IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No: 94/2000

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

REBUZZI, CHARLOTTE ELIZABETH Respondent

Coram: Vivier, ADCJ; Marais, Mthiyane, JJA; Cloete and Nugent, AJJA.
Heard: 8 November 2001
Delivered: 23 November 2001

Summary: Prevention of Organised Crime Act 121 of 1998 – restraint order – whether permissible where victim of crime has a claim against the defendant.

J U D G M E N T

Nugent AJA:

[1] This appeal concerns a provisional restraint order that was made in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (as amended by Acts 24 and 38 of 1999) and thereafter set aside. The appellant now appeals against the order setting it aside with leave granted by the Court *a quo.* The respondent has abided the judgment of this Court.
[2] Chapter 5 of the Act (which encompasses sections 12 to 36) is designed to enable a court to deprive a convicted person of the proceeds of

crime. Its foundation is s 18(1), which permits a court that has convicted a person of an offence to make what is referred to as a 'confiscation order'. The subsection reads as follows:

> '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
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> (c) any criminal activity which the court finds to be sufficiently related to those offences,
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> 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 the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[**3**] The amount for which a confiscation order may be made is restricted to the lesser of (a) the monetary value of the proceeds of the offences or related criminal activity or (b) the net value of the sum of the defendant's property and certain defined gifts (called 'affected gifts') made by the defendant (s 18(2)).

[**4**] Sections 25 and 26 (which fall within Part 3 of Chapter 5) allow for a 'restraint order' to be made in anticipation of the granting of a confiscation order. The purpose of a restraint order is to preserve property so that it might in due course be realised in satisfaction of a confiscation order. Section 26(1)

authorises the National Director of Public Prosecutions to apply to a High Court, *ex parte,* for an order 'prohibiting any person … from dealing in any manner with any property to which the order relates.' The remaining provisions of Part 3 confer wide powers upon the court as to the terms of a restraint order. In particular, it may appoint a curator *bonis* to take charge of the property that has been placed under restraint, order any person to surrender the property to the curator, authorise the police to seize the property, and place restrictions upon encumbering or transferring immovable property. It may also make a provisional restraint order having immediate effect and simultaneously grant a rule *nisi* calling upon the defendant to show cause why the order should not be made final.

[**5**] The circumstances in which a restraint order may be made are provided for in s 25(1) as follows:

'A High Court may exercise the powers conferred on it by section 26(1) [i.e. the powers to make restraint orders] –

(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.'

[6] The restraint order that is now in issue was applied for by the appellant at the request of a company known as PG Bison Ltd ('the company') which formerly employed the respondent. The application was supported by the evidence of, amongst others, Mr Flockton, the internal audit manager of the company, and Mr van der Walt, a partner in the auditing firm KPMG.

[7] The respondent was formerly employed at the company's Boksburg factory as a senior credit co-ordinator. Her duties included receiving the proceeds of cash sales (a combination of cash and cheques) together with the relevant documentation and arranging for them to be deposited into the company's bank account.

[8] According to the evidence of Mr Flockton the company operated an incentive scheme which allowed certain customers a rebate on the purchase price of goods, the amount of which depended upon the quantity of goods purchased. The rebate was calculated annually and was paid to the customer either by means of a cheque or by crediting the customer's account. The respondent was responsible for distributing the cheques to some of the company's customers.

[9] In about the middle of 1999 Mr Flockton received information which caused him to investigate certain transactions. He discovered that various cheques drawn by the company in payment of rebates owing to customers had been deposited into the company's bank account in place of the proceeds of cash sales. He inferred from these and other related transactions that the respondent had stolen the proceeds of the cash sales

and had concealed the theft by depositing the cheques instead. The company engaged Mr van der Walt to conduct a more comprehensive investigation and he concluded that the respondent had stolen at least R897 066 during the period from 1 April 1997 to 30 July 1999 by using that technique.

[10] It was also established that the respondent owned a residential property in Edenvale and that she had twenty-four accounts of various kinds at Nedbank and First National Bank. At the request of the company the appellant applied to the High Court at Johannesburg, *ex parte*, for a provisional restraint order, and the order was made. It is not necessary to set out its provisions in any detail. It is sufficient to say that it incorporated the following features. It prohibited all persons from dealing with the respondent's property and bank accounts and a curator *bonis* was appointed to take charge of them. The curator was also authorized to seize other property of the respondent (up to a certain value) that might be discovered. The respondent was ordered to disclose certain information to the curator and I will return to that portion of the order later in this judgment.

[11] The curator duly took charge of the property and the bank accounts. The respondent opposed the confirmation of the order and filed an affidavit in support of her opposition. On the extended return day the matter came before Goldstein J who set aside the provisional order (his judgment is reported as *National Director of Public Prosecutions v Rebuzzi* 2000 (2) SA 869 (W)).

[**12**] The learned judge was of the view that the legislature could not have intended a confiscation order to be made where there was an identifiable victim who had a claim for recovery of the proceeds of the crime. Otherwise, so the learned judge reasoned, the realisation of the defendant's assets in satisfaction of the confiscation order would deprive the victim of the means of satisfying his claim. The learned judge put the matter thus (at 875C-D):

> ' [T]he proceeds of confiscation orders are intended by the Act to accrue to the State. It follows that if a court were to convict the respondent and were to make a confiscation order in terms of s 18 and were to give effect to such intention, it would deprive the complainant of the benefit of obtaining payment of its loss …'

[**13**] After noting that s 18(1) confers a discretion on the court

concerned the learned judge continued as follows (at 875E-F):

> ‘ [I]t seems to me inconceivable that a confiscation order could be made in the present circumstances where PG Bison Ltd, a known complainant, is entitled to compensation or repayment of money stolen which far exceeds the total assets under restraint. It would be absurd to provide for the granting of a confiscation order which would deprive the complainant of compensation for the wrong perpetrated upon it.’

The learned judge concluded that there was thus no reason to believe a confiscation order might be granted in the event that the respondent is convicted and it was not competent for a restraint order to be made.

> [**14]** In my view a court is not precluded from making a confiscation order merely because the victim of the crime has a claim for recovery of the proceeds nor is that a consideration that needs even to be weighed when it exercises its discretion. A confiscation order does not purport to authorise the confiscation of particular property of the defendant. It is no more than an order upon the defendant to pay to the State a specified sum of money (which may not exceed the amounts referred to in s 18(2)) and by itself it does not deprive the victim of the means for recovering his loss.
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> [**15**] Bearing in mind that s 23 accords to such an order the effect of a civil judgment I have assumed (without deciding) that the State might execute it in the ordinary way in which case a claim by the victim would indeed compete with it for the property of the defendant. Even if that were to be so, however, it is far more likely that the State will enforce the order by invoking instead the mechanism that has been created specifically for that purpose by Part

4 of Chapter 5 (sections 30 to 36).

[**16**] Where a confiscation order has been made and its effect has become final s 30(2) of the Act permits a High Court to appoint a curator *bonis* (if one has not already been appointed) whose function it is to realise certain defined property of the defendant and to distribute the proceeds. The curator acts throughout under the supervision of the High Court which may direct how the property is to be realised and to whom the proceeds are to be distributed.

[**17**] In my view sections 30(5) and 31(1) make it clear that the legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss. Not only do those sections recognise that a confiscation order might co-exist with a claim by the victim (which would hardly have been provided for if the legislature intended that to be avoided) but they provide the means to avoid the claims competing for the defendant's property. Where the defendant's property has not yet been realised s 30(5) expressly authorises the High Court to suspend the realisation until the victim's claim or judgment has been met, and where the property has been realised s 31(1) enables the High Court to direct the manner in which the proceeds are to be distributed. There is no reason to think that a court that is called upon to give such directions will not recognize the claim of a victim and order that it be paid before any moneys accrue to the State bearing in mind that s 31(1) expressly provides that it does not have a preferential claim. Thus the making of a confiscation order need not deprive the victim of the means of recovering his loss, nor is there reason to think that it will ordinarily

do so.

[**18**] The learned judge in the court *a quo* said the following of those provisions (at 878B-C):

'The fundamental answer to counsel's reliance on ss 30(5) and 31(1) is, however, that the Legislature could hardly have intended a Court to make a confiscation order which would not have the effect of any money being paid to the State but would merely put the complainant to the expense of Court proceedings in order to protect its rights to the proceeds of the assets to be realised or already realised.'

[**19**] The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view it is therefore not significant that in some cases the State might end up receiving nothing. It is because the purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State that the court's inquiry in terms of s 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss. Indeed, in the case of so-called "victimless" crimes, such as drug-dealing and the like, there will be no person who could be said to have suffered a loss. That a confiscation order might not be necessary in order to deprive the convicted person of the proceeds of crime (i.e. where there is an identifiable victim who has suffered loss) does not seem to me to be a reason to withhold such an order. It still serves the purpose of ensuring that, irrespective of whether claims are in due course established, the convicted person will not remain in possession of the proceeds.

[**20**] The respondent did not appear before us to advance any other grounds for setting the order aside and I see no reason to do so. In her opposing affidavit the respondent denied that she had committed the crimes. A court is not required to be satisfied of the guilt of the defendant before a restraint order is granted. What is required, *inter alia*, is only that there should be reasonable grounds for believing that the defendant may be convicted. The material facts in the present case are substantially not in dispute. The disputes, such as they are, relate rather to the proper inferences to be drawn from those facts. It is not necessary to traverse them in detail. It is sufficient to say that in my view there are indeed reasonable grounds for believing that the respondent may be convicted and that a confiscation order may be made.

[**21**] There is, however, one reservation. Section 25(7) of the Act purports to confer a discretion on a court, when making a restraint order, to compel the defendant to disclose information. The provisional order that was granted in the present case included the following:

'1.9 Directing the Defendant to disclose forthwith to the appointed *curator bonis* on affidavit all affected gifts she has made over the past seven years as well as property other than those mentioned in (the schedules to the order) in which she holds any interest, as well as the location thereof.

1.10 Directing that the information disclosed by the Defendant in terms of the affidavit … may not be used against the Defendant in a criminal trial pertaining to the subject matter of this application.'

[22] The term 'affected gift' is defined by s 12(1) of the Act to mean any gift (that word is given an extended meaning by s 16) :

'(a) made by the defendant concerned not more than seven years before the fixed date [which is defined]; or

(b) made by the defendant concerned at any time, if it was a gift

(i) of property received by that defendant in connection with an offence committed by him or her or any other person; or

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection,

whether any such gift was made before or after the commencement of this Act'.

[**23**] It is apparent that the order sought by the appellant will compel the respondent, under threat of the penalties for perjury and contempt of court, to make disclosures that have the potential to be self-incrimating not only in relation to the commission of the offences that are now in issue but also in relation to the commission of offences as yet unknown to the State.

[**24**] The law has an inherent resistance to placing a person under compulsion to make self-incriminating disclosures which is now reflected in s 35 of the Constitution. Such compulsion, when subject to a restriction in similar terms to the restriction proposed in the present case on the use of any disclosures that are made, has been held to be unobjectionable in the context of ss 415 and 417 of the Companies Act 61 of 1973 (*Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095(CC); *Ferreira v Levin NO and Others;*

Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)). Whether it is likewise unobjectionable in the context of the Act that is now in issue is not necessary to decide because in my view the order ought nevertheless not to be granted in the present case. In my view an order compelling a defendant to disclose information is not to be had simply for the asking: while a court has a discretion to grant such an order it must be exercised upon proper grounds. There is no suggestion that the respondent might have other property that is being concealed or might have made affected gifts or that she might have previously engaged in criminal activity. In my view no factual basis has been laid for granting the order that is now sought.

[**25**] With that reservation the appellant was entitled to confirmation of the provisional order, and to that extent the appeal must succeed. The amount that was alleged to have been stolen was incorrectly reflected in the provisional order and falls to be corrected. The respondent, who did not oppose the appeal, could have done nothing to avoid the necessity for the appeal, and in those circumstances she ought not to be held liable for the costs.

[**26**] Accordingly the appeal is upheld. The order of the court *a quo* is set aside and the following order is substituted therefor:

'The provisional restraint order granted on 2 December 1999, but for paragraphs 1.9 and 1.10, is confirmed with the following amendment: the amount of R974 055 is deleted wherever it appears and substituted by the amount of R897 066. The respondent is ordered to pay the costs occasioned by her opposition to the application which are to include the costs of two counsel.'

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NUGENT AJA

Vivier ADCJ)

Marais JA)

Mthiyane JA)

Cloete AJA) concur