IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

Case no: 1265/2010
Date Heard:04/11/2010
Date Delivered:09/11/10

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**APPLICANT**

Versus

TEBOHO LIVINGSTON MAKOSHOLO (born MAFATA)	**1ST RESPONDENT**
THABO RICHARD METIBELA N.O	**2ND RESPONDENT**
JOHN MGALOSI N.O	**3RD RESPONDENT**
ANNA MAKOSHOLO	**4TH RESPONDENT**
THEMBA NDONGENI	**5TH RESPONDENT**
SIDWELL PAMBA	**6TH RESPONDENT**

JUDGMENT

SMITH J:

[1] The matter which was set down for hearing on the 4th of November 2010 is an application for forfeiture in terms of s. 50 of the Prevention of Organized Crime Act, 121 of 1998 ("POCA") of an amount of R 2 497 454 which had been found at the home of the first respondent, on the basis that it is an instrumentality of an

offence or the proceeds of an offence as envisaged in the said section. The foresaid amount of money is subject to a preservation order which was issued on 6 May 2010.

[2] The first respondent has however, at the commencement of the hearing, applied for an order in terms of rule 11 of the Uniform Rules of Court that this application and another, which the applicant had brought against the first respondent and one Anna Makosholo, under case number 2630/10, be consolidated and heard as one. The latter application was brought in terms of s. 26 of the POCA for a restraint order in respect of other properties, pending the finalization of criminal proceedings which have been instituted against the first respondent. That application has been enrolled for hearing before this court on Thursday, 18 November 2010.

[3] The application was opposed by the applicant. To avoid confusion I refer to the parties as they are in the main application.

[4] Mr Ronaasen, who appeared on behalf of the applicant, submitted that in determining these applications the court will be engaged in substantially the same enquiries in respect of both fact and law. He submitted further that the forfeiture and restraint applications both had their origins in the same set of facts, namely the arrest of the first respondent for allegedly dealing in drugs. In

the forfeiture application the applicant will have to show that the assets which are sought to be declared forfeited are the proceeds of unlawful activity, alternatively, the instrumentality of an offence. Similarly, so he submitted, in the restraint application the applicant will have to show that the assets sought to be restrained are the proceeds of unlawful activities. He submitted that under the circumstances it would be convenient for the two applications to be consolidated and heard as one.

[5] He submitted further that the consolidation of the applications will avoid multiplicity of proceedings and the attendant additional costs. In his submission if the consolidation is not ordered the first respondent will be obliged to incur substantial legal costs to oppose the two applications. If on the other hand consolidation is ordered, he will only have to incur the expense of opposing one application.

[6] It is trite that in exercising its powers in terms of Rule 11 the court has a wide discretion. The onus is on the applicant to show that it would be convenient to order the consolidation and that there will not be substantial prejudice to the other side.

[7] Regarding the meaning of "*prejudice*" see the matter of **New Zealand Insurance Co Ltd v Stone and Others 1963 (3) SA 63**

(C) at 69 where Corbett JA said the following**:**

> "In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the *onus* is upon the party applying to Court for a consolidation to satisfy the Court upon these points."

See also in this regard the matter of **Mpotsha v Road Accident Fund 2000 (4) SA 696 (C).**

[8] The question of prejudice to the other party obviously becomes relevant only if the court is of the view that it would be convenient for the matters to be consolidated. The issue of convenience is the paramount consideration. As is the case with the joinder of third parties under rule 13, the purpose of consolidation of actions and/or applications is to ensure that matters in which substantially the same facts or points of law have to be pronounced upon, are tried at a single hearing in order to avoid duplication, save costs and expedite proceedings. See in this regard **Nel V Silicone Smelters (Edms) BPK en ander v 1981 (4) SA 792 (A) 801-802**.

[9] When considering the issue of convenience, the approach is the same as that in applications for separation in terms of Rule 33 (4). In the matter of **Minister of Agriculture v Tongaat Group**

Ltd. 1976 (2) 357 (D), at 363C-D Miller J said the following regarding the meaning of "convenience" in the context of Rule 33(4):

> "The word "*convenient*" in the context of Rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to all the parties concerned."

See also in this regard the matter of **S v Malinde 1990 (1) 57 A** at page 68 where it was held that the *"convenience*" is not only those of the parties but also of the court.

[10] It is therefore necessary to consider the provisions of the respective sections which govern the granting of forfeiture and restraint orders respectively, and the jurisdictional facts which an applicant is required to establish in order to succeed in either.

[11] In terms of s. 50 of the POCA the court shall make a forfeiture order if it satisfied on the balance of probabilities that the property concerned:

> *"(a) is an instrumentality of an offence referred to in Schedule 1;*
>
> *(b) is the proceeds of unlawful activities; or*

(c) is property associated with terrorist and related activities"

[11] The jurisdictional facts required for a restraint order in terms of s. 26 of the POCA on the other hand are as follows (s. 25):

(a) *i. A prosecution for an offence has been instituted against the defendant concerned;*

ii. Either a confiscation order has been made against the defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against the defendants;

iii. The proceedings against the defendant have not been concluded; or

(b) When –

(i) the 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 granted against such a person."

[12] From the above it is clear that the factual bases required for an applicant to be successful in either application are fundamentally different. The fact that both may have their respective geneses in the same event, (for example in this case the alleged dealing in

drugs by the first respondent,) does not necessarily mean that an applicant will be called upon to establish the same set of facts in both applications.

[13] On this basis, in my view, there can be no conceivable advantages to consolidate the two matters. The two applications are fundamentally different and do not concern the determination of substantially the same question of law or fact. It would in my view therefore not be convenient to consolidate the two matters. The only convenience which Mr Ronaasen could point to was the fact that the Respondent may save some legal costs if the matters are argued together. This is in my view not sufficient to order consolidation under circumstances where the consolidation would clearly not be convenient either to the court or the applicant. Insofar as it may be relevant, I may mention that the main application was also postponed to the 18th of November 2010, so both applications will be heard on the same day in any event.

[14] Mr De Jager, who appeared on behalf of the applicant, has submitted that in the in the event of the application being unsuccessful, the court should order punitive costs against the first respondent. In my view there is no basis for such an order. The applicant is already mulcted with costs attendant upon the postponement of the main application.

[15] In the result I make the following order:

(1) The application for consolidation is dismissed;

(2) The first respondent is ordered to pay the applicant's costs on the party and party scale.

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J. E. SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Ronaasen
Attorney for the Applicant	:	State Attorney 29 Western Road CENTRAL PORT ELIZABETH (REF:838/2010/Y)

Counsel for the Respondent	:	Advocate De Jager
Attorney for the Respondent	:	Griebenow Attorneys 157 Cape Road Mill Park PORT ELIZABETH Ref: R. A. Griebenow
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