Regter Preller · 641.

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 23/5/2005

CASE NO: 11783/2003

UNREPORTABLE

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

MADUMETSA OSCAR LETSHWALO **Respondent**

J U D G E M E N T

VORSTER AJ:

This is the extended return day of a rule *nisi* issued on an ex parte basis on 6 May 2003 in terms of the provisions of Section 26(1) of the Prevention of Organised Crime Act 121 of 1998 ("the Act"). In terms of the provisional restraint order the Respondent and any person with knowledge of the order were prohibited from dealing in any manner with two immovable

four motor vehicles.

The relevant portions of Sections 25 and 26 read as follows:

"25(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 the Defendant or it appears to the Court that there are reasonable grounds for believing that* a *confiscation order* ***may*** *be made against the Defendant; and*

(iii) the proceedings against the Defendant have not been concluded ....

26(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* .... " (My emphasis.)

The relevant portion of Section 18(1) of the Act provides as follows:

"(1) Whenever a *Defendant is convicted* of *an offence the Court convicting the Defendant may, on the application* of *the Public Prosecutor, enquire into any benefit which the Defendant may have*

derived from -
(a) that offence;
(b) any other offence of which the Defendant has been convicted at the same trial; and
(c) any criminal activity which the Court finds to be sufficiently related to those offences,
and, if the Court finds that the Defendant has so *benefited, the Court may, in addition to any punishment which it may impose in respect of the offence, make an order against the Defendant for payment to the State of any amount it considers appropriate ... "*

The Applicant's case may be summarised as follows:

The Respondent has been charged with theft of motor vehicles, housebreaking as well as hijacking of motor vehicles, the total value of these vehicles being estimated at R2 445 400,00. The founding papers contain a detailed exposition of how the vehicles in question were introduced to the vehicle registration authority by provision of false documentation representing that the vehicles had been sold on police auctions. The vehicles had in fact not been sold on police auctions. The Respondent sold a number of the stolen vehicles to a Trust called CKM Trust, based in Port Elizabeth. One Adam Lawson who is a trustee of the CKM Trust has deposed to an affidavit in which he identifies 11 of the stolen vehicles which he purchased from the Respondent while being

under the impression that they had been lawfully purchased at police auctions. On the facts as disclosed in the Applicant's founding papers the Respondent is at the very least guilty of a contravention of Section 37 of Act 62 of 1955, if not of actual theft, housebreaking and hijacking.

The Respondent raised a number of points *in limine* in the answering papers. In the Respondent's heads of argument the following points are persisted with:

1. Non-joinder of various family members of the Respondent whom the Respondent contends in his answering affidavit are affected by the order and who have a substantial interest in the outcome of this litigation.

2. That the curator *bonis* who was appointed in terms of the order initially granted never obtained or presented letters of curatorship as envisaged in paragraph 1.5 of the rule *nisi.*

3. That there was no proof of service of the report of the curator *bonis* on the Master of the High Court in accordance with paragraph 1.15

of the rule *nisi.*

During oral argument Mr Jacobs, who appeared for the Respondent, further contended that the rule *nisi* could not be confirmed as it had not been demonstrated that the curator had set security as required in terms of Section 32(2) of the Act as read with Section 77 of the Administration of Estates Act 66 of 1965.

As far as the merits of the application are concerned, the Respondent has raised the following points:

1. He complains that it is common cause that certain documentation pertaining to the Respondent and his business interests which had been seized by the SAPS, were lost and that the Respondent is in the absence of such documents unable to formulate a proper answer to the Applicant's case; and

2. That the Applicant has in any event not discharged its onus of showing that there are reasonable grounds for believing that a confiscation order will be made.

Non-Joinder

In the answering papers the Respondent alleges for the first time that the Club Galaxy, a tavern, and one of the assets which have been seized is co-owned by his brother and members of his family and that the order should accordingly have been served on them as well. This should be contrasted with what the Respondent stated under oath in his bail application, namely that he owns the club and that his income from the club is approximately R20 000 per month. In view of this previously inconsistent statement under oath I am of the view that the Applicant was fully justified in not serving the papers on those persons whom the Respondent now contends are interested parties and in not joining them. It should further be pointed out that the curator indicated in her affidavit that the Respondent confirmed to her during an interview that Club Galaxy belongs to himself and so did his brother who was on the scene when Club Galaxy's assets were seized. The curator states that none of the persons whom the Respondent now claims to have an interest in the property indicated to the curator during the seizure that they have any interest in the property.

The point is further taken in the answering affidavit that service of the initial order was not effected on the bondholder of the other immovable property and also not on the financier of one of the vehicles which was seized. In my view the bondholder and financier do not have a sufficient interest in the present proceedings to be joined. The order merely prevents the Respondent and all persons with knowledge of the order from dealing with the property. The bondholder and financier have, on the facts as disclosed, no interest in dealing with the property at the present time. Section 30 of the Act which provides for the realisation of property which has been confiscated provides that a High Court shall not exercise its 'powers in this regard unless it has afforded all persons known to have an interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property. It is only at that juncture that it would be appropriate to give the bondholder and financier notice of the proposed realisation of the property.

Conduct of the Curator *Bonis*

In reply the Applicant makes the point that the curator *bonis* is a Court appointee who is not in the employee of the Applicant and is not

answerable to the Applicant. I am of the view that any misconduct on the part of the curator *bonis* (I am not suggesting that there was any), can have no bearing on the question whether the Applicant is entitled to confirmation of the rule *nisi.* In any event, as Mr Lebala, who appeared for the Applicant correctly pointed out, the curator specifically stated in paragraph 9.3 of her affidavit on *p.* 397 of the papers that copies of the order and of her letters of curatorship were handed to the Defendant's wife and his brother during the seizure which had taken place pursuant to the granting of the interim order in this matter. Also, as Mr Lebala correctly pointed out, Section 28(2) of the Act provides a sufficient remedy for the Respondent in the event of any misconduct on the part of the curator. This section specifically provides that someone in the position of the Respondent may at any time apply for the discharge of the curator *bonis.*

I am of the view that there is also no merit in the point raised orally by Mr Jacobs that it had not been demonstrated that the curator had set security. It is trite law that in motion proceedings the affidavits fulfil the function which in action proceedings would be fulfilled by the pleadings together with the evidence: **see *Swissborough Diamond Mines v Government of the RSA* 1999(2) *SA* 279 *(T) at* 323 G**. The issue now raised by Mr

Jacobs in oral argument was not raised in the affidavits filed on behalf of the Respondent and was accordingly not canvassed by the Applicant. It would accordingly be inappropriate and unfair to the Applicant to consider this point.

Lost Documents

The Respondent identifies the documents which he contends he requires in order to answer properly to the present application on ***pp.*** **541 to 546** of the papers read together with ***par*** **6 - 9** ***on pp.*** **524 - 528**. It is clear from what the Respondent says in regard to the missing documents that, at best, he requires most of the documents in order to demonstrate that he acquired the property forming the subject matter of the restraint order, lawfully. Other references to documents which the Respondent contends to be relevant are extremely terse and the reader is unable to discern why exactly the Respondent says he requires the documents. In this regard I refer for example to ***pp.*** **526** ***par*** **7.2** where he simply states that an envelope contains original documents able to prove the purchasing of vehicles from Hillbank Motors. This description is simply too cryptic to be of any real assistance to the Respondent.

The nub of the Respondent's case regarding the lost documents and the importance thereof is contained in the following paragraphs of the Respondent's papers: ***p.* 523 *par* 4** where the Respondent states: *"I wish to point out to the Court that the conduct* of *the Applicant and the investigating officer severely prejudiced* me *in* my *opposition* of *this application. They made it impossible for* me *to furnish the Court with documentary proof* of *legitimate business transactions from which I generated income to buy the assets which are the object* of *this application. These documents could also have been used by myself during the criminal trial as proof* of my *innocence; I am, however, advised that it is not directly relevant here and will deal with that in the proper forum. "*

On ***p.* 879 *par* 4.21** the Respondent states: *"I wish to emphasise the fact that I confirm that all the assets that I own were acquired as set out in the opposing affidavit, and that I have no documentary proof thereof as* a *result thereof that it was destroyed,* ***alternatively*** *lost by the Applicant. The assets were therefore not acquired through any proceeds* of *crime, and I submit therefore that* a *forfeiture order will not be granted against me."*

It appears from these and other paragraphs of the Respondent's papers that the Respondent has misconceived the nature of the relief granted in terms of Section 26 of the Act. It is clear that for purposes of restraint and confiscation orders, it matters not whether the assets restrained or confiscated were acquired through legitimate business transactions and not through the proceeds of any crime.

As was pointed out in ***National Director* of *Public Prosecutions v Rebuzzi* 2002(2) SA 1 *(SCA)* at 6 *D - F*** a confiscation order does not purport to authorise the confiscation of particular property of the Defendant. It is no more than an order against the Defendant to pay the State a specified sum of money. It follows that the purpose of the restraint order is merely to provide the State with a form of security with a view to a confiscation order which may be granted in future. The documents which the Respondent says he requires in order to answer properly, will accordingly not assist the Respondent in formulating a legally tenable defence in these proceedings.

Mr Jacobs indicated to me during oral argument that the above finding regarding the relevance of the lost documents would be inconsistent with

orders previously made by, *inter alia,* Bosielo J and Snijman AJ which had been made earlier in these proceedings. During the hearing of oral argument, only the orders made in this regard were placed before me and not the unreported judgements giving rise to these orders. On 17 September 2003 Bosielo J ordered the Applicant and/or the curator and/or the investigating officer to furnish the Respondent with certain circumscribed documents which had been seized. On 18 February 2004 Snijman AJ extended the return date of the rule *nisi* and ordered the Applicant to pay costs occasioned by the extension. Mr Jacobs indicated that he would have the unreported judgements giving rise to these orders transcribed and supply them to me together with further written argument as regards the impact of these judgements.

The two judgements in question together with supplementary heads of argument on behalf of the Respondent were made available to me on 29 April 2005. A reading of the judgement delivered by Bosielo J on 17 September 2003 certainly reveals that the Learned Judge was quite rightly concerned that the Respondent was being prejudiced in preparing his defence to the present application without the documents in question. It is obviously for that reason that the order with regard to the furnishing of

the documents was granted. However, the order in question was granted without the Learned Judge having had the benefit of the affidavits subsequently deposed to by the Respondent. ***Par* 4 *on p.* 523** of the papers which I have quoted above forms part of an affidavit which was only filed by the Respondent on 5 February 2004 while ***par* 4.21 *on p.* 879** of the papers forms part of an affidavit which was only filed on 1 June 2004 .. These more recent affidavits deposed to by the Respondent place his insistence that he be supplied with the documents in question (which it is common cause have since been lost) in its proper perspective. In the circumstances I am of the view that the judgement and order given by Bosielo J on 17 September 2003 do not preclude the confirmation of the provisional restraint order granted on 5 May 2003.

In my view the judgement and order granted by Snijman AJ on 18 February 2004 do not take the matter further. Snijman AJ expressed the view that the South African Police Services should have been joined in this application in view of the order made by Bosielo J. In view of the way in which the issues in this application have now crystallised, I am of the view that the South African Police Services do not have a direct and substantial interest which is distinct from that of the Applicant as far as the present

application is concerned. In any event, Snijman AJ indicated on ***p.3*** of his judgement that it would at that stage have been a matter of pure speculation to say whether the Respondent, strictly speaking, needed the documents in question to file a proper answer.

The only jurisdictional fact which is in issue in the present case is whether there are reasonable grounds for believing that a confiscation order may be made against the Respondent. The authorities interpret this requirement to mean that the Applicant must demonstrate a reasonable prospect of obtaining both a conviction in respect of the charges levelled against the Respondent and a subsequent confiscation order under Section 18(1): **see e.g. *National Director* of *Public Prosecutions v Phi/ips* & *Others* *2002(4) SA* 60 *(W) at* 81 *D - H.*** I have already mentioned that the founding papers justify the conclusion that there are reasonable grounds for believing that the Respondent will be convicted of one of the offences with which he has been charged or at least of a competent verdict in terms of Sections 260 and 264 of the Criminal Procedure Act 51 of 1977. The only other requirement of Section 18(1) which needs consideration is whether the Respondent benefited from the offences in question. In this regard Section 12(3) of the Act provides that

for purposes of the relevant chapter of the Act, a person has benefited from unlawful activities if he or she has at any time received or retained any proceeds of unlawful activities. On the founding papers, the Respondent has obviously received or retained proceeds of unlawful activities, being the purchase price in respect of the stolen vehicles.

In the ***Philips*** case *supra* it was held that an application for a restraint order is analogous (although not identical) to an application for an interim interdict and attachment *pendente lite.* It if therefore appropriate, according to the ***Philips*** case, in determining whether the onus has been discharged to apply the long accepted test of taking the facts set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether, having regard to the innate probabilities, the Applicant **should** on those facts obtain final relief at the trial (for this purpose, the confiscation hearing). The facts set out in contradiction by the Respondent should then be considered and, if serious doubt is thrown upon the Applicant's case, he cannot succeed.

I have doubts whether the emboldened word *"should"* above does not perhaps set the standard too high, bearing in mind the word *"may"* in

Section 25(1)(a)(ii) of the Act. (See in this regard ***National Director* of *Public Prosecutions v Kyriacou* *2004(1) SA* 379 *(SCA)* at *3841- 385 B.)*** Upon the facts of this case it is, however, unnecessary to decide whether the test in the ***Philips*** case has been formulated too stringently. Even on that test I am of the view that the Applicant has discharged its onus. I say this because the facts set out by the Applicant together with those set out by the Respondent which the Applicant cannot dispute are plainly sufficient to justify the relief sought. A consideration of the facts which the Respondent attempted to set up in contradiction reveals that no serious doubt is thrown upon the Applicant's case. In this regard the high watermark of the Respondent's case in rebuttal of the allegations against him is contained in paragraph 26 on ***p.* 298 of *the papers***: *"I deny that I* am *involved in the criminal charges as alleged against me. I was involved with Mr Lawson in* a *number of transactions with motor vehicles. I deny, however, that I was any stage aware that the vehicles were stolen. I merely acted as an agent in* a *number of transactions where I introduced the buyer to the seller of the said vehicle".* In my view the defence could hardly have been set out more vaguely or sketchily. It is not disclosed who the seller of the vehicles was, nor what the commission arrangement was between the Respondent and the seller, nor what commission was paid. From the evidence of Lawson it is quite apparent that the Respondent led Lawson to believe that the Respondent was acting as a

principal and not as an agent. On the papers filed I am accordingly of the view that a confiscation order should eventually be made. (The Respondent will of course be at liberty to adduce such further evidence at the confiscation hearing as he pleases in order to avoid a confiscation order.)

As a last line of defence, Mr Jacobs argued that, as the affidavit of Lawson only justifies a finding that the Respondent has benefited to a maximum amount of R325 000,00 from his unlawful activities, the restraint order should be limited to property of that value. The Applicant avers that the total value of all the stolen vehicles sold by the Respondent is R2 445 400,00. In his answering affidavit the Respondent did not specifically deal with this averment nor did he indicate why he was unable to deal with this averment. On the papers I do not believe that there is a sufficient basis for limiting the order as has been suggested by Mr Jacobs.

In view of the aforegoing I am of the view that the provisional restraint order granted on 5 May 2003 which appears on ***pp.* 433 - 455 of *the papers*** ought to be confirmed, subject to what is stated below with regard to costs.

The costs in respect of the hearing of this matter on 12 and 13 May 2004 were reserved. I am of the view that the postponement of the application on the latter date was caused by an attempt by the Applicant to reconstruct certain of the documents and there was, to a certain extent, a lack of co-operation from the Respondent and from financial institutions. Accordingly those costs are to be costs in the cause and are to be paid by the Respondent.

The postponement of the application on 7 October 2004 was occasioned by a new practice directive for which neither party is to blame. The costs reserved on that date should accordingly be costs in the cause and be paid by the Respondent.

The Applicant was not ready to proceed on 8 February 2005 due to the fact that the Applicant's attorney had not briefed counsel. The Applicant must therefore pay the costs of 8 February 2005.

The following order is made:

1. The provisional restraint order granted on 5 May 2003 which appears on ***pp.*** **433 - 455** of the oaainated oaoers is confirmed, subject to the cost orders hereunder.

2. The costs order contained in prayer 2.2 on *p.* **452 of *the papers* is** qualified to the extent that previous costs orders have already been made in this application and also qualified in the following respects:

2.1 The reserved costs in respect of the hearing of this matter on 12 and 13 May 2004 are costs in the cause and are accordingly to be paid by the Respondent.

2.2 The reserved costs of 7 October 2004 are costs in the cause and are accordingly to be paid by the Respondent.

2.3 The Applicant is to pay the costs of 8 February 2005.

J P VORSTER
ACTING JUDGE OF THE HIGH COURT