

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: 1242/2020

Matter heard on: 11/03/2021

Judgment delivered on: 23/03/2021

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

ASISIHLE VUMISO

Respondent

JUDGMENT

SMITH J:

- 1) The applicant seeks confirmation of a provisional preservation order granted on 10 December 2020. The application concerns a sum of R50 000, which the applicant contends is the proceeds of unlawful activities, namely the fraudulent sale of a vehicle. The applicant contends that the disposal of the vehicle amounted to money laundering.
- 2) The following facts were either common cause or have not been disputed by the respondent. On 2 June 2020, the respondent took a vehicle belonging to one Mr. Bozo, without his knowledge or consent, and drove it from Mthatha to East London. There she presented the vehicle for sale to Mr. Mufudza, (the complainant in the criminal case), holding out that she was either the owner of the vehicle or otherwise authorised to sell it. He offered to buy the vehicle for R50 000, which offer the respondent accepted. Mufudza subsequently transferred the aforesaid sum into the respondent's Capitec Bank account. The respondent thereafter effected various transactions from that account and transferred some R40 000 into her other bank account. Mufudza subsequently laid a criminal charge of fraud and theft against the respondent on 11 June 2020. It was on the basis of that case that the Asset

Forfeiture Unit obtained the provisional preservation order in terms of section 38 of the Prevention of Organized Crime Act, No. 121 of 1998 (POCA).

- 3) It is perhaps instructive to mention that on her own version, the respondent effectively admitted to complicity in fraudulent conduct. She explained that the owner of the vehicle, namely Bozo, is a former boyfriend. She had driven his vehicle to East London and parked it in the parking area at St Dominic's Hospital. She then called Bozo and told him that the vehicle was parked there and that once he gets to East London he should arrange to fetch the keys from her. After a few days had elapsed without Bozo calling her, she got concerned about the safety of the vehicle and decided to approach Mufudza to take possession of the vehicle "for safekeeping". After she had told the latter how she came to be in possession of the vehicle, he volunteered to take the vehicle "off her [my] hands".

- 4) Regarding how the transaction came about, she said the following:

"The complainant then tendered to pay me R50 000 to rid the vehicle from me. As tempting as this offer was, I then accepted it. And that is how the amount of R50 000 ended up in my Capitec Bank account. I did not in any way whatsoever manipulate the complainant into the transaction."

- 5) With the merits effectively having been conceded by the respondent, it was no surprise that a number of points *in limine* were raised on her behalf. The first of these relate to the authority of Ms Nicole Irene Peters, who is the deponent to the main affidavit and the Deputy Director of Public Prosecutions in the applicant's Local Asset Forfeiture Unit. In her answering affidavit, the respondent challenged Ms Peters' assertion that she had been duly mandated to bring the application on behalf of the National Director of Public Prosecutions. This was a bald assertion without any supporting facts. Nevertheless, in her replying papers, Ms Peters produced her written authorisation. The applicant also filed a confirmatory affidavit by Dr Ndzengu, who is the Senior Deputy Director of Public Prosecutions attached to the Port Elizabeth office of the Asset Forfeiture Unit. In that affidavit the latter confirms that the application had been properly instituted, with his approval.
- 6) The respondent nevertheless persisted with her challenge to Ms Peters' authority on the ground that the written authorisation provides that all cases in respect of which it

is utilized, must be checked by the regional head to whom she reports, or any Deputy Director of Public Prosecutions appointed by the regional head for that purpose. She also asserted that Dr Ndzengu's affidavit amount to an *ex post facto* attempt to clothe Ms Peters with authority which did not exist at the time when the application was launched.

- 7) In my view both these contentions are without any merit. First, the assertion that the case which is the subject matter of this application has not been checked by the regional head or other relevant functionary prior to the institution, has been soundly negated by Dr Ndzengu's confirmation that he had given his approval for the institution of the application. And second, the latter's confirmatory affidavit was filed in response to an unsubstantiated challenge to Ms. Peters' authority. It was consequently appropriate for that issue to be dealt with in the replying affidavit. Dr Ndzengu has stated categorically that he has had insight into the preservation application in this matter and that the proceedings had been properly instituted, with his approval. The contention that his assertion in this regard amounts to an *ex post facto* attempt to rectify Ms Peters' lack of authority is manifestly untenable.
- 8) Mr *Magaleni*, who appeared for the respondent, also submitted - albeit rather half-heartedly - that because the previous preservation application in respect of the same property, which was launched under case number 649/2020, was withdrawn, it was incumbent on the applicant to wait until the matter had again been referred to it by the police before launching these proceedings. The fact that this did not happen renders the matter *res judicata*, or so the argument went. This argument is self-evidently flawed. In order for the respondent to succeed with the aforementioned defence she had to establish that a case involving the same issues and the same parties had been previously decided by another court or competent tribunal. It is common cause that the previous application was withdrawn before the matter could be adjudicated and the issue of *res judicata* can accordingly not arise.
- 9) There can accordingly be little doubt that the applicant has established, on a preponderance of probabilities, that there are reasonable grounds to believe that the property sought to be preserved is an instrumentality of an offence referred to in Schedule 1 of POCA, and is the proceeds of unlawful activity.
- 10) The respondent has accordingly failed to show cause why the provisional preservation order should not be made final.

11) In the result of the following order issues:

- (a) The provisional preservation order made on 10 December 2020 in terms of section 38 of the Prevention of Organized Crime Act, No. 121 of 1998, is hereby confirmed, with costs, including all reserved costs.

J.E. SMITH

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT : Adv. A. French
ATTORNEYS FOR APPLICANT : Office of the State Attorney
17 Fleet Street
East London

COUNSEL FOR RESPONDENT : Mr M.O. Magaleni
ATTORNEYS FOR RESPONDENT: M.O. Magaleni Attorneys
Office No. 2
Alberti Chambers
14 Cromwell Street
King Williams Town