IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No: 131/2000

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

WOUTER BASSON Respondent

Coram: Hefer, ACJ, Scott, Streicher, Mpati, JJA and Nugent, AJA

Heard: 17 September 2001

Delivered: 28 September 2001

Summary: Section 18(1) of the Prevention of Organised Crime Act 121 of 1998 – whether retrospective in effect.

J U D G M E N T

NUGENT, AJA:

[1] A statute is said to operate retrospectively if it creates legal consequences for conduct only after that conduct has occurred. The decisive question in the present appeal is whether s 18(1) of the Prevention of Organised Crime Act 121 of 1998 (prior to the amendment of the Act by Act 38 of 1999) operates with that effect. If it does, further questions would arise relating to its constitutional validity, but for the reasons that follow those questions need not concern us in this appeal.

[2] Before turning to the circumstances which gave rise to the appeal it is convenient to summarise some of the salient features of the Act. Section 18(1) is the foundation for Chapter 5 of the Act, which is designed to enable a court to deprive a convicted person of the

proceeds of crime. The section permits a court which has convicted a person of an offence to make what is referred to as a "confiscation order" which has the effect of a civil judgment. The section reads as follows:

> "Whenever a [criminal] 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;
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> and
>
> (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] In terms of s 12(3) a person has "benefited from unlawful activities" (which presumably means that he has derived a benefit as contemplated by s 18(1)) if:

> "… he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities."

[4] The amount for which a confiscation order may be made may not exceed the lesser of (a) "the value of the defendant's proceeds of the offences or related criminal activities referred to in [subsection 18(1)]" or (b) the net value of the sum of the defendant's property and certain defined gifts made by the defendant (s 18(2)). Section 19(1) defines the "value of a defendant's proceeds of unlawful activities" to be:

> "…the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her

> at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person."

[5] Part 3 of Chapter 5 deals with "restraint orders", which are designed to ensure that property is preserved so that it can 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 of Chapter 5 confer wide powers upon the court as to the terms of any such 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 bonis, authorize 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.

[6] 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 –
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> (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
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> (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."

[7] The present appeal concerns a provisional restraint order that was made by the High Court at Pretoria on 3 August 1999. At that time the respondent had been indicted on numerous charges of fraud and theft. The appellant applied, *ex parte*, for a restraint order to be made in relation to property under the respondent's control. The application was supported by affidavits deposed to by Mr Fouche, formerly employed as a Deputy Attorney-General in the Office for Serious Economic Offences, who had been instrumental in investigating the allegations made against the respondent, and Mr Ackerman, a Deputy Director of Public Prosecutions, who had been

deputed to undertake the prosecution of the respondent. (The appellant and a Mr Swanepoel also deposed to affidavits but they take the matter no further). What appeared from the affidavits was little more than a summary of the allegations made against the respondent in the indictment and the summary of substantial facts. Those allegations, briefly stated, were that the respondent, while he was a member of a top secret military project of the former South African Defence Force, misappropriated for his own benefit some R45 million of the moneys that had been made available for the project by the State by channeling the moneys to a web of private companies and accounts that were under his control. Mr Fouche and Mr Ackerman both said that they had considered the evidence against the respondent

and believed that there was a reasonable prospect that he would be convicted and that a confiscation order would be made.

[8] The application came before Cassim AJ who granted a provisional restraint order operating with immediate effect. The order is lengthy, and its detailed provisions are not material to the present appeal. It is sufficient to say that the order incorporated the following principal features. It prohibited all persons from dealing with certain specified property, which included the respondent's house in Pretoria, immovable property in Paarl and in England, rights in various companies situated in this country and abroad, and moneys held in bank accounts in this country and abroad. A curator bonis was appointed to assume control of the property, which was required to be surrendered to the curator, failing which he was authorized to instruct

the police to seize it. The respondent, and a certain Mr Viljoen were also directed to make various disclosures on oath relating to other property interests.

[9] On the return day of the provisional order the respondent opposed its confirmation. The matter came before Roux J who set aside the provisional order with costs on the attorney and client scale. The appellant now appeals against that order with leave granted by this Court.

[10] The offences upon which the respondent was indicted (which served as the basis upon which the restraint order was sought) were all alleged to have been committed before the Act came into operation. The court *a quo* held that any court that might convict the respondent would not be entitled in those circumstances to make a confiscation

order because s 18(1) does not have retrospective effect. It followed that a restraint order was also not permitted, and on those grounds the provisional order was set aside. The court *a quo* went on to find that a proper case had in any event not been made out for the grant of a restraint order, and furthermore that the provisional order was liable to be set aside for the failure to disclose certain facts to the court which granted it. In view of the conclusion I have reached on the main issue the latter findings are relevant only to the question of costs.

[11] There is a natural resistance to creating legal consequences for conduct only after the conduct has occurred. As stated by Justice Scalia, concurring with the majority in *Kaiser Aluminium and Chemical Corporation et al v Bonjorno et al* 494 US 827 at 855:

> "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took

> place has timeless and universal human appeal. It was recognized by the Greeks … by the Romans … by English common law … and by the Code Napoleon. It has long been a solid foundation of American Law…"

[12] That principle is also recognized by the law of this country in which there is a strong presumption against the retrospective operation of a statute: generally a statute will be construed as operating prospectively only unless the legislature has clearly expressed a contrary intention (*Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry & Others* 1995 (1) SA 563 (A) at 572E-F). Moreover, a statute that purports to create an offence (which was not at least an offence in international law) or to prescribe a punishment, with retrospective effect, will conflict with

sections 35(3)(l) and (n) respectively of the Constitution and might be invalid unless it can be justified in terms of s 36(1).

[13] If the imposition of a confiscation order upon a convicted person constitutes a punishment as envisaged by s 35(3)(n) of the Constitution (cf *Welch v United Kingdom* 20 EHRR 247) we might for that reason alone be enjoined by s 39(2) to construe s 18(1) of the Act so as to operate only prospectively, in order to promote the spirit, purport and objects of the Bill of Rights. Because the matter can be disposed of on ordinary principles of construction, however, we are not called upon to decide that question in this appeal.

[14] In support of the submission that s 18(1) operates with retrospective effect the appellant relied upon certain remarks that were made by this Court in *National Director of Public Prosecutions v*

Carolus & Others 2000 (1) SA 1127 (SCA), which concerned the provisions of Chapter 6 of the Act. In dealing with the question whether those provisions operated retrospectively Farlam AJA said the following at par 20:

> "It is clear from s 12(3) and s 19(1) of the Act, which are both contained in chap 5, that the provisions of chap 5…are retrospective *in the sense that, in determining the value of the proceeds of an accused person's unlawful activities, the Court is not confined to those activities which took place after the coming into operation of the Act* …" [emphasis added].

[15] Those remarks do not meet the point that arises in the present case. The fact that events preceding the coming into operation of the Act are to be taken into account in determining whether the defendant has "benefited from unlawful activities" (s 12(3)), and in valuing the "proceeds of unlawful activities" (s 19(1)), is not decisive of whether s

18(1) operates with the same effect. Those sections allow for benefits received before the commission of the particular offence to be taken into account, both in determining whether a confiscation order should be made, and in determining the scope of such an order, and are equally consistent with the section operating only prospectively as they are with it operating retrospectively. To the extent that they are of assistance at all, in my view they indicate a contrary intention to that which the appellant contends for: the express reference in those sections (and in the definitions of ‘pattern of criminal gang activity’ and ‘pattern of racketeering activity’) to events that preceded the Act coming into operation indicates that the legislature was alive to the question of retrospectivity, and the absence of similar words in 18(1) suggests that the omission was deliberate.

[16] The only other provision of the Act upon which the appellant relied in support of a retrospective construction of s 18(1) was the definition in s 12(1)(iii) of a "defendant", which means "a person against whom a prosecution for an offence has been instituted …" It was submitted that the definition includes a person against whom a prosecution had been instituted at the time the Act came into operation, from which it follows that s 18(1) extends to offences that had already been committed. That submission begs the question whether the definition does indeed include such a person. It assumes that s 18(1) operates retrospectively, for if it does not, then the definition of a "defendant" *ipso facto* excludes a person against whom a prosecution was pending at the time the Act came into effect. To place reliance upon that definition in an attempt to resolve the present

problem seems to me to commit one to a process of circular reasoning. What is more important, in my view, is to ask whether the legislature would have resorted to such an oblique method to give retrospective effect to s 18(1) when express words (as in s 12(3) and s 19(1)) would have sufficed. In my view it clearly would not have done so.

[17] The sections that were referred to by the appellant in support of the construction that it contended for do not constitute the clear expression of legislative intent that is required before a court will give retrospective effect to a statute. The section must thus be construed as operating only prospectively, with the result that a confiscation order may not be imposed in consequence of a conviction for an offence committed before the Act came into effect. That being so, it could not be said in the present case that there were grounds for believing that a

confiscation order might be made and a restraint order ought to have been refused. On those grounds alone the appeal must fail.

[18] Two matters remain that are relevant to the question of costs. The learned judge granted a punitive order, both because he considered the application to be hopeless, and as an expression of disapproval at certain conduct relating to the circumstances in which the application was brought.

[19] Section 25(1) of the Act does not permit a court to grant a restraint order upon nothing more than a summary of the allegations made against the defendant concerned, and an expression of opinion by members of the appellant's staff that a confiscation order will be granted (which is all that was before the court in the present case). The section requires that it should appear to the court itself, not

merely to the appellant or his staff, that there are "reasonable grounds" for such a belief, which requires at least that the nature and tenor of the available evidence needs to be disclosed. Precisely what evidence is required, and the form that it should take, is not necessary, to decide in the present case, because the punitive costs order was in any event justified on other grounds.

[20] On the day before the application was brought the respondent's legal advisers, who had become aware that a restraint order might be sought, telephoned Mr Ackerman and told him that such an order was unnecessary because the respondent laid no claim to any of the property concerned (other than his house, two motor vehicles, and personal belongings) which he was willing to place under the control of the State. As for the house, Mr Ackerman was told that it was

already under the control of the State as security for the respondent's bail. Mr Ackerman's response was that they should speak to Mr d'Oliviera, the Deputy National Director of Public Prosecutions, who was dealing with the matter. The respondent's legal advisers attempted to telephone Mr d'Oliviera on his cell phone the following morning but the phone had been switched off the previous night and remained off for the next two days. On the morning of 3 August, before the application was brought, Mr Ackerman spoke to Mr d'Oliviera, and told him that he had learnt the previous night that the respondent's legal representatives were aware of the pending application. It seems that he did not disclose the offer that had been made, because that was not disclosed to the court when the application was moved by Mr d'Oliveira, who said that he was unaware of it.

Sometime in the course of that morning Mr Ackerman also deposed to an affidavit in support of the application, in which he made no mention of the offer that had been conveyed to him the previous day, but expressed the opinion that it was "necessary and in the interests of justice" that a restraint order should be made.

[21] Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E – 349B). The fact that the respondent had volunteered to place all the affected property under the control of the

State was clearly material. Why it was not disclosed to Mr d'Oliveira, and then suppressed in the affidavit deposed to by Mr Ackerman in support of the application, has not been explained. It was submitted on behalf of the appellant that Mr Ackerman might have considered that the offer was made without prejudice. There is no suggestion of that in the evidence. In my view the affidavit deposed to by Mr Ackerman was materially misleading. Although the appellant himself cannot be said to have been at fault, he must perforce bear the consequence of the conduct of the officials who are entrusted to litigate on his behalf.

[22] The question of costs was a matter for the discretion of the court a quo and this Court will not lightly interfere in the exercise of that discretion. In my view there were ample grounds in the present case

for the court *a quo* to have exercised its discretion in the way in which it did.

[23] The appeal is dismissed with costs which are to include the costs occasioned by the employment of two counsel.

R W **NUGENT**
Acting Judge of Appeal

Hefer, ACJ)
Scott, JA)
Streicher, JA)
Mpati, JA) concur