IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. 614/2004

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
ANDRIES RABOREPE MOLATLHOE	Defendant
KEIKANETSWE PAULINAH MOLATLHOE	1st Respondent

CORAM:	**MALHERBE JP.**
HEARD ON:	**29 JULY 2004**
DELIVERED ON:	**5 AUGUST 2004**

This is the extended return date of a provisional restraint order in terms of section 26 of the Prevention of Organised Crime Act, Act 121 of 1998 ("the Act") dated 26 February 2004. The property to which the order relates consist of 2 immovable properties described as 5058/9 Mojatou Street, Rocklands, Bloemfontein and erf number 30941, Botchabela, Mangaung (situated at 3182 Taaibosch Street), home contents or household goods to the value of approximately R300 000,00 and 25 motor vehicles. It is applicant's case

(i) that all these assets are realisable property held by defendant and/or first respondent (his wife) as envisaged by section 26(2) of the Act;

(ii) that a prosecution for contravention of section 5(b) of the Drugs and Drug Trafficking Act, Act 140 of 1992, (commonly known as dealing in dagga) has been instituted against defendant; and

(iii) that there are reasonable grounds for believing that a confiscation order may be made against him at the conclusion of his trial (section 25(1) of the Act).

Applicant's main deponent is a Ms Keightley, a Deputy Director of Public Prosecutions. She is supported by several affidavits relating mainly to defendant's alleged involvement in the criminal activities of a syndicate which had been dealing in dagga over a number of years. Police Inspector Melato is stationed with the Organised Crime Unit of the South African Police Service, Bloemfontein and is the investigating officer of project "Big Boy" which investigated the smuggling of dagga in the Free State. He declares that a syndicate controlled by defendant is particularly active in the Free State and that the Police have canvassed an agent to purchase dagga from the syndicate. On 18 November 2002 various properties were searched and 305,956 kilograms of dagga were seized. The street value of this dagga is R1,00 per gram or R305 956,00. Defendant was one of the people arrested on this occasion. He was initially released on R15 000,00 bail but was thereafter arrested on 2 counts of car theft and is presently in custody. Inspector Melato's affidavit deals comprehensively with purchases of dagga by the police agent from so-called "runners" for the syndicate on various dates during the period June to November 2002. All these allegations are substantiated by affidavits from the police officers involved. Some of the dagga seized on 18 November 2002 was found in vehicles registered in defendant's name. The Taaibosch Street property mentioned above plays a prominent role in almost all the transactions by the police agent and there are 2 other cases pending against defendant in which it is alleged that 362 kilograms and 32 kilograms dagga respectively were found at his home at 5058/9 Mojatou Street, Rocklands. Apart from all the details of the alleged sale of dagga on various occasions, Inspector Melato also says that an unlicensed firearm, together with 2 magazines, 26 bullets and a holster were found in a Corolla motor vehicle registered in defendant's name when the Taaibosch Street property was searched on 18 November 2002. Inspector Huxham confirms this in her affidavit.

To sum up: In its founding affidavit applicant has tendered overwhelmingly detailed evidence of defendant's involvement in dealing in dagga on a large scale. This evidence clearly links both the immovable properties mentioned above, especially the Taaibosch Street property, to these criminal activities. It also links a number of the vehicles registered in defendant's name to these activities.

Defendant commences his answering affidavit with an allegation that certain paragraphs in the affidavit of Inspector Melato should be struck out as objectionable on the ground that they are scandalous, vexatious or irrelevant. These paragraphs are the following:

"15.1 On the 9th February 1995 the SAPS stopped a red Mazda Drifter, registration number OB 201 786, belonging to Molatlhoe between Dewetsdorp and Bloemfontein. During a search of this vehicle the SAPS found and seized 102,86 kilograms of cannabis. At the time of this incident, Magusha was the driver of the Mazda Drifter and an unknown male accompanied him as a passenger. This case was withdrawn, as this unknown male could not be traced when the case was set down for trial.

15.2 During July 2001 a blue Mazda 626, registration number BMR 924 FS, belonging to Molatlhoe was in an accident outside Verkeerdevlei. The SAPS on the scene seized 84 kilograms of cannabis that was found in the car.

16. A number of cases were investigated with regard to cannabis that was seized at Taaibosch:

16.1 Three sellers were acquitted on the following dockets that were opened after cannabis was found at Taaibosch:

16.1.1 Batho CAS 794/10/98. In this case 3 kilograms of cannabis was seized at the above address.

16.1.2 Park Road CAS 294/11/98. The SAPS seized 32 kilograms of cannabis at Taaibosch during the arrest of the seller.
16.1.3 In Batho CAS 630/2/97 the SAPS seized 35,557 kilograms of cannabis during the arrest of the seller.

16.2 The SAPS found and seized cannabis at Molatlhoe's home, i.e. 5058/9 Mojatau Street ("Mojatau") on various occasions. The following case dockets were opened:

16.2.1 In Kagisanong CAS 59/9/96 the SAPS found and seized 22,2 kilograms of cannabis hidden in a toilet on the premises. Nobody could be prosecuted in this case.

16.2.2 In Kagisanong CAS 63/4/01 the SAPS found and seized 32,12 kilograms of cannabis in the garage of this property. Molatlhoe was arrested and the case against him is pending. The facts of this case are discussed in more detail in paragraph 29.1 below.
16.2.3 362 Kilograms of cannabis was found and seized by the SAPS in Batho CAS 261/6/01. Molatlhoe was also arrested on this case and the trial against him is pending."

"28. Molatlhoe has previously been charged on two cases of dealing in cannabis. However, these cases did not lead to convictions. The charge of contravention of Section 5(b) of Act 140 of 1992 in Batho CAS 105/11/91 was withdrawn due to a lack of evidence. On the charge of contravention of Section 5(b) of Act 140 of 1992 in Batho CAS 577/2/98, Molatlhoe was acquitted."

In his Heads of Argument on behalf of defendant/first respondent Mr Sizephe advances a further argument why these same paragraphs should be struck out. I quote from the Heads:

"The nub of the Defendant's complaint *in limine* is that by allowing the matters complaint of to stand, his right to equality before the law, as enshrined in Section 9 of the Constitution will be violated in these proceedings, and for the following reasons:-

7.1 the applicant will be using information to which only the applicant has access and to which the Defendant has no access, in order to establish so serious an allegation as "sufficiently related criminal activity";

7.2 and only one aspect of the whole of each case is relied upon, and that would be that either dagga was found there or someone was charged for dagga and the end result of each such case is not told to this Court e.g. that whoever that was acquitted was so acquitted because the evidence did not establish a crime of any criminal activity and to such information the Defendant does not have access in order to give this Court a fair and clear picture of each case;

7.3 in this context, it is submitted that this Court should either refuse to follow or depart from the **Phillips** case **supra** at **124(H)** where it is said that even acquittals qualify as related criminal activities, because:-

(i) such an interpretation would inevitably lead to this enactment achieving unjust and quite inequitable results, even in the context of the main purpose of this legislation, *viz* to "combat organised crime, money laundering and criminal gang activities".

Examples of these untoward results proliferate e.g. if the Defendant was indeed acquitted because the conduct complained of in his trials could not conform to the definition of proscription, what other lawful and legal definition of criminal activity or conduct do the Applicants want this Court to use?

(Compare Snyman se Strafreg 4de uitgawe bl.64; Principle Immigration Officer v/s Bhula 1931 AD 323 at 336)

(ii) to interpret this enactment in this way will alter the existing law i.e. common law, statute law and judicial precedent more than is necessary, like in the example given in (i) immediately above, and as such it can never be in accordance with the intention of the legislature.

7.4 given what is said in the **Phillips** Case **supra** at **77(H-I)** *viz*; "Plainly, restraint orders are seriously invasive …." and what is further said by the Supreme Court of Appeal in the matter of **National Director of Public Prosecutions v/s R O Cook Properties (Pty) Ltd and others**, a reportable but not yet reported judgment in **Cases No 260/03, 666/02** and **111/03** delivered on **13 May 2004** and at **pages 18-19**, that **Chapter 6** of this Act is penal in character.

That, with respect, goes for **chapter 5** as well. In any event a

> confiscation order is equated with a forfeiture order in **Phillips** at **111(F)**, the difference is only that whilst in confiscation orders a restraint order serves as a prelude, in forfeiture orders a preservation order serves as a prelude. This, therefore, brings into consideration the maxim of double jeopardy for the Defendants.
>
> He is being exposed for the second time to the same penalty now, albeit it being disguised in another form.
>
> (see generally **S v Vermeulen 1976 (1) SA 623 (c) at G35** and **Minister of Justice v/s Bagattine 1975 (4) SA 252 (T) at 259**)."

(The reference to "related criminal activities" is obviously a reference to the provisions of section 18(1)(c) of the Act).

I must confess that I find it difficult to understand this line of reasoning. In his address to the Court Mr Sizephe advanced substantially the same contention, albeit somewhat differently. He submitted that an acquittal on a criminal charge is irrelevant, and, therefore, inadmissible, to decide whether defendant may have derived any benefit from criminal activity related to dealing in dagga. I do not agree. The following example comes to mind: If the prosecuting authorities have evidence at their disposal proving e.g. the sale of dagga or the possession or storage thereof on immovable property belonging to a particular person and the inference can rightly be drawn that that person made common cause with those activities, I can see nothing either constitutionally or otherwise wrong with a finding that there is a relation between that person and/or his offences and those criminal activities, even though the "criminals themselves" were either not prosecuted or acquitted. This view conforms with the view expressed by Heher, J in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v PHILLIPS AND OTHERS 2002 (4) SA 60 (WLD)** at p.**124H** in the following words:

> "The related criminal activity may also be that of someone other than the defendant, for example a co-accused or a gang and may even relate to a charge of which the defendant himself has been acquitted."

Mr Sizephe submitted that I should not follow this *dictum* as appears from the above quotation from his Heads of Argument. The **PHILLIPS**-decision (supra) was confirmed on appeal in **PHILLIPS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2003 (6) SA 447 (SCA)**. The Supreme Court of Appeal did not criticise the Court *a quo's* judgment in relation to its discussion of the phrase "sufficiently related" quoted above. **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v KYRIACOU 2004 (1) SA 379 (SCA)** also dealt with the phrase "sufficiently related activity" in section 18(1)(c) of the

Act. (See paragraph [11] on p.385 of the report). There is nothing in this judgment that supports Mr Sizephe's argument in the **COOK PROPERTIES** judgment (*supra*) the Supreme Court of Appeal said in paragraph [29] that Act 121 of 1998

> "requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation."

If, therefore, defendant is convicted of dealing in dagga and there is acceptable evidence of other instances where dagga was either possessed on or sold from property belonging to him, it seems to me that such possession or sale could be sufficiently related to his dealing in dagga as contemplated by section 18(1)(c) of the Act and that evidence of such possession or sale will be admissible against defendant in restraint or forfeiture proceedings under the Act. The fact that defendant does not have access to such evidence or information (whatever that might mean) cannot stand in the way of applicant to prove the relationship required in section 18(1)(c) of the Act.

I fail to see the relevance in Mr Sizephe's Heads of Argument to **S v VERMEULEN 1976 (1) SA 623 (C)** at **635** where the maxim *nemo debet bis vexari pro eadem causa* is discussed. It is clear from the provisions of the Act that a person who is convicted of an offence runs the risk of a punitive forfeiture order over and above any sentence imposed for that offence. (Mr Sizephe abandoned this ground in his oral address). The restraint order with which this application is concerned, is the prelude to a forfeiture order. I find, therefore, that there is no substance in the first ground advanced for striking out the paragraphs in question.

The second ground advanced in the papers for the application to strike out is that the allegations complained of are scandalous, vexatious and irrelevant. In his address Mr Sizephe expressly informed the Court that he was no longer relying on the grounds "scandalous" or "vexatious" and was confining his argument to the ground "irrelevant". In paragraph [37] of the **PHILLIPS**-decision in the Supreme Court of Appeal the following is said with reference to section 25(1) of the Act which bears the heading "Cases in which restraint orders may be made":

> "Turning to the requirements of s 25(1) of the Act, respondent has to show in a restraint application reasonable grounds for believing a confiscation order may be made. This involves reasonable grounds for believing that the defendant may be convicted as charged, that the trial court may find that he benefited from the proved offence or related criminal activity and that a confiscation order may be made in that court's discretion."

The allegations complained of appear to me to be eminently relevant because they show that members of what applicant calls "the syndicate" have sold dagga over a lengthy period of time from properties belonging to defendant. In fact defendant himself says that he was aware of such activities by lessees of rooms on his properties but was unable to put a stop to it. He denies any personal involvement in any of the criminal activities alleged in the founding papers. The application to strike out can, therefore, not succeed.

Mr Sizephe relied heavily on the judgment in the **COOK PROPERTIES**-case (***supra***). With reference to that judgment he submitted that before the provisional restraint order can be confirmed the applicant must show a relationship between the unlawful activities and the property in issue. Mr Fischer, correctly in my view, submitted that Mr Sizephe is confusing the requirements for a restraint order in terms of Chapter 5 of that Act with the requirements of a preservation order in terms of Chapter 6. Chapter 5 (section 18) requires the Court to enquire whether a defendant has derived any benefit from his offence or related criminal activity whereas Chapter 6 (section 38) requires the Court to make a finding whether there are reasonable grounds to believe that the property concerned is an instrumentality of an offence or is the proceeds of unlawful activity. Mr Sizephe is quite correct that applicant does not allege that the defendant acquired any of the property in question directly with the proceeds of dealing in dagga or that such property was an instrumentality of such dealing. Applicant's case is in fact simple: Defendant's lawful income is insufficient to account for his known assets. He has committed the offence of dealing in dagga and there is a relationship between his erven and motor vehicles, on the one hand, and his own offences and related criminal activities in the past, on the other hand. Therefore, he probably benefited from either his own offences or criminal activities related to those offences. The benefit need not consist of any realisable property but may even be the ability to support his family. I agree with this exposition of applicant's case by Mr Fischer and also agree that it rests upon a correct interpretation of the Act.

In his answering affidavit defendant refers at length to the evidence during his bail application in the Magistrate's Court. He says, *i.a.* that

> "the Police officers were lying through their teeth"
>
> "their evidence then became a shame and a sin and was utterly destroyed"
>
> "it was difficult to believe them even when they said who their names are"
> "they conceded that the agent himself is a liar, a criminal and a person nobody can trust."

With reference to Inspector Meloto's affidavit, he says that Melato

> "knows very well the Police planted that cannabis"

in his house at 5058/9 Mojatou Street. He accuses applicant of malice against him. He says that

> "the State employed dirty tricks"

against him. He makes the following sweeping statement in paragraph 29 of his affidavit:

> "I mean on the founding papers alone the statement
>
> > "Defendant clearly lives beyond his alleged legitimate sources of income"
>
> is a blatant lie! Nothing is clear from the founding papers! The only thing that is clear in the founding papers is the fact that they are riddled through with distortions, half truths and lies!"

Such intemperate language does not impress. Nor does it disturb my conviction that applicant has shown convincingly that defendant could be convicted of dealing in dagga in his pending trial.

Section 18 of the Act provides for a confiscation order in addition to any punishment for an offence. Such an order is dependant upon a finding that the accused has benefited from the offence or any criminal activity sufficiently related to that offence. Applicant's case is that defendant must have benefited financially from the syndicate's dealing in dagga because his legitimate means of income are insufficient to have acquired all his assets. The realisable property or assets to which the rule *nisi* applies, have been set out earlier in this judgment *viz* 2 immovable properties, household goods to the value of R300 000,00 and 25 motor vehicles. In its founding papers applicant says that in his bail application defendant stated that his only income was derived from operating 5 taxis. In his answering affidavit defendant says that he in fact mentioned 7 taxis during his bail application. However, he also says that sometimes 1 or 2 taxis might break down so that only 5 are operative. Be that as it may, he also says the following:

> "The income I derived from my taxis was my only income enabling me to meet my day to day obligations to my family."

> "I reiterate here that my income from the taxi business is R25 000,00 and that my wife also earns income in excess of R3 000,00 per month from her employer. This fact will also become clear from the curator's own assessment."

<u>The immovable property:</u>

Defendant says that the Taaibosch Street property was bequeathed by his late father to all the latter's children and registered in his name as the oldest son. His father died during 1980. He says that he purchased the property at 5058/9 Majatou Street

> "from the proceeds of my late father's estate as well as my income from where I was employed. I improved that property through the income I generated from my taxi business."

The curator, however, reports that the Deeds Office records show that the Taaibosch Street property was registered in defendant's name only on 24 February 1999. Defendant says the following about himself:

> "3.4 I deem it very necessary to inform this Honourable Court about my background:
>
> 3.4.1 I was born and bread in Bloemfontein and my late father was a railway worker, now spoornet, and I personally was employed, for 15 years at a Bakery, here in Bloemfontein;

3.4.2 In 1983 I left permanent secular employment and concentrated full time on the taxi business bequeathed to me by my late father;
3.4.3 I worked hard and tirelessly to grow that taxi business from one taxi of a valiant motor vehicle to a fleet of almost ten (10) taxis at some stage. I bought some of these taxi vehicles new and sold others and I made a lot of profit from that business;
3.4.4 I deny as malicious all the allegations that I gained any benefit from illicit or illegal dealings in cannabis;"

He says further that

> "all the furniture we have at Rocklands was purchased by my wife from her own employer which is a furniture business at Botshabelo."

In reply applicant repeats that defendant could not have purchased his assets with his so-called legitimate income from his taxi business and attached his income tax returns for the years ending February 1998, 1999, 2000, 2001 and 2002. These returns show the following:

	<u>Gross income</u>	<u>Nett profit</u>

1998	R46 601,90	R15 147,80
1999	R48 532,55	R16 974,61
2000	R56 092,00	R17 284,80
2001	R66 473,00	R19 318,51
2002	R69 828,00	R21 764,48

For the years 1998 to 2000 his income tax returns show that he was the registered owner of only 2 vehicles and for the years 2001 and 2002 3 vehicles are listed. Not in one of the years referred to above did his nett income approach the R25 000,00 which he claimed he earned per month from his taxi business.

The motor vehicles:

The curator attached 7 motor vehicles of which 3 appear in the list of 25 motor vehicles referred to earlier. He afforded defendant an opportunity to explain where the other listed vehicles were. According to the curator's notes defendant explained that 9 vehicles had been sold (some many years ago in Lesotho); that 6 had been written off; that 2 were being used as taxis; that 7 were in Police custody and that 1 was not in a working condition.

Defendant's allegation that all his assets (which he claims to be worth
"ten times more than the value of the cannabis I am charged for"

i.e in excess of R3-million) were lawfully acquired, is very, very doubtful.

In my view applicant's reply and the curator's report tend to substantiate the allegations in the founding papers that the trial Court may find that defendant probably benefited from dealing in dagga or related criminal activities. There are, therefore, reasonable grounds for believing that a confiscation order may be made against him. (**KYRIACOU-*supra*** paragraph [10] on pp.384-385).

In the result I make the following orders:

1. The provisional restraint order dated 26 February 2004 is confirmed.

2. All the costs that have not already been awarded to applicant, are to be paid by defendant/respondent.

J.P. MALHERBE JP

On behalf of Applicant: Mr P.U. Fischer
Instructed by

The State Attorney
Bloemfontein

On behalf of Defendant/Respondent: Mr M.J.D. Sizephe
Bokwa Attorneys
Bloemfontein

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