

IN THE HIGH COURT OF SWAZILAND

CASE NO. 246/07

In the matter between:

THEMBANI SIMELANE

APPLICANT

AND

**THE DIRECTOR OF PUBLIC
PROSECUTION**

1st RESPONDENT

THE FIRST NATIONAL BANK

2nd RESPONDENT

THE ATTORNEY GENERAL

3rd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: M. MKHWANAZI

**FOR 1st & 3rd RESPONDENTS: OFFICE OF THE ATTORNEY
GENERAL**

JUDGEMENT

10th October, 2008

[1] The Applicant who is a civil servant, holds and or operates a Bob 2000 Savings Bank Account at the Mbabane branch of First National Bank, the 2nd Respondent herein.

[2] Following a criminal charge under the Serious Offences (Confiscation of Proceeds) Act 8 of 2001 (hereinafter referred to as the Act) preferred

against her by the Director of Public Prosecutions, the 1st Respondent herein, a restraint order; restraining and interdicting her from dealing with that account was obtained by the first respondent from this court. The criminal charge faced by the Applicant is a Serious Offence as defined in the Act. However, on the 22nd February, a consent order was granted by this court whereby the 2nd Respondent was allowed to transfer or release to the Applicant a portion of the money held by it on behalf of the Applicant in that relevant Bank account. This was in respect of her salary deposited into her bank Account from February to October, 2007.

[3] It is common cause that part of the monies held by the Bank under the restraining order is a sum of E13 435.08 which was deposited into that account on the 31st January 2007. This money was paid to her by Cash Build in respect of haulage services rendered by the Applicant. There is no allegation by the first Respondent that this money was unlawfully or corruptly acquired by the Applicant. It is because of this reason, and this reason alone that she has applied to this court to have this amount released to her. She states in paragraph 7.2 of her replying affidavit that "I am advised and verily believe that the Act only provides for confiscation of proceeds of Serious Offences and the Cash Build payment is not proceeds of any offence but proceeds of my trucking business." This is repeated in paragraph 9.1 where she states that "only proceeds of a serious crime or property acquired through such proceeds may be restrained."

[4] This application is opposed by the 1st and 3rd Respondents with the

2nd Respondent abiding the decision of the court. The ground of opposition by the two respondents already indicated above is that "...the fact that the sum complained of is not proceeds of a crime is not enough to justify a variation order...."

[5] The allegation against the Applicant is that she is guilty of having fraudulently misappropriated a sum of E1 141,000-00 (One Million, One Hundred and Forty One Thousand Emalangeni). The restraining order also applies to her Swaziland Building Society Savings Account at the Mbabane branch. There is, however, no indication on the papers before me what the respective balances are in respect of these two accounts. But as there is no allegation that the monies subject to the restraining order far exceed the amount that is the subject of the charge or that could be ordered forfeited in the event the Applicant is convicted of the criminal charge, this missing link is of no moment in this application.

[6] In terms of section 11 (1) of the Act

"If a person has been, or is about to be charged with a Serious Offence, the Director of Public Prosecutions may apply to the court for a restraining order under this section in respect of-

- (a) specified property of that person.
- (b) all the property of that person, including property acquired by that person after the making of the order; or
- (c) specified property of any other person which was used in, or in connection with, the commission of the offence or was derived or realised, directly or indirectly, by that other person, as a result of the commission of the offence."

Section 12(3) of the Act is also relevant in this application and provides that:

"(3) A person who has been convicted of or has been charged or is to be charged with a serious offence and whose property is subject to a restraining order, may apply to the court for the exclusion of the property from the order, and the court shall grant the application if it is satisfied that -

(a) the property was not used in or in connection with the commission of the offence; and

(b) the property or the interest in the property was lawfully acquired."

Reference must also be made to s15 of the Act.

"15(1) A restraining order shall cease to have effect if the charge against the person in respect of whom the order is made is withdrawn or if the person is acquitted of the charge.

(2) If the court makes a forfeiture order or pecuniary penalty order, the restraining order shall cease to have effect if that order is satisfied or otherwise discharged."

[7] The Act is modeled on the Prevention of Organized Crime Act 121 of 1998 of South Africa, although the latter covers a wider range of offences and procedural safeguards in the implementation or enforcement of its provisions. Restraining orders (referred to as restraint orders in the South African Act) are dealt with under sections 25 and 26 of that Act and has been the subject of several judgements in that country.

[8] The general scheme of the Act is "to provide for the confiscation of proceeds of Serious Offences and to provide for matters incidental therewith." The South African Act is more elaborate or detailed as it states inter alia that it is "to provide for the recovery of proceeds of unlawful activity; for civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity."

[9]A restraining order under section 11 of the Act is a preliminary interim or a preparatory order that prevents a person who has been charged or there is reason that he shall be charged of having committed a Serious Offence (crime) from in any way alienating or disposing of property or the proceeds of a Serious Offence. The restraint order operates pending the events or instances stipulated in section 15 quoted in paragraph (6) above. It is a precursor to and is made in anticipation of a confiscation order. The restraining order protects the property covered by the order from being dissipated, so that in the event the accused is convicted and a forfeiture order or a pecuniary penalty or both is granted, there is property to satisfy these orders. The primary object of such orders is to punish persons guilty of serious offences and also deprive them of the proceeds of crime. The whole aim is to bring it home to them, and would-be offenders that crime does not pay; the game is not worth the candle!

[10] In the case of **The National Director of Public Prosecutions v Muller Conrad Rautenbach and Another (case 146/2003)**

NUGENT JA at para 24 had this to say:

"The nature of a restraint order, and the circumstances in which such an order might be granted, have been considered in various decisions of this court. ...It is sufficient to say that a court that convicts a person of an offence is entitled, in certain circumstances, to make an order (referred to as a confiscation order) that such person pay to the state the value of the proceeds of the offence or of related criminal activity. The purpose of a restraint order is to preserve property in the interim so that it will be available to be realized in satisfaction of such an order.

(25) A court from which such an order is sought is called upon to assess what might

occur in the future. 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 against such person' (s25(i)) it has a discretion to make a restraint order."

See also the case of **National Director of Public Prosecutions v Basson 2002 (1) SA 419(SCA)**; **National Director of Public Prosecutions v Rebuzzi, 2002 (2) SA 1 (SCA)**; **Phillips and others v National Director of Public Prosecutions, 2003 (6) SA 447 (SCA)** and **National Director Prosecutions v Kyriacou, 2004(1) SA 379(SCA)**, cited in the judgement and the judgement by ANNANDALE ACJ (as he then was) in **Director of this Public Prosecutions v Musa Fakudze and 13 others**, under the above case number, delivered on the 22nd May, 2007 at paragraphs 8,53 and 54 thereof.

[11] In the present application, the restraining order has of course been made. The Applicant wants this court to vary it by excluding from its operation or ambit, the amount paid by Cash Build, because it was lawfully acquired.

[12] Section 11(1) of the Act empowers the court to restrain embargo or encumber;

"(a) specified property of that person; [or]

(b) all the property of that person, including property acquired by that person after the making of the order; ..." The Act defines property in section 2 as "real or personal property of every description wherever situated whether tangible or intangible and it also means any interest in any such real or personal property [and] proceeds of Serious Offence [as] any property used in or in connection with the commission of a serious

offence or any property that is derived or realized directly or indirectly by any person from the commission of any offence or from any act or omission which had it occurred in Swaziland would have constituted a serious offence."

[13] From the above it is plain therefore that the court may issue a restraint order against all the property of a person, covered by the section. There is no qualification or requirement that the property to be restrained must have been illegally acquired or be the proceeds of or be connected to property illegally acquired. See again the judgement by my learned brother Annandale J at paragraph 54 thereof. Similarly, a confiscation order may be made over any property belonging to a person convicted of a serious offence.

[14] In **Rautenbach's case (supra)** the learned judge of Appeal stated as follows:

"Such an order is directed at confiscating the benefit that accrued to the offender whether or not the offender is still in possession of the particular proceeds. Once it is shown that a material benefit accrued the offender may be ordered to pay to the state the monetary equivalent of that benefit even if that means that it must be paid from assets that were legitimately acquired. Thus, the fact that some of Rautenbach's assets were acquired before the offences were committed, and were not themselves from the proceeds of unlawful activity, is immaterial when determining whether a confiscation order might be granted."

The same view was expressed by Erasmus AJA at paragraph 76 of the judgement where the learned judge said that:

"The Act has the object of depriving the defendant of the fruits of his crime or criminal activities, but not necessarily the very same fruits. The confiscation order reduces his estate p_ro tanto those benefits. It does not matter that Rantenbach passed on the benefits to others, nor that the subject matter of the restraint order is property acquired by him from legitimate sources."

I, with due respect, fully align myself with the above exposition of the law on the matter.

[15] If a confiscation order may be made on any property owned by the offender; a restraint order may equally be made on any property belonging to the offender. As noted above the restraint order is made in anticipation of the forfeiture order. If, for instance, there is no intention by the crown to apply for a forfeiture order upon the conviction of the Accused, there would be no application for a restraint order. This is also captured I think in section 11 (2)(d) of the Act.

[16] An applicant bears the onus to show, on a balance of probabilities that an application brought, in terms of section 12(3) must be granted. In casu, the applicant has only alleged that the money in question was paid to her as haulage charges in respect of services by her to Cash Build and that this transaction between her and Cash Build was legitimate. This allegation is clearly not enough to show or prove that her charges were not the proceeds of a Serious Offence. I have already referred to the broad definition of "property" and "proceeds of a Serious Offence" above. For her

to satisfy the court that the money from Cash Build was legitimately acquired she must show amongst other things that the haulage or trucking business is itself not the proceeds of a Serious Offence; directly or indirectly. She has said absolutely nothing in this regard. If for instance her haulage business benefited in one way or the other from the money that is the subject of the criminal charge, her payment from Cash Build would not have been legitimately acquired. It would be the proceeds of a Serious Offence as defined in the Act.

[17] I am therefore not satisfied that the money paid to her by Cash Build (a) was not used in or in connection with the commission of a serious offence and (b) the property or the interest in the property was lawfully acquired - as set out in section 12(3)(a) and (b) of the Act. She has failed to discharge the onus placed upon her as an Applicant.

[18] I do observe though that the provisions of section 12(3) of the Act would seem to suggest that property lawfully acquired may not be the subject of a restraining or forfeiture order. If this is correct, then this subsection destroys or negates the primary object of a restraint and forfeiture order. Offenders would, for example, use unlawfully acquired property to purchase their food and finance their expensive or luxury holidays but use their lawfully acquired funds to purchase immovable assets. To suggest that in such a case the immovable property would be immune from a restraint or forfeiture order, would make precious little

sense to me and defeat the whole rationale for a restraint or forfeiture order. I suggest that these provisions should be reconsidered urgently.

The application is therefore dismissed with costs.

MAMBA J