REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 11244 / 2006

In the matter between:

THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS Applicant

and

WERNER BRAUN First Respondent
VILLABRAUN (PTY) LTD Second Respondent

In re: Erf 1084, Bakkershoogte, situated in the Helderberg Municipality, Stellenbosch Division, Western Province.

JUDGMENT : 22 DECEMBER 2006

BOZALEK, J:

[1] In February 2006 the applicant sought and obtained, on an urgent *ex parte* basis, an order in terms of s 38(1) of the Prevention of Organised Crime Act, 121 of 1998 ("the Act") in the form of a *rule nisi* preserving a certain *BMW X5* motor vehicle and certain fixed property situated in Somerset-West. The basis for the application was the contention that

the first respondent had used both the vehicle and the immovable property as "instrumentalities of an offence" in relation to a large number of alleged contraventions of the Sexual Offences Act, 23 of 1957, involving sexual acts with minors.

[2] Before the *rule nisi* could be confirmed the respondents in that case, who are the respondents in the present matter as well, brought an application in terms of Rule of Court 6(12)(c) for a reconsideration of the initial order made. The application was successful, Traverso DJP finding that, although the applicant was entitled to bring the initial application *ex parte*, various material non-disclosures on the part of the applicant justified the order being set aside.

[3] Traverso, DJP's judgment was handed down on 20 September 2006 and less than a month later the applicant brought this fresh application for substantially the same relief namely a preservation order in respect of the same property but on this occasion on notice to the respondents. The first respondent is the alleged perpetrator of the sexual offences and the owner of the BMW vehicle. The second respondent is a company incorporated in terms of the company laws of this company having its registered address in Somerset West and is the registered owner of the immovable property forming part of the subject matter of the application.

[4] The matter was first called in third division before Dlodlo, J on 22 November 2006 as an unopposed motion. I am given to understand that he indicated that he required full argument in support of the application. The matter was postponed to 30 November on which date Adv. Schippers SC appeared for the applicant together with Adv. Baartman and duly delivered argument. Judgment was reserved whereafter counsel was requested, in a note, to furnish written argument in respect of various issues raised by the Court. Counsel's written response has been most helpful. I propose to briefly consider the issues which I consider to be relevant to the order sought.

SCOPE OF THE APPLICATION

[5] The order sought by the applicant relates only to the immovable property. The reason for this is that the first respondent is opposing the preservation order sought by the applicant in respect of the BMW motor vehicle. The registered owner of the immovable property, the second respondent, does not oppose the application for a preservation order. It has indicated, however, that it intends to oppose the application for forfeiture of the relevant immovable property which the applicant intends to move in terms of s 48 of the Act in due course. This much appears from a letter dated 21 November 2006 from the second respondent's attorneys, Messrs. Schliemann Incorporated, to the State Attorney.

[6] The preservation order being sought interdicts the first and second respondent from dealing with the immovable property, requires the Registrar of Deeds to endorse the title deeds with a suitable restrictive condition, appoints a *curator bonis* to the property with appropriate powers to preserve the property, requires the holder of the property to surrender it to the *curator bonis* and makes provision for him to report and for the payment of his fees and expenses. The proposed order makes provision furthermore for its service upon the first and second respondents, for publication in the government gazette and sets out the steps to be followed by such persons as may wish to oppose the proposed forfeiture application.

[7] There is nothing in the draft order submitted by counsel which excites concern, the only point to be noted being that the clause in which costs are sought in the event of the matter is being opposed now falls away. The preservation order is cast in final form as opposed to a *rule nisi*. Section 38 of the Act empowers the applicant to seek preservation orders by way of *ex parte* application. In the particular circumstances of this matter, it being a second application and one brought on notice to the respondents, together with the fact that the preservation order is in itself of a temporary nature, it seems to me that no point is served by granting the order in anything but final form.

SERVICE OF THE ORDER

[8] According to the finding affidavit of the Deputy-Director of Public Prosecutions, Adv. AC Mopp, the first respondent fled South Africa in September 2005 after his alleged sexual exploitation of the children became known. First respondent now lives in Berlin, Germany and stated in an affidavit deposed to in the previous application for a preservation order, that Germany is his permanent home and that he had no intention of returning the South Africa. In that application the first and second respondents were represented by two different firms of attorneys, Messrs. Kulenkampff and Associates and Messrs. Schiemann Incorporated.

[9] The present application was timeously served upon the aforesaid firms of attorneys. From correspondence annexed to the application it appears that both firms of attorneys have ongoing mandates to represent first and second respondents in relation to the proposed forfeiture of the movable and immovable properties.

[10] It appears from the judgment of Traverso, DJP that the entire issued share capital in the second respondent is owned by the Braun Family Trust the only beneficiaries of whom are the children of the first

respondent and his wife. I raised with counsel whether it would not be appropriate for this order to served upon the Braun Family Trust and the aforesaid beneficiaries. Counsel has pointed out that the order will served upon the second respondent's attorneys who represent the second respondent and the sole director of the second respondent, first respondent's wife, Mrs. RG Braun. Inasmuch as it is the second respondent which owns the immovable property and is before the court, I am persuaded that it is not necessary to serve the order on the Braun Family Trust or the beneficiaries of that trust.

CAN A SECOND APPLICATION FOR A PRESERVATION ORDER BE BROUGHT?

[11] It would appear that Dlodlo J required argument, *inter alia*, as to whether the applicant was entitled, after the discharge of the *rule nisi* initially granted in the first application, to bring a second such application. In essence Mr. Schippers's submission on this point was that it was competent for the applicant to bring a second such application since, firstly, the initial ruling unfavourable to the applicant was not appealable and, secondly, since the *rule nisi* had been discharged on technical grounds rather than on the merits of the application as such.

[12] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (AD) it was held that, generally speaking, a non-appealable decision is a decision which

is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Having regard to the fact that the *rule nisi* previously discharged was a preservation order in terms of s 38 of the Act and in other words a pre-cursor to the real relief sought, namely, a forfeiture order, and to the fact that it was discharged for want of full disclosure in an *ex parte* application, I am of the view that the judgment lacks the second and third attributes for an appealable judgment or order. Those attributes are that the judgment or order must be definitive of the rights of the parties and thirdly it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. In my view the applicant would have found it difficult, in the circumstances of the present matter, to have sought to appeal the judgment of Traverso, DJP. Quite apart from that consideration I can see no reason in principle why, where an application such as was previously brought by the applicant is dismissed on a basis that full disclosure was not made in an *ex parte* application, he should be barred from approaching court again for the same relief in a fresh application.

IS AN ATTACHMENT OF MOVABLE PROPERTY NECESSARY TO FOUND OR CONFIRM JURISDICTION?

[13] In the notice of motion the applicant sought, only in the event of this court holding that the provisions of s 38(1) of the Act do not permit the

granting of an order without an attachment to found jurisdiction, an order directing the sheriff to attach, as property *ad fundandam jurisdictionem* or *ad confirmandam jurisdictionem*, *inter alia*, the first respondent's interest in and right and title to the *BMW* motor vehicle and the costs order which he obtained in the earlier application. The draft order sought by the applicant, however, omits any reference to the aforesaid prayer and counsel was asked to submit argument on whether an attachment to found jurisdiction was necessary.

[14] Counsel points out that that prayer related only to the first respondent since the registered office of the second respondent as well as the relevant immovable property falls within this court's area of jurisdiction.

[15] Counsel argues furthermore that an attachment to found jurisdiction is not necessary in the light of the scheme of the Act. He submits that the purpose of the Act, and more specifically chapter 6 thereof, is aimed at the forfeiture of the proceeds of or an instrumentality used in crime. To achieve this purpose the lawgiver has provided for the filing of a civil law suit against the property itself, in effect an action *in rem*, and that the statutory procedure is modelled on modern notions of *in rem* forfeiture. The underlying notion is that property itself is the offender and thus can be cited as the defendant *in rem* in a civil case.

[16] The courts have recognised the *in rem* nature of the proceedings and held that civil forfeiture is modelled largely on statutory provisions in the USA and New South Wales, Australia see *National Director of Public Prosecutions v Prophet*. This analysis is set out by in following extract from an article by Casella entitled "*The Development of Asset Forfeiture Law in the United States*".[1]

> "*Today, it is understood that proceedings in rem are simply structures that allow the government to acquire title to criminally tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time. As it has always been, the civil forfeiture is entirely independent of, and wholly unaffected by, any criminal proceeding, and the role of the property owner in the commission of the offence is irrelevant. It is only necessary that the government prove, by a preponderance of the evidence that the property was derived from, used to commit, or used to facilitate the commission of a criminal offence. Thus, though rationale, the scope and the application all have changed, in rem forfeiture continues to serve a vital purpose in allowing the government to take criminally-tainted property out of circulation, abate nuisances, discourage certain types of unregulated commerce, and encourage property owners to take care in managing their property, ….* ."

[17] Bearing in mind that the owner of the immovable property is a registered South African company and the property is situated in South Africa, as well as for the reasons cited above, I can see no basis upon which it would be necessary for an order *ad fundandam ad confirmandam jurisdictionem*.

IS THE IMMOVABLE PROPERTY AN "INSTRUMENTALITY OF CRIME"?

[18] In order to succeed in obtaining a preservation order in respect of the immovable property the applicant must satisfy this court that there are

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1 Burchell and Erasmus (eds), Criminal Justice in a New Society: Essays in Honour of Solly Leeman (first published in Acta Juridica, 2003) 314 at 319.

reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in schedule 1. That schedule includes the statutory offence of unlawful carnal intercourse with a child under a specified age, committing an immoral or indecent act with a child under a specified age, soliciting or enticing such child to the commission of an immoral or indecent act, attempted rape and contraventions of s 71 of the Sexual Offences Act, 23 of 1957. Having regard to the affidavits filed in support of the application by or regarding minor girls with whom the first respondent allegedly had unlawful sexual intercourse or with whom he committed so-called indecent acts it is clear that the alleged offences fall within the statutory scheme. The question which arises is whether the immovable property in question was an instrumentality of such an offence or offences.

[19] The applicant's case in this regard is that the use of the immovable property was an integral part of the first respondent's modus operandi. According to the applicant many of the numerous offences allegedly committed by the first respondent were committed at the aforesaid residence. The applicant's case is, further, that the use of the immovable property by the first respondent made it possible or easy for him to commit the numerous sexual offences with the minors. It provided him with a secure private residence within which to exploit children sexually without risking detection. The residence is entered

through a large remote-controlled gate and once this gate closed behind the first respondent's vehicle he would enter the garage also through a remote controlled door. From that garage there was direct access to the residence. There is further evidence that upon approaching the property the first respondent would require the minors to conceal themselves by flattening the seats and having the minors to lie down in the vehicle.

[20] In this manner the first respondent was able to get the children to, from and into the residence undetected. The first respondent then utilized the immovable property extensively for his alleged unlawful acts. He had intercourse with the minors in the main bedroom, in the computer room as well as in the lounge area. He used the two bathrooms in the house on occasion to bathe the minors before having intercourse with them and washed himself there afterwards. He took photographs of the children in the garden.

[21] It is the applicant's case furthermore that the first respondent's repeated sexual exploitation of minors was not an incidental occurrence which happened to take place on the immovable property. The applicant's case is that there was a pattern of sustained and premeditated unlawful conduct on the part of the first respondent in which the immovable property played an important and vital part.

[22] In these circumstances it seems to me that there are reasonable grounds to believe that the property concerned was an instrumentality of an offence or offences. I hasten to add that the above must by no means be viewed as a definitive finding. The application is at this stage unopposed but indications are that the forfeiture order will be opposed. The question of when and in what circumstance immovable property on which offences are committed will be considered to be an instrumentality of an offence is a vexed question. See in this regard the cases of *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 and *Simon Prophet v National Director of Public Prosecutions* 2006(1) SA 38 (SCA) as well as *National Director of Public Prosecutions v RO Cook Property (Pty) Ltd* and others 2004 (2) SACR 208. With the benefit of full argument from both points of view, the court hearing the forfeiture application will be in a better position to make an informed and conclusive finding.

[23] In the result, I am satisfied that the applicant is entitled to the preservation order which it seeks in respect of the immovable property. An order is granted in the form of the draft handed up by counsel, save for para 13 thereof which order is annexed hereto.

LJ BOZALEK, J