Africa's three key platinum mining companies during 1995 to 1998 was approximately R60 million. During 1998 it amounted to R20,6 million. They value of undetected thefts cannot be estimated. He confirmed the nature and extent of the illicit PGM syndicate operations and the money laundering operations discussed by van Tonder.

The Investigation and the Charges:

As was stated above, investigations commenced in 1999 into the national and international smuggling arena and evidence was collected about individuals and criminal syndicates operating and trading in stolen unwrought precious metal in a organised manner on an international basis. The project was planned as a long-term investigation aimed at securing evidence to support a successful prosecution against identified suspects involved in the illicit PGM market. On 20 February 2002, the former Investigating Director of the Director of Special operations directed that a preparatory investigation in terms of sec 28(13) of the National Prosecuting Authority Act, 1998, (the "NPA Act"), be conducted into the affairs of persons and or entities

who, nationally and internationally, on an organised basis, were involved in the illicit smuggling of PGM. On 30 July 2002 the status of the investigation was converted to an investigation in terms of sec 28(1)(a) of the NPA Act. On 16 May 2002 authority was granted by the Director of Public Prosecutions of Pretoria in terms of Sec 252A of the Criminal Procedure Act, 1977, for the conducting of undercover operations, using undercover agents. On 22 July 2003 the Applicant and the Directors of Public Prosecution for the Free State, Witwatersrand Local Division, Northwest Province, Kwa Zulu Natal and the Western Cape authorised the extension of the undercover operations in terms of section 252A of the Criminal Procedure Act, 1977, within their jurisdictions. The joint venture with the Directorate of Special Operations was thus formed and a formal

project (Project Yield) was registered to investigate the whole matter thoroughly.

Due to the extensive nature of the operations to be investigated, use was made of forty five investigators. Mr P.H. Bishop, a Senior Special Investigator with 23 years experience and attached to the Directorate of Special Operations was designated as the project manager of Project Yield. He filed a lengthy supporting affidavit setting out in detail the nature of the investigation and the results obtained. I shall refer to some of the salient features thereof.

Mr Bishop explained that due to the nature of the illicit PGM trade and more particularly the complexity of the chain of activity and the secretive nature thereof, extensive use had to be made of undercover

agents to infiltrate the syndicates with a view of gathering evidence for further investigations and to support the arrest and prosecution of those involved. Some of the individuals used to infiltrate the syndicates had to be individuals with a known record of engaging in criminal activity. Due to the highly technical nature of the illicit PGM activities and the scale of the project, expert assistance was also obtained from the platinum mining industry and the auditors KPMG was later also appointed as independent forensic auditors for the project. The forensic auditors assisted with the accounting functions relating to the project's expenditure as well as compiling information and evidence for prosecution and prosecution-related purposes from the vast body of evidence and information collected during the course of the investigation. KPMG also

calculated the benefits received or derived by the various defendants from their known and identified illicit PGM transactions and related criminal activities. In this regard Me A.L. Wolmarans filed an extensive affidavit attached to the founding papers and another one as part of the Applicant's replying papers (under her newly acquired married name of Jordaan).

Mr Bishop further stated that he was the recipient of all the evidence, intelligence reports and other relevant information emanating from the project. He kept records in the form of notes, diary entries, activity sheets, contemporaneous notes, recordings and debriefing notes and collected some 600 pages of statements made by potential witnesses in the criminal trial against the defendants. The evidence

was obtained from various sources which, apart from those instances where he personally obtained information, included historical information from previous SAPS operations; intelligence sources; the interception of communications in terms of section 3 of the Interception and Monitoring Act, Act 127 of 1992; assistance from the National Crime Squad of England and Wales; interviews with and statements from relevant witnesses; summonses issued in terms of section 28(1) of the Criminal Procedure Act, 1977; the utilisation of section 252A of the Criminal Procedure Act, 1977; surveillance; and assays of illicit PGM in South Africa. Mr Bishop further indicated that it is likely that section 204 of the Criminal Procedure Act, 1977, providing for the use by the prosecution of the evidence of witnesses who might incriminate themselves, will be used.

Mr Bishop stated that the defendants in the present application are the persons and entities identified as being involved in illicit PGM activities and which would be prosecuted. He submitted that the contemplated search and seizure operations would yield further evidence to corroborate the evidence and information available at the time and that further individuals may be arrested.

According to Bishop, and this was supported by the supporting affidavits of other members of the Applicant's staff, the defendants will be charged with offences under the Mining Rights Act, offences relating to contraventions of the Import and Export Control Act, 45 of 1963, contraventions of the Companies Act and of the Exchange Control Regulations. They will also be charged with offences such as theft, fraud, forgery and uttering, offences

relating to the proceeds of unlawful activities, money laundering and racketeering activities in terms of the Prevention of Organised Crime Act, 1998. Altogether some 800 counts are envisaged in certain cases. Most of the defendants have already been charged and it is not necessary to say more in this regard.

According to the affidavit of Adv J.G. Rabaji, the Head of Operations at the Asset Forfeiture Unit in the office of the Applicant, and who deposed to the main supporting affidavit on behalf of the Applicant, the calculated total value of the illicit PGM transactions at the time the interim order was sought, was R199 000 264,77. This figure did not include the revenue benefits of these transactions. She submitted that the illicit schemes in which the Defendants were involved were by no means restricted to these identified transactions and that in

all likelihood evidence of further illicit transactions would be found in this ongoing investigation. In her replying affidavit, which was deposed to after the arrests and seizures following on the interim order, she stated that this was indeed the case and referred in quite some detail thereto.

The Nature of the Evidence:

As a prelude to the evidence presented by mr Bishop in his affidavit, he submitted that due to the sheer volume of the available evidence it is not possible or practical to cover everything in the papers before the court. Furthermore, that the investigation was ongoing and that the arrests and seizure operations would uncover further evidence. In his replying affidavit he did in fact refer to such newly obtained evidence which supported his earlier evidence. He further stated that due to the extensive and secretive

nature of the illicit PGM operations and the fact that use had to be made of agents and other witnesses to infiltrate the operations, such witnesses cannot be identified at this early stage as their lives would be in danger. He submitted that even disclosing the contents of their affidavits would cause them to be identified. To support his submissions in this regard he alluded to persons who have posed a threat to the illicit precious metal market and who had been killed by hit squads. He also alluded to the fact that corruption of officials and law enforcement agents and the use of intimidation tactics have in the past caused many investigations to be unsuccessful and that such actions, and the physical danger to the individuals involved in the present operation, are a real threat to the successful outcome of this operation. Consequently the exposure of evidence in any other form than has been done in the present

matter and any breach of the privileged nature of such evidence at this point, would seriously jeopardise the successful outcome of the final investigation and prosecutions relating to the present matter as well as future operations.

The Evidence Relating to the Defendants:

In respect of the evidence against the defendants and the respondents, mr Bishop's affidavit and the annexures thereto may be referred to. As the application in respect of most of the defendants has been settled, only a brief outline of the alleged involvement of certain of the main players in the saga is required. More emphasis shall be placed on the allegations relating to the defendants with whom there has been no settlement. They are the 9th defendant (James), the 19th defendant (Boekhoud), the 20th defendant (Just Refiners and Technologies

Ltd UK) (JRT UK), the 21st defendant (Just Refiners and Technologies Ltd SA (Pty)Ltd) (JRT SA), and the 22nd defendant (Aerotrade No 62 (Pty)Ltd) (Aerotrade). The 5th, 9th, 11th, 12th, 14th and 16th respondents are related to the aforesaid defendants.

The following from mr Bishop's affidavit may be referred to: The 1st, 3rd and 4th Defendants are brothers and together with 5th Defendant they constituted a syndicate known as the "Mountain Boys" and operated mainly from the Gauteng area. The 9th Defendant, Mr T.R. James ("James"), was an accountant for an entity known as MPT. MPT was involved in illicit PGM activities. The 10th to 13th Defendants shared a membership interest in the 14th Defendant, Wepelec Trading CC ("Wepelec"), which was also involved in illicit PGM activities. The 15th Defendant was the sole director of the 16th

Defendant, Utility Resources CC ("Utility"), which was also involved in illicit PGM activities. The 17th and 18th defendants were involved in an entity ABS Precious Metals (Pty)Ltd ("ABS") through which illicit activities were conducted. The 19th defendant, mr H.L.J. Boekhoud ("Boekhoud"), is a South African who resides in the United Kingdom. He conducted his business through Just Refiners and Technologies Ltd UK ("JRT UK") which operated a refinery situated in Peterborough in the United Kingdom. JRT UK is the 20th defendant. Just Refineries and Technologies SA (Pty)Ltd ("JRT SA"), the 21st defendant, is also an entity in which Boekhoud had an interest. Aerotrade No 62 (Pty)Ltd ("Aerotrade"), the 22nd defendant, trades under the name of JRT SA and James has an interest in this entity. James and Boekhoud are married to two sisters. According to Bishop he has collected

reliable evidence that all the aforesaid defendants possessed, purchased and/or received PGM and/or dealt, directly or through agents, with such PGM.

According to Bishop PGM stolen from the mines, mostly in small quantities but also in bulk, and PGM stolen through the highjacking of trucks between mines in Zimbabwe to South Africa or from mines in South Africa to refineries, were eventually sold in larger quantities to exporters such as the Mountain Boys. One method of selling and exporting the PGM occurred *via* Zambia to Boekhoud in the United Kingdom or, in some cases, to a company called Metalor in Switzerland. The smuggling to Zambia occurred in one of two ways. If larger quantities were sent they would be declared, for export purposes, as some or other legitimate product and not PGM. The PGM would then be concealed in the

containers and not be declared with the declared legitimate product. This related mostly to larger quantities of between five to twenty tons at a time and were mostly lower grade PGM. Where smaller quantities of higher grade were smuggled out, same were usually hidden, for example, in false compartments in motor vehicles.

From Zambia the exports were destined for JRT UK, the company controlled by Boekhoud, or to Metalor in Switzerland. The name of a company called Stargem was used to export the product by air. False descriptions of the product as well as an under-declaration of its value were used for export purposes. At the time of deposing to his first affidavit Bishop indicated that eight such illegal exports could be identified. He attached a schedule of these exports reflecting the dates thereof, the

precise nature of the cargo, the weight of each shipment, the approximate value thereof, the destination and the exporter. In each instance the exporter was the 1st defendant or the Mountain Boys.

The second scheme identified by Mr Bishop was the so-called "Independent Security Scheme". This scheme entailed the export of illicit PGM by JRT to Boekhoud *via* Johannesburg International Airport using Cathay Pacific Airlines. These shipments were purportedly made by an entity called "Independent Security" but the use of this name was done fraudulently. Again the airway bills indicated the shipment to be something else than PGM and were, as such, substantially undervalued. Invoices were then sent on false Stargem letterheads to JRT who took delivery thereof as importer. Boekhoud was the importer through JRT. At the time of deposing to his

first affidavit Bishop indicated that thirty eight such illegal exports could be identified. He attached a schedule itemizing these exports and also reflecting the dates thereof, the name on the exporter invoice, the exporter waybill, the receiver of the shipment, the weight of each shipment, the precise false description of the cargo and the invoice value thereof. It is not necessary to refer to the detail thereof. According to Bishop he has the evidence of witnesses who will testify at the criminal trial that in each instance illicit PGM were exported and that the exporter was the 1st defendant or the Mountain Boys.

The third scheme identified by Bishop was the so-called "Front Company Scheme". This scheme entailed the export of illicit PGM by companies who have licences to export for example copper and

nickel or scrap material containing legitimate PGM components such as computers and telephone equipment. The export documentation were falsified to hide the substantial quantities of illicit PGM actually exported and consequently also undervalued the actual product. Sometimes the values declared were the actual values but this would be done to have the proceeds seen as legitimately returned to South Africa. The exports under this scheme were to JRT and were done by Wepelec, Utility and MPT. Mr Bishop identified quite a number of these exports and supplied the detail in respect thereof. In an attached schedule he also gave the detail of the dates thereof, the airway bill particulars, the approximate value and the nett mass of each shipment. Some of the schedules also mention the exporter, the precise false description of the cargo, the receiver of the shipment, the weight

of each shipment, and the value thereof in South African Rand and in British Pound. It is not necessary to refer to the detail thereof. According to Bishop he has documentary evidence as well as the evidence of witnesses who will testify at the criminal trial that in each instance illicit PGM were exported and that the defendants involved were the 1st, 5th, 10th, 11th, 12th and 13th defendant as well as James, the 9th defendant. Mr Bishop also stated that Aerotrade exported illicit PGM to JRT in the United Kingdom using the front company scheme. According to Bishop he has reliable information that ABS also engaged in this illegal scheme but stated that confirmation is hoped for as a result of the search and seizure operations.

In regard to James, the 9th defendant, Bishop

referred to evidence which establishes that James actively participated in a number of illegal activities aimed at facilitating the export of illicit PGM to Boekhoud, through JRT. James did this through his association with MPT where he was employed as an accountant. According to the attached schedules, forty nine such illicit PGM transactions from MPT to JRT are identified. According to Bishop, James was also involved through Wepelec which was used in the front company scheme. In fact, Bishop stated that he has information which proved James to be the agent and middleman for Boekhoud in South Africa and that his role was to assist Boekhoud and his suppliers such as 1st defendant and the Mountain Boys. Evidence also shows James and Boekhoud sourcing avenues to deal in illegal PGM in South Africa during April 2003. Meetings with individuals having access to illicit PGM were held at various

venues in South Africa to discuss the pricing and availability of illicit PGM. As a consequence of one of these meetings an amount of 1,906 kg of high grade PGM with a value of R69 919,90 was delivered to James personally. The product was exported by James on 3 July 2003 as a copper and nickel sample with a declared value of only R100,00. The invoice through which this export was conducted identified the exporting entity as "Just Refiners and Technology SA Prop. of Aerotrade 62 Pty Ltd". The invoice and relevant airway bill were attached to the papers. As indicated before, Aerotrade, a company in which James had an interest and was a director of, traded as Just Refiners and Technology SA ("JRT SA"). The aforesaid export was to Boekhoud in the United Kingdom. According to evidence in Bishop's possession the value of this shipment was in reality GBP 5 422,86 and this amount was in fact paid by

JRT into a nominated offshore account. James was also, according to Bishop's evidence, involved in the Zambian scheme where he assisted in exporting 8 tons through Zambia in June 2001.

Bishop further explained that the overseas buyers are all persons who can receive PGM without raising too much suspicion. Consequently the receivers were refineries in the United Kingdom and Europe such as JRT and Metalor. These entities either refined the product further or sold the product on for a profit. Information gathered by Bishop showed, for example, that JRT resold illicit PGM received from South Africa to other refineries in the United Kingdom and Belgium.

Mr Bishop stated that payment for the shipments were made to overseas accounts nominated by the

South African sellers. This was in effect a money laundering scheme and was an integral part of the whole criminal enterprise. Holders of such offshore bank accounts could effect the transfer of money to other accounts and eventually the defendants who were the sellers were able to repatriate the proceeds of their illegal foreign earnings back to South Africa and/or to build up large foreign exchange capital bases offshore. In this regard the names of 1st defendant, JRT, James and Utility feature prominently. Different intricate money laundering schemes were employed but it is not necessary for present purposes to elaborate on the details thereof as supplied by Bishop. The details of the transactions uncovered by Bishop and his investigators, that have been conducted through the money laundering scheme, are set out in schedules attached to his affidavit. The schedules list money

laundering transactions in three Channel Island accounts and other accounts which are all linked to some of the defendants. Bishop indicated that he believed that further documentary proof would be obtained after execution of the search warrants. In respect of James, Bishop further stated that his investigations turned up an account in Madeira in the name of James. The purchase price of illicit PGM transactions between 1st defendant and Boekhoud, through Wepelec, was paid into this account of James in Madeira. Also, an amount of GBP17 122,08 from this account was laundered through the Hawkwind Account, one of the aforesaid Channel Island accounts, for the 1st defendant.

According to Bishop all the different schemes uncovered in the present operation, identified Boekhoud, through JRT, as the main overseas

purchaser of illicit PGM exported from South Africa. From the detailed evidence of Bishop in this regard it would appear that Boekhoud received illicit PGM from a number of the defendants under the aforesaid schemes and that he had established strong associations with many of them. The illicit PGM dealings were on a large scale and conducted over a substantial period of time. According to Bishop's evidence the 1st defendant received an amount in excess of $450 000,00 into one identified account during the period August 2001 to March 2002 from Boekhoud or James. Bishop stated that the inescapable conclusion is that Boekhoud and 1st defendant and the other defendants were engaged in many illicit transactions other than those uncovered up to the time of his affidavit. According to Bishop's evidence Boekhoud was involved in the falsification of export documentation relating to, *inter alia*, the

nature of the product exported, the identity of the exporter and associated matters as well as the falsification of invoices in respect of the nature of the product and the value of the product exported to him. According to Bishop's evidence, the detail of which he alluded to in his affidavit, Boekhoud was also involved in the money-laundering activities already referred to.

Project Yield also uncovered an illicit domestic market scheme involving some of the defendants. It also uncovered evidence of a so-called warehouse scheme in terms whereof some exporters enlisted the assistance of others to prepare the illicit PGM for export. It entailed the receipt of batches of illicit PGM, the storing thereof and the packaging according to the instructions of the exporters. This included the concealment of the PGM in such a way

that the PGM would not be detected when exported or when crossing the South African border. It is not necessary to refer to the detail thereof as presented by Bishop.

In regard to the rather detailed account in his affidavit relating to the activities of each of the defendants, Bishop stated that the case against the defendants is based on the evidence of witnesses who are prepared to testify at the criminal trial, on documentary evidence and exhibits discovered in the investigation process as well as on other evidence. Regarding witness statements Bishop stated that he has a number of sworn eye witness statements and annexures consisting of over 600 pages obtained from agents and witnesses who had been involved in this project. These agents reported to him personally, often on a daily basis, on their

activities. These reports were recorded in writing. Certain of the facts contained in the reports can be verified by Bishop personally as a result of his own direct involvement in activities undertaken as part of project Yield. As already mentioned, a substantial amount of documentary evidence was attached to the affidavits in support of Bishop's allegations.

An Associate Director of KPMG, me A.L. Wolmarans, also made an affidavit which was attached to the founding papers. She was involved in the determination of the extent of the involvement of certain of the defendants and respondents and to assist with the quantification of their involvement and the benefits derived by them. On the evidence presented to her she calculated the value of the fifty three irregular exports by MPT, with which James was involved, to be the equivalent of R19 836 350,71.

Boekhoud's involvement was in the amount of R41 275 215,88 in respect of transactions and R12 148 971,60 in respect of money laundering activities. It is for present purposes not necessary to refer to the other evidence of Me Wolmarans.

The Answering Affidavits:

The 1st defendant did not file an affidavit answering the allegations on behalf of the applicant. The other defendants and most of the respondents filed answering affidavits and, for the most, denied any complicity in unlawful conduct. However, since the application has been settled with most of such parties, as indicated above, I need not refer to their answers. I shall refer briefly to the affidavits filed on behalf of the 9th defendant, James, and on behalf of 19th defendant, Boekhoud, and the 20th to 22nd defendant.

James mainly took the view that the applicant failed to disclose the allegations on which it relies and that the allegations are based on scandalous, vexatious and irrelevant hearsay evidence and/or opinions which should be struck out. The application to strike out was also based on the ground that new evidence appeared in the replying affidavits which should have appeared in the founding affidavits in order to substantiate the relief sought. An attack was also made on the conduct of the curators. I shall revert to this aspect later on in this judgment. In respect of all the affidavits filed on behalf of the applicant James denied any wrongful conduct and denied any knowledge of the alleged activities relating to the illicit PGM industry. He submitted that the deponents have no personal knowledge and rely upon evidence received from other persons which

they and more particularly Bishop, fail to identify and whose evidence has not been provided. Consequently, so James submitted, the applicant has failed to make out a case for the relief claimed for.

James did, however, admit that he was the accountant for MPT but denied knowingly being involved in illicit PGM activities. He stated that MPT exported PGM under licence to JRT but denied knowledge of anything untoward occurring. He admitted that Boekhout is a director of JRT. He admitted that PGM were received from Zambia but denied knowledge that same were sent through Zambia to another country. He admitted knowledge of 1,902 kg PGM sent to JRT but said that it was merely sent as a sample. He denied any knowledge

of further exports. He admitted that the document relating to this transaction was compiled by him. James stated that he was aware of certain payments made overseas and also that he secured payments for goods delivered but that he had no knowledge of any money laundering scheme or knowingly dealt in illegal PGM in South Africa or elsewhere. He admitted knowledge of two exports by Wepelec to JRT but said that he was unaware of any illegality in regard thereto. He admitted that on occasions he was requested by 1st defendant to trace certain transactions in order to secure payment but that he was never involved in the mechanics of any transaction and was unaware of anything untoward in relation thereto.

In the answering affidavit by Boekhoud on behalf of himself and the 20th to 22nd defendants as well as the

9th, 11h, 12th and 14th respondents, he also, in the main, submitted that the applicant's case is based on hearsay evidence and speculation and that the rule *nisi* granted by this court should thus be discharged. He denied any wrongdoing and stated that he did his business in the United Kingdom and can therefor not be prosecuted for crimes in terms of South African legislation. He also merely denied knowledge of most of the factual averments in the applicant's affidavits but made very little substantial allegations in that regard. He admitted that he knew 1st defendant and that he had dealings with Utility which he thought was a legitimate company. He also knew 3rd and 5th defendants as they acted for Stargem which he thought was a legitimate Zambian company. He further admitted Bishop's allegations regarding the Zambian scheme and the Independant Security scheme but denied knowledge that MPT

was involved in illicit PGM activities. He also admitted knowing the name Wepelec but denied knowledge of the allegations regarding the Front Company scheme.

According to Boekhoud he merely received products in the United Kingdom which he then analysed. If the results differed from the assay sent through by the customer, the necessary adjustments were made. He normally received only material with a low grade platinum content which he refined further. Boekhoud said that he paid the client for the product but that the client remained the owner thereof until payment had been made. Payment would be made on instructions of the client. He denied knowledge of any false invoices.

<u>The Reply to Boekhoud:</u>

According to the replying affidavit of Bishop to Boekhoud's answering affidavit, Boekhoud was arrested and charged on a range of charges, some being in terms of Act 121 of 1998, which relate to activities abroad such as racketeering and money laundering. Bishop referred to documents acquired in South Africa and the United Kingdom since the launching of the main application. Some of the documents were obtained as a result of the co-operation between the South African and British authorities. He also referred to documentation annexed by some of the other defendants in their answers to the application. Bishop also attached examples of documents such as, *inter alia*, e-mails between the role players, invoices and transport documentation which, on the face of it, supported Bishop's evidence regarding the alleged illegal transactions, the fraudulent misrepresentations, the

under declaration of values, the laundering of money through foreign bank accounts and other forms of unlawful conduct. Of particular note was the correspondence between Boekhoud and James regarding certain transactions and the commission which they earned on transactions with the other exporters in South Africa and which amounts were paid into off-shore accounts. Bishop indicated, however, that the bulk of the documents will be presented at the criminal trial and that disclosure at this point would jeopardise the lives of undercover agents as well as the further investigations of the matter. In a further affidavit Boekhoud denied any unlawful conduct and offered an explanation regarding the transactions referred to by Bishop.

The Reply to other Defendants:

In reply to some of the other defendants, including the 9th defendant, James, Me R.K. Keightly filed an

extensive affidavit. She is a Deputy Director of Public Prosecutions and the Regional Head of the Forfeiture Unit in Johannesburg. From her affidavit it appears that a restraint order obtained against Boekhoud under the relevant laws of the United Kingdom as well as the search and seizure operations in South Africa after the interim order was granted, yielded a substantial quantity of additional evidence which corroborated the case put up by the applicant in the founding papers. It is not necessary to refer to the detail of her evidence.

What may be mentioned is the extensive work that was done by KPMG, the firm of auditors assisting the applicant. In the affidavit of Me Jordaan, who filed the supporting affidavit in the founding papers under her maiden name of Wolmarans, it is explained how

the evidence was collated, analysed, cross-referenced and linked together with all other available evidence by way of computer programming to eventually link all the role players, their transactions in respect of PGM and the flow of money and the laundering thereof. She fully explained the procedures performed by KPMG in this regard. She furthermore referred to the documentation supplied to her by the investigating team and the manner in which same were dealt with. These documents, *inter alia*, consist of export invoices and pro-forma invoices, airway bills, telefax communications, goods received notices, assay reports, self-billing invoices, instructions to banks, confirmation advice records, payment instructions, communications between various parties in e-mails and telefax correspondence, payment schedules and handwritten notes appearing on documents.

Samples of this evidence were annexed to Jordaan's affidavit. She also annexed schedules which set out in a summarised and structured manner the nature of the evidence gathered and the results thereof. The volume of evidence and documentation is vast and it is not necessary to refer thereto in any detail.

What should be said, however, is that the evidentiary trail corroborates the evidence set out on behalf of the applicant in the founding papers relating to the various schemes involving the illicit dealings in PGM by the defendants. It also links the various defendants to the criminal offences in respect of which they are to stand trial. In other words, the evidentiary trial established by the documentation and records presently available extends from the point of export to the point where payment was made for each consignment. The only real difference

between the applicant's position now as opposed to what it was when the application was initially launched, is that it now possesses much more evidence than it earlier had and that many more transactions and alleged illegal operations by some of the defendants have come to light.

Another comment which should be made is that the evidence links the different defendants with each other. It may not be so in respect of every transaction but there is a clear thread linking all the defendants as part of the larger operation starting in South Africa and ending abroad. What was also particularly glaring, as applicant emphasized in the replying affidavits and in argument before court, was the many instances where important evidence, which clearly called for an answer or at least some sort of explanation, was simply not responded to or only

partially responded to in the answering affidavits, more particularly also by James and Boekhoud. It is not necessary to discuss each of these instances and suffice it to say that these failures supported the main submissions on behalf of the applicant.

Lack of Particularity and Hearsay evidence:

In dealing with the main criticisms of the remaining defendants referred to above namely that the applicant failed to disclose the allegations on which it relies, that particularity is lacking, that the allegations mainly constituted hearsay evidence and that the applicant's case was amplified in reply, the undermentioned references are relevant. In regard to the manner in which the applicant's case must be presented, the Honourable Nugent JA said the following at p 612H, paragraph [21], in NDPP v Rautenbach and others (supra):

"[21] Allied to that earlier contention was also a submission that the appellant's case is vague

and inconsistent and has varied over time with consequent uncertainty for Rautenbach of the case that he was called upon to meet. The appellant must set out his case in such a manner that the respondent is fairly informed of the case that he or she is called upon to meet (cf National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director Of Public Prosecutions v Seevnarayan) but that does not mean that it must be presented in any particular form. What is required is only that the case that is sought to be made out by the appellant is articulated with sufficient clarity to reasonably inform the respondent of the case against him or her. But when evaluating whether that has been done it can be assumed that a respondent is not obtuse and will draw those inferences that fairly present themselves from the allegations, in much the same way as an accused person is expected to do when confronted with an indictment".

In this regard mention should also be made of the findings of the Honourable van der Westhuizen J in National Director of Public Prosecutions v Alexander and Others 2001 (2) SACR 1 (T) at p 8F where he stated the following in regard to hearsay evidence that had been tendered by the applicant:

"In forming such an opinion or a belief a court obviously has to take into account that the onus of proof in the criminal trial will indeed be on the State, and that it is beyond reasonable doubt. What does this say regarding the admissibility of for example hearsay evidence? Hearsay evidence is generally inadmissible, but it is well known that there are exceptions. These have to be applied within the context of a particular case and situation. By its nature the evidence available to a court in a restraint order application may not necessarily be as direct and concrete as could be expected to secure a criminal conviction. After all, s 25(1)(b) even allows for this procedure where a court is satisfied that the person is still to be charged with an offence. It might sometimes be unavoidable to take some hearsay evidence into account. Certainly support of any hearsay allegations in the relevant affidavits would be most valuable, inter alia in view of the drastic consequences of this procedure. It would be highly undesirable to grant an order in an application merely based on wild and unsupported hearsay allegations.
I am of the opinion that the above exposition is in accordance with the views expressed in the Full Bench judgment of Madlanga AJP and Kruger AJ, with which Locke J concurred, in National Director of Public Prosecutions v Mcasa and Another 2000 (1) SACR 263 (Tk)."

I respectfully agree with the approach and remarks of van der Westhuizen J. Without detracting from

the *caveat* regarding "wild and unsupported hearsay allegations", and without proposing an absolute rule in this regard, I am of the view that it would be unnecessary to consider the relevance of hearsay evidence in a matter such as the present on the basis of a strict application of the provisions of section 3 of the Law of Evidence Amendment Act, Act 45 of 1988, in respect of every piece of hearsay evidence in the applicant's papers (as it was submitted on behalf of the defendants the approach should be). In considering hearsay evidence in a matter such as the present, the court will necessarily have regard to factors such as the nature and purpose of the evidence, the probative value and reliability thereof, the reason why direct evidence was not submitted, the possible prejudice to the other party and all the other facts of the case. These are, *inter alia*, the factors which, according to section

3 of Act 45 of 1988, the court should take into account, but as the veracity of the evidence is at this stage of the process not the primary question but only whether there is evidence that might reasonably be believed and which might reasonably support a future conviction and a consequent confiscation order, a formal ruling in terms of Act 45 of 1988 as to the admissibility of every piece of hearsay evidence is not required.

Furthermore, in an application for a restraint order, especially one involving alleged criminal activities of the magnitude alleged in the present case, reliance upon hearsay evidence is virtually indispensable and even more so where the restraint is applied for before an indictment is served. This is so because the application for a restraint will usually precede the completion of the criminal investigation and

disclosure of evidence before completion of the investigation might well prejudice the capacity of the prosecution to effectively prosecute in the ensuing trial and may also, as I have indicated above, endanger the safety of potential witnesses.

Even if I were to be wrong in my aforesaid view regarding the formal and express application of section 3 of Act 45 of 1988 not being necessary, I am nevertheless satisfied that if the section were to be applied, a sufficient amount of admissible evidence can be found to exist which corroborates the other direct evidence and which would support the confirmation of the rule *nisi*.

I am satisfied that it is clear from the founding papers that the criminal case against the defendants which resulted from an extensive investigation, is

supported by a substantial body of evidence, including the documentary evidence attached to the affidavits, which was collected over an extended period of time from a variety of sources. The investigation leading to the charges was supported by a range of law enforcement agencies both in South Africa and abroad. The restraint order against Boekhoud in the United Kingdom and the search and seizure operations in South Africa also yielded a substantial quantity of additional evidence which corroborated the case put up by the applicant in the founding papers. *In casu* the hearsay allegations cannot be characterized as wild and unsupported. In fact, they all fit in with the bigger picture sketched on behalf of the applicant and also fit in with the documentary evidence attached. Many of these allegations are supported by other evidence which may not, at this stage, conclusively prove the initial

evidence but might support future convictions and confiscation orders. It was further submitted on behalf of the defendants that the deponents to the applicant's affidavits, and especially Bishop, did little more than place before the court his own opinion of evidence and hearsay evidence. I do not agree. Bishop informed the court of what evidence he has in his possession. He also attached some of the documentary parts thereof and described others. As to the other evidence he informed the court of the source thereof, how it was obtained, what the nature and tenor thereof is and how it would be presented to the court conducting the criminal trial. In respect of many alleged transactions he gave the dates, the places, the times, the people involved, the nature of the transaction and other such detail, and added that the evidence in his possession would substantiate such facts. By the very nature of the matter he had

to inform the court of the conclusions that could, and according to him should, be drawn from the evidence. By doing so he assisted the court in understanding the nature and import of the evidence and to understand the relevance of the evidence referred to with reference to the bigger picture and the legislation involved. Bishop's submissions cannot and did not usurp the function of this court.

As far as the founding papers are concerned I am satisfied that it would have been well-nigh impossible and totally unnecessary to disclose the full content of the bulk of evidence that had been gathered during the extensive and long investigation which preceded the interim application. The sheer magnitude of the evidence, the sensitive nature thereof and the privilege that attaches to some of the

evidence are some of the reasons therefor. The deponents on behalf of the applicant and more specifically Bishop, however, sufficiently set out the nature and tenor of the evidence against the defendants. Approached holistically and not on a piecemeal basis, the evidence forms a complete picture. To the extent that the deponents gave opinions or summaries of the evidence available, such opinions or summaries were properly substantiated with reference to actual evidence and the facts at hand.

The evidence Bishop referred to which was at his disposal was detailed and extensive. What is of importance, as has been stated above, is that the Court needs only to be satisfied that there are reasonable grounds for believing that the trial court my convict the defendants and that a confiscation

order may be made. The applicant is not required to prove as a fact that a confiscation order will be made. From the facts contained in the affidavits and the annexures thereto it appears that the applicant possesses evidence which is capable of presentation at a criminal trial and which may reasonably lead to the conviction of the defendants.

In the applicant's replying papers the facts and documents obtained as a result of the search and seizure and the confiscation order have been alluded to. This evidence amplified and supported the initial evidence submitted in the founding papers and cannot be ignored. On behalf of the 9th defendant it was submitted that he was not able to answer the allegations of his complicity in the alleged illicit PGM transactions and the money laundering through off-

shore bank accounts and other methods, which were made in the replying affidavits, as that would have meant that he would have had to file a further affidavit. The applicant did make out a case in the founding papers, as I have indicated above, but, by the very nature of this type of proceedings, where further evidence is obtained as a result of the ongoing investigation and the interim order that was granted, the applicant would be entitled to submit such further supporting evidence by way of its replying affidavits. It would not be in the interest of justice to disallow such evidence. *In casu* the applicant did that and presented the court with quite detailed evidence which further linked, *inter alia*, the 9th defendant to the alleged illegal dealings and export of PGM and money laundering. The 9th defendant cannot sit back and avoid such new evidence on the pretext that it would cause a further

set of affidavits. I cannot imagine a court denying a defendant the right to file a further affidavit in such circumstances. In the present matter some of the defendants did exactly that but the 9th defendant elected not to do so. Having regard to all the relevant factors the application to strike out certain matter should therefore be dismissed.

Boekhoud's role in the illicit schemes had similarly and even more convincingly been shown on the evidence before the court. The evidence links him to most of the important transactions, the *prima facie* false entries, under-declaration of values, payment of monies into off-shore accounts and to the other persons and entities involved.

In the result the inescapable conclusion is that there are good grounds to find that a court might find that

9th defendant and 19th defendant, with the aid of the other defendants, actively participated in a number of illegal activities aimed at facilitating the export of illicit PGM to the 20th defendant and that they participated in money laundering activities associated therewith. The evidence shows a particularly strong working relationship between 9th defendant and 1st defendant and between 9th defendant and Boekhoud, the 19th defendant. The evidence also shows his link to Wepelec, Utility, Aerotrade, MPT, JRT and other entities connected by the evidence before the Court. The evidence also shows the vast amounts in commission they earned on PGM exports and the use of offshore accounts and/or offshore entities in regard to such monies.

It would seem to have been accepted by counsel that should the rule *nisi* be confirmed against 9th and 19th

defendant, the rule should similarly be confirmed against the 5th, 9th, 11th, 12th, 14th and 16th respondents. I am satisfied that a case has been made out for such an order.

Lastly I should refer to the attack by especially the 9th defendant on the curators which were appointed in terms of the interim order. Accusations of improper conduct, failure to act in terms of the court order and other such allegations were leveled against them. At the hearing the curators were represented by counsel and on their behalf it was submitted that they were not parties to the present application, that the papers have not been served on them and that they have not had the opportunity to answer to the allegations. All the allegations of misconduct were denied. In regard to the allegation

that they had failed to make an inventory and to file a report, which was the main allegation against them, it eventually turned out that the report and inventory had in fact been served on the Pretoria attorneys of the 9th defendant and that all relevant aspects had been addressed. It was submitted that in these circumstances no order can be made against the curators and that these allegations are in any event irrelevant for purposes of adjudicating the main application.

I agree with these submissions. Substantial relief was not claimed against the curators other than the submission that their appointment should be terminated. The conduct of the curators, whatever it entailed, or their competency, might be the subject of a separate application but it cannot, on the facts before this court, result in the rule being discharged

in respect of any of the defendants or respondents nor in the dismissal of the curators. In this regard I have taken notice of what the was stated in the affidavits as well as the submissions on behalf of the applicant, the curators and the 9th defendant.

Consequently the applicant has made out a proper case for the confirmation of the rule *nisi* and I make the following order:

1. The rule *nisi* is confirmed in respect of 9th, 19th, 20th, 21st and 22nd defendant as well as the 5th, 9th, 11th, 12th, 14th and 16th respondent.

2. The 9th defendant and the 19th defendant are ordered jointly and severally to pay the applicant's costs in respect of the application insofar as it relates to the defendants and the respondents mentioned in paragraph 1 above. The costs shall include the costs of two counsel.

CASE NO: 25395/04

HEARD ON: 30 AUGUST 2005

FOR THE APPLICANT: ADV MARCUS SC

ADV DORFLING

ADV LABUSCHAGNE

INSTRUCTED BY: MASILO INC. ATTORNEYS

012 430 3951

FOR THE 9TH DEFENDANT: ADV HODES SC

INSTRUCTED BY: PHILLIP SILVER & SWEIDEN INC

FOR THE 19TH TO 22ND DEFENDANT: ADV BARNARD

INSTRUCTED BY: JAY & VOGEL INCORPORATED

012 362 4116

DATE OF JUDGEMENT: 10 APRIL 2006