

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No 21509/10

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Applicant

and

**SMILO ELIOT GOCI**

Respondent

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**JUDGMENT DELIVERED ON 28 NOVEMBER 2012**

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**GANGEN A J:**

- [1] This is an application for a forfeiture of property order sought by the Applicant in terms of Section 48(1) read with section 50(1)(a) of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The application is in relation to a motor vehicle namely, a Mercedes Benz Sprinter with registration number FFN 225 EC ("the vehicle"), on the basis that the vehicle is an instrumentality of an offence listed in item 22 of schedule 1 of POCA (any offence referred to in section 13 of the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act").

- [2] On 5 October 2010 a preservation of property order was granted pursuant to an application in terms of section 38(1) read with section 74(1)(a) of POCA. On 19 January 2011 the applicant instituted an application for a forfeiture order over the vehicle. On 16 February 2011 the Respondent's answering affidavits were filed. On 6 September 2011 the matter was set down for 7 May 2012. On 18 April 2012 the applicant filed a replying affidavit incorporating an application for condonation.
- [3] The applicant had until 9 March 2011 to file a replying affidavit but submits that he was unable to do so as he was still awaiting a crucial affidavit of Sidlova which was deposed to on 5 June 2011 the original of which was only received by the Applicant at the time same was filed. The applicant alleges that there is no prejudice to the Respondent on the basis that it is not a new affidavit and the pleadings were not closed as no replying affidavit was yet filed. The applicant submits that the purpose of filing the affidavit is to ensure that the Court has all the relevant evidence in order to adjudicate this case with the benefit of all evidentiary material on the issues that the court is called upon to adjudicate.
- [4] Respondent submits that the application for condonation should not be granted as the applicant's substantiation could not be considered a satisfactory reason for not adhering to the uniform rules and that the non-compliance stretched for 13 months and was therefore not trivial. The Respondent further submits that the applicant attempts to introduce new information in an effort to discredit the Respondent's defence thereby causing the Respondent to suffer prejudice.

- [5] Although the replying affidavit was filed thirteen months late and the period could have been reduced, I have considered the explanation and noted that the replying affidavit was filed at least three weeks prior to the date of hearing. I am of the view that the application for condonation should be granted having regard to the nature of the matter (not being the kind where the interests of justice would be served by dismissing same) and the fundamental consideration that the matter should be adjudicated upon all the facts relevant to the issues in dispute.
- [6] It is common cause that on 20 February 2010 the vehicle was stopped at a roadblock in Oudtshoorn by police officers Storm and Adams and that the driver of the vehicle was Nozitshixwana and the passenger was one Nonkemane. Nozitshixwana advised the police that he was transporting cleaning material from Umtata to Somerset West. As Nozitshixwana could not open the lock on the vehicle, it was opened by the police in his presence and bags of dagga were found. In September 2010 Nozitshixwana pleaded guilty to dealing in 1660,5kg of dagga (Section 5(b) of the Drugs Act) and was fined R35000.
- [7] On 7 October 2010 Respondent's attorneys contacted Applicant to obtain release of the vehicle and arranged for service of the preservation order to be effected on them.
- [8] Applicant's case is that the Respondent purchased the vehicle in March 2009 for R80 000 paid by way of a cash deposit of R10000 and a cheque for R70000 and that the vehicle was an instrumentality of an offence referred to in

Schedule 1 of POCA. The Applicant submits that the vehicle was used for the transportation of dagga weighing 1660,5kg. Applicant submits that the Respondent has not given sufficient detail to support Respondent's application that he is an "innocent owner". This relates to both the Respondent's purchase of the vehicle and his alleged lack of knowledge of the unlawful activities.

[9] The Respondent states that he is the owner of the vehicle and that he employed Nozitshixwana to transport furniture to Umtata for which he paid him R500 and for which he paid Nonkemanie R200. He states further that when the vehicle left Cape Town he had not secured any contract for the return journey. He claims that on Saturday 20 February 2010 he was contacted by one Sidlova who stated that he had received a request for the transport of cleaning materials to be transported from Umtata to Somerset West and that he(Sidlova) had received R8000 for such transport. He states that he thereafter contacted Nozitshixwana to advise that he would be contacted by a person who would arrange for the cleaning materials to be loaded on the vehicle and he(Nozitshixwana) would transport it to Somerset West. He later discovered that Nozitshixwana was arrested and the vehicle impounded.

[10] Respondent states that he is not a drug dealer and that he had no knowledge or involvement in the transportation of drugs in the vehicle. He states that he relies on the vehicle for an income. Respondent's counsel submitted that the vehicle although playing a part in the offence (the transportation) it was incidental and not integral, that the vehicle was not adapted to make the commission of the offence possible and that Applicant has not established that



the vehicle was part of a pattern of sustained activity that reveals the instrumental character of the specific property.

- [11] The Supreme Court of Appeal in *National Director of Public Prosecutions v R O Cook Properties* 2004(2)All SA 491 SCA stated that where a forfeiture order is sought, the court must undertake a two-stage enquiry to ascertain whether the property in issue was an instrumentality of an offence and if so, the court must consider whether certain interests should be excluded from forfeiture.
- [12] Section 1 of POCA defines "instrumentality of an offence" as "*any property which is concerned in the commission or suspected commission of an offence*". In the *Cook Properties* case (supra) the Court held 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.....the link between the crime and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime.*"
- [13] On the first question of instrumentality, it is clear that the vehicle was an instrumentality of the offence in that the vehicle was utilised to transport the dagga bearing in mind that the offence of dealing in drugs in contravention of section 5(b) of the Drugs Act is listed in item 22 of Schedule 1 of POCA. The Drugs Act defines "*deal in*" as "*in relation to drug includes performing any act in connection with transshipment...of the drug*". There is clearly a direct link between the offence and the vehicle as it was used to transport the dagga. The

vehicle was thus instrumental in and not merely incidental to the commission of the offence.

[14] I accordingly find that the applicant has shown on a balance of probabilities that the vehicle was an instrumentality of the offence and is susceptible to forfeiture to the State in terms of the provisions of POCA.

[15] The second part of the enquiry that the court must consider is whether the Respondent's interest in the vehicle should be excluded from forfeiture.

[16] The onus rests on the Respondent to establish, on a balance of probabilities, that he acquired the vehicle legally and that he, neither knew, nor had reasonable grounds to suspect, that the vehicle was an instrumentality of an offence referred in Schedule 1 of POCA.

[17] It is common cause that the Respondent is the owner of the vehicle which he bought in March 2009 for R80 000. Respondent has failed to set out in his papers the source from which he financed the acquisition of the vehicle when he purchased same in March 2009. The closest that Respondent comes to explaining the source of funds is by inference. Respondent states that "for the entire period that he was residing in that area (Khayelitsha), he was in the employ of Khuseleka Bus Services and he was also involved in the selling of vegetables and fruit at a stall in that area". Respondent does not say that it was this income that financed the purchase of the vehicle. Respondent does not give the Court any information regarding the period of employment, his

earnings from his employment and his income from the stall or information relating to the bank account from which the cheque was issued to pay for the vehicle. To the extent that there is a suggestion in the Applicant's papers that he is a known drug dealer, it would be expected that the Respondent as an innocent owner would have been at pains to take the Court into his confidence and satisfy this Court on a balance of probabilities that the vehicle was purchased through legitimate means. He has not done so.

[18] The next issue to be determined is whether the Respondent has established, on a balance of probabilities that he neither knew, nor had reasonable grounds to suspect, that the vehicle was an instrumentality of an offence referred in Schedule 1 of POCA. In order to do this, it is necessary to go into some length as to Respondent's version.

[19] In his affidavit of 11 November Respondent states that during 2009 he started his own transport business and he began transporting goods from Cape Town to Umtata and that his rate varied from R6000 to R8000. He advised that he knew Nonkernane who accompanied his driver Nozithshixwana from Cape Town to the Eastern Cape and that he agreed to pay him R200 and to pay for his food and accommodation. He states that on 19<sup>th</sup> February the driver was instructed by him to transport furniture from Cape Town to Umtata. He states further that he was informed recently by Nozithshixwana that at the time of his arrest he informed the police that he was transporting cleaning material and that the court had accepted this explanation. He stated further that he was still prepared to employ Nozithshixwana as his driver as he has always been reliable and hardworking. Respondent stated that his friend Sidlova of Umtata often

secured return contracts (for a commission) and that the vehicle is registered at the address of Sidlova. When the vehicle left Cape Town on 19<sup>th</sup> February no return contract had been secured. On 20<sup>th</sup> February Sidlova contacted him advising that he had a request for cleaning materials to be transported to Somerset West and that he received payment of R8000. He contacted Nozitshixwana and informed him that he would be contacted by a person in Umtata who would arrange for the cleaning materials to be loaded on the vehicle and he would transport them back to Somerset West- he had no further contact with Nozitshixwana until he discovered that he had been arrested and his vehicle impounded. He says he had no knowledge or involvement in the transportation of the drugs in the vehicle.

[20] In response to Colonel Dzingwa's affidavit that Sidlova denied that the Respondent stayed at his premises and denied contacting Respondent on the day, Respondent attaches an affidavit by Sidlova dated 16 February 2011 confirming his version. He also attaches an affidavit by Nozitshixwana wherein he states that he pleaded guilty and that the court accepted that he had no prior knowledge of the dagga and only became aware of the dagga whilst refuelling the vehicle. Nozitshixwana says that he transported furniture to Umtata and delivered same to the owner at the bus rank in Umtata. He says he was then telephoned by his employer (Respondent) who informed him that a person wanted cleaning materials transported to Somerset West and would contact him. He was contacted by a person unknown to him who then met him at the bus rank. This person took the vehicle in order to load the cleaning material and later returned the vehicle having locked and sealed the rear doors. He



denied knowing of the dagga prior to the events that took place at the time he was refuelling (the petrol attendant enquired what he was transporting as he could smell the dagga and Noxitsixwana could smell the dagga).

- [21] The Respondent, despite claiming to have a transport business, does not furnish this Court with any information as to the transactions of the business in relation to the trip from Cape town to Umtata and the return trip. He does not advise how he keeps records in relation to the administration and finances of the business. This information is in the Respondent's possession and would easily have proven his claim as innocent owner. The Respondent could easily have given the address where the furniture was picked up and loaded and the name of the person to whom it was delivered in Umtata and how the contact was made with the person. Similarly, in relation to the return trip, the Respondent does not provide the Court with any information as to the name of the client and the person to whom the goods (*the alleged cleaning material*) were to be delivered and how the payment of R8000 was dealt with in the books of his transport business or to at least show the deposit into his bank account. The Respondent cannot say that he does not know who loaded the vehicle or who paid him because, on his own version, he advised the driver that the vehicle would be picked up and loaded. It is highly improbable that the owner of a transport business would allow his driver to hand over his vehicle to some unknown person to be loaded and returned to him. In any event, it is that very conduct of the Respondent that lends to the proposition that he failed to exercise responsibility to avoid the vehicle's criminal utilisation. The only reasonable inference that can be drawn in the circumstances is that the respondent knew or ought to have had reasonable grounds to suspect that the

purported sender in Umtata and the purported recipient in Somerset West wanted to use the vehicle as an instrumentality of an offence to advance their unlawful activities. Respondent failed to verify the contents of the vehicle as any reasonably diligent and vigilant person in the transport industry would have done in the circumstances.

[22] In *Cook* (supra) the Court held, "the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation."

[23] The Respondent has allowed his vehicle to be utilised to transport dagga by the manner in which he conducted his business and gave instructions to his driver.

[24] Furthermore, if one has regard to Sidlova's affidavit which was filed with Applicant's replying affidavit of 5 June 2011, Sidlova denied the version that is set out in the affidavit which Respondent submitted to the Court as to his (Sidlova's) involvement. His version in the later affidavit is that he did not know the person who contacted him and that he had merely put him in contact with the Respondent and that Respondent was the one who should know the owner of the material and the place of delivery.

[25] Also, if one has regard to Nozithshixwana's affidavit, attached to Respondent's affidavit, "there was nothing unusual to his instructions and that it often happened that he delivers goods to taxi ranks and it is seldom that he is present when goods are being loaded for transportation. This is further

confirmation that the Respondent failed to exercise responsibility for the vehicle in relation to its possible criminal utilisation.

[26] In addition, in Nozithshixwana's statement of 21 September 2010 he states "Ek ken nie die persoon wie my in Umtata ontmoet het nie. Meneer Goci het na my arrestasie my meegedeel dat hy self met die polisie sou kontak maak en vir hulle vertel van die mense wat hom versoek het om sy voertuig te gebruik om skoonmaak middels terug te vervoer na die Kaap". This was not done nor has the Respondent placed that information before this Court.

[27] I cannot find that the Respondent has established, on a balance of probabilities, that he neither knew, nor had reasonable grounds to suspect, that the vehicle was an instrumentality of an offence referred in Schedule 1 of POCA.

[28] The Supreme Court of Appeal held that at the forfeiture stage, the Court could engage in a proportionality analysis in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role it played in its commission (*Cook Properties case* (supra))

[29] In *National Director of Public Prosecutions v Cole and Others* 2004(2) All SA 745 (W) the Court held that any proportionality analysis would have to weigh the impact of the forfeiture on the Respondent and also against the public interest in the prevention of crime.

[30] In *Mohunram and another v NDPP & Another* 2007(4)SA 222 CC, Moseneke DCJ held "in deciding whether or not a forfeiture of property would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered." Sachs J held in *Mohunram* (supra) that, "the purpose of the legislation is primarily deterrent. In relation to the instrumentalities of an offence, it seeks to prevent people from using their property or allowing it to be used for the commission of offences. The closer one gets to the prevention of organised crime, which is the primary rationale underlying POCA, the greater the importance of the purpose becomes."

[31] The quantity of dagga transported in the vehicle was confirmed to be 1660kg although Respondent attempted to argue that the forensics report only referred to 619g. It is evident that the vehicle was loaded with bags of dagga and that only samples were sent for forensic analysis. Furthermore, the driver, having been represented in the criminal matter by Respondent's attorneys of record, pleaded guilty to 1660 kg.

[32] The quantity of dagga would indicate that same was meant for pursuing an offence which is close to one of organised crime, that is, dealing in dagga. The street value of the dagga would be significant in comparison to the value of the vehicle.



[33] It is accordingly in the public interest to forfeit the vehicle to the state as this would serve to deter people from allowing the property to be used as instrumentalities of offences such as drug dealing.

[34] I am accordingly of the view that the Applicant has made out a proper case on a balance of probabilities that the forfeiture of the vehicle is proportionate to achieving the objectives of POCA.

[35] In the circumstances, it is ordered that-

[35.1] The respondent's claim for the exclusion of his interest in the property is dismissed with costs

[35.2] An order is granted in terms of the provisions of Section 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring the Mercedes Benz Sprinter with registration number FFN225 EC (the property) forfeit to the State.

[35.3.] Ricardo Reginald Rhoda, a Senior Special Investigator in the employ of the Asset Forfeiture Unit of the National Prosecuting Authority is authorised to uplift the property from the SAP 13 Clerk at the Oudtshoorn police station and to arrange the sale of the property by way of an auction or a private sale and directed to deposit the proceeds of the sale of the property into the trust account of the State Attorney.

[35.4] The State attorney is directed to transfer the proceeds deposited into its trust account into the Criminal Assets Recovery Account established under section 63 of POCA with account number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria.

[35.5] In accordance with section 50(5) of POCA, the Registrar of the above Honourable Court is ordered to publish a notice of this order in the government gazette as soon as practicable after the granting of this order.

[35.6] The Respondent is ordered to pay the Applicant's costs from date of filing the notice of opposition in the preservation application.

  

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**GANGEN A J**