IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 61/2017**

CIV/APN/445/15

In the matter between:

MOLISANA SEKOALA **APPELLANT**

and

THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES **RESPONDENT**

CORAM: MUSONDA AJA
MAHASE AJA
CHINHENGO AJA

HEARD: 16 JANUARY, 2019

DELIVERED: 1 FEBRUARY, 2019

Summary

Directorate of Corruption and Economic Crime applying for preservation of property order in relation to appellant's three motor

vehicles in terms of s 88(1) of Money Laundering and Economic Crimes Act 2008 - Authority neglecting to publish preservation of property order as required by s 89(1) of Act - Order lapsing in terms of s 90(1) of the Act – vehicles to be released to appellant

JUDGMENT

CHINHENGO AJA

Introduction

[1] The appellant is the owner of three motor vehicles, a black BMW 320D, a charcoal BMW 1 Series and a white Toyota Dyna. During the course of certain criminal investigations against him these three motor vehicles were impounded by the police. The criminal investigations were centred around of s 7 of the Prevention of Corruption and Economic Offences Act, 1999 (Act No. 5 of 1999) ("the Corruption Act"). In this connection the appellant was charged in October 2015 under Case No. 1/2015 with contravention s 7(1)(b) of the Corruption Act, the particulars of which were that on or about 22 September 2015 he failed to provide any information and/or gave false information, and /or failed to answer questions in relation to his moveable and immovable property and large deposits of money into his Nedbank and First National Bank accounts in the total sum of M1 227 329.32. The respondent received further information that the appellant was living large and

beyond his means and possibly on proceeds of crime. The respondent then resorted to the Money Laundering and Proceeds of Crime Act, 2008 (No. 4 of 2008) ("the Money Laundering Act") and made an *ex parte* application to the High Court for a preservation of property order in terms of s 88 (2) of the Money Laundering Act. Such preservation order is a precursor to a forfeiture order in terms of s 90 of the same Act.

[2] On hearing the *ex parte* application the High Court granted an interim preservation order in terms of s 88(2) of the Money Laundering Act on 3 December 2015 and a *rule nisi* returnable on 14 December 2015, calling upon any persons with an interest in the motor vehicles to show cause "why such a provisional order should not be confirmed pending the application for a forfeiture order under section 97 of MLPCA and the finalisation of such forfeiture proceedings."

[3] It is not clear what happened on the return day but the matter was finally heard on 26 September 2016. The judgment thereon was only delivered a year later on 17 August 2017 with the following result:

> "[62] The Court has thus come to the conclusion that the respondent's vehicles are proceeds of crime and the respondent has failed to give reasonable grounds for having acquired same. Under the circumstances the interim

> preservation order that was granted on the 3rd December 2015 is made a final order of this Court."

[4] It is this final preservation of property order on appeal to this Court. It is clear that the learned judge *a quo* made a finding that the three motor vehicles "are proceeds of crime" and slammed the appellant with a final preservation order.

Grounds of appeal

[5] The main grounds of appeal are that –

> "1.1 The court erred and misdirected itself in finding that the preservation order has not lapsed in terms of section 90 of the Money Laundering and Proceeds of Crime Act 4 of 2008 (the MLPC Act).
>
> 1.2 The court erred in finding that the preservation order did not lapse because there was an application for a forfeiture order pending, whereas no such application was pending at all.
>
> 1.3 The court conflated the application for a preservation order and an application for a forfeiture order thereby committed a misdirection."

[6] The appellant filed several other grounds of appeal in the alternative. These alternative grounds of appeal do not fall for consideration because, at the hearing of the appeal, counsel were of the shared opinion that the appeal can be disposed of on a consideration of the single issue captured in the main

grounds of appeal, which is whether the preservation order is still extant or it has lapsed.

[7] The appellants, as it can be seen, is aggrieved by the fact that learned judge determined that the preservation order did not lapse in terms of s 90 of the Money Laundering Act and in finding as a fact that an application for a forfeiture order had been made by the respondent. He is also aggrieved by the fact that the learned judge conflated two procedures – one relating to a preservation order and the other to a forfeiture order. If this Court determines that the preservation of property order lapsed, then *caedit questio*.

[8] The relevant sections of the Money Laundering Act for purposes of answering the question whether or not the preservation of property order lapsed are ss 88 - 92 of the Act.

[9] Section 88 reads as follows-

> "(1) The Authority may by way of an *ex parte* application apply to the High Court for *an order prohibiting a person*, subject to such conditions and exceptions as may be specified in the order, *from dealing in any manner with any property* referred to in subsection (2).
>
> (2) The High Court may make an order referred to in subsection (1) if there are *reasonable grounds* to believe that the property concerned –
>
> (a) is an instrumentality of a serious offence; or

> (b) is the proceeds of unlawful activities.
>
> (3) The High Court making a preservation of property order *may*, when it makes the order or at any time thereafter, *make any ancillary orders* that the court considers appropriate for the proper, fair and effective execution of the order, *including an order authorising the seizure of the property concerned* by a police officer or an authorised officer.
>
> (4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order."
>
> [*the emphasis is mine*]

[10] A preservation of property order does not have to be accompanied by a seizure order at the same time. Section 88(1) envisages that in the ordinary scheme of things a preservation of property order is not accompanied by any seizure order. That to me is eminently reasonable because when an application is made for such an order the primary objective is to secure the property concerned in the hands of the possessor so that the property may not be disposed of or removed but remain available to be dealt with in terms of the law. The subsection makes it clear that any ancillary order made by the court, including one of seizure of the property, must be proper, fair and effective to meet the purposes of the preservation order.

[11] In my view, where property subject of a preservation of property order is property that is used by the person against whom the order is issued or by members of his family, such as cars as in this case, a seizure order may be quite inappropriate.

It seems to me that in the absence of an application that the property be seized, a court should not lightly make a seizure order *mero motu*. In any event in terms of s 91(1) a police officer or an authorized officer is empowered to seize property if he has reasonable grounds to believe that the property will be disposed of or removed subject to the requirement that the property so seized shall be dealt with in accordance with the directions of the High Court that made the preservation of property order.

[12] Section 89 deals with the steps that must be taken upon the making of a preservation of property order. It provides that –

> "(1) If the High Court makes a preservation of property order, the *Authority shall, as soon as practicable after the making of the order* –
>
> (a) *give notice of the order to all persons* known to the Authorityto have an interest in property which is subject to the order; and
>
> (b) *publish a notice of the order in the Gazette*.
>
> (2) A notice under subsection (1)(a) shall be served in the manner in which a summons whereby civil proceedings in the High Court, is served.
>
> (3) A person who has an interest in the property which is subject of the preservation of property order may enter appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.
>
> (4) An appearance under subsection (3) shall be delivered to the authority within, in the case of –

> (a) a person upon whom it has been served under subsection (1)(a), *14 days after such service*; or
>
> (b) any other person, *14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette*.
>
> (5) … [deals with the contents of the appearance]."
> [*Emphasis is mine*]

[13] A person's right to enjoyment or use of his or her property or property in his possession is obviously interfered with by the issuance of a preservation of property order. It is therefore understandable why the Legislature provided time frames within which a notice is to be given or published and the persons affected thereby are given 14 days within which to file any opposition to the issuance of the order. Both notices must be given or published "as soon as practicable after the making of the order." The subsection does not use words such as "within a reasonable time after the making of the order." The suggestion is clearly that the notices must be given or published in the shortest possible time after the order has been made.

[14] In order to ensure that matters relating to preservation of property orders and sequential forfeiture orders are attend to quickly, the Legislature provided a terminal date of the presevation of property order unless the exceptions thereto are met. Section 90 thus provides:

> "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 –
>
> > (a) there is an application for forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order;
> >
> > (b) there is an unsatisfied forfeiture order in realtion to the property, subject to the preservation of property order; or
> >
> > (c) the order is rescinded before the expiry of that period."

[15] The timeframes within which, and speed with which, a preservation of property order must be dealt is in large measure dictated by the process by which the order is sought. The Authority may commence the process by way of an *ex parte* application. This way of commencing the application is not mandatory. The language of s 88(1) is permissive in relation to the Authority. The Authority may very well commence the proceedings by motion. This means that the court is not itself bound to issue the order sought without, where appropriate, requiring that the other party must be heard before the preservation of property order is made. In that event the usual considerations in an application of this nature applies.

[16] An *ex parte* application is generally resorted to in certain legally prescribed circumstances because the general rule is that a court should never make an order affecting another

person or prejudicing his or her rights without giving him notice. In other words it should never make an order which may prejudice the rights of parties not before it. See *Clegg v Priestley* 1985 (3) SA 950 (W) and *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651. An *ex parte* application is used, for example, when an applicant is the only person interested in the relief that is claimed; or when the relief sought is a preliminary step in proceedings, such as an application to sue by edictal citation or to attach property to found jurisdiction; or when, though another will be affected by the order, immediate relief is essential because of the danger of delay or because notice may precipitate the very harm that the applicant is trying to forestall, such as in an interdict or an arrest *tamquam suspectus de fuga*. A court may actually refuse to make an order on an *ex parte* application if it considers notice should be given (*Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 458 H – J), or the court may grant only a temporary order to enable persons who may be affected to place their views before the court. It usually does this by issuing a *rule nisi*.

[17] The learned judge *a quo* gave a temporary preservation of property order on 3 December 20 and set as the return day the fourteeth day of the same month. As earlier stated it is not known what transpired on the return date.

[18] One way to look at the procedure adopted by the learned judge is that ordinarily there is nothing in law that prevents a judge, in a proper case, from issuing a *rule nisi* with a return day for the parties to argue the propriety of the court making the order sought. In this case, however, there is nothing to indicate that the *rule nisi* was extended to a later date, let alone to 26 September 2015, when the application was finally heard. It must be assumed that the *rule nisi* was not extended and that it lapsed on 14 December 2015.

[19] The other way of looking at what the learned judge did when she issued what she called a temporary preservation of property order, is to focus, as one should really do, on the scheme of the Money Laundering Act, in particular ss 88-90 thereof. These provisions do not envisage that upon application by the Authority by way of an *ex parte* order, any temporary order may be issued. The preservation of property order is by nature a temporary order which subsists pending the granting or refusal of a forfeiture order or for 90 days when it lapses unless an application for a forfeiture order has been made. To my mind a proper construction of the cited provisions is that there is no scope or practical reason for issuing a temporary preservation of property order.

[20] To confirm my understanding of the procedure one only has to look at what the effect of the temporary order that the judge issued on 3 December 2015 was. That was for all intents and purposes a preservation of property order. At paragraphs 2 and 3 thereof she ordered that -

> "2. In terms of section 88(2) of the MLPCA and subject to the provisions of this order, all persons with knowledge thereof are prohibited from disposing of, further incumbering, dissipating, interferring with, attaching or selling in execution, diminishing the value of or dealing in any other manner with property to which this order relates.
>
> 3. The property shall remain under the effective control of the principal Investigating officer until the expiration of this order in terms of section 90 of MLPCA or until the conclusion of the forfeiture order."

[21] The learned judge had by these orders effectively issued a preservation of property order and a seizure order. In my view the scheme under the Money Laundering Act is that once such a preservation order has been made the clock starts to tick for other steps to be taken. From the moment that the order is issued the persons affected by it can no longer deal with the property as they wish. They become prejudiced in their enjoyment of the property concerned. The next step for the Authority to take under the Act is to ensure that the preservation of property order is confirmed by a forfeiture order or by an order that the property be released to its owner. The

latter would, in effect, be a discharge of the order on a finding that forfeiture is not justfied.

[22] The more important step to take after a preservation of property order is made, so far as the Authority is concerned, and which is of direct relevance to this appeal, is that that the respondent must, as enjoined of it by section 89(1)(b), publish a notice of the order in the Gazette as soon as practicable after it is made. In the context of the Act "as soon as practicable" must be understood to be a test of feasibility and physical possiblity even though, having regard to the facts of the case, the words must be interpreted with flexibility and common sense. There are no complex conditions and processes that need to be met or completed after an order has been made and before the notice can be published. There is no real background work to be done before the notice is published: at worst for the Authority it is merely to prepare the notice and hand it over to the authorities that produce the Gazette. I am fully aware that, generally speaking, where time limits are considered to be important in legislation, those time limits are stated for example as within 30 calendar days, or as in s 90 of the Money Laundering Act, within 90 days from the publication of the notice.

[23] It is not in dispute that the Authority did not publish the relevant notice in the Gazette. At the hearing counsel for the respondent gave an explanation for the failure to publish the notice. He submitted that after the "interim preservation order of 3 December 2015, no publication could be done since there was no final preservation of property order to act on. After the judgment was handed down on 17 August 2017, the publication was scampered by the noting of the appeal. I do not understand how it could be so scampered in light of Rule 13(1) of the Court of Appeal Rules 2006 which is to the effect that the noting of an appeal does not operate as a stay of the judgment appeal from.

[24] Whichever way one looks at the facts, there was no publication of a notice in terms of s 90 of the Money Laundering Act after the temporary preservation of property order of 3 December 2015 or after the "final" order on 17 December 2017. It is therefore clear that the preservation of property order lapsed in terms of s 90 of the Money Laundering Act. The effect thereof is that in terms of the Act, there is no order upon which the appellant's motor vehicles must remain in the custody of the respondent or the investigating officer.

[25] In the circumstances the order this Court must make is that -

1. The appeal is allowed.

2. The order of the Court *a quo* is set aside and replaced with the following-

"The application is dismissed with costs."

3. The respondent shall pay the costs of appeal.

MH CHINHENGO

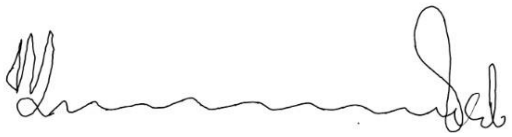
Acting Justice of Appeal

I agree

MAHASE ACJ

Acting Justice of Appeal

I agree



P MUSONDA

Acting Justice of Appeal

For Appellant: Adv M. Teele KC

For Respondent: Adv Lesholu assisted by
Adv T.C. Tsutsubi