THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 730/2011

In the matter between:

National Director of Public Prosecutions **APPELLANT**

and

Johannes Erasmus van Staden and 11 Others **RESPONDENTS**

Neutral Citation: *NDPP v Van Staden & others* (730/2011) [2012] ZASCA 171 (28 November 2012)

Coram: Lewis, Malan, Wallis, Pillay JJA and Mbha AJA

Heard: **9 November 2012**

Delivered: **28 November 2012**

Summary: Application for confirmation of a provisional restraint order granted in terms of s 26(1) of the Prevention of Organized Crime Act 121 of 1998 refused by high court on ground that NDPP had not acted in good faith when it sought the order: decision reversed on appeal: no ground for finding bad faith and no reason for refusing confirmation.

ORDER

On appeal from: Western Cape High Court, Cape Town (Blignault J sitting as court of first instance):

1 The appeal is upheld with costs including those of senior counsel.

2 The order of the high court is set aside and replaced with the following order:

'The provisional restraint order granted on 12 December 2008 is confirmed. The respondent is ordered to pay the costs of the application including those of senior counsel.'

JUDGMENT

LEWIS JA (Malan, Wallis, Pillay JJA and Mbha AJA concurring)

[1] The appellant, the National Director of Public Prosecutions (NDPP), brought an ex parte application, in camera, in the Western Cape High Court (before Traverso DJP) for a restraint order in terms of s 26(1) of the Prevention of Organized Crime Act 121 of 1998, the effect of which would be to restrain the respondents from dealing with property to which the order related pending a criminal trial for fraud perpetrated against the South African Revenue Service (SARS). The fraud charges were in respect of the provision to SARS of fraudulent VAT returns. The respondents were Johannes van Staden, his family members and various entities through which Van Staden operated fishing and exporting activities. The details of the fraud alleged do not now concern this court. The high court granted provisional restraint orders against the respondents, including Van Staden, and a rule nisi calling on them to show cause why the orders should not be made final.

[2] Two founding affidavits served before the high court: that of Mr J K Rossouw, a Deputy Director of the National Prosecuting Authority, and regional head of the specialized tax component, and that of Mr F P Scholtz, an investigator in the criminal investigations section of the SARS. Scholtz alleged that during 2008 he had investigated the VAT returns of Van Staden's business entities and suspected that they were fraudulent. He approached Rossouw to assist with the investigation. On 27 November 2008 he conducted a search and seizure operation at the premises of one of the offices from which the various Van Staden businesses were conducted. During the course of the search, he alleged, the fourth respondent, Mr C de Vries, an employee of Van Staden in effect (he was actually employed by Indo-Atlantic Motorcross (Pty) Ltd, the ninth respondent), approached Scholtz and indicated that he was willing to talk to him about the reasons for the investigation. According to Van Staden, when he filed an opposing affidavit after the provisional order had been granted, De Vries was the financial director of the 'Indo Atlantic Group'.

[3] De Vries volunteered to make a statement and was advised to consult an attorney first. This he did. These facts were placed before the high court in the founding affidavits. The sworn statement of De Vries was provided to SARS and to the NDPP on 8 September 2009, after the provisional restraint order had been granted. It was not part of the record that served before the high court when the application to confirm the orders was sought. The high court (per Blignault J) discharged the order against Van Staden (orders against other respondents were confirmed on different occasions) principally because in the ex parte application the NDPP had not acted with the 'utmost good faith' in that it relied on the information provided only orally by De Vries, and had failed to obtain the De Vries affidavit as soon as possible after the grant of the provisional restraint order. And in addition, Blignault J complained that the NDPP had not placed the affidavit before him when the application for confirmation of the restraint order was sought. Whether the NDPP failed to act in good faith forms the crux of the appeal before us, leave to appeal having been given by this court.

<u>The information from De Vries placed before the court in the ex parte application</u>

[4] The evidence of Rossouw and Scholtz about De Vries in their founding affidavits that served before Traverso DJP was to the following effect. When Scholtz

was approached by De Vries in the offices being searched, and De Vries offered to speak about the investigation, Scholtz phoned Rossouw to advise him of this. Rossouw suggested to De Vries that he consult an attorney before making any statement and warned him that he was himself a suspect, and against self-incrimination. De Vries in fact consulted two attorneys on different occasions, and undertook to provide a statement under oath in due course.

[5] De Vries, as I have said, provided that statement only on 8 September 2009. As an accused person he could not have been compelled by the NDPP to provide a sworn statement. Although some of the evidence in the affidavits of Rossouw and Scholtz was based on what De Vries had told them, there was much other objective evidence in addition. And, in his reply to the opposing affidavits, Rossouw confirmed that subsequent investigation had for the most part confirmed what De Vries had said before providing an affidavit.

[6] In his opposing affidavit of 17 August 2010, before the application for confirmation of the restraint order was sought, Van Staden alleged that he had not had access to De Vries's affidavit. That was not the case. He had been given an electronic copy and Rossouw tendered to make it available to the court. Rossouw stated in his reply that the De Vries statement, if attached to court papers, might prejudice his criminal trial and those of the other accused. Van Staden responded through three further affidavits in 'rebuttal', but did not deal with the material in the De Vries affidavit of which he had an electronic copy.

Section 26: the requirements for an ex parte application for a restraint order

[7] The section makes provision for the NDPP to apply to a high court ex parte for an order prohibiting any person from dealing with property to which the order relates. The section is contained in Chapter 5 of the Act which deals with the proceeds of unlawful activities. Part 3 (ss 24A-29A) regulates restraint orders. Section 24A provides that a restraint order and an order authorizing seizure of property which is in place at the time of any decision made by a court ordering confiscation remains in force pending the outcome of any appeal against the decision concerned. Although the heading of the section is 'Order to remain in force pending approval' it is not in my view clear whether the section refers to an order that has been confirmed or also to one that is provisional. It is not necessary to decide the matter in this case.

[8] Section 25 sets out the basis upon which a restraint order may be made: either a prosecution has been instituted, a confiscation order has been made or there are reasonable grounds for believing that one will be made, and the proceedings have not been concluded; or the court is satisfied that a person is to be charged with an offence and 'it appears to the court that there are reasonable grounds for believing that a confiscation order may be made'. And where the high court has made a restraint order under s 25(1)(*b*) (where it is satisfied that a person is to be charged with an offence and that there are reasonable grounds for believing that a confiscation order may be made) the court is required to rescind the order if the person is not charged within a reasonable period.

[9] Section 26 sets out the procedures to be followed. The NDPP may apply ex parte for an order prohibiting any person from dealing with property to which the order relates. A court may make an immediate order provisionally, and simultaneously grant a rule nisi calling upon the respondent (referred to throughout these sections as a defendant) to show cause why the restraint order should not be made final. The high court seized of the matter may make a number of ancillary orders dealing with matters such as the living and legal expenses of the respondent, discovery and seizure of movable property. The court may also vary or rescind the restraint order on the application of any person affected by it who alleges undue hardship.

[10] The point I wish to emphasise at this stage is that the application made ex parte in this case was not for final relief. It was for the preservation of the proceeds of unlawful activities that Van Staden may or may not have acquired, pending the criminal trial and a further determination at a later stage as to whether those proceeds or property acquired with them should be forfeited in terms of the Act. When the ex parte application was moved, the high court had before it evidence that Van Staden was in fact in control of companies in the group involved in defrauding the fiscus and had himself received a benefit of at least R100 million for the fraud. Van Staden did not subsequently dispute that the fraud had occurred. He instead claimed ignorance and placed much of the blame at the door of De Vries. But at the time when an ex parte application is made the test to be adopted by the court in determining whether a provisional order should be granted is now well-settled and

was expressed as follows by this court in *National Director of Public Prosecutions v Rautenbach*:[1]

'It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or some other unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion . . . it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all the evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied on is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true.'

The application to confirm the provisional order: fairness

[11] The application to confirm the order in this matter was refused and the order discharged on 9 March 2011. Blignault J held that the NDPP had been in breach of his obligation to act fairly by relying on the oral evidence of De Vries and not providing his affidavit in the papers that served in the application for the order ex parte. Van Staden argued before the high court that De Vries's evidence was 'unidentified' and hearsay. Blignault J, in dealing with this argument, said:

'It is generally recognised that applications of this nature under POCA [the Act] are draconian in effect. This is vividly illustrated by the facts of the present case. As a result of one single order granted *ex parte* Mr van Staden was deprived of all his assets and his businesses which went into liquidation. His family life was seriously affected. He is now dependent on food and charity from friends for the most basic food and clothes. It is therefore self-evident that the NDPP must act in such a matter with scrupulous fairness to a defendant. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC).'

[12] Two comments should be made at this stage. First, although the effect of an order in terms of s 26 of the Act may be harsh, it is not generally accepted to be

[1] *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603; 2005 (2) SACR 530 (SCA) para 27.

draconian. The defendant is not deprived of his property arbitrarily. He is simply restrained from dissipating what are alleged to be the proceeds of unlawful activities until such time as he has been convicted and a court is persuaded that such proceeds should be confiscated. Nor are Van Staden's allegations about being reduced to penury substantiated in the papers. His complaints related largely to the way in which the court-appointed curator of his assets was conducting his business affairs. And he was entitled to apply for living expenses, as indeed he did at the same time as the application for confirmation was heard.

The failure to produce the sworn statement of De Vries to the court granting the provisional order

[13] It is no doubt correct that in an ex parte application the applicant must act bona fide and disclose all the information that it has available to it to the court – the *uberrima fides* rule.[2] The NDPP did not question this principle. But he argued that he did not act in bad faith in the ex parte application. He disclosed the fact that De Vries had been interviewed, and revealed information that De Vries had divulged. The deponents to the founding affidavits made plain that De Vries had offered to make a sworn statement but that it had not been furnished at the time when the application was made. Blignault J nonetheless considered that the NDPP 'owed the court a duty' to ensure that the alleged evidence actually existed. He was thus obliged to obtain De Vries's sworn statement expeditiously and make it available to the court as soon as it was obtained. The learned judge said the NDPP should have 'discharged this duty as soon as practically possible'.

[14] But that was done. The statement was furnished to the NDPP on 8 September 2009, and Van Staden given an electronic copy on 29 April 2010. A copy was offered to the high court when the confirmation was sought. It was not filed with the court papers for the reasons given below. It is not clear to me why the high court decided, then, that the NDPP was in breach of its duty to act in the utmost good faith when it applied for the provisional order.

Uberrima fides before the court called upon to confirm the order

[2] *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 296.

[15] The court that is asked to confirm or discharge the order must look at the facts before it to determine whether the order is warranted. By the time the court below had seen the papers they had multiplied: not only were more facts placed on record by the NDPP but Van Staden himself had responded with four affidavits opposing confirmation and rebutting the affidavits deposed to on behalf of the NDPP.

[16] But the high court appeared to consider that even at the stage when the confirmation order was sought the NDPP's conduct was somehow tainted by non-disclosure. Even though the De Vries affidavit had been furnished to Van Staden, the high court took the view that the manner of providing it was 'unfair': it was recorded on a CD, together with many other documents. The CD had no index. Van Staden complained that he could not find it. And it was not placed on the court record. The NDPP explained that the affidavit was incriminatory and should not be placed on public record: De Vries and other witnesses might be prejudiced. He offered to provide the affidavit to the court at the hearing. However, Van Staden was required to keep the material confidential as, in terms of his bail conditions, he was not permitted to have contact with other witnesses. The high court's view that this approach was not acceptable and showed lack of good faith is not explicable.

[17] At the stage when the confirmation of the order was sought the rule requiring utmost good faith was not at issue. In *Trakman NO v Livschitz*[3] this court stated that the rule applicable to ex parte proceedings does not extend to opposed motion proceedings. Smalberger JA said:

'Nor is there any sound reason for so extending the principle. Material non-disclosure, *mala fides*, dishonesty and the like in relation to motion proceedings may, and in most instances should, be dealt with by making an adverse or punitive order as to costs but cannot, in my view, serve to deny a litigant substantive relief to which he would otherwise have been entitled.'

Furnishing the De Vries affidavit in electronic form

[18] The sworn statement of De Vries was included, in electronic form on a CD, with many other documents, as I have said, as part of the docket in Van Staden's prosecution for fraud. Van Staden complained of this and Blignault J, in the

[3] *Trakman NO v Livschitz* 1995 (1) SA 282 (A) at 288F-H.

application for confirmation of the restraint order, criticised the NDPP's conduct in this regard. Although the CD had no index there was no reason advanced why Van Staden could not have used a search function to find the De Vries statement. Nonetheless Blignault J said that this form of 'service' was 'in conflict with every rule of practice and every principle of fairness'. This, too, was advanced as a reason for refusing confirmation of the order.

[19] Even in a criminal trial the right of access by an accused to the docket is limited. In *Shabalala v Attorney General, Transvaal*[4] Mahomed DP said that even where access to witness statements by an accused was justified, it 'does not follow that copies of witnesses' statements have to be furnished'. A fortiori Van Staden, who had access to the document on the CD, was not entitled to be given a printed version. But if he had wished to obtain it in a different form he had a right to demand discovery of the statement. He was legally represented throughout the proceedings and R150 000 of the moneys subject to the restraint order were released by the NDPP for the payment of legal costs. There was thus no 'inequality of arms'[5] when the application for confirmation of the provisional order was moved.

Van Staden's argument

[20] I shall deal with the conduct of Van Staden in the appeal process in due course. His principal argument was one in limine: that once the provisional order made by Traverso DJP had been discharged, there was nothing in place to appeal against. This argument was based on a passage in *Rautenbach* which stated:[6]

'An interim order that is made *ex parte* is by its nature provisional – it is "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side" (*per* Harms JA in *MV* Snow Delta: *Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) in para [6]), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) in para [45]). It follows that when an appeal is sought to be brought against a

[4] *Shabalala v Attorney General, Transvaal* 1996 (1) SA 725 (CC) para 38.
[5] A reference to the judgment of Blignault J when refusing leave to appeal, and distinguishing this case from that in *Trakman* above, on which the NDPP relied.
[6] Above, para 12.

discharge of such an order there is nothing to revive for it is as if no order were made in the first place.'

[21] A superficial reading of the passage appears to support Van Staden's argument. However, the paragraph must be viewed as part of the whole judgment. A reading of that reveals that the court was concerned with two appeals: the main appeal was against the discharge of a provisional order granted under s 26 of the Act; the ancillary appeal raised the question whether the institution of the main appeal had the effect of keeping the provisional restraint in place. In separate proceedings the high court held that the provisional order did not have the effect contended for and ordered the curator to return the property placed under the restraint. It is that order that the passage in *Rautenbach* quoted above referred to. The high court found that the lodging of an appeal against that order did not revive the provisional order. That ancillary appeal was dismissed by this court. The main appeal of the NDPP in this court was against the order discharging the provisional restraint order. That appeal succeeded. Nugent JA confirmed the provisional order. The fact that there was nothing to revive does not mean that the discharge was not appealable.

[22] Van Staden advanced no arguments to persuade this court that the order should not be confirmed other than those relating to the De Vries statement. I have dealt with those already. He disputed some of the allegations made in the founding affidavit, but did not refute those that are required for a restraint order to be made. He argued also that the NDPP had not made it clear either to Traverso DJP when she heard the ex parte application for the provisional restraint order, nor to Blignault J when he heard the application for confirmation of the order, that he had had three years of 'clear audits' before the search and seizure took place. The relevance of this assertion escapes me.

Should the provisional restraint order be confirmed?

[23] An order for confiscation will be made under Chapter 5 of the Act only where there has been a conviction, and it is proved that the defendant has benefited from

the crime. This entails a finding by a trial court in due course that Van Staden benefited from the offence he committed or a sufficiently closely related offence.[7]

[24] In order to succeed in confirming the restraint (as opposed to the confiscation) order the NDPP must show only that there are reasonable grounds for believing that a confiscation order may be made at the conclusion of the criminal trial. I have set out the test enunciated in *Rautenbach*[8] for determining whether a restraint order should be granted. I consider that there are reasonable grounds for believing that there will be a conviction and an ensuing confiscation order. The NDPP has shown on the papers, on the probabilities, that VAT fraud was committed by at least three companies of which Van Staden is a director, and also the chief executive officer; that he must have had personal knowledge of the fraud because of his direct control; and that there is direct evidence showing his personal involvement in the fraud.

[25] Van Staden has not denied that his co-accused, in particular De Vries and one Mr G Botha, committed fraud. He has simply denied his own knowledge and participation. On the NDPP's allegations, some R246 million was paid by SARS as VAT refunds to the Indo-Atlantic group. Van Staden cannot have been ignorant of the source of such a large amount of money. In addition he personally gave instructions to SARS to make VAT repayments to one entity rather than another. Further details are unnecessary. If proved, the evidence would show that his benefit from the VAT fraud would be in the region of R100 million.

<u>The assets that might be the subject of a confiscation order</u>

[26] One of the difficulties presented in this appeal is that Van Staden has rested his case on a denial of his own involvement and has not contested the allegations that he 'holds' property even though it appears that members of his family, or entities within his business group, are the formal owners. The heads of argument presented by him in this appeal do not take issue at all with the factual averments of the NDPP in this regard. I shall revert to this matter.

[27] The NDPP contends that Van Staden, through various business entities and family members, has control over valuable assets, and treats them as his own. Van

[7] Section 18(1) of the Act.
[8] Above, para 27. See also *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 19 and *National Director of Public Prosecutions v Kyriacou* 2003 (2) SACR 524 (SCA) para 10.

Staden's response to the averments has changed over the course of his opposing affidavit and the rebuttal affidavits. He has in effect said no more than that there was nothing untoward in housing company assets and personal assets in a trust. That trust owns vehicles, immovable property and an aircraft. The likelihood is that these assets have been acquired with funds derived from the VAT fraud. Other assets have been donated to Van Staden's wife. She has asserted that they were given to her as personal gifts: yet he has also averred that he has bought and sold jewellery as her agent. Whether the assets are truly hers remains to be tested if and when proceedings are instituted for a confiscation order. The same is true of assets donated to Van Staden's daughter. The probability is that they are the realisable property of Van Staden himself.

[28] At this stage the court is not called upon to do more than determine whether there are grounds for believing that a confiscation order may be made against Van Staden if he is convicted of fraud. I consider that there is a probability that he has benefited from fraud to the extent of R100 million. The assets that he controls through a trust, companies and family members are realisable and subject to the provisional restraint order. On appeal Van Staden has made no attempt to show that these assets are not realisable as his property. In the circumstances the appeal against the decision not to confirm the provisional restraint must be upheld.

Van Staden's conduct in the appeal

[29] The appeal was set down for hearing on 13 September 2012. The NDPP filed its heads of argument on 18 April 2012. Van Staden's heads should have been filed by 18 May 2012. By 13 July, although there had been correspondence between Van Staden and the office of the NDPP, no heads had been filed on his behalf, and he had advised the NDPP that he intended to cross appeal and to apply for a postponement, but that he did not have funds to do so. The various attorneys of record who had represented him previously had all withdrawn because of lack of payment. Moreover, Van Staden refused to co-operate with the NDPP when asked to agree on documents to be incorporated in the record, and the latter was compelled to ask for instructions from the court.

[30] The NDPP thus wisely anticipated that a postponement would be requested at the last minute and his office requested the Registrar of this court to postpone the

appeal to the fourth term of this year. That was done at the instance of the President of this court.

[31] The matter was set down for hearing again on 9 November 2012. The Registrar attempted in vain to contact Van Staden. Eventually, Van Staden was advised that the appeal would proceed on the allocated date. In response to that advice, Van Staden instructed another attorney, who wrote to the Registrar requesting a postponement of the hearing of the appeal until the first court term in 2013. The attorney was advised to make a formal application, supported by an affidavit, for a postponement. No application was filed, but an affidavit of Van Staden was filed in this court on 26 October 2012 in support of the request for a postponement.

[32] The reasons advanced for a postponement were that Van Staden had been incarcerated on 19 October 2012 in Pollsmoor Prison, his bail having been withdrawn. The criminal trial on the charges of fraud against him is still pending. He claimed lack of funds for legal representation. Van Staden has known since July that the appeal was set down in the fourth term. He had made no attempt to deal with the many requests by the NDPP and the Registrar's office before his incarceration. The NDPP opposed the request for a postponement. And since no reasons of substance were advanced by Van Staden, and no explanation was given for ignoring the calls and correspondence of this court, the court refused to postpone the matter.

[33] Heads of argument were filed on behalf of Van Staden on 7 November 2012, two days before the hearing. Further heads were proffered on the morning of the appeal but the court declined to accept them since they related not to the appeal but to a further charge in respect of racketeering laid against him in December 2009. That charge has nothing to do with this appeal. Van Staden's conduct in this appeal has been deplorable as his counsel readily conceded.

Order

[34] In the result the appeal must succeed. The NDPP did not ask for the costs of junior counsel who is employed by the NDPP.

1 The appeal is upheld with costs including those of senior counsel.

2 The order of the high court is set aside and replaced with the following order:

‘The provisional restraint order granted on 12 December 2008 is confirmed. The respondent is ordered to pay the costs of the application including those of senior counsel.’

_____

C H Lewis

Judge of Appeal

APPEARANCES:

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