

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Merensky and Others (CIV F 01/10) [2011] ZANWHC 13 (11 March 2011)

[2011] ZANWHC 13

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, Samkelo Gura, N Gutta

CASE / FILE NUMBER

CIV F 01/10

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IN THE NORTH WEST HIGH COURT,

MAFIKENG

CASE NO: CIV F 01/10

In the matter between:-

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

.....Appellant

and

DUAN MERENSKY

.....First

Respondent

SARAH WILHELMINA BENNET

.....Second

Respondent

DANIEL JACOBUS SCHOEMAN

.....Third

Respondent

FULL BENCH APPEAL

HENDRICKS J; GURA J; GUTTA J

DATE OF HEARING : 11 FEBRUARY

2011

DATE OF JUDGMENT : 11 MARCH

2011

COUNSEL FOR THE APPELLANT : ADV

PISTOR SC

with ADV OOSTHUIZEN

COUNSEL FOR THE
RESPONDENTS :

ADV JAGGA

JUDGMENT

HENDRICKS J

[A] Introduction:-

- [1] The Appellant, through his representative in the North West Province, Mmabatho, launched and obtained on the 14th March 2008 on an ex parte basis, seven (7) preservation orders in terms of Section 38 of the Preservation of Organized Crime Act, No 121 of 1998 ("POCA").
- [2] These orders prohibited any person from dealing with any proceeds of offences committed at certain business premises in the Rustenburg area in contravention of the North West Gambling Act, No 2 of 2001 (as amended). The proceeds were placed under the control of a curator bonis pending the outcome of an application for forfeiture of such proceeds in terms of Section 50 of POCA.
- [3] On the 21st May 2008 the Respondents applied for reconsideration of the aforementioned orders. Mogoeng JP (as he then was) reconsidered the preservation orders granted by Gcabashe AJ and discharged them. Written reasons for the reconsideration of the said orders were handed down on the 3rd July 2008.
- [4] The Appellant thereafter sought and obtained leave to appeal to the Full Bench of this division from the court a quo, against the dismissal of the preservation orders. Hence this appeal.

[B] History of the matter:-

- [5] The appeal was ultimately set down for hearing on the 25th June 2010. At the hearing, an affidavit was handed in by the Appellant indicating that the attorney in the office of the State Attorney, Mmabatho, Mr Elgin Forbes ("Mr Forbes") was struck from the roll of attorneys by the Northern Cape High Court some time ago. The effect of this was that at the time of signing of the notice of appeal and notice of application for leave to appeal, Mr Forbes was not an attorney and he fraudulently held himself out still to be one. The appeal was struck from the roll with costs due to this problem because strictly speaking there was no appeal before that court as a result of the aforementioned defect.

- [6] An application for the reinstatement of the appeal coupled with an application for condonation for the late prosecution of the appeal was heard simultaneously with the merits of the appeal before this Court on the 11th February 2011. Without pronouncing on any of these applications or the merits, judgment was reserved.

[C] Condonation:-

- [7] The application for the late prosecution of the initial appeal and also the reinstatement of the appeal is opposed by the Respondents on the basis that it amounts to a flagrant disregard of the Rules of this Court without good reasons therefore being provided and that there is no merit in the appeal (and therefore no good prospects of success) because of mootness.
- [8] In *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) the following is stated by the then Appellate Division (now the Supreme Court of Appeal):-

“It is well settled that, in considering applications for condonation, the court has discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent’s interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.”

- [9] In terms of Rule 49 (2) of the Uniform Rules of Court, if leave to appeal to the Full Bench is granted, the notice of appeal shall be delivered and filed within twenty (20) days from the date that such leave was granted or within such longer period as may upon good cause shown be permitted. The twenty
- (20) days period expired on 31st July 2009, whereas the notice of appeal (signed by Mr Forbes) was only filed on 18th September 2009.
- [10] An application for condonation for the late filing of the notice of appeal was filed. The explanation for the lateness of the filing of the notice of appeal was a misunderstanding between the attorney of record for the Appellant, by then Mr Forbes from the office of the State Attorney, Mmabatho, and counsel representing the Appellant as to whose duty it was to file the said notice of appeal.
- [11] It goes without saying that there could never have been any misunderstanding as to who was responsible for the filing of the said notice because it is the responsibility of an attorney and not counsel to file the said notice of appeal. This, in my view, amounts to dereliction of duties on the part of the attorney. As already alluded to earlier on, it also emerged later on that Mr Forbes was no longer an attorney and could therefore not have signed the notice of appeal in that capacity. Much criticism can be leveled against not only the conduct of Mr Forbes but also about the manner in which this appeal was prosecuted.

- [12] Be that as it may, this is not the only factor to be considered in an application for condonation. Suffice to say that an attempt was made, although also belatedly so, to file a new notice of appeal (this time by a duly admitted and practicing attorney) in an attempt to cure the defect and replace the defective notice of appeal initially filed.
- [13] Mr Pistor SC on behalf of the Appellant contended that a proper case had been made out for condonation, especially if regard is had of the fact that the Respondents won't suffer any prejudice as a result thereof and the prospect of success on appeal. Mr Jagga on behalf of the Respondents submitted that the notice of application for leave to appeal that was also signed by Mr Forbes, which forms the basis of the judgment for leave to appeal, was also defective. So too, goes the argument, was the judgment on leave to appeal (obtained as a result of the defective notice of application for leave to appeal) erroneously granted.
- [14] Mr Pistor SC submitted that the judgment and order granting leave to appeal stands, although the notice of application for leave to appeal was

defective because it was not signed by an attorney. I agree with the submission of Mr Pistor SC. The irregularity of the signing of the notice of application for leave to appeal can be condoned especially having regard to the decision reached by this Court.

[D] Appealability:-

- [15] Mr Jagga contended that the said orders are interim orders and therefore not appealable. Mr Pistor SC submitted the contrary. The appealability of an order discharging a preservation order is not dependant on whether the preservation order itself is appealable. The question whether the granting of the relevant preservation orders in casu is appealable, is not relevant to this appeal.
- [16] The jurisdictional requirements for a civil appeal emanating from a provincial or local division as a court of first instance are twofold:-

[i] The decision appealed against must be "a judgment or order";

[ii] Leave to appeal must have been obtained.

It stands beyond contention that leave to appeal has been granted. The question arises whether the discharge of the preservation orders constitutes "a judgment or order".

A "Judgment or Order"

- [17] Section 20 of the Supreme Court Act, Act 59 of 1959 creates a right of appeal from a "judgment or order" of a provincial or local division sitting as a court of first instance. It was held by the Appellate Division of the then Supreme Court that a "judgment or order" is a decision which has the following three characteristics:-

[i] The decision must be final in effect and not susceptible to alteration by the court of first instance.

[ii] The decision must be definitive of the rights of the parties in the sense that it grants definite and distinct relief.

[iii] The decision must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

See:- *Zweni v Minister of Law And Order* 1993 (1) SA 523 (A).

[18] If the decision does not constitute a “judgment or order”, the decision is not appealable. It is also a trite principle that the granting of an interdict pendente lite is not a final order and is therefore not appealable. Furthermore, interlocutory orders refer to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to or during or in the process of litigation. Such orders are divided into two classes. First, orders that have a final and definitive effect on the main action and secondly, orders that do not have such an effect on the main action (known as simple interlocutory orders). No appeal lies against simple interlocutory orders.

[19] This raises the question, whether a preservation order resembles the three characteristics of a “judgment or order” and whether a preservation order is not a simple interlocutory order? The duration of a preservation order is limited. POCA provides that:-

“A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless:- there is an application for a forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order.”

See:- Section 40 of POCA.

[20] Noticing that a preservation order in essence attaches property, this section creates an attachment ad fundandam jurisdictionem. Once the curator bonis attaches the property, the Appellant has a time frame of ninety (90) days from publication in the Government Gazette to make an application for a forfeiture order in terms of Section 48 of POCA. If the time period lapses, the preservation order is discharged ex lege and the Applicant cannot make an application for a forfeiture order.

[21] If one accepts that a preservation order only has a procedural effect, it means inherently, the same court will at a later stage determine the substance of the matter. In such a case, a preservation order is not final and not appealable. However, a preservation order goes further in the sense that the Respondents are prejudiced by the removal of their property pending the outcome of a final determination (at the forfeiture stage) of their case. This is dependent on a publication in the Government Gazette. This has a fundamental effect on the Respondent. In view of the decision of *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC) the audi-rule is not excluded and the Respondent may anticipate the preservation orders for consideration by the court afresh. This curbs the possible hardship that Respondent may suffer in these circumstances.

- [22] Where an application for reconsideration is made (similar to a rule nisi), the matter becomes *res judicata*. In this sense, a preservation order has a substantive effect and becomes final and appealable. In *Metlike Trading Ltd and Others v Commissioner, SARS* 2005 (3) SA 1 (SCA) at 11C-12H, the Supreme Court of Appeal supports this approach in the following sense:-
- (a) To decide whether an order is final, it is important to bear in mind that not merely the form of the order must be considered but also and predominantly its effect.
 - (b) In the *Metlika* case, *supra*, an order was issued to return an aircraft. The court concluded that to return an aircraft has immediate effect and will not be reconsidered by the court at the trial. For these reasons such an order is final in effect.
- [23] In the case of *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA), the Respondent contended that a restraint order (assimilates with a preservation 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 the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A). Plainly, so the Respondent in that case argued, 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. Incidental thereto, the contention was further
- that a preservation order decides nothing final as to the involvement of the property in crime.
- [24] However, in the *Phillips* case *supra*, the Supreme Court of Appeal considered a restraint order in terms of POCA (analogous to a preservation order), and found that an interim interdict for attachment of property pending litigation, was final in the sense required by case law for appealability.
- [25] The crucial question, however, is whether a restraint order (or preservation order) has final effect because it is unalterable by the court that grants it. Save for variation or rescission as laid down by POCA (section 26 (10)(a) and section 47), a restraint order (or preservation order) is not capable of being changed. The Respondent is stripped of his property and any control or use of them. Pending the outcome of confiscation or forfeiture proceedings he is without any remedy. It is this unalterable situation which makes a restraint or preservation order final for appealability.
- [26] I now turn to the appealability of an order discharging a preservation order. In my view it is not necessary to decide whether the refusal of a preservation order at the *ex parte* stage is appealable. The position with regard to the discharge of a preservation order on the return date is clear. Such orders have been held to be appealable.
- [27] In *National Director of Public Prosecutions v Rautenbach and Others* 2005

- (4) SA 603 (SCA), the Supreme Court of Appeal had to decide on two appeals. The main appeal was against the decision of Rabie J to discharge a provisional restraint order on the return day of a rule nisi. The court accepted that such a decision is appealable. This approach is in line with other decisions of our courts to the effect that the discharge of an interim order is appealable.

See:- Barlows Manufacturing Co Ltd v Metal and Allied Workers Union and Others 1990 (2) SA 315 (T).

- [28] In my view therefore, the orders of the court a quo discharging the preservation orders in casu are appealable. This approach finds support in the following authorities:-

See:- Cronshaw and Another v Coin Security Group (Pty) Ltd

[1996] ZASCA 38; 1996 (3) SA 686 (A);

Metlika Trading Ltd & Others v Commissioner: SARS 2005

- (3) SA 1 (SCA);

African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A);

South African National Defence Union (SANDU) v Minister of Defence & Others / Minister of Defence & Others v South African National Defence Union & Others 2007 (2) SA 402 (SCA);

Van Niekerk & Another v Van Niekerk & Another 2008 (1) SA 75 (SCA);

Pine Villa Country Estate v JR 29 Investments 2009 (4) SA 302 (SCA).

[E] Merits:-

- [29] In the judgment discharging the preservation orders, the court a quo remarked as follows:-

“[1] A preservation order was previously granted prohibiting any person from dealing in any manner with the proceeds generated from unlawful activities, in particular any illegal gambling, gaming or lottery operations at the business called or trading as Pirates located at the Taxi Rank, Rustenburg in the North West Province and to surrender such property to the control of a curator bonis in terms of the Draft Order.

- [2] An application was subsequently launched for the reconsideration of the preservation order. It was argued before me. Having heard both counsel and considered the issues, I discharged the preservation order with costs. These are the reasons for the order I made.
- [3] A number of grounds were set out for the reconsideration and the discharging of the aforementioned preservation order. Due to the approach that I have decided to adopt in this matter, it will be unnecessary to mention them.
- [4] It is clear from the papers and it became even more so during address, that there is a matter pending in the Transvaal Provincial Division:-

[4.1] in which virtually all the parties in this matter are also involved;

[4.2] the building in which the proceeds sought to be preserved are generated, is also the subject-matter of the dispute between the parties in the Transvaal Provincial Division;

[4.3] the issues to be decided upon by the Transvaal Provincial Division in the matter are the nature of the Respondents' business and the operation of the machines which are intrinsically related to the business premises and whether or not the Respondents' activities and possession of the machines are unlawful.

[5] I therefore agree with Mr Jagga, for the Respondents, that a case relating to essentially the same premises, the same parties, the nature of the business, especially the alleged illegality of the business operations conducted at the aforementioned premise, is pending in the Transvaal Provincial Division. Both parties are aware of this pending case. It is, therefore, inappropriate for this Court to effectively make a ruling that preempts the decision of the Transvaal Provincial Division by finding that the proceeds of the same activities taking place in the business premises in question must be made the subject-matter of a preservation order because those activities are illegal.

[6] It is for these reasons that the preservation order was discharged with costs."

[30] Granting leave to appeal to the Full Bench, the court a quo stated:-

"[3] On the day of the hearing of that application, I made an order in favour of the Respondents. When reasons were subsequently asked for, I cited as the reasons for my judgment, the fact that, in my view, the same legal issue between the parties, and in respect of the same premises, was pending before the late Mr Justice Patel, in the then Transvaal Provincial Division of the High Court of South Africa.

[4] A further reflection upon the facts and the benefits of further submissions by counsel, during the application for leave to appeal, have satisfied me that another Court will in all likelihood find that I was wrong. Not only was this issue not relied on by the Respondents, it also does not seem to be supported by the law and the facts."

[31] Mr Pistor SC contended that the court a quo erred in finding that because of the principle of *lis alibi pendens* (a similar case pending in another court) the preservation orders should be discharged. That also explains why leave to appeal was subsequently granted by the court a quo. This is clear from the above quoted passage from the judgment on leave to appeal.

[32] The contention by Mr Jagga that *lis alibi pendens* was not the only consideration for the discharging of the preservation orders doesn't hold water. If that was the case, the court a quo would have said so in no uncertain terms. It is not necessary to speculate what motivated the granting of the orders to discharge the preservation orders as the judgment is clear on this aspect.

[33] Mr Jagga also submitted that this Court should take into account the mootness of the orders that were granted as well as the practical implications in the event that his Court set aside the orders discharging the preservation orders. It is quite apparent that there is a great

passage of time since the said orders for discharge were indeed granted. However, this is not the only factor that needs to be

considered. As far as the practical effect that the setting aside of the discharged orders are concerned, there is no evidence that the orders are only of academic value.

[34] No case had been made out and no evidence on record proves that in the event this Court grants the order setting aside the discharged orders, that the preservation orders will have no force and effect. The Respondent might or might not continue with the alleged illegal operations.

[F] Costs:-

[35] The usual practice is that costs follow the result. However, this Court has a wide discretion as far as the awarding of costs to a litigant is concerned. In exercising its discretion, this Court must have regard to a number of factors, one of which is the manner in which the Appellant conducted the case. I have already earlier on in this judgment stated that the Appellant belatedly filed the processes in this appeal. This behaviour is not without criticism. However, it is not of such a degree that costs should be awarded to the Respondent instead. Having considered all the facts and circumstances of this case, I am of the view that it would be appropriate under the circumstances of this case for this Court to show its disapproval with the conduct of the Appellant by not making any costs order in its favour despite being successful on appeal.

[G] Conclusion:-

[36] I am of the view that the court a quo erred in granting the discharge of the preservation orders. The orders of the court a quo discharging the preservation orders should be set aside. No order as to costs should be made.

[H] Order:-

[37] Consequently, the following order is made:-

[i] The appeal is reinstated.

[ii] The late noting and filing of the appeal is condoned.

[iii] The appeal is upheld.

[iv] The orders dated 14 March 2008 discharging the preservation orders are set aside.

[v] There shall be no order as to costs.

R D HENDRICKS

JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA

N GUTTA

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