

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 33824/14

DATE: 3 July 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JAMES DANIEL EDWARDS

APPLICANT

WILLEM BEKKER PRETORIUS

and

RICHARD MASOANGANYE

FIRST RESPONDENT

HONDURA (PTY) LTD

SECOND RESPONDENT

(Registration No 2001/011996/07)

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

THIRD RESPONDENT

THE REGISTRAR OF DEEDS

FOURTH RESPONDENT

JUDGMENT

RAULINGA J,

[1] The Applicants seek an order, on urgent basis, that the agreement of sale concluded between the First Respondent and the Second Respondent for the Purchase of Portion 1 of the Farm K[...] 847 LR and Portion

l(remaining extent) of the Farm S[...] 848 LR ("the property"), be set aside.

[2] The First Respondent was appointed under the provisions of Section 42 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA") and in that capacity was authorised by this Court with the powers, duties and authority as provided for in POCA and in the Order of the Court and was, in addition, subject to the applicable provisions of the Administration of Estates Act 66 of 1965, as well as the supervision of the Master of the High Court - See Preservation Order: "E" page 24 paragraph 5.

[3] After 3 October 2013, i.e the date of the aforesaid Preservation Order same was served on the interested party with rights in and to the property namely, Dingoako Farming Projects (Pty) Ltd ("Dingoako") and all other persons who had an interest in Portion 1 of the immovable property. No interested party as defined in terms of POCA filed a notice of intention to oppose under the provisions of Section 39(3) of POCA.

[4] On 4 February 2014, this Court, granted a forfeiture Order in the absence of an appearance by any interested party. The order reads as follows:

"1. An order is granted in terms of the provisions of section 53 of the Prevention of Organised Crime Act 121 of 1998(the POCA) declaring forfeit to the state certain property (the property), which is presently subject to a preservation of property order granted by this honourable court under the above case number on 3 October 2013, namely, portion 1 of the farm K[...] 847 LS, Limpopo and portion 1 (remaining extent) of the farm S[...] 848 LS, Limpopo.

2. The *curator bonis* appointed by this court in terms of the order granted on 3 October 2013 is directed to continue to act as such with authority to perform all the functions specified in the POCA subject to the provisions of the Administration of Estates Act 66 of 1965, and to the provisions of the Master of the High Court.

3. The *curator bonis* shall have all such powers, duties and authority as provided for in the POCA and in this order, including such powers, duties and authority reasonably incidental thereto and shall, in addition, be subject to the applicable provisions of the Administration of Estates Act 66 of 1965. The fees and expenditure of such *curator bonis* reasonably incurred in the execution of his duties shall be paid from the proceeds of the forfeited property.

4. In terms of section 56(2) of the POCA, the property shall vest in the *curator bonis* on behalf of the state on the date on which the forfeiture order takes effect.

5. The *curator bonis* is authorised, as of the date on which the forfeiture order takes effect to:

5.1 assume control of the property and take into his custody;

5.2 dispose of the property by private sale or other means;

5.3 deduct his/her fees and expenditure that were approved by the Master of the High court, subject to any order of this court for the exclusion of any interest in the property under section 52(2) of the POCA;

5.4 deposit the balance of the proceeds into the cheque account of the Land & Agricultural Development Bank of SA, account [...] which is held at ABSA Capital. The reference to be used is Masepula Dinga. A copy *of* the payment must be forwarded to S de Villiers at fax number 012 [...] or s[...]

5.5 perform any ancilliary acts, in the opinion of the *curator bonis* but subject to any directions of the Criminal Assets Recovery Committee established under section 65 of the POCA, are necessary.

6. The *curator bonis* shall as soon as possible, but not later than within a period of 90 days of this order coming into effect, file a report with the applicant and the Master of the High Court, indicating the manner in which he:

6.1 completed the administration of the property mentioned above; and

6.2 complied with the terms of this order.

7. The Registrar of this honourable *court* must publish a notice of this order in the Government Gazette as soon as practical after the order is made.

8. Any person affected by the forfeiture order, and who was entitled to receive notice of the application under section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the Gazette, apply for an order under section 54 of the POCA, excluding his or her interest in the property, or varying the operation of the order in respect of the property.

9. All the paragraphs of the order operate with immediate effect, except paragraphs 4,5 and 6, which will only take effect on the day that a possible appeal is disposed of in terms of section 55, or on the day that an application for the exclusion of interests in forfeited property in terms of section 54 of the POCA is disposed of, or after expiry of the period in which an appeal may be lodged or application be made in terms of section 54 of the POCA.

10. The costs of this application are awarded to the applicant.

[5] The said order was published in the Government Gazette on the 16 May 2014. On the 27 February 2014, the First Respondent received an offer from the Second Applicant for the purchase of the property, in the amount of R1800 000.00 which he rejected. On the 28 February 2014, the First Respondent received an offer from the First Applicant in the amount of R2 300 000.00 which he rejected. On the 4 March 2014, the First Respondent received a further offer from the First Applicant in the amount of R3 000 000.00 which he similarly rejected.

[6] On 5 March 2014, the First Respondent received an offer from the Second Respondent in the amount of R3200 000.00 which was the highest offer which he in due course accepted on the 7 March 2014.

[7] The acceptance of the offer of the Second Respondent by the First Respondent, prompted an objection by the Applicants' attorney, contending that since the Government Gazette had not been published at the time that the First Respondent had sold the property to the Second Respondent and because the 45 day period referred to in POCA had not yet expired as at the date of such sale, the Deed of Sale was a nullity.

[8] The Applicants contend for a finding that the First Respondent was not empowered to dispose of any asset forming the bases of the forfeiture order and seek the setting aside of the sale.

[9] The First Respondent asserts for two separate findings on the papers.

(i) As a preliminary point, it contends that the Applicants have no locus standi to bring the application seeing as it does not constitute an "interested person" under application of the POCA.

(ii) As pertains to the legitimacy of the sale, the First Respondent contends that, on proper interpretation of the POCA, the First Respondent was not empowered to dispose of the property.

[10] The First Respondent's contention that the Applicants have no locus standi can be sustained based on the following reasoning.

[11] I refer first to the POCA. Under the heading section definitions and interpretation provides under section 1 (i) (viii) for a definition of the term "interest" as "interest includes any right". Whereas Section 1(i) describes "property" as meaning "money or any movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof. For any Applicant to have an interest or right in and to the forfeited property in question, must exhibit a legally recognised right thereto. This right or interest does not exist in limbo. This is a simple analysis which in an urgent Court does not require any reference to authorities. There is nothing that defies these meanings.

[12] Section 39 (3) provides thus:

"(3) Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof".

I am minded to emphasise that this section amplifies the definition of "interest" and "right" as discussed above.

[13] The relevant parts of section 50 provide: "Making of forfeiture order;

(1).....

(2).....

(3).....

(4).....

(5) The Registrar of the Court making a forfeiture order must publish a notice thereof in the Gazette as soon as practicable after the order is made.

(6) A forfeiture order shall not take effect -

(a) before the period allowed for an application under section 54 or an appeal under section 55 has expired; or

(b) before such an application or appeal has been disposed of".

[14] I am with the Applicants that the publication referred to in section 50(5) above is pre-emptory. However, this will depend on whether the person concerned has an "interest" or "right" in order to employ this section. It is indeed true that the time period for any interested person to apply for an exclusion of interest, accordingly only stands to run from the date of publication of the Court order by the registrar.

[15] Paragraph 9 of the order was granted as a result of the provisions of section 50 (6) of the POCA. The effect of section 50(6) and paragraph 9 of the concomitant court order, is that the forfeiture order does not take effect until such time as one or more or all of the events that qualify it, have occurred or have been finalised. On their own version, the Applicants submit that it is not their case that they are interested persons

capable of invoking the provisions of sections 54 and 55 of the POCA. One must be mindful of the fact that the forfeiture order does not take effect until such time as a possible appeal is disposed of or upon the finalisation of an application for exclusion of interest, or after expiry of the period in which an appeal may be lodged or application is made in terms of section 54 of the POCA.

[16] The question that begs an answer is who is this "interested person" who is affected by the forfeiture order"? It is true as the Respondent correctly submits, that only persons under section 54 affected by a forfeiture order and who were entitled to receive notice of the application for the order under section 48 (2) and who did not receive such notice, can apply for an order excluding his or her interest in the property concerned from the operation of the order or to an order varying the operation of the order in respect of such property and notice in the Government Gazette for the purposes of the forfeiture order. Such a party is obliged to file a notice of intention to oppose or to apply for an order excluding his or her interest from the property in question. The only party entitled to a notice of opposition; as provided for in section 54 (1) read with section 48 (1) and with section 39 (3) is clear in this regard. There were no such parties in the instant case or they elected not to come forward. If section 39 (3) affected an interested party and he or she did not receive notice of an intention to process a forfeiture order, they would have 45 days to apply for an order excluding the interest or varying the operation of the order 45 days after publication in the Government Gazette.

[17] Section 55 of the POCA provides for a party that opposed at the hearing of the application for a forfeiture order for an entitlement, under the provisions of section 48, within 30 days after the making thereof, to appeal against such order. The provisions of section 55 are incapable of assisting the Applicants. The applicants are not interested parties.

[18] The provisions of section 54 of the POCA do not assist the Applicants. On the Applicants version, forfeiture will not take effect until 45 days have elapsed after the publication in the Government Gazette. The submission of the First Respondent is supported in that, the section applies exclusively to someone who falls within the section 39 (3) category. These are persons who had to give notice of an intention to oppose. The Applicants do not fall in this category.

[19] Similarly, based on a proper interpretation of the POCA, the Applicants' contention that under the circumstances of the forfeiture order the first Respondent was not empowered to dispose of the property is untenable.

[20] It is indeed true that the first Respondent has been appointed in terms of statute (i.e. POCA) and has exercised a public power in the interest of the state. The first Respondent also derives that power from the tenet of the court order. However, as I have already intimated above, the Applicants are not any person

affected by the forfeiture order and who was entitled to receive notice of the Application under section 48 (2), but who did not receive such notice, was entitled, within 45 days after the publication of the notice of the forfeiture order in the Government Gazette, to apply for an order under section 54 of the Act, excluding his or her interest, in the property or varying the operation of the order in respect of the property.

[21] Section 33 of the Constitution of the Republic of South Africa, No 108 of 1996, is apposite on the issue of "just administrative action"

"33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must -

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal,

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration".

[22] Section 3 of PAJA provides as follows:

"3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

3(2) (a) A fair administrative procedure depends on the circumstances of each case".

[23] The Applicants are not parties whose rights have been adversely affected by the First Respondent's administrative act of the property either under the provisions of POCA or PAJA.

[24] The next issue for discussion is whether the Applicants find any solace under the common law. Prior to the advent of Constitutional democracy, judicial review was governed by common law principles which had evolved over many years. They are sometimes referred to as the Shidiack grounds of review after their statement in *Shidiack v Union Government* (Minister of the Interior) 1912 AD 642 at 651-652.

"There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to

the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute- in such cases the court might grant relief".

This case was referred to in the matter of First Rand Bank v Master of the High Court 2014 (2) SA 527. In that matter the court found that the master's decision breached the Applicants rights to fair administrative action, and further that the master's decision also violated the legality principle.

[25] I have already dismissed the Applicants' aversion that they have rights to a fair administrative action, because they are not protected under both the POCA and the PAJA. Therefore the issue of legality does not arise. In my view, the First Respondent did not act mala fide or from ulterior motive or failed to apply his mind to the matter in the exercise of his administrative action. There is no iota of evidence by the Applicants that the First Respondent acted mala fide or otherwise. All what the record reflects are unfounded speculations. On the contrary, the First Respondent objectively considered the offers by the Applicants which were found to be lower than the offer of the Second Respondent to whom the property was finally sold. The First Respondent correctly rejected the offers by the Applicants.

[26] In the circumstances this court has to decide in favour of the First Respondent. The order I make is the following:

The Application is dismissed with costs.

TJ RAULINGA

JUDGE OF THE HIGH COURT

FOR THE APPLICANTS : Adv DA Smith

Adv SG Gouws

INSTRUCTED BY : B BEZUIDENHOUT INC

FOR THE 1st RESPONDENT : Adv JK Berlowitz

INSTRUCTED BY : ANTHONY BERLOWITZ ATTORNEYS

HEARD ON : 27 May 2014

DATE OF JUDGMENT : 3 July 2014