THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 202/2002

In the matter between :

ANDREW LIONEL PHILLIPS **First Appellant**
LADDIES LARK (PTY) LTD **Second Appellant**
JANVEST CLOSE CORPORATION **Third Appellant**
APVEST CLOSE CORPORATION **Fourth Appellant**
MAYVEST CLOSE CORPORATION **Fifth Appellant**
JUNVEST CLOSE CORPORATION **Sixth Appellant**
AUGVEST CLOSE CORPORATION **Seventh Appellant**
DECVEST CLOSE CORPORATION **Eighth Appellant**
PORTION 1 of 247 EDENBURG CLOSE CORPORATION **Ninth Appellant**
SUSHIMI INV CLOSE CORPORATION **Tenth Appellant**
SWINGING TRADING TWISTER CLOSE CORPORATION **Eleventh Appellant**
FEBWEST CLOSE CORPORATION **Twelfth Appellant**
D MORNINGSIDE INVESTMENTS (PTY) LTD **Thirteenth Appellant**
STEPHEN WERNER CLOSE CORPORATION **Fourteenth Appellant**
MOONLIGHT IMPORT & EXPORT CLOSE CORPORATION **Fifteenth Appellant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

CORAM: **HOWIE P, ZULMAN, NUGENT, CONRADIE JJA *et* MLAMBO AJA**

HEARD: **15 AUGUST 2003**
DELIVERED: **4 SEPTEMBER 2003**

Summary: **Restraint order under Prevention of Organised Crime Act 121 of 1998 – appealability of such order**

J U D G M E N T

HOWIE P/

HOWIE P:

[1] For many years first appellant has owned and operated a business called the Ranch. It is conducted on suburban premises in Sandton. The business involves providing a venue and facilities where men can go to have sexual relations with women prostitutes, or sex workers. The women are not employees of the business. They are free agents. However, they work there in shifts and to gain access to the premises they each have to pay first appellant a certain sum per shift. Each customer has to pay him an admission charge. In addition, the customers pay the women for sexual services rendered but first appellant receives no part of those payments. The current amount each of the women has to pay is R450 per shift and a customer's entry fee is R250.

[2] Arising out of his conduct of this business first appellant is presently facing criminal prosecution on several counts. Two are based on the provisions of the Sexual Offences Act 23 of 1957. Under s 2 he is charged with keeping a brothel and, under s 20 (1) (a), with living off the earnings of prostitution. It is

unnecessary for present purposes to refer to the other charges.

[3] In December 2000 the present respondent, the National Director of Public Prosecutions, applied *ex parte* to the High Court in Johannesburg for a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 ('the Act'). Cited as respondents were first appellant and 14 companies or close corporations of which he is either sole shareholder or sole member. The application came before Labe J in chambers who issued a provisional restraint order in the form of a rule *nisi*, with immediate effect pending the return day, in respect of all first appellant's realisable property and the property owned by his companies and corporations. That same day the property was seized and attached, some of it at first appellant's home. On the return day appellant sought the discharge of the order. Having heard argument, Heher J confirmed the rule but subsequently granted first appellant and the other erstwhile respondents leave to appeal to this Court. The judgment of Heher J is reported as *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W).

[4] Of the various issues raised on appeal the first that requires consideration is the contention on behalf of the respondent that the order made by Heher J is not appealable.

[5] As the learned judge confirmed the rule without modification, regard must be had to the contents of the provisional order. Summarised, its three elements relevant to the present point were these. First, having described the property to which the order related, it prohibited first appellant, and anyone having knowledge of the order, from 'dealing in any manner with the property, except as required or permitted by this order'. Second, a curator *bonis* was appointed to seize the property, to take control and care of it and to administer it. Third, any of the restrained property in the possession of the appellants had to be

surrendered to the curator.

[6] These three elements were variously based on provisions of the Act. Consideration of respondent's contention therefore requires analysis of the material sections. They are contained in Chapter 5 and embody a scheme structured to enable the State to obtain confiscation of the proceeds by means of which convicted criminals have succeeded in making crime pay.

[7] Chapter 5 comprises sections 12 to 36. In s 18 (1) it is provided that in the event of any conviction the trial court may hold an enquiry to determine whether the accused (referred to in the Act as 'the defendant') derived any benefit from his offence. If so, that court may make a confiscation order against him.

[8] To ensure in advance that the offender's assets, or any of them, are available at the time of trial so as to satisfy a confiscation order, respondent is empowered by s 26 to apply to the High Court for a restraint order prohibiting the defendant from dealing in any manner with his assets. The making of a confiscation order is within the exercise of a wide discretion accorded the trial court. Although I refer to 'the trial court' for convenience, it is made clear in s 13 that proceedings for a confiscation order, and for a restraint order, are in all material respects civil proceedings, *inter alia*, in regard to the rules of evidence and the requirement that facts be established only on a balance of probabilities.

[9] In terms of s 18 (2) the quantum of a confiscation order may not exceed the lesser of two amounts. One is the value of the benefit which the defendant derived either from the offence or offences of which he is convicted and, according to s 18 (1) (c), from any other criminal activity which the court finds

to be ‘sufficiently related’ to those offences. The second determinative amount is that which might be attained by realising, among other things, such assets as the defendant has at the time of the confiscation order. For convenience I shall refer to the assets subject to the restraint order as ‘the restrained assets’.

[10] In terms of s 25 the High Court hearing an application for a restraint order has a discretion to grant it only if certain jurisdictional facts are established. The most important one for present purposes is that there are reasonable grounds to believe that a confiscation order may be made against the defendant.

[11] If a restraint order is made the Court must at the same time make an order authorising seizure of all movable restrained assets (s 26 (8)); may at any time appoint a curator *bonis* to take control and care of the restrained assets (s 28(1)); and may at any time order the endorsement of restrictive conditions on the title deeds of any immovable restrained assets (s 29(1)).

[12] A restraint order has only temporary duration. It operates pending the outcome of later events. In terms of s 26(10)(b) it must be rescinded by the High Court when the proceedings against the defendant are concluded. Conclusion, says s 17, occurs on acquittal (whether at trial or on review or appeal) or if no confiscation order is made despite conviction, or if the confiscation order is satisfied.

[13] Apart from rescission in those instances the Act makes provision for variation or rescission by the High Court of restraint orders and related orders in other circumstances. In terms of s 26(10)(a) the court may vary or rescind a restraint, seizure or other ancillary order on the application of any person affected, provided it is satisfied on each of two particular grounds. The first is that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses and cause him undue hardship. The second is that such hardship outweighs the risk that the restrained assets may be destroyed, lost, damaged, concealed or transferred.

[14] There is no such restriction on the High Court’s power in relation to orders appointing curators *bonis* and orders for the surrender of property which may be varied or rescinded at any time (s 28(3)), and orders for the endorsement of restrictive conditions on title deeds, which may rescinded at any time (s 29(7)).

[15] The only provisions of Chapter 5 that concern appeals in some presently relevant measure are s 24A and s 29A. S24A states that if a restraint order is in force when a confiscation order is made, the restraint order remains in force pending the outcome of any appeal against the confiscation order. (The latter

order is by nature and effect obviously an appealable order and the statute recognises that, albeit in passing.)

[16] S29A provides that the noting of an appeal against variation or rescission of any order under sections s 26(10) (restraint), 28(3) (curator *bonis* or surrender) and 29(7) (restrictions on title deeds) shall suspend such variation or rescission pending the outcome of the appeal. The aggrieved party in the event of a variation would normally be the respondent and, in the case of rescission, could only be the respondent. Moreover the section does not refer or extend to appeals against refusing variation or rescission. Has only the respondent an appeal? If both parties can appeal would it not be extraordinary if the defendant could appeal against a refusal to vary or rescind but not against the restraint order itself? I shall revert to these questions.

[17] Turning to the respondent's argument, its starting point was that Heher J had rightly held that a restraint order was analogous to an application for an interim interdict or for attachment of property pending litigation. Consequently in the same way that at common law a judgment or order granting interim relief was in principle not appealable, a restraint order, being a statutory interim remedy and altogether comparable, was also not appealable. Counsel for respondent emphasised in this regard that a restraint order was variable or rescindable by the court that made it; that an appeal could only be aimed at a decision that was final and definitive and not at what was, in effect, a 'moving target'; and that a restraint did not finally dispose of any issue that would arise for decision in either the criminal or the confiscation proceedings. Moreover, so it was urged, to entertain an appeal against a restraint order would defeat the purpose of the remedy.[1] Accordingly, said counsel, when Heher J granted leave to appeal and, held that his order was final in the sense of that word in the present legal context, the learned Judge had erred. (I may point out that Heher J did not actually hold that a restraint order is analogous to an interim common law restraint *pendente lite*. He merely commented (at 76I-J of the reported judgment) that there is a similarity.

[18] In weighing up these submissions, the first consideration to be borne in mind is that to be appealable a judicial decision of the High Court must be a judgment or order.[2] Generally speaking, a judgment or order is -

1. Final in effect, 'final' meaning unalterable by the court whose judgment or order it is.

[1] Cf *Cronshaw and another v Coin Security Group (Pty) Ltd* 1996(3) SA 686(A) at 691 C-D

[2] S 20 of the Supreme Court Act 59 of 1959.

2. Definitive of the rights of the parties in that it grants definitive and distinct relief.
3. Dispositive of at least a substantial portion of the relief claimed in the main proceedings.[3]

[19] Clearly, if the decision in issue has none of those attributes it is difficult (one need put it no higher) to see how it could be susceptible of appeal. But what if it has one or some but not all? The answer, apart from the fact that the *Zweni* formulation itself contains the qualification 'generally speaking', is that this Court has held that the formulation is illustrative, not immutable, and that a decision having final jurisdictional effect can be appealed against even if it is not definitive or dispositive in the sense meant in *Zweni.*[4]

[20] Counsel for the respondent is right, in my view, in submitting that a restraint order is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect as envisaged in *Zweni.* Plainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount. The crucial question, however, is whether a restraint order has final effect because it is unalterable by the court that grants it. In this regard counsel for respondent argued that the provisions of s 26(10)(a) deprived a restraint order of the finality required for appealability because it permitted variation and even rescission.

[21] Orders respectively appointing curators, requiring surrender of property and burdening title deeds are all rescindable at any time. Presumably the unstated requirement is that sufficient cause must be shown but otherwise, unlike the case of s 26(10)(a), no limits are placed on their susceptibility to rescission. And in the case of a common law interim interdict or attachment *pendente lite* there is no reason why, for sufficient cause, they would not, generally, be open to variation, if not rescission.

[22] Absent the requirements for variation or rescission laid down in s 26(10)(a) (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is, in my opinion, final in the sense required by the case law for appealability.

[3] *Zweni v Minister of Lw and Order*1993 (1) SA 523 (A).

[4] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10E-11B.

[23] Returning to the implications of s 29A, it seems to me that its only purpose is to ensure a restraint order's existence where an order for variation or rescission (including under s 26(10)(a)) is granted and there is an appeal against the latter order. The order for variation or rescission would ordinarily be suspended by noting the appeal but the defendant could apply under Rule 49(11) for an order that the variation or rescission be not suspended. There is on the other hand no need for the section to deal with the case where the defendant fails to obtain variation or rescission. The restraint order would obviously continue to exist in that situation. It is not to be inferred from the section, therefore, that a defendant does not have an appeal against refusal of either variation or rescission. An order for rescission is clearly appealable on ordinary principles, for it has all the characteristics referred to in *Zweni's* case. A variation of a restraint order, however, like the restraint order itself, is neither definitive of the rights of the parties, nor dispositive of any of the relief claimed in the main proceedings. Yet the legislature clearly contemplated that such an order should be appealable notwithstanding that it lacks those characteristics. It is difficult, in those circumstances, to see why the legislature should have intended that a restraint order itself should not be appealable merely because those characteristics are lacking. In my view the section, while not decisive in itself, lends support to the conclusion that a restraint order was intended to be appealable because it is final (in the sense in which the term was used in *Zweni's* case) notwithstanding that it is not definitive or dispositive of any of the issues that will arise in the main proceeding.

[24] I also see no reason why the recognition of the appealability of such an order will necessarily undermine the purpose of the Act. An appeal from such a decision lies only with the leave of the court concerned or, where that is refused, with the leave of this Court, and where such leave is granted, the court concerned may attach appropriate conditions (see s 20(5)(a) of the Supreme Court Act 59 of 1959). Properly applied, those limitations upon an appeal provide ample scope for adequate protection to be afforded to the respondent in

appropriate cases.

[25] The respondent's appealability argument must consequently fail.

[26] Turning to the appeal itself, it was first appellant's argument in the Court below, and in his counsel's heads of argument, that the assets of the second to fifteenth appellants – the companies and close corporations – were wrongly subjected to the restraint order. Counsel indicated at the commencement of his address that this point, and two others it is unnecessary to mention, were not being pursued. For convenience I shall therefore refer from now on to first appellant as 'appellant'.

[27] The submissions advanced on appellant's behalf may be shortly summarised as follows:

1. Respondent, as *ex parte* applicant before Labe J, failed to make disclosure of various matters which it was his duty to include in his papers. Heher J ought therefore to have discharged the rule on that ground alone.
2. Respondent brought the application with the ulterior motive to have the Ranch closed down and to put appellant out of business.
3. The provisional order was executed unlawfully and in violation not only of the order itself but also in conflict with appellant's rights to privacy and dignity.
4. There are no reasonable grounds for believing that a confiscation order might be made.
5. The provisional order should have been amended by placing a value limitation on the assets to be restrained.

[28] The non-disclosure argument involves a number of points which were raised before Heher J *in limine.* The learned Judge heard argument on them before hearing counsel on the other issues. He gave a judgment dismissing all the points, with costs. That judgment does not form part of the reported judgment and was only presented to this Court shortly before the day of the appeal.

[29] It is trite that an *ex parte* applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that

discretion the later court will have regard to the extent of the non-disclosure; the question whether the first court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.

[30] Counsel for appellant detailed what he submitted were nine separate instances of non-disclosure in the founding papers which, individually or cumulatively, should have persuaded Heher J to set aside the provisional restraint order. It is unnecessary, in my view, to say anything more about eight of them than this. In his unreported judgment the learned Judge considered them all. He found that one did not require disclosure. He held that five were such that if disclosure had been made it could not be found that the omitted material might have influenced Labe J to refuse relief. The remaining two concerned disputed issues of fact and were not susceptible to disposal as points *in limine*. I am not persuaded that Heher J erred in any respect in exercising his discretion not to discharge the rule on these grounds.

[31] The ninth instance of non-disclosure was not raised in the founding papers and consequently respondent never had the opportunity to deal with it. It was raised for the first time on appeal. Therefore it could not possibly have influenced Heher J to discharge the provisional restraint order. The only reason for discussing this point further is that in argument counsel contended there had been bad faith on the part of a senior member of respondent's staff, Mr Hofmeyr. The point arises in this way. Appellant was a State witness in an earlier prosecution against three men charged with extorting him to organise what were called 'sex holidays' overseas. In the course of his evidence he admitted that the Ranch was a brothel. The admission was part of the evidential matter in the founding papers on which respondent relied for the allegation that there were reasonable grounds to believe appellant might be convicted on the charges under the Sexual Offences Act.

[32] In appellant's papers he said that he had not been warned before testifying of his right against self-incrimination or offered an indemnity against prosecution under the Sexual Offences Act. (The evidence supports him.) He went on to add that Mr Hofmeyr had been present at court when he gave the evidence in question and that this was no coincidence but an indication that Mr Hofmeyr was intent, with others, on pursuing a vendetta against him. Heher J duly concluded that in view of the omission to give appellant the appropriate warning it was most unlikely that the admission would be admitted against him at his own trial. Before us the argument for appellant had become this: it was

respondent's duty to disclose in the *ex parte* application that appellant's admission was inadmissible and Mr Hofmeyr's presence at the extortion trial somehow or other warranted the conclusion that appellant had, in effect, been set up to incriminate himself so that his evidence could be used against him in the present proceedings. Mr Hofmeyr, in the replying papers, fully explained his presence and denied the allegation. To add fuel to the conflict appellant's counsel contended that the matter 'reeks of *mala fides*'. I shall revert to the imputation of bad faith when dealing with costs.

[33] This non-disclosure point has no merit. There was no duty on respondent to raise the possible inadmissibility of appellant's evidence. It was not a matter of fact but of law. For all the reasons stated above, the non-disclosure argument fails in all respects.

[34] The next argument for appellant is that the restraint proceedings were prompted by the ulterior motive to have the Ranch closed down. In the hearing before Heher J this aspect was raised *in limine*. The learned Judge dealt with it fully in his unreported judgment and concluded that had Labe J been informed that this was respondent's purpose it would not have influenced him to refuse relief. In my view Heher J was right. His reasons dispose of this point whether as a component of the non-disclosure argument or an independent ground of appeal. The learned Judge held that the closure of the business of the Ranch was an inevitable concomitant of the restraint given the nature of the business and that the curator could not seriously have contemplated running the business economically without the prostitution, or lawfully if there was prostitution. Accordingly, even if respondent contemplated or wanted the closure of the business this does not vitiate his actions or the *ex parte* proceedings.

[35] It is then argued that the execution of the provisional order was unlawful and in violation of appellant's rights of privacy and dignity. There are two factual allegations which underlie this argument. The first is that representatives of the news media, with photographers, were present at the very beginning of the execution operation and the inference is, says appellant, that respondent invited their attendance with the purpose of ridiculing or embarrassing him. The second is that the search and seizure process resulted, *inter alia*, in his home and personal effects being left in an unacceptable state of disorder and uncleanliness. In the replying papers Mr Hofmeyr says the media were informed of the restraint order after it had been granted and denied what he called the insinuation that the media were invited to the implementation of the

order. Apart from the fact that this version cannot, in these proceedings, be rejected, the media point was not raised in appellant's papers as a ground for discharging the rule and respondent was not called on to reply to it in greater detail than was done.

[36] As regards the state of appellant's home and personal possessions, a large scale removal operation would no doubt inevitably involve resultant disarray. However, the implementation of the order was not the task or responsibility of respondent but the curator. Any unlawful conduct by employees or agents of the curator are irrelevant to the issues in this appeal. The argument founded on alleged unlawfulness of the execution of the provisional order therefore cannot succeed.

[37] Turning to the requirements of s 25(1) of the Act, respondent has to show in a restraint application reasonable grounds for believing a confiscation order may be made. This involves reasonable grounds for believing that the defendant may be convicted as charged, that the trial court may find that he benefited from the proved offence or related criminal activity, and that a confiscation order may be made in that court's discretion.

[38] Analysis of the evidence proffered by respondent in support of the charges levelled against appellant, and the latter's responses, took up much time in the Court below and a material portion of the parties' heads. It is enough for purposes of this judgment, however, to point to what appellant himself said in his papers. He has operated the Ranch since 1987. He aims to attract 'executive patrons' who want 'personal stress relief' in a 'private, clean and secure environment'. There are women sex workers there at any time. He 'assumes' that the service they render is sex in some form. They are paid for the favours they provide. I have recounted at the beginning of the judgment the various sums payable by the women to him and those payable by the patrons. Appellant claims that the Ranch has a reputation for being the best establishment of its kind 'probably in the southern hemisphere'.

[39] I do not propose to discuss the meaning of 'brothel' and 'keeping a brothel'. Heher J did so fully in the reported judgment at 99D-H. Counsel for appellant was unable to offer any convincing reason for saying that the Ranch was not a brothel. He could only venture that the women were not oppressed employees in thrall of a domineering employer. That is irrelevant.

[40] Also on his own version, appellant has earned substantial financial reward from his conduct of the ranch.

[41] In my view, therefore, there are reasonable grounds for believing that

appellant might be convicted on at least two of the charges preferred : keeping a brothel and living on the earnings of prostitution.

[42] That appellant has earned handsomely from his enterprise is reflected in the considerable number and range of assets seized by the curator. It is unnecessary to attempt to guess at their value. It suffices to say that on the evidence he is a person of considerable financial substance.

[43] There are therefore reasonable grounds for believing that he benefited within the meaning of the Act and that a confiscation order may be made.

[44] The final submission for appellant is that because the charges cover only the period 30 June 1999 to 2 February 2002 there cannot be a reasonable possibility that the reach of any confiscation order might extend to assets acquired, or assets acquired from income received, prior to that period. I disagree. There are reasonable grounds to believe that the trial court may find earlier conduct 'sufficiently related' criminal activity within the meaning of s 18(1)(c) of the Act. It would seem to me to be no answer to say that because earlier conduct was exactly the same it cannot, linguistically or otherwise, be the same as 'sufficiently related' conduct. In the absence of any feasible suggestion that the restrained assets were to any material extent the product of any venture other than that for which the Ranch has, apparently, become so well known, there is no sensible basis on which to limit the assets hit by the restraint to any particular sum. The appeal must accordingly fail.

[45] As to costs, counsel for respondent sought a special order. They relied on appellant's imputations of deliberate non-disclosures in the founding papers and the insinuation of *mala fides* on the part of Mr Hofmeyr. In the latter respect, they said, no basis for the allegation existed. The tenor of their argument as to the alleged *mala fides* seemed to convey that this accusation had come somewhat out of the blue. I am not at all sure this is so. It had already been alleged in appellant's papers that respondent was conducting a vendetta against him and had brought the proceedings with an ulterior motive. An accusation of *mala fides* is not far removed. Appellant's case could of course have been stated in the papers and in argument without resorting to insinuation, baseless accusations or extravagant language. Why should respondent and his staff have to bear the sting of such excesses if they are only trying, in the public interest, to combat organised crime? On the other hand, respondent operates in a tough environment especially in so far as the areas in which asset forfeiture and related matters are concerned. If those he accuses are indeed criminals they will be in the game to obtain rich rewards. They will not use kid gloves.

They might well resort to exaggerated vehemence to add weight to their protestations of innocence. In all the circumstances I am unpersuaded, but only just, that a special order is warranted.

[46] The appeal is dismissed with costs, including the costs of two counsel.

CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCURRED:
ZULMAN JA
NUGENT JA
CONRADIE JA
MLAMBO AJA