IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 14/2019

CIV/APN/422/18

MF PETROLEUM (PTY) LTD	**1ST APPELLANT**
MF PETROLEUM (PTY) LTD	**2ND APPELLANT**
MAKHETHA THAELE	**3RD APPELLANT**
MF HOLDINGS (PTY) LTD	**4TH APPELLANT**

And

COUNTER COMMERCIAL CRIME UNIT	**1ST RESPONDENT**
COMMISSIONER OF POLICE	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

CORAM: DR K E MOSITO P

DR P MUSONDA AJA

DR J VAN DER WESTHUIZEN AJA

HEARD: 14 OCTOBER 2019

DELIVERED: 1 NOVEMBER 2019

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 and the amount affected; the alleged lack of justification for an order against the fourth respondent; and the fact the High Court did not provide reasons for its order. The appellants failed to persuade the Court of Appeal on the first two grounds. The absence of a reasoned judgment is unacceptable, but cannot be held to prejudice the respondents who made out a proper case before the High Court. The appeal is dismissed. The parties have to bear their own costs.

JUDGMENT

VAN DER WESTHUIZEN AJA:

Introduction

[1] At the heart of this appeal are two questions: Does a restraining order in terms of section 67 of the Money Laundering and Proceeds of Crime Act 4 of 2008 (the Act), that froze the bank accounts of the appellants and others, granted by the High Court, exceed the amount justified by the circumstances? And: Should the order have been made with regard to the fourth appellant? This Court had to consider these without the benefit of a reasoned judgment by the High Court.

[2] The first and second respondents (the applicants in the High Court) are the Counter Commercial Crime Unit (Crime Unit) and the Commissioner of Police of Lesotho (Commissioner). The

appellants - the respondents in the High Court - are a business man and companies to which he is linked.

Background

[3] The third appellant, Mr Makhetha Thaele, was charged (with co-accused) in the Maseru Magistrate's Court with the theft of M17, 785, 969. 09 from the Leribe Recurrent Expenditure Account (the Leribe account). According to the third appellant, he is the founding shareholder and director of the fourth appellant. He is also a signatory to the bank account of the second appellant; and responsible for the financial management and supervision of the first and second appellants.

[4] 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. The eleventh to fourteenth respondents in the High Court were banks operating in Lesotho.

[5] 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. 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] On 26 November 2018 **Monaphathi J** granted the interim relief and a rule nisi, returnable on 10 December 2018. The interim order and restraining order application were served on the then respondents. On 10 December the respondents gave notice of their intention to oppose and to anticipate the return date.

[7] Mr Thaele, the third appellant, filed an opposing affidavit. In it, he submitted inter alia that he had not stolen any money; and that a restraining order was in any event unnecessary, because he was aspiring to be the Prime Minister of Lesotho, was not going anywhere and was "going to live, die when the time comes and be buried in Lesotho". He alleged that the application was politically motivated. In view of the opposition, the matter was postponed to 13 December 2018.

[8] 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.

[9] On 13 February 2019 the rule nisi was confirmed. The accounts of the first to the tenth respondents were frozen.

The appeal

[10] On appeal to this Court the appellants raised the following grounds:

> (1) The High Court ruling is erroneous because it effectively shuts down the appellants' businesses until the finalisation of the criminal proceedings, while –
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> (a) it is clear on the facts that the only amount sought to be preserved is M482 144,35;
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> (b) the preserved amount is in excess of one million Maluti; and
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> (c) there was no legal and factual basis for an order against the fourth appellant, because it was neither implicated in the founding papers, nor criminally charged.

(2) The High Court erred by not giving reasons for its order.

No reasons

[11] I deal with the last ground of appeal first. The appellants refer to authority like *Lesotho Teachers Trade Union v Director of the Teaching Service Department and Others LAC* (2000 – 2004) 804; C of A (CIV) No 14 of 2003, as well as case law quoted in that judgment. The failure to give reasons was described as *"reprehensible"* and a practice that *"cannot be deprecated strongly enough"*. Not to furnish reasons is unethical and brings *"the whole justice system into disrepute"*. It leads to a perception that judges give arbitrary decisions. Arbitrariness is in itself *"a form of dictatorship … foreign … to the rule of law"*. It causes a loss of public confidence in the ability of courts to resolve disputes.

[12] In South Africa the Supreme Court of Appeal (*in Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae*) [2012] ZASCA 115 (14 September 2012)) pointed out the cynicism of saying that everyone has a constitutional right to rational decisions, but no right to know the reasons for a decision. In the Constitutional Court case of *Bell Porto School Governing Body v Premier, Western Cape* 2002(3) SA 265 (CC) it was mentioned that the duty to give reasons when rights or interests are affected had been stated "to constitute an indispensable part of a sound system of judicial review". If this can be said with regard to the judicial review of executive and

administrative decisions, it would be infinitely more valid regarding appeals against court orders.

[13] It is well-known that courts can only justify and be accountable for their decisions and expect their orders to be respected, through their reasoning. The above condemnations of orders without reasons are entirely justified.

[14] Where does this leave an appeal like the one before this Court though? Relying on the English case of *Padfield v Minister of Agriculture, Fisheries and Food* 1968 (1) All ER 694 (HL); (1968) AC 997, referred to in Lesotho Teachers Trade Union, the appellants argue that the appeal must be upheld. From the absence of reasons for a judgment the inference could be drawn *"that there were no good reasons*" for the judgment. A judgment arrived at in the absence of proper reasoning is arbitrary and cannot stand.

[15] The temptation to go the route proposed by the appellants is strong. Not only is the failure of a court to furnish reasons for a decision – especially of this magnitude and with the effect this decision has – unacceptable from a rule of law perspective, but it could seriously hamper the fairness of an appeal. Whereas the appeal is against the order of a lower court, the court of appeal needs the benefit of the reasoning of the lower for the order it made. Without a reasoned judgment, consideration of whether the order should be set aside could amount to second guessing. Unless an

order is glaringly and obviously correct, or patently and blatantly wrong, an appeal court could hardly conclude that a lower court correctly decided, erred in law, or misdirected itself, if it has no insight into the lower court's reasoning. It could be argued that an appeal should be struck off the role, dismissed, or upheld, in the absence of a reasoned judgment.

[16] However, these possibilities hold the potential of prejudice to litigants. A court's failure to meet its judicial obligations should not disadvantage an appellant or a respondent on appeal, who did its best to present a reasoned case to the court below. If the Senior Inspector correctly stated in the founding affidavit that Lesotho would suffer irreparable harm, should the appellants be allowed to continue operating their accounts with stolen money, it would be unfair to punish the people of Lesotho for the court's omission.

[17] If the failure by judges to provide reasons for orders and account to litigants and the public is indeed a practice in any court system, it may well have to be addressed by the relevant authority. In the present case this Court has little choice but to deal with the appeal on the basis of what is before it.

The amount

[18] Counsel for the appellants argue that the High Court erroneously ordered what effectively amounts to freezing one million plus Maluti, whereas the only suspect transaction evident

from the papers is to the amount of M482 144.35. This amount is indicated on a Standard Lesotho Bank statement, as a credit on the account of MF Petroleum Pty Ltd for *"fuel purchases*", dated 5 November 2018. Another Lesotho Standard Bank statement indicates the same amount as a debit to the Leribe Account, on the same date.

[19] Counsel for the appellants furthermore submits that the High Court did not consider the appellants' *"reasonable expenses and reasonable business expenses*", as it should have done in terms of section 68(2)(a) of the Act. On behalf of the respondents, counsel answered that the appellants could not get an order from a court that they had not asked for. The expenses claim was not part of their case in the High Court.

[20] As to the amount effectively "*frozen*", counsel for the respondents submitted that the appellants confused the provision for preservation orders in section 88 of the Act with section 67. This section, in terms of which the freezing of the accounts was ordered in this case, provides for restraining orders.

[21] A broader look at the Act may assist. According to its Preamble, 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 this part, *"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".*

[22] 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"*.

[23] Section 68(1) states that if the court is satisfied that *"(a) the accused has been convicted of a serious offence or has been charged or is about to be charged"*; *"(c) there is reasonable cause to believe that the property is tainted property"*; *"(d) where the application seeks a restraining order against property of a person other than the accused, there are reasonable grounds for believing the property is tainted property"*; and (e) *there are reasonable grounds for*

believing that a confiscation order or a pecuniary penalty is likely to be made …", the court may make a restraining order.

[24] Section 88 deals with *"Preservation of property orders"* and falls under *"Division 2 – Preservation of property"* in **"PART V – CIVIL RECOVERY OF PROPERTY**" of the Act. Sub-section (1) provides for *"an order prohibiting a person … from dealing in any manner with any property referred to in subsection (2)".* This subsection then mentions property believed on reasonable grounds to be *"(a) … an instrumentality of a serious offence; or (b) … the proceeds of unlawful activities"*.

[25] In spite of some perhaps less than entirely lucid wording in the Act, the purpose of preservation orders clearly differs from that of restraint orders. The provisions fall under two separate parts of the Act, as different components of the over-all scheme to combat money laundering and related criminal activities.

[26] This Court recently dealt with a preservation order under section 88 in the matter between *Molisana Sekoala and The Directorate on Corruption and Economic Offences* (C of A (CIV) NO 61/2017, CIV/APN/445/15). The property at stake was a BMW 320D, a BMW 1 Series and a Toyota Dyna. In his judgment on behalf of a unanimous court, **Chinhengo AJA** mentioned that the respondent had failed to answer questions about his moveable and immovable property and large deposits of money into his bank

accounts, as well as information that he was living beyond his means, possibly on the proceeds of crime. The judgment stated that a preservation order was a precursor to a forfeiture order under section 90 of the Act.

[27] Before us is a restraint order in terms of sections 67 and 68. The transfer of M482,144.35 between the Leribe Account and the account of an appellant is but one example of a suspect transaction. The third appellant admitted that the MF Petroleum account had been credited with this amount from a government account. Other transactions, evident from the bank statements, were also pointed out by the applicants in the High Court. The restraint order did not have to be limited to that amount. According to the above-mentioned founding affidavit, there was reason to suspect theft of more than 17 million Malutis.

[28] Section 68(2) of the Act states that a restraining order *"may be made subject to such conditions as the Court thinks fit and … may make provision for meeting out of the property or a specified part of the property … (a) the person's reasonable living expenses … and reasonable business expenses"*. Whether to make provision for living and business expenses is in the discretion of the court, as indicated by the word *"may"*.

[29] In an affidavit signed on 10 December 2018, as well as in his answering affidavit, the third appellant stated that *"the exparte is*

prejudicial … (and) … causes daily prejudice". "*The business operations … have been put to halt"*. Employees of the respondents' companies had not received their salaries for November 2019 and *"unless the bank accounts are unfrozen they will not have food to eat during the Christmas break"*. He presented these circumstances to the court as a reason why the restraining order should not be made at all. The third appellant neither asked for reasonable living and business expenses – for example to look after the needs of workers - nor proposed how these should be met out of the relevant property. I am unable to conclude that the High Court erred or misdirected itself on this point.

The missing link

[30] According to the appellants, there was nothing before the High Court to link the fourth appellant to the alleged criminality. The restraint order should not have been made against the fourth appellant.

[31] The respondents argue that it is common cause that the third appellant was the owner or in effective control of the first and second, as well as fourth appellants. In the founding affidavit ten accounts in which tainted money was under the effective control of the respondents are stipulated. One of these is the First National Bank account of the fourth appellant, effectively owned or controlled by Mr Thaele, the third appellant.

[32] In his answering affidavit the third appellant states: "*I am the founding shareholder and director of MF Holdings (pty) ltd*". MF Holdings is the fourth appellant. The third appellant is an accused in the criminal proceedings. What further connection is needed?

[33] The link is not missing.

Conclusion

[34] The 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 appellants' arguments that the order should have been restricted to the amount of one transaction, that expenses should have been provided for and that nothing linked the fourth appellant to the third appellant and the suspicions about his dealings with Leribe are not persuasive. The appeal cannot succeed.

Costs

[35] Costs normally follow the result. However, in view of the fact that private entities are in this matter pitted against the state, as well as the predicament the appellants find themselves in given the

frozen bank accounts, it seems fair and prudent not to order the appellants to pay the costs of the respondents.

Order

[36] In view of the above the following is ordered:

(1) The appeal is dismissed.

(2) No order is made as to costs.

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DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree,

_____

DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree,

_____

DR P MUSONDA

ACTING JUSTICE OF APPEAL

For the Appellants: Adv T P Chabana

For the Respondents: Adv N C Sehloho