

SUMMARY

A restraining order by the High Court in terms of the Money Laundering and Proceeds of Crime Act 4 of 2008, freezing several bank accounts, is appealed against because of the alleged disconnect between the criminal charges on which the order is based - the alleged lack of justification for an order against the appellants - The appeal is dismissed with costs.

JUDGMENT

K E MOSITO P

Introduction:

1. This appeal is on all fours with *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit*.¹ Both this appeal and the appeal in the *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit* arise from the same High Court order CIV/APN/422/2018. I can therefore do no better than to align myself with the background sketched by my brother Van Der Westhuizen AJA in *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit (supra)*, but with slight modifications.
2. The background to this case is that, on 26 November 2018 the Crime Unit and Commissioner approached the High Court in terms of section 67 of the Act by way of an urgent *ex parte* application for a restraining order to freeze bank accounts of the first ten respondents in that court. Appellants were cited as the fourth and eighth respondents in the High Court. The eleventh to fourteenth respondents were banks

¹ *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit C of A (CIV) 14/19.*

operating in Lesotho. **Monaphathi J** granted the interim relief and a *rule nisi*, returnable on 10 December 2018. The applications for an interim order and a restraining order were served on the then respondents. On 07 December 2018 the respondents gave notice of their intention to oppose and to anticipate the return date. The Appellants anticipated the return date to 13 December 2018. The second Appellant filed an Answering Affidavit on behalf of the appellants on 10 December 2018.

3. On that date the matter was argued. Only six of the respondents registered opposition, amongst them the four appellants in this Court. The directors of some or all of the companies that did not oppose were later criminally charged, with the third appellant. The matter was postponed to 13 February 2019 for judgment. The *rule nisi* was extended accordingly. On 13 February 2019 the *rule nisi* was confirmed. The accounts of the appellants were frozen.

The factual matrix

4. As far as relevant to this appeal, the material facts can be gleaned from the founding affidavit of Senior Inspector Sera Makharilele. In the founding affidavit Senior Inspector Sera Makharilele referred to an investigation into suspicious transactions of a value beyond the threshold of the Act. A trail of suspect transactions had been revealed, also by bank statements. The founding affidavit alleged that stolen money had been placed in different accounts. Huge unauthorised expenditure by the respondents in the High Court from the accounts took place in Lesotho and South Africa.

5. The founding affidavit explained how fraudulent transfers had taken place, as revealed by the investigation. The money in the accounts was tainted property, according to the founding affidavit. The Crime Unit and Commissioner had a clear right to freeze the accounts. Lesotho could suffer irreparable harm if the respondents were not restrained from operating their accounts, which had been credited with monies illicitly obtained from the Leribe account. There were reasonable grounds for believing that a confiscation order or pecuniary penalty was likely to be made in due course, according to the founding affidavit.
6. Ms Mahlape Thaele, the second appellant, filed an opposing affidavit on 10 December 2018. In it, she avers *inter alia* that, she and the first appellant had not stolen any money; and that a restraining order was in any event prejudicial to the appellants. She avers that the legal requisites for freezing of a bank account had not been met. She further avers that, there is no case made out against the appellants in the founding affidavit.
7. In reaction to this answering affidavit, Senior Inspector Sera Makharilele filed a replying affidavit. He averred in para 8.8 that, on the 06/11/2018, the first appellant was fraudulently credited with M22,000.00 with reference to CBL which is attached to the Replying Affidavit and marked ML03. The appellants did not seek leave of the Court to file a Supplementary Affidavit to controvert this averment. There is nothing on record to show that this belated introduction of such a material disclosure was objected to. We are entitled

therefore to assume that this material disclosure was allowed to stand.

The appeal

8. On appeal to this Court, the appellants raised a trifurcate ground of appeal that, on the totality of the facts and the law, there is no case which has been made against them because: (a), The appellants are not facing any criminal proceedings because they have not been charged and there is no intention to charge them now or in the future; (b), the transaction relied upon for purposes of implicating the appellants was wrongly interpreted; (c), there is no purpose that is going to be served by freezing the accounts of appellants just as there are no justifiable grounds for the freezing of accounts.

The issues

9. There are essentially three issues that arise for decision in this appeal. First, whether a restraining order can only be granted against a person who is personally facing criminal proceedings, such as appellants. Second, whether the transaction relied upon by the respondents as implicating the appellants was wrongly interpreted. Third, whether the restraining order in this case serves no purpose and whether there are no justifiable grounds for the award of the restraining order by the court *a quo*.

The law

10. For a determination of this appeal, the first law to be considered is the *Money Laundering and Proceeds of Crime Act*.² As Van der Westhuizen AJA pointed out in *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit (supra)*, the aim of the Act is “to enable the unlawful proceeds of all serious crimes to be identified, traced, frozen, seized and eventually confiscated; and to require accountable institutions to take prudential measures to help combat money laundering”. **PART III** deals with “**MONEY LAUNDERING**” and **PART IV** with “**CONFISCATION**”. Under Part IV, “*Division 6*” deals with “*Restraining Orders*”. Under this heading, section 67(1) provides for the application for a restraining order “*against any realisable property held by the accused or specified realisable property held by a person other than the accused*”
11. Restraining orders are intended to prevent abuse of power and arbitrariness on the part of the Respondent as is evident in this case. This is why for every action the Respondent is empowered to do, there is a neutral third party in the form of a court of law before whom the Respondent must make a case *ex parte* whether a particular case warrants the exercise of one of the powers in the Act.
12. The grounds of a restraining order are provided for in section 67(2) of the Act. A freezing order specifically targets bank accounts, and has the effect of preventing a person from accessing funds held in a bank account. A competent court will only grant a freezing order if: (a) there are grounds to suspect the bank account reflects proceeds of crimes; and

² Money Laundering and Proceeds of Crime Act 4 of 2008.

(b), unless the order is made, there is a risk that the funds will be reduced. Freezing orders have the effect of preserving the *status quo* to ensure such bank accounts are not interfered with.

13. According to section 67(2), a restraining order may be applied for on an *ex parte* basis, with an affidavit stating, inter alia, “(b) where the accused has not been convicted of a serious offence for which he or she is charged or about to be charged, grounds for believing that the accused committed the offence”. Section 67(2)(c) requires “a description of the property in respect of which the restraining order is sought “and (e) “the grounds for the belief that the property is tainted property in relation to the offence”. Sub-section (g) also mentions “tainted property”; and (h) requires “grounds for the belief that a confiscation order or a pecuniary penalty may be or is likely to be made under this part in respect of the property”.

Consideration of the grounds of appeal

14. There is essentially one trifurcated ground of appeal before us. It is that, the High Court ruling is erroneous because the appellants are not facing any criminal proceedings. The first reason for this is said to be that, the appellants have not been charged and there is no intention to charge them now or in the future. In his written submissions, the learned counsel for the appellants, Advocate Ts’abeha charges that “[e]xcept for general assertions in the founding affidavit deposed to by Senior Inspector Sera Makharilele there was no specific averment in

what was termed suspicious transactions” implicating the appellants. I am unable to agree with this contention.

15. Firstly, Senior Inspector Sera Makharilele referred to an investigation into suspicious transactions of a value beyond the threshold of the Act. A trail of suspect transactions had been revealed, also by bank statements. The founding affidavit alleged that stolen money had been placed in different accounts. Huge unauthorised expenditure by the respondents in the High Court from the accounts took place in Lesotho and South Africa. The founding affidavit explained how fraudulent transfers had taken place, as revealed by the investigation. The money in the accounts was tainted property, according to the founding affidavit.

16. The Crime Unit and Commissioner had a clear right to freeze the accounts. Lesotho could suffer irreparable harm if the respondents were not restrained from operating their accounts, which had been credited with monies illicitly obtained from the Leribe account. There were reasonable grounds for believing that a confiscation order or pecuniary penalty was likely to be made in due course, according to the founding affidavit.

17. Secondly, there is no factual foundation on the record to support the proposition that there is no intention to charge the appellants in the future. Contrarily, the record reveals that the appellants’ accounts are some of those into which monies were deposited. In fact, the second appellant, who is also a director of the first respondent, deposes in paragraph 5 of her Answering affidavit that, “there is only one

transaction dated 05 November 2018 as shown in Annexure ML01 which concerns the first [Appellant].”

18. This ground of appeal goes further to allege that, “[t]he transaction relied on for purposes of implicating the appellants was wrongly interpreted.” In my opinion, this is a clear concession that there is a transaction relied on for purposes of implicating the appellants. There is neither evidence nor a submission as to in what way the said transaction was wrongly interpreted.

19. The third branch of the ground is that, there is no purpose that is going to be served by freezing the accounts of the appellants. As I pointed out above, a freezing order specifically targets bank accounts, and has the effect of preventing a person from accessing funds held in a bank account. That is the purpose.

Conclusion

20. As Van der Westhuizen AJA pointed out in *MF Petroleum (Pty) Ltd v Counter Commercial Crime Unit (supra)*, ‘[t]he respondents approached the High Court *ex parte* for a restraining order in terms of the Act. The founding affidavit made out a case for the relief sought. A *rule nisi* was granted and the interim order as well as the application were served. The appellants opposed and filed papers. The matter was argued before the High Court, before the court granted a restraining order freezing the bank accounts of the appellants. The appeal cannot succeed.’ This should mark the end of the appeal.

Order

21. In view of the above reasoning, the appeal is dismissed with costs.



DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



N T MTSHIYA
ACTING JUSTICE OF APPEAL

For the Appellants: Adv S S Tsábaha

For the Respondents: Adv N C Sehloho