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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 84/2017

20/9/2018

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

and

JOHNNY BESAPHI MAILA RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an application for a forfeiture order in terms of section 48 read with section 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) to have the property of the Respondent, to wit, a Toyota Hilux 3.0 Bakkie with registration number [...], a White Toyota Conquest motor vehicle with registration number [...] (also referred to as a Tazz motor vehicle in the papers before me) and cash in the amount of R 92 100.00 seized by the

Police ("the property") on 22 January 2016 forfeited to the State.

[2] The basis for this application is that the property was used in the commission of an offence listed in Schedule 1 of POCA and / or the proceeds of unlawful activities and therefore subject to forfeiture. The application is opposed by the Respondent on the basis that the property was not used as an instrumentality in the commission of the offence and / or that the property is not proceeds of any unlawful activities.

[3] The following facts are common cause or not seriously disputed by the Respondent:

3.1. The Respondent was arrested by members of the South African Police Service on 22 January 2016 for contravention of the provisions of the Drugs and Drug Trafficking Act 140 of 1992 (illicit dealing in drugs) and for the contravention of the provisions of the Firearms Control Act 60 of 2000 (unlawful possession of firearm).

3.2. During the Respondent's arrest the police seized among other things cash amount of R 91 000.00 found in the safe in the Respondent's house, a white Toyota Conquest motor vehicle, a Toyota Hilux 3.0 Bakkie and a cash amount of R 1 100.00 found in the Toyota Conquest motor vehicle.

3.3. On 25 January 2016, the Respondent appeared in the Groblersdal Magistrate Court together with one Tshepo Cebeni. The said Tshepo Cebeni was driving the aforesaid Toyota Conquest motor vehicle during his arrest. They were both released on bail and currently the Respondent's trial is still ongoing. Tshepo Cebeni has since disappeared and thus evaded trial.

3.4. The Respondent is the registered owner of the Toyota Hilux Bakkie and Toyota Conquest motor vehicle which are subject of the order sought by the Applicants. The said Tshepo Cebeni was at all material time hereto the employee of the Respondent.

3.5. During January 2017, the Applicant made an application for a preservation of property order in terms of section 38 of POCA and this Court granted the said order on 13 January 2017. The said Court order together with the preservation application were served

on the Respondent on 26 January 2017. On 8 February 2017 the Respondent filed a notice of his intention to oppose the making of a forfeiture order in terms of section 39(3) accompanied by an affidavit in terms of section 39(5) of POCA.

- 3.6. The Applicant filed an application for a forfeiture order in terms of section 48 of POCA on 11 May 2017 and served same on the Respondent's legal representative on 13 May 2017. The Respondent filed his answering affidavit and served same on the Applicant's legal representative on 31 July 2018. On 17 August 2018 the Applicant served his replying affidavit on the Respondent's legal representative and same was filed at Court on 20 August 2018.
- 3.7. The Respondent's answering affidavit was served and filed out of time and no substantive application for condonation was made. Hence the Applicant has raised point *in limine* in this regard and prays that the answering affidavit be excluded in these proceedings.

FACTUAL BACKGROUND

- [4] During 2014 the South African Police Service, Polokwane Organised Crime Investigation Unit conducted an operation under project name Drosdy Hof. The purpose of the said operation was to investigate cases of drugs trafficking, sale and use of drugs by young people in and around Groblersdal and Marble Hall. During that operation the police used the undercover operations and traps for them to succeed in dealing with drug dealers. Several undercover operations were conducted from December 2014 until January 2016 when the Respondent was arrested.
- [5] The police had identified targets and used agents in order to buy drugs from the said targets. The Respondent was one of the identified targets. During the operations the police agent managed to buy drugs from the Respondent and his runners on four occasions. During the operations all the drugs bought from the Respondent and his runners were sent to SAPS Forensic Science Laboratory in Pretoria for analysis. The analysis results

came back showing that the drugs bought from the Respondent and his runners contained diacetylmorphine (heroin) and cocaine.

[6] In the present case the Applicant's case is based on the evidence of the following persons: -

- 6.1. T T M (deponent to the founding affidavit).
- 6.2. Jacobus De Wet Du Toit (a Police Captain attached to the Limpopo Provincial Organised Crime Unit).
- 6.3. Kgabo Nicholas Masoga (a detective Warrant Officer and investigating officer in the pending criminal case against the Respondent).
- 6.4. N R M (an undercover police agent and a Constable in the SAPS).

The Respondent's version is contained in his own answering affidavit with no supporting affidavits and/ or supporting documents.

Events leading to the arrest of the Respondent and Tshepo Cebeni

[7] According to Captain Du Toit, Detective R M of the SAPS Provincial Detectives in Polokwane was used as an agent to buy drugs from the Respondent and Tshepo Cebeni on 22 and 29 January 2015 and 13 and 20 February 2015.

[8] On the 22 January 2015 Constable M contacted Tshepo Cebeni and made arrangements to meet Tshepo at Jabulani Tavern in Groblersdal. Tshepo took Constable M into Jabulani Tavern where they found one Raymond. The latter was also a runner. Constable M bought 40 sachets of nyaope from Raymond for an amount of R 1 200.00.

[9] On the 29 January 2015 the investigation team conducted another operation at Groblersdal to trap and buy drugs called Nyaope and Cocaine from Tshepo and Raymond. Constable M was again the agent used to buy the drugs. The sale of the drugs took place at Jabulani Tavern. Constable M bought 33 sachets of Nyaope for R 30.00 each and 10 packets of Cocaine at R 40.00 each from Raymond.

[10] On 13 February 2015 the investigation team conducted another operation

at Groblersdal. The operation was to conduct a trap and buy Nyaope and Cocaine from Tshepo and the Respondent. Constable M was again the agent used to buy the drugs. Constable M met Tshepo next to Jabulani Tavern. Using Constable M's phone Tshepo called the Respondent and told him that he had a client who wanted to buy Nyaope and Cocaine for an amount of R 2 000.00. The Respondent arrived at the tavern driving a maroon Toyota Hilux motor vehicle with registration number [....]. The Respondent went into the tavern and Constable M followed him into another room inside the tavern. Constable M bought 34 sachets of Nyaope and 25 small plastics of Cocaine from the Respondent.

- [11] On the 20 February 2015 another operation was conducted to trap and buy Nyaope and Cocaine from Tshepo and the Respondent. Constable M was again the agent used to buy the drugs. Constable M met the Respondent at Jabulani Tavern. Again the Respondent was using his Toyota Hilux motor vehicle. At Jabulani Tavern the Respondent sold 38 plastic sachets of Cocaine for an amount of R 1 500.00 and 50 sachets of Nyaope for an amount of R 1 500.00 to Constable M.

The arrest of Tshepo and the Respondent

- [12] On the 22 January 2016 the SAPS members conducted a take-down on Operation Drosdy Hof. The Respondent and Tshepo were arrested during this operation. The Respondent was arrested at his place of residence at [....]. When arresting the Respondent, the SAPS members searched the Respondent's house. In the main bedroom they found cash in the amount of R 91 000.00 inside a safe. In the main bedroom and inside the clothing cabinet the police found the following hidden amongst the clothes:

- A 303 rifle and magazine with 40 rounds of ammunition;
- 25 rounds of ammunition for a 38 Special revolver;
- 21 rounds of ammunition for an AK47 machine gun;
- A police officials bullet proof vest and an ordinary bullet proof vest.

- [13] The Respondent was then arrested for possession of unlicensed firearm,

possession of ammunitions, possession of police bullet proof vest and dealing in drugs. The police seized the cash as it was believed to be from his illegal dealings in drugs and the other items as instrumentalities of unlawful activities. When asked about his Toyota Hilux motor vehicle, the Respondent informed the police that the vehicle was with his brother around Marble Hall. The motor vehicle was seized by the police later on that day.

[14] When asked about the source of the cash found in the safe, the items found in his bedroom and the licences for the firearms and the ammunitions, the Respondent refused to give any answers to the police indicating that would give his statement in Court.

[15] Tshepo as arrested at Jabulani Tavern. The police found him sitting inside the Toyota Conquest motor vehicle with registration number [....]. From the search, the police officers found a small trunk on the front passenger seat inside the motor vehicle. Inside the trunk they found 31 small wrapped papers containing dagga and 4 smoking pipes. They also found cash in the amount of R 1 100.00. The police seized all the items and the Toyota Conquest. They seized the cash as it was believed to be proceeds of Tshepo's illegal dealings in drugs and the Toyota Conquest as it was believed to have been used as an instrument of unlawful activities, to wit dealing in drugs by Tshepo.

Issues for Determination

[16] The Applicant's case is that:

16.1. A Toyota Hilux 3.0 Bakkie with registration number [....] and a Toyota Conquest motor vehicle with registration number [....] are the instrumentalities of an offence referred to in Schedule 1 of POCA, namely dealing in drugs; and

16.2. The cash in the amount of R 91 000.00 found in the safe in the Respondent's house and cash in the amount of R 1 100.00 found in the white Toyota Conquest motor vehicle are the proceeds of unlawful activities.

[17] The case for the Respondent is based on the following:

- 17.1. That both the Toyota Hilux Bakkie and the Toyota Conquest motor vehicles are his property.
- 17.2. He has been a taxi operator for a long time dating back to the early nineties. He is also running Jabulani Tavern although the licence has changed and his brother is involved in the operation therein.
- 17.3. That the amount of R 91 000.00 that was found in his house constitutes the proceeds of the two businesses he runs. He indicated that the amount was accumulated over a period of a month.
- 17.4. He denies that the said amount is the proceeds of illegal activities and that the seized motor vehicles are the instrumentalities of an offence as alleged by the Applicant.

Legal Framework

[18] The purpose of POCA is in the main, designed to combat the spiraling wave of organized crime and to provide legislative mechanism of depriving criminals in general, of the proceeds of unlawful activity. The mechanism for such deprivation of the benefits of a criminal activity is either through Chapter 5, which is dependent on a successful prosecution and conviction of the offender, when only then the proceeds of unlawful activity can then be declared forfeited to the State, or through Chapter 6 which is not conviction - based but may be invoked even when there is no prosecution. See **National Director of Public of Prosecutions v Mohamed NO**¹.

[19] In **National Director of Public Prosecutions v Van Staden and Others**², dealing with the provisions of Chapter 6 of POCA, Nugent JA remarked that: *"It has been said, at times, that the purpose of the Prevention of Organised Crime Act 121 of 1998 is to combat the special evils that are associated with organized crime, but that is not entirely correct. That is*

¹ National Director of Public Prosecutions v Mohamed NO 2002 (4) SA 84 3 (CC) at 850E - 850D

² National Director of Public Prosecutions v Van Staden and Others 2007 (1) SACR 338 (SCA) at

certainly one of its purpose, and perhaps even its principal purpose, but as pointed out by this Court in National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan³, its provisions are designed to reach far beyond organized crime and apply also to cases of individual wrongdoing."

[20] Under Chapter 6 a forfeiture order would be preceded by a preservation order in terms of section 38 and followed by the forfeiture order irrespective of whether there is a prosecution or not. The State need only place before the Court facts which on a balance of probability show that the property sought to be forfeited as proceeds of unlawful activity should be declared forfeited to the State in terms of section 50 of POCA⁴.

[21] That POCA is draconian⁵ and invasive, was reiterated and confirmed by Bosielo AJA (as he then was) writing for the Court in the matter of Mazibuko and Another v National Director of Public Prosecutions⁶, through the following remarks:

"[22] It is generally acknowledged that the effects of forfeiture are draconian and potentially invasive of the rights of people to their properties. There is an ever-present threat of a serious conflict between the right to property as provided in s 25(1) of the Constitution and an order for the forfeiture of property under 50(1) of POCA which can result in far-reaching consequences if not managed with care. I agree with Nkabinde J in Prophet v National Director of Public Prosecutions⁷ where she expressed the following caution: "While the purpose and object of ch 6 must be considered when a forfeiture order is sought, one should be

paragraph [1]

³ National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA); 2004(8) BCLR 844; [2004] 2 ALL SA 491.

⁴ Vide National Director of Public Prosecutions v Mohamed NO (supra) at 851E - F.

⁵ Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) (2007 (2) BCLR 140) in paragraph [46].

⁶ Mazibuko and Another v National Director of Public Prosecutions 2009 (2) SAC R 368 (SCAO at 378A-G

⁷ Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) ;(2007 (2) BCLR 140) in paragraph [61].

mindful of the fact that unrestrained application of ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution, which requires that no law may permit arbitrary deprivation of property. In First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)⁸ this Court held that arbitrary in s 25(1) means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Court said:

"(F)or the validity of such deprivation, there must be an appropriate relationship between means and end, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination."

- [22] In the Prophet matter⁹, it was also held that: *"the general approach to forfeiture, once it had been established that the property was an instrumentality of an offence, was to embark on a proportionality inquiry - weighing the severity of interference with individual rights to property against the extent to which the property had been used in commission of the offence."* This approach, in my view, also holds well in instances of the innocent bystander as well as in dealing with proceeds of crime.

Findings and Conclusion

- [23] The Court called upon to decide the forfeiture issue, is not called upon to decide the veracity of the evidence placed before it. It suffices, if the evidence satisfies the Court that there is a reasonable ground to believe that, the affected properties are proceeds of unlawful activities. On the

⁸ First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB) 2002 (4) SA 768 (CC) ; 2002 (7) BCLR 702 paragraph [100]

⁹ Supra at paragraph (58) at 548G

other hand the Respondent had to satisfy the Court on a balance of probabilities that it is not necessary to grant a forfeiture order. It is not enough, in my view, for the Respondent to make bold statements of denial of criminality or that the properties are not the instrumentalities of an offence.

[24] Crucial and damning allegations contained in the Applicant's founding affidavit and supporting affidavits have not been dealt with and/ or challenged by the Respondent. The Respondent merely stated that the properties have been acquired lawfully in that he is a businessman operating a tavern, Jabulani Tavern, and that he operates a taxi business. The Respondent failed to support this version by at least attaching copies of financial statements and motor vehicle carrier permits to his answering affidavit. These documents can easily be made available if indeed the Respondent is earning a living through such lawful means. In any event the evidence before me is that the Jabulani Tavern is being run by the Respondent's brother who runs same on his own account.

[25] It needs to be mentioned that the Respondent did not make a full disclosure of his defence to the allegations mentioned above. The essence of his defence is a denial of being involved in any criminal activities and that the properties mentioned are not the instrumentalities of an offence or proceeds of criminal activities. In my view, regard being had to the above evidence placed before the Applicant and before this Court, and the response of the Respondent to the allegations leveled against him, the inference to be drawn is that the evidence is overwhelming and making this Court to conclude that the properties, including the cash amount are indeed the instrumentalities of an offence and proceeds of unlawful activities.

[26] In view of the conclusion I have arrived at on the merits of this application, I do not find it necessary to make a ruling on the *point in limine* raised by the Applicant with regard to the late filing of the Respondent's answering affidavit. The Applicant was not prejudiced by the late filing of the answering affidavit in as much as the Applicant had an opportunity to file

its replying affidavit on 17 August 2018, almost a month before the hearing of this application on 10 September 2018.

[27] For all the above reasons the following order is granted:

1. It is declared that the Toyota Hilux 3.0 Bakkie with registration number [...] and the white Toyota Conquest motor vehicle with registration number [...] and cash in the amount of R 92 100.00 seized by the police under case dockets Groblersdal CAS numbers 122/01/2016, 123/01/2016 and 125/01/2016 ("The Property") which are presently subject to a preservation of property order granted by this Court on 13 January 2017 are the instrumentalities of an offence and proceeds of unlawful activities respectively .
2. In terms of section 56(2) of the POCA the property is forfeited to the State and vest in the State.
3. The draft order attached hereto and marked Annexure "A" is hereby made an order of Court.
4. The Respondent is ordered to pay the costs of the application.

EM MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Application heard on : 10 September 2018
Order pronounced on : 20 September 2018
For the Applicant : Adv. M F Mmela
Instructed by : State Attorney

Polokwane
For the Respondent : M J Mohoto
Instructed by : Van Deventer & Campher Inc
c/o H Masindi Attorneys

INTHE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 84/2017

In the application of:

National Director of Public Prosecutions

Applicant

And

Johnny Besaphi Maila

Respondent

In re: a White Toyota Conquest motor vehicle with registration number [...], Chassis number 7A9512625 and Engine number AHT4AE9609012096, a Toyota Hilux 3.0 TD/B bakkie with registration number [...], Chassis number AH31GNK008020068 and Engine number 1KZ1209180, AND cash in the amount of R92 100.00 seized by the police under case dockets Groblersdal CAS numbers 122/01/2016, 123/01/2016 and 125/01/2016

IN AN APPLICATION FOR A FORFEITURE ORDER IN TERMS OF SECTION

48 READ WITH SECTION 53 OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998 (POCA)

ORDER

On 20 September 2018.

Before the Honourable Judge President Makgoba

- 4.2 sell the motor vehicles at best, either by public auction or private treaty;
 - 4.3 sign all documentation necessary to effect sale, transfer and registration of the motor vehicle; and
 - 4.4 deposit the cash together with the proceeds from sale of the motor vehicles less any commission and incidental expenses occasioned by the sale into Criminal Asset Recovery Account established under section 63 of POCA, account number 80303056 held at the South African Reserve Bank, Madiba Street, Pretoria (CARA).
- 5 Hlamarisa Simon Rikhotso shall as soon as possible but not later than within a period of 90 day of this order coming into effect, file a report with the applicant indicating the manner in which he complied with the terms of this order.
- 6 Any person whose interest in the property concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the court.

BY ORDER OF COURT

REGISTRAR OF THE HIGH COURT

DATE