

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 2043/2017  
DATE HEARD: 8/11/2018  
DATE DELIVERED: 4/12/2018  
NOT REPORTABLE**

In the matter between:

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**and**

**MFUNDO 'STOMZA' KULATI**

**RESPONDENT**

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**JUDGMENT**

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**PLASKET J**

[1] On 9 May 2017, Roberson J granted an order in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA)<sup>1</sup> which preserved two pieces of property belonging to the respondent, Mr Mfundo 'Stomza' Kulati (Kulati). The property concerned is an Audi motor vehicle (the Audi) and a freezer. The

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<sup>1</sup> Section 38(1) and (2) of POCA reads:

'(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

- (a) is an instrumentality of an offence referred to in Schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.'

NDPP now applies for an order in terms of s 48 of POCA<sup>2</sup> for the forfeiture of the Audi and the freezer to the State.

[2] The application is opposed by Kulati. That being so, the facts upon which the application must be decided are to be determined in accordance with the *Plascon-Evans* rule – all things being equal, where factual disputes arise between the applicant and the respondent, the respondent's version prevails.<sup>3</sup>

[3] It is clear from ss 38 and 48, read together, that a forfeiture order may be granted in respect of property that is either an instrumentality of an offence, is the proceeds of unlawful activity or is associated with terrorist or related activities. It is alleged by the NDPP in this case that the Audi and the freezer are instrumentalities of the offence of kidnapping.

## **Background**

[4] The NDPP's case is that Kulati and two others kidnapped two men, Mr Lazola Maqoko (Maqoko) and Mr Khanyile Saza (Saza), transported them from their homes to a tavern owned by Kulati and held them both in the freezer for a period of time.

[5] In his answering affidavit, Kulati set out a detailed version at odds with the NDPP's version in important respects.

[6] He stated that on 3 August 2016 when he arrived at his tavern, he found that his business partner, Mr Luvuyo Mbolekwa, (Mbolekwa) had apprehended Maqoko inside the perimeter wall of the tavern and was assaulting him with an empty plastic beer crate.

[7] Kulati believed that someone must have helped Maqoko to scale the wall and he went to look for this person. He did not find anyone and returned to the tavern. By this time, Mr Thembelani Yantolo (Yantolo) had arrived, having heard that Maqoko had been caught attempting to break into the tavern.

[8] Yantolo thought he knew who may have assisted Maqoko. Kulati and Yantolo drove in the Audi to Saza's house. They brought him back to the tavern in the car. Kulati stated that '[w]e did not transport him in the boot' as alleged by the NDPP.

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<sup>2</sup> Section 48(1) of POCA provides: '(1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.'

<sup>3</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[9] They then assaulted Maqoko and Saza 'with fists and by pouring a substance that is used for fixing roofs over them'. Then Maqoko and Saza were 'taken away by Yantolo' and Kulati has no knowledge of what became of them.

[10] He stated that during the incident 'no one was placed in the boot of my car or in my freezer'. He concluded:

'From the above facts, I respectfully state that to the best of my knowledge, neither the car nor my freezer are an instrumentality of an offence. To the extent that the car may be an instrumentality of an offence committed by Mbolekwa while I was searching the vicinity, of which I have no knowledge, I respectfully state that I could not reasonably be expected to have foreseen such an occurrence.'

### **The issues**

[11] On these facts, two issues arise for determination. The first is whether the Audi was an instrumentality of the offence of kidnapping Saza. The second is, if so, whether its forfeiture is proportional to its utilisation in the commission of the offence.

[12] POCA is mainly concerned with organised crime, money laundering and gang activity. These serious social ills are not its exclusive focus. More generally, it is concerned with preventing people using property to commit offences and from benefitting from the proceeds of offences that they commit.<sup>4</sup> It has consequently been held that POCA has a broader application than to organised crime, money laundering and gang activity: it also applies in relation to individual wrongdoing.<sup>5</sup>

[13] Section 1 of POCA defines an instrumentality of an offence to mean 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere'. As will be shown, this broad definition has been narrowed somewhat by judicial interpretation.

[14] In *Cook Properties*,<sup>6</sup> Mpati DP and Cameron JA held:

'For now it is enough to say that the words "concerned in the commission of an offence" must in our view be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to

<sup>4</sup> See POCA's long title and preamble.

<sup>5</sup> *National Director of Public Prosecutions v R O Cook Properties (Pty)Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnanarayan* 2004 (2) SACR 208 (SCA) para 65; *National Director of Public Prosecutions v Van Staden & others* 2007 (1) SACR 338 (SCA) para 1.

<sup>6</sup> Para 31. See too *Prophet v National Director of Public Prosecutions* 2005 (2) SACR 670 (SCA) para 17.

the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term “instrumentality” itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.’

[15] The facts of *Cook Properties* are instructive. The NDPP had sought the forfeiture of a house which had been used as a brothel, and persons who had been kidnapped had been held and assaulted there. The court held that the mere fact that people had been held hostage and assaulted at the house did not necessarily make it an instrumentality of these offences: it was simply the place where the offences happened to be committed and the ‘location was purely incidental to their commission’.<sup>7</sup>

[16] The court proceeded to hold:<sup>8</sup>

‘The fact that a crime is committed at a certain location does not by itself entail that the venue is “concerned in the commission” of the offence. An illuminating discussion of the Australian forfeiture cases (where property “used in, or in connection with, the commission of” certain serious offences is subject to forfeiture) by the New South Wales Supreme Court shows that something more than mere location is essential. We consider that the same applies to our legislation. Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime; or the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used to lure minors into falling prey to sexual offences).’

[17] It concluded that the ‘evidence is solely that the victims were taken there and then detained and abused’; and that the ‘nature, location, attributes or appointment

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<sup>7</sup> Para 33.

<sup>8</sup> Para 34.

of the house itself played no distinctive role in the crimes nor did any features of the house play a role in luring the victims there'. It was no more than the venue at which the offences were committed, and this was 'not enough to trigger the forfeiture provisions'.<sup>9</sup>

[18] This may be compared to the property that was found, in *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as amicus curiae)*,<sup>10</sup> to have been an instrumentality of the offence of using a property for gambling activities without a licence. Van Heerden AJ pointed out that the property had been specially adapted to operate as a casino; it had been partitioned for this purpose; it had been fitted with tinted windows to make it difficult for people to see into the property; a large number of gambling machines were installed in rows; and a cashier's booth had been constructed in the property.<sup>11</sup> In addition, the property was used to commit offences over a long period, which Van Heerden AJ held, was 'another indicator of instrumentality'.<sup>12</sup>

[19] In this case, the Audi played a limited and incidental role in the unlawful events that Kulati admits to. It happened to be the means to convey the victim from his home to the tavern some two kilometres away, where he was held against his will and assaulted. It was used, on the evidence that I have accepted, only once during the commission of an offence, and for a short duration. It cannot be said that the Audi facilitated or made possible the commission of the offence in a real or substantial sense. It accordingly is not an instrumentality of an offence for purposes of POCA. The result is that it is not liable to forfeiture, and the application must fail.

[20] In the light of this conclusion, there is no need to deal with the question of proportionality.

## Conclusion

[221] The application is dismissed with costs.

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<sup>9</sup> Para 35.

<sup>10</sup> *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as amicus curiae)* 2007 (2) SA 145 (CC).

<sup>11</sup> Para 50.

<sup>12</sup> Para 51.

C Plasket  
Judge of the High Court

#### APPEARANCES

For the applicant:

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