THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 043/04

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Appellant
and	
ANDREW LIONEL PHILLIPS	1st Respondent
LADDIES LARK (PTY) LTD	2nd Respondent
JANVEST CLOSE CORPORATION	3rd Respondent
APVEST CLOSE CORPORATION	4th Respondent
MAYVEST CLOSE CORPORATION	5th Respondent
JUNVEST CLOSE CORPORATION	6th Respondent
AUGVEST CLOSE CORPORATION	7th Respondent
DECVEST CLOSE CORPORATION	8th Respondent
PORTION 1 OF 247 EDENBURG CC	9th Respondent
SUSHIMI INV CC	10th Respondent
SWINGING TRADING TWISTER CC	11th Respondent
FEBVEST CC	12th Respondent
D MORNINGSIDE INVESTMENTS (PTY) LTD	13th Respondent
STEPHEN WERNER CC	14th Respondent
MOONLITE IMPORT & EXPORT CC	15th Respondent
DOC PROPERTY INVESTMENTS CC	16th Respondent

Coram : MPATI AP, SCOTT, NUGENT, FARLAM JJA *et* JAFTA AJA
Date of Hearing : 11 NOVEMBER 2004
Date of delivery : 30 NOVEMBER 2004

Summary: Restraint order in terms of s 26(1) of Act 121 of 1998 – court granting it has no inherent jurisdiction to rescind or vary the order – power to do so limited to the grounds prescribed in the Act.

JUDGMENT

SCOTT JA:

[1] On 22 December 2000 the appellant, to whom I shall refer as the NDPP, sought and obtained a provisional restraint order in the form of a rule nisi in the Johannesburg High Court against the first to the 15th respondents in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 ('the Act'). The order was made final, despite opposition, on 30 July 2001. The judgment of Heher J is reported: *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W). Broadly stated, a restraint order serves to prohibit any person from dealing with the assets of a suspected offender with the object of ensuring that in the event of the suspected offender subsequently being convicted those assets will be available to satisfy a confiscation order which a court is empowered to make in terms of s 18 of the Act. An appeal to this court was dismissed on 4 September 2003. The judgment is reported as *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA). On 19 June 2003, and prior to the hearing of the appeal, the 15 respondents plus another, the 16th respondent in this appeal, commenced proceedings in the Johannesburg High Court for the rescission of the restraint order. The NDPP and the *curator bonis* who had been appointed in terms

of s 28(1)(a) of the Act, were cited as the respondents. Only the NDPP opposed. The application was heard by Louw AJ, who on 12 December 2003 granted an order rescinding the restraint order. The present appeal against that order is with the leave of the court *a quo*.

[2] In order better to understand the issues and the context in which they arise it is convenient to set out briefly the events preceding the rescission application. As I shall show, these include what may fairly be described as a spate of applications directed mainly at the *curator bonis.* Some resulted in orders, others were simply left unresolved.

[3] Until 8 January 2001 the first respondent ('Phillips') owned and openly operated a business known as the Ranch. It involved providing a venue and facilities for paying male customers to have sexual relations with female prostitutes who were not employees. The business was conducted on premises at 54 Autumn Street, Rivonia, ('the Autumn Street property') owned by the 16th respondent. Another business, known as the Titty Twister, was conducted by the 13th respondent on the same premises. The business involved the production of strip tease shows and was said to operate in tandem with the business of the Ranch. Phillips

is either the sole shareholder or sole member of the second to the 16th respondents.

[4] On 4 February 2000, following a raid two days earlier, the NDPP applied for and was granted a preservation order in terms of s 38 of the Act prohibiting any person from dealing with the Autumn Street property. A preservation order is a prelude to a forfeiture order. The latter is an order which a High Court is empowered to make in terms of s 48 of the Act. The forfeiture of property under these provisions, unlike a confiscation order in terms of s 18, is not dependent upon a successful prosecution, but ultimately upon it being established by the NDPP on a balance of probabilities that the property in question 'is an instrumentality of an offence referred to in Schedule 1' to the Act or 'is the proceeds of unlawful activities'. (For an analysis of the provisions dealing with preservation and forfeiture orders see *NDPP v R O Cook Properties (Pty) Ltd*; *NDPP v 37 Gillespie Street Durban (Pty) Ltd and another* and *NDPP v Seevnarayan 2004 (2) SACR 208 (SCA)*.) Proceedings for a forfeiture order were subsequently commenced but have not been finalised. Following the granting of the preservation order on 4 February 2000, Phillips and the 13th respondent continued to conduct their respective businesses on

the Autumn Street property to the knowledge of the *curator bonis* who had been appointed in terms of s 42 of the Act.

[5] Charges were subsequently laid against Phillips both under the Sexual Offences Act 23 of 1957 for keeping a brothel and under the Aliens Control Act 96 of 1991 for unlawfully employing foreign women. The trial has commenced but has since been postponed.

[6] The restraint order granted on 22 December 2000 extended not only to the property specified in a schedule of assets attached to the order, but, subject to certain exceptions such as clothing etc, to 'all other property held by [Phillips], whether in his name or not'. The first to the 15th respondents were furthermore directed in terms of s 28(1)(b) to surrender to the *curator bonis* any of the property subject to the order which may have been in their possession or under their control. The *curator bonis*, in turn, was authorised and required to take possession or control of the property, to take care of it and to administer it. Acting in terms of the order, he took control *inter alia* of the businesses which were being conducted on the Autumn Street property and on 8 January 2001, not unexpectedly, caused them to cease operating. The consequence, of course, was that the property ceased to generate an income.

[7] I mention in passing that the *curator bonis* previously appointed in terms of s 42 appears to have played no further role in relation to the Autumn Street property. The *curator bonis* appointed in terms of s 28(1) simply took this property into his possession and administered it together with the other property to which his appointment related. Nothing turns on this and further reference in this judgment to the *curator bonis* is to be understood as a reference to the curator appointed in terms of s 28(1).

[8] In the absence of available funds, the *curator bonis* in the months that followed failed to pay various charges accruing on the immovable properties owned by the ninth, 13th, 14th and 16th respondents. These included municipal rates as well as other charges such as those for electricity, water, sewerage removal and the like. At the instance of these respondents and Phillips, an order was granted by Grobler AJ on 23 August 2002 declaring the *curator bonis* to be responsible for the payment of all such arrear and future charges. The latter sought to comply with the order by using the funds standing to the credit of Phillips and the second respondent at various banks. Phillips and the second respondent responded by launching an application for an order directing him to restore the credit balances in the accounts in question.

[9] In the meantime, the Autumn Street property, owned by the 16th respondent, and immovable property situated at 26 Gary Avenue, Morningside, owned by the 13th respondent, had been damaged by vandals. This prompted two further and separate applications to compel the *curator bonis* to restore the properties to the condition in which they had been on 22 December 2000. An order in these terms was granted by Masipa J on 21 November 2002.

[10] In response, no doubt, to the situation in which he found himself, the *curator bonis* took steps to let the immovable properties owned by the respondents in order to generate an income and so comply with the orders against him. This resulted in an urgent application interdicting him from doing so pending yet another application to have him removed as *curator bonis.* The interdict was granted by De Jager AJ on 6 March 2003 on the ground that the curator was not authorised to let the properties. The application to have him removed as *curator bonis* appears never to have been finalised.

[11] In the event, the *curator bonis* failed to comply with the order granted on 23 August 2002 declaring him to be responsible for payment of arrear and future charges on the properties. Contempt proceedings followed but these were dismissed on 19 March 2003

by De Jager AJ on the grounds that the *curator bonis* had no authority to generate funds and that he could not be guilty of contempt 'for not doing what is not possible to be done'. Contempt proceedings were also instituted arising from the curator's failure to comply with the 'restoration' order granted by Masipa J on 21 November 2002. Answering affidavits were delivered on 1 April 2003 but the application appears not to have been pursued, presumably because of the fate of the earlier contempt proceedings.

[12] The next step appears to have been the application for the rescission of the restraint order which, as I have said, was launched on 19 June 2003. Before considering the basis on which the respondents (applicants in the court below) claimed the relief they sought, it is necessary to refer briefly to a subsequent event. After the hearing and shortly before judgment was due to be delivered the NDPP sought and was granted leave to file a supplementary affidavit. Attached to it was a report by the *curator bonis* in which he explained that on 17 November 2003 he had succeeded in concluding an agreement with a bank in terms of which the latter had made available a credit facility of R10 m to cover the costs of the former in the performance of his duties as *curator bonis.* In an answering affidavit Phillips argued that the

amount of R10 m was inadequate and pointed to various other difficulties which, he said, would confront the curator in the event of the latter attempting to rectify what had occurred in the past. In view of the conclusion to which I have come it is unnecessary to consider these issues. It is also unnecessary for the purpose of this judgment to express a view as to the correctness or otherwise of the various orders granted against the *curator bonis* referred to in the preceding paragraphs and I deliberately refrain from doing so.

[13] The respondents did not seek to have the restraint order rescinded on one of the grounds provided for in the Act, but 'in the exercise of this court's inherent jurisdiction to protect and regulate its own process, and to develop the common law, taking into account the interests of justice'. It was contended that in the exercise of that discretion the rescission order should be granted because it had become impossible for the *curator bonis* to perform his duties under the restraint order and that the effect of the restraint order was directly contrary to its clear purpose. The question that arises and one which became the primary issue both in this court and the court below, is whether a restraint order can be rescinded by the court that granted it in the exercise of its inherent jurisdiction and on some ground other than one provided

for in the Act. To resolve the issue it is necessary to refer in some detail not only to the provisions in the Act relating to the rescission of a restraint order but also to those concerning the granting of restraint orders and the appointment of a *curator bonis*.

[14] The necessary jurisdictional facts for the exercise of the discretionary power afforded to a High Court to grant a restraint order are set out in s 25(1). The relevant part reads:

'A High Court may exercise the powers conferred on it by section 26(1) –

(a) . . .

(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.'

Section 25(2), which is one of the provisions in the Act dealing with the rescission of a restraint order, provides:

'Where the High Court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.'

Section 26 empowers a High Court to grant a restraint order. Subsection (1) reads –

'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.

Section 26(2), in turn, provides that a restraint order may be made in respect of property of the kind specified therein. Subsections (3) and (7) are not relevant for present purposes. Section 26(8) deals with the execution of a restraint order. It provides –

'A High Court making a restraint order shall at the same time make an order authorising the seizure of all movable property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.'

Section 26(9), in turn makes provision for the manner in which seized movable property is to be dealt with. It reads:

'Property seized under subsection (8) shall be dealt with in accordance with the directions of the High Court which made the relevant restraint order.'

Section 26(10)(a) prescribes the circumstances in which a High Court which made the restraint order *may* vary or rescind that order. In terms of s 26(10)(b) the court is obliged to rescind the order when the proceedings against the defendant are concluded. Section 26(10) reads:

‘(10) A High Court which made a restraint order –

(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied –

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.’

Finally it is necessary to quote s 28 dealing with the appointment of a *curator bonis*, which I do in its entirety.

‘(1) Where a High Court has made a restraint order, that court may at any time –

(a) appoint a *curator bonis* to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely –

(i) to perform any particular act in respect of any of or all the property to which the restraint order relates;

(ii) to take care of the said property;

(iii) to administer the said property; and

(iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;

(b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a *curator bonis* has been appointed under paragraph (a), into the custody of that *curator bonis*.

(2) Any person affected by an order contemplated in subsection (1)(b) may at any time apply –

(a) for the variation or rescission of the order; or

(b) for the variation of the terms of the appointment of the *curator bonis* concerned or for the discharge of that *curator bonis*.

(3) The High Court which made an order contemplated in subsection (1)(b) –

(a) may at any time –

(i) vary or rescind the order; or

(ii) vary the terms of the appointment of the *curator bonis* concerned or discharge that *curator bonis*;

(b) shall rescind the order and discharge the *curator bonis* concerned if the relevant restraint order is rescinded;

(c) may make such order relating to the fees and expenditure of the *curator bonis* as it deems fit, including an order for the payment of the fees of the *curator bonis* –

(i) from the confiscated proceeds if a confiscation order is made; or

(ii) by the State if no confiscation order is made.'

[15] It is appropriate at this stage to make certain general observations regarding the provisions quoted above. As far as s 28 is concerned, it is apparent that once an order is made in terms of s 28(1)(b) directing property to be surrendered to the *curator bonis*, a High Court which made the order may in terms of s 28(3)(a) vary or rescind that order or it may discharge the *curator bonis* or vary the terms of his or her appointment. The circumstances in which the power to vary or rescind may be exercised are not circumscribed. Any good or sufficient cause would suffice and a court would be entitled to have regard to 'a number of disparate and incommensurable features' when exercising the power so afforded to it. (*Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) at 361H-J.*)* In this respect the provisions of s 28(3)(a) stand in stark contrast to those of s 26(10) dealing with the court's power to vary or rescind a restraint order. On the other hand, in the absence of an order in terms of s 28(1)(b), the impact of a restraint order, certainly in the case of immovable property, would in most cases be minimal. There would seem to be no reason in such circumstances why a defendant could not live on

the property, or continue to receive rent from it if let, or run a business on the property. Such activities would not involve dealing in the property within the meaning of s 26(1).

[16] As previously mentioned, the first to the 15th respondents were in terms of s 28(1)(b) directed to surrender to the *curator bonis* any property in their possession or control which was subject to the restraint order. In the result the High Court granting the order was empowered on good or sufficient cause shown to vary or rescind at any stage the order in terms of s 28(1)(b) or to vary or rescind any of the terms of the curator's appointment. Good or sufficient cause for varying the terms of the curator's appointment would typically include the need to ameliorate or resolve some administrative difficulty. If the *curator bonis* had no authority in terms of his appointment to let any one or more of the properties, as was held by De Jager AJ to be the case, the respondents or the *curator bonis* would have been free to approach the court for a variation of the terms of his appointment so as to authorise him to do so.

[17] The court *a quo*, in coming to the conclusion it did, found that on a proper construction of s 26 of the Act it was free in the exercise of its inherent jurisdiction to rescind or vary a restraint order on good cause shown. It reasoned that a restraint order,

unlike a confiscation order in terms of s 18, was interlocutory, that it was akin to and essentially the same as the interim interdict at common law sometimes referred to as an 'anti-dissipation order' which it regarded as susceptible to variation or rescission and that the Act did not manifest a clear intention to exclude the common law rule that such an order can be rescinded or varied on good cause shown. It concluded that the object of s 26(10)(a) was no more than to extend the right to apply for such a rescission or variation to any person affected by the order in the manner described in the section. In effect, therefore, so it held, s 26(10) is a '*locus standi* providing provision' and not a provision which limits the court's common law powers in respect of persons who have *locus standi* at common law.

[18] The immediate difficulty one has with this conclusion is that it is inconsistent with the construction placed on s 26 by this court when dismissing the appeal against the granting of the restraint order. (The reference is given in para [1] above.) In that appeal ('the restraint appeal') the question arose whether a restraint order was appealable. Howie P, who delivered the judgment of the court, accepted that a restraint order was 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 v Minister of Law and Order* 1993 (1) SA 523 (A)]' (para 20). Recognising that interlocutory orders which are said to be 'purely interlocutory' (see eg *Bell v Bell* 1908 TS 887 at 891), may be varied or rescinded by the court that granted them and are therefore unappealable, the learned president identified the 'crucial question' to be 'whether a restraint order has final effect because it is unalterable by the court that grants it' (para 20). In answering the question so posed, the president contrasted a restraint order with an order made in terms of s 28(1) of the Act. At para 21 he said:

'[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.'

Thereafter, and having previously referred to the limited circumstances in which a restraint order may be rescinded or varied as prescribed by s 26(10)(a), the learned president concluded: (para 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.'

He accordingly held that the order was final in the sense required for appealability and that for this and other reasons which need not be considered the restraint order was appealable.

[19] In his judgment, Louw AJ makes no more than a passing reference to the judgment of this court in the restraint appeal and appears not to have appreciated that the finding of the court that a restraint order was unalterable, save as provided for in the Act, was part of the *ratio decidendi* and therefore binding upon him. Nonetheless, I consider it desirable to comment on the construction placed on s 26(10)(a) by the court *a quo* (which was not advanced in the restraint appeal); namely that the section is no more than 'a *locus standi* providing provision'. As I understand the learned judge's reasoning, it is this: A defendant, ie a person charged or to be charged, who wishes to have a restraint order varied or rescinded need establish no more than the existence of good or sufficient cause, as the expression is understood at common law, but anyone other than the defendant would be confined to the grounds set forth in s 26(10)(a). I must immediately confess to finding this construction contrived, to say the least.

However, its fallacy lies in the fact that it is premised on the assumption that a court granting a restraint order has inherent jurisdiction at common law to vary or rescind the order until deprived of that jurisdiction, whether expressly or by necessary implication. A restraint order as contemplated in s 26 is not one that may be granted at common law. A High Court is empowered by the Act to grant the order just as it is empowered by the Act to vary or rescind it. If no provision was made in the Act for the order to be varied or rescinded at the instance of a defendant, as is apparently suggested, the order would stand until set aside in terms of s 25(2) or s 26(10)(b). In my judgment, s 26(10)(a) is not capable of the construction the court *a quo* would place upon it; the section prescribes the circumstances in which a High Court may vary or rescind a restraint order, whether at the instance of the defendant or any other 'person affected' by it.

[20] In this court counsel for the respondents submitted that even if in terms of the Act the circumstances in which a court may rescind a restraint order were limited to those prescribed in s 26(10)(a), a court, nonetheless, ought to be able to rescind the order in the circumstances which prevailed in the present case. He argued that just as a court could always set aside an order on the grounds of fraud or error as observed by Howie P in a passage

quoted in para [18] above, so would a court be able to set aside a restraint order where its implementation had become impossible.

[21] It is a well-established principle that a court may always set aside its own final judgment in certain limited circumstances. These include situations where the judgment is founded upon fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents). See generally *Herbstein & Van Winsen The Civil Practice of The Supreme Court of SA* 4ed by Van Winsen, Cilliers & Loots, edited by Dendy, at 690-698. The principle, however, has no application to the circumstances relied upon by counsel. As observed by Trengove AJA in *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 939D-F:

'. . . I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment.'

[22] The contention that the restraint order has become impossible to implement is in any event based on a misconception. As indicated above, there is a clear distinction between the restraint order made in terms of s 26(1), on the one hand, and an

order in terms of s 28(1) on the other. The former has the effect of prohibiting any person, subject to certain conditions and exceptions, from dealing in any manner with property made subject to the order. Such a prohibition may, no doubt, in particular circumstances result in undue hardship. Indeed, the provisions of s 26(10)(a) are aimed at such a situation. But it is difficult to conceive a situation in which a prohibition is impossible to implement. Section 28(1), on the other hand makes provision for an order appointing a *curator bonis*, directing the surrender of the property in question to him or her and determining the latter's powers in relation to that property. As previously observed, once an order is made in terms of s 28(1)(b) any order in terms of s 28(1) may be varied or rescinded on good or sufficient cause shown.

[23] The facts of the present case reveal a woeful lack of co-operation between the respondents and the *curator bonis*. The root of all the problems highlighted by the respondents and giving rise to the flood of court applications lay in the absence of funds available to the *curator bonis* to care for and pay the imposts in respect of the immovable properties in question. But these difficulties arose, not from the restraint order, but from the absence of a power afforded to the *curator bonis* in terms of the order made

under s 28(1)(a) to generate the necessary funds from the use of the properties, or possibly the latter's failure properly to exercise the powers already granted. As I have said, the obvious solution appears to have been to grant the *curator bonis* the power to let one or more of the properties.

[24] It is true, of course, that in the absence of a restraint order there could be no order in terms of s 28(1)(b). But it does not follow that the implementation of the restraint order has been rendered impossible by reason of the failure of the *curator bonis* to exercise powers which he or she has, or the failure of the *curator bonis* to be afforded powers necessary properly to administer the property.

[25] To sum up, a High Court which grants a restraint order in terms of s 26(1) of the Act has no inherent jurisdiction to rescind the order. Subject to one exception its power to do so is circumscribed by the Act and is limited to the grounds set forth in s 25(2) and s 26(10). The exception is the existence of one or other of the recognised common law grounds for rescission which must have existed when the restraint order was granted.

[26] The respondents' application for rescission of the restraint order was founded on none of these grounds and the appeal must accordingly succeed.

[27] The following order is made:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court *a quo* is set aside and the following is substituted:

'The application is dismissed with costs, including the costs of two counsel'.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

Mpati AP
Nugent JA
Farlam JA
Jafta AJA