

SOUTH AFRICA / JUDGMENT

Buys and Others v Minister of Police and Another (2339/2016) [2018] ZANCHC 37 (29 June 2018)

[2018] ZANCHC 37**COURT**

Northern Cape High Court, Kimberley

BEFORE

C J Olivier, C C Williams, M Mamosebo

CASE / FILE NUMBER

2339/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(Northern****Cape High Court, Kimberley)****Reportable:**

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CASE

NO:

2339/2016

DATE

HEARD:

22

JUNE 2018

DATE

DELIVERED:

29

JUNE 2018

In

the matter between: BUYS,
CHARLES
1st
Appellant
BUYS,
ANDRIES
2nd
Appellant
BUYS,
CONRAD
3rd
Appellant
BUYS,
GORDON
4th
Appellant
MOSSEL,
LOUIS
5th
Appellant
and
MINISTER
OF
POLICE
1st
Respondent
HEAD
OF HAWKS, SA POLICE
SERVICE
2nd
Respondent

Coram: Williams
ADJP et
Olivier
J et
Mamosebo
J

JUDGMENT

Olivier J:

[1.] On 26 July 2016, 29 July 2016 and 9 September 2016 members of the South African Police Service seized property of the appellants, Mr Charles Buys (1st appellant), Mr Andries Buys (2nd appellant), Mr Conrad Buys (3rd appellant), Mr Gordon Buys (4th appellant) and Mr Louis Mossel (5th appellant)[1].

[2.] Although it appears that some of the items were seized on the basis of a search warrant in terms of section 21 of the Criminal Procedure Act^[2] (“the Act”), other items were seized without such a warrant.

[3.] The appellants were arrested and charged with money laundering and theft. It appears that the charges related to the theft or robbery of approximately R37 000 000.00 from a security firm on 6 May 2016.

[4.] The appellants were all subsequently released on bail. The money laundering charge was withdrawn in August 2016. At the time of the filing of the replying affidavit in this matter on 30 November 2016 the criminal proceedings against the appellants had been finally postponed to 26 January 2017.

[5.] In the meantime the appellants had, however, on 27 October 2016 launched an application for the return of their property. The Minister of Police was cited as the first respondent and the “Head of the Hawks, South African Police Service, Kimberley Police, Northern Cape Province” as the second respondent. The application was opposed by the first respondent, but there was never appearance on behalf of the party cited as the second respondent. The application was dismissed on 21 April 2017, on the basis that the parties would bear their own costs in the application.

[6.] The appellants were subsequently granted leave by the court a quo (Snyders AJ) to appeal to this court. The appeal, which is opposed by the first respondent, was initially set down for hearing

on 16 April 2018.

[7.] On that date the appeal was, however, postponed when we intimated to Mr Schreuder, counsel for the appellants, and Ms Phakama, the attorney of the Office of the State Attorney who represents the first respondent, that our prima facie view was that the Director of Public Prosecutions, Northern Cape, should be afforded an opportunity to join.

[8.] On 8 May 2018, and presumably after the papers in the application had been brought to the attention of the Director of Public Prosecutions, the office of the State Attorney filed a notice to abide on behalf of the Director of Public Prosecutions.

[9.] It was never really in dispute that the Director of Public Prosecutions had a direct and substantial interest in the subject matter of the application, and therefore also of the appeal, in his capacity as the functionary responsible for the exercise of the “Power to institute and conduct criminal proceedings” on behalf of the “prosecuting authority”, as envisaged in the provisions of the National Prosecuting Authority Act, 32 of 1998^[3].

[10.] In her heads of argument for the first respondent Ms Phakama raised the objection that the “National Prosecuting Authority” should have been joined, as that authority had “prerogative to bring either preservation or forfeiture application”. This submission was presumably made with reference to the provisions of the Prevention of Organised Crime Act[4]. Whether or not the authority responsible for such applications would have had a sufficient interest to have been joined as a party in the application, is not the issue here and need not be decided.

[11.] Mr Schreuder has in supplementary heads of argument, filed after the notice to abide had been filed, submitted that the fact that the Director of Public Prosecutions has decided to abide by any decision taken in this appeal, shows “that the DPP had the same view than before, namely not to oppose the initial application”. In support of this submission Mr Schreuder has referred to the fact that the deponent for the first respondent had in the answering affidavit stated that the police had “informed the National Prosecuting Authority and it is in their discretion to consider whether to bring an application for forfeiture or not”.

[12.] In the first place it is by no means clear from the statement that the National Prosecuting Authority had indeed been alerted of the application and of the relief claimed therein, as opposed to having been alerted of the seizure of the property and of the charge/s against the appellants.

[13.] More importantly though, it would seem that Mr Schreuder confused the role that the National Prosecuting Authority plays in terms of the provisions of the Prevention of Organised Crime Act with the role that it plays in terms of the National Prosecuting Authority Act, and more specifically the role that the Director of Public Prosecutions in this province plays in the exercise of the power to

institute and conduct criminal proceedings.

[14.] It follows that the Director of Public Prosecutions in this province should, especially in view of the fact that the charge of theft had not yet been withdrawn at the time when the application was launched, have been joined as a respondent and that he had a direct and substantial interest in the application at that stage. That interest remains relevant in the appeal, inter alia as regards the effect of the eventual decision to withdraw the theft charge against the appellants, with which I will deal in due course.

[15.] Ms Phakama argued in limine that no notice of appeal was filed as required by the provisions of Uniform Rule 49(2) and that there was, as a result of that failure,

in effect no appeal before us. She had to concede that the first respondent has not been prejudiced by this failure. The grounds of appeal were set out in the supporting affidavit in the application for leave to appeal and the court a quo, in granting leave to appeal, made it very clear in respect of which of those grounds leave were being granted. Insofar as it may be necessary condonation is therefore granted. Almost two years have gone by since the property of the appellants was seized and it would, especially in view of what follows, not be in the interests of justice that the hearing of the appeal is further delayed on the basis of what is clearly at most a

technical objection.

[16.] The relevant provisions of section 31(1)(a) of the Act read as follows:

“If no criminal proceedings are instituted ... or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the

article shall be returned to the person from whom it was seized ...”. (my emphasis)

[17.] Prior to the hearing of the application, and as an annexure to the heads of argument on behalf of the appellants, the appellants attempted to introduce an affidavit by their attorney to the effect that the criminal proceedings against them had been withdrawn on 26 January 2017, in other words on the date to which the proceedings had been remanded before, on the basis that it was the final postponement.

[18.] It appears from the judgment of the court a quo that the affidavit was disallowed, on the basis that it had been irregularly introduced and that the first respondent was “not ad idem with the contents thereof”. We were informed from the Bar that it had in fact been common cause that the criminal matter had been withdrawn, and that the problem that Ms Phakama at the time had with the contents of the affidavit was only that it was not mentioned that, according to her information, the withdrawal had been a “provisional” one.

[19.] The court a quo proceeded to distinguish Choonara v Minister of Law and Order and Others[5], Venter v Minister Van Polisie[6] and Dookie v Minister of Law and Order[7] on the basis that, unlike in those cases, legal proceedings had in the present matter indeed been instituted. It was furthermore

remarked that the appellants would have been better off had they brought their application after the charges against them had been

withdrawn. It is very clear from the judgment that the court a quo chose to disregard not only the contents of the affidavit, but also what had clearly (as appears from the judgment) been conveyed to the court a quo from the Bar.

[20.] In this the court a quo was in my view, with respect, wrong. The affidavit had undoubtedly been introduced irregularly, but it was common cause,

very clearly, that the criminal proceedings against the appellants had at that stage indeed been withdrawn, whether provisionally or otherwise, and whether or not the criminal proceedings against the appellants remained instituted at the time when the court a quo had to consider whether the property should be returned to the appellants was a crucial issue in the exercise of its discretion in this regard. The court a quo had the discretion to allow this further affidavit in the interests of justice, or at the very least take into account what it had been informed of from the bar[8], and as will appear from what follows it would have caused no prejudice to the first respondent if cognisance was taken of the fact of the withdrawal, even if only on the basis that the intention had been to withdraw the remaining charge on a provisional basis only.

[21.] In *National Director of Public Prosecutions and others v Freedom under Law*[9] Brandt JA remarked as follows:

“I do not believe a decision to withdraw a criminal charge ... can be described as ‘provisional’ just because it can be re-instituted. It would be the same as saying that because a charge can be withdrawn, the institution of criminal proceedings is only provisional. As I see it, the withdrawal of a charge in terms of section 6(a)[10] is final. The prosecution can only be recommenced by a different, original decision to re-institute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.”[11]

[22.] This means that the withdrawal of the theft charge, even if only intended as a provisional withdrawal, brought the criminal proceedings to an end. At the time when the court a quo had to consider the application, the criminal proceedings had not been re-instituted. Therefore, for purposes of section 31(1)(a) of the Act, there were no pending criminal proceedings at the time when the court a quo had to consider whether to order the return of the goods to the appellants.

[23.] The Police had by then already been in possession of most of the property for approximately nine months and “the deponent(s) for the (first) Respondents (did not) give any indication of what avenues of investigation remain unexplored; nor, indeed, is there any averment that such avenues exist”[12]. Almost three months had expired since the withdrawal of the remaining charge against the appellants, without any indication, on the papers, that the criminal proceedings would be reinstituted. In my view the appellants had on the evidence before the court a quo discharged their onus to show that “there was no reasonable likelihood of criminal proceedings being instituted in connection with the article in the foreseeable future”[13]. More than a reasonable time within which to have instituted criminal proceedings had lapsed since the seizure of the property[14] and there was no explanation before the court a quo for the fact that the proceedings that had been instituted, had been withdrawn. On this basis alone the appellants were in my view entitled to an order for the return of their property.

[24.] I will however, in case I am wrong in this conclusion, consider the alternative basis for the return of the property that is provided for in section 31(1)(a) of the Act, viz that the return of the property can also be ordered if “it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court”.

[25.] In *Abubakar v Minister of Police and others*[15] the following was stated as regards the burden of proof in circumstances such as these:

“Where the reasonableness of the further detention of the article is challenged, ..., general principles dictate that the onus is on the State to place facts and circumstances before the Court on which such reasonableness may be adjudged.”

[26.] The property of the third appellant that is concerned is a Nokia cell phone with a value of approximately R200.00 and shoes with a value of approximately R2 500.00 that were seized on 26 July 2016. The first respondent did not make an allegation, let alone provide proof, that this cell phone or the shoes could at a criminal trial of the third appellant be “required ... for purposes of evidence or for purposes of an order of court”. No evidence was, for example, produced as to when or how these items had been purchased.

[27.] Exactly the same applies to the property of the fourth appellant that was seized on 29 July 2016, viz a lounge suite, a TV Samsung Curve Set, a TV stand, two beds, a microwave oven and a number of speakers.

[28.] The property of the fifth appellant that had been seized was a black Opel Corsa vehicle, which was seized on 9 September 2016.

According to the deponent for the first respondent the vehicle was seized because the fifth appellant could be “linked” with the first four appellants and because the vehicle had been purchased for an amount of R75 000.00 after the date of the theft at the security company. No attempt at all was made to explain what the so-called “link” was.

[29.] It was furthermore alleged, by the same deponent, that “All investigations up to date reveal that none of the Applicants at the time when these items were bought had sufficient funds available to purchase the items. The only reasonable deduction that we could make was that these items were bought with stolen money”. Needless to say this statement was bald, sketchy and completely lacking in detail. What investigations were made as far as the fifth appellant was concerned and what exactly were the results thereof?

[30.] There was no allegation that the amount of R75 000.00 had been paid in cash. There was therefore no evidence on the basis of which it could be said that this vehicle could reasonably be “required at the trial for purposes of evidence or for purposes of an order of court”. It is in any event not clear why the particular vehicle would have had to be available to be presented as an exhibit for purposes of proving the transaction and the amount of the purchase price, and the decision of the Director of Public Prosecutions to abide has not shed any light on this.

[31.] In the case of the second appellant the police had on 26 July 2016 seized a Nokia cell phone to the value of R200.00, as well as a Blackberry cell phone and a laptop in respect of which no particulars were provided as to their value. The first respondent produced no evidence of any basis upon which these items could be required at a criminal trial for any of the purposes envisaged in section 31(1)(a) of the Act. No allegations were made, for example, as to when or how these items were purchased. On the available evidence it is not clear how the availability of these items, as exhibits, could by any stretch of the imagination assist the prosecution to prove that the second appellant is guilty of theft of the money at the security company.

[32.] On 29 July 2016 the police also seized a BMW vehicle belonging to the second appellant. It seems to be common cause that it was a 2006 model, but no particulars are available of when the vehicle was purchased and what the purchase price was. The deponent for the first respondent

stated that the purchase price had been paid by means of three cash deposits. It was the version of the second appellant that the purchase price had been paid from the proceeds of the sale of two other vehicles. The deponent for the first respondent countered by saying that no sign could be found on the registration system of the sale of two other vehicles of the second appellant. The general allegation already referred to as regards the insufficient funds of the appellants to purchase the items is assumed also to have been intended to apply to this appellant and this vehicle, but again the complete lack of detail would have made it impossible for the court a quo to draw any inferences from this statement.

[33.] Even if it is assumed that the BMW vehicle was purchased after the date of the theft, and even if there had been proper evidence before the court a quo as regards the funds available to the second appellant and the purchase price of the vehicle, it is once again not clear how the physical presence of that vehicle was going to further assist the prosecution to prove that the purchase price had been paid from money that had been stolen. That the vehicle had been purchased was clearly not going to be in dispute, and on the first respondent's own version the Police would seem to have had all the relevant information as regards how the purchase price was paid and what the second appellant's financial means were at the time.

[34.] This brings me to the first appellant. On 26 July 2016 a Ford Focus vehicle belonging to the first appellant was seized by the police. It was common cause that it was a 2009 model, that the first appellant had purchased the vehicle at Human Motors, that the purchase price had been financed by Nedbank and that the monthly instalment was R3 263.40 per month.

[35.] The first respondent supplied no particulars as to when exactly the vehicle was purchased and as to whether or not a deposit had been paid. There was therefore, on the papers, simply no evidence which could provide a basis for saying that the availability as an exhibit of this vehicle could reasonably be required for purposes of evidence or for the purpose of an order of court in criminal proceedings on a charge of theft.

[36.] On 29 July 2016 the police seized a Nokia cell phone (value R600.00) and three vehicles, viz a Tata, a Toyota Quantum and a Corsa bakkie, and a trailer, all belonging to the first appellant.

[37.] As regards the cell phone, no particulars were provided by the first respondent as to exactly when the cell phone was purchased and in what way it was expected to be required at the trial for purposes as envisaged in section 31(1)(a) of the Act.

[38.] As regards the vehicles and the trailer, the deponent for the first respondent stated that they had all been purchased after the date of the theft, the Tata for R365 000.00 in cash. On the same day the first appellant purchased the Corsa vehicle for R122 816.41, again in cash. It is not clear exactly when the Toyota Quantum vehicle was purchased, but the case of the first respondent was that the first appellant had paid an amount of R64 500.00 in cash as a deposit on that transaction, as well as a first instalment of R11 500.00, also in cash. The case for the first respondent, as enunciated in the general and vague statement that I have already alluded to, was that the first appellant did not have other funds, than the stolen money, with which to have paid these

amounts.

[39.] As regards the ability of the first appellant to have paid the amounts from funds not derived from the theft, the statement by the deponent for the first respondent was, as was the case in respect of other items that had been purchased after the date of the theft, lacking in any detail and completely vague.

[40.] It was not disputed that the vehicles and the trailer had been purchased, and also not that the date of the theft preceded the dates of the purchases. Once again, however, it is not clear how the physical presence of the vehicles and the trailer would help the prosecution to prove, by means of those exhibits, that the relevant amounts had been paid with stolen money or with money that

constituted the proceeds of the theft. To put it another way, it is not clear why the prosecution would not have been able to prove those transactions, and the first appellant's financial position, without presenting the vehicles and the trailer as exhibits. The fact that the Director of Public Prosecutions has seen fit to abide, and to file no affidavit, has left this court in the position where it has to draw the inference that the availability of these items as exhibits would not have taken the matter any further.

[41.] It was common cause that the first appellant had, when the police officers were going to seize the Toyota Quantum vehicle, presented them with a document, a copy of which was also annexed to the founding affidavit. The document clearly pertains to a credit agreement between SA Taxi Association (Pty) Ltd and the first appellant in respect of a 2011 vehicle. It was also common cause that the vehicle that was seized was a 2016 model. The deponent for the first respondent apparently interpreted the contents of the document as somehow contradicting what the first appellant had been trying to convey to the police officers by showing them the document.

[42.] However, the first appellant's explanation for this, given in his founding affidavit already, was that the document had been presented merely as an example of how he purchased vehicles with the financial assistance of SA Taxi Association (Pty) Ltd, and therefore not to convey that the seized vehicle was indeed the vehicle described in the document. This explanation was never disputed.

[43.] In paragraph 17 of the judgment of the court a quo it was, however, nevertheless found that it was the appellants' case that the "Quantum taxi seized" was a 2011 model and that it was the subject of "the financial statement" attached to the founding affidavit. This finding is, with respect, wrong and it is not borne out by the undisputed evidence. Insofar as the finding may have implied that the first appellant had through this attempted to mislead the police officers, this too would have been wrong.

[44.] The conclusion to which I have come, as regards the alternative basis provided for in section 31(1)(a) of the Act, is therefore that the first respondent had not discharged the onus of showing that the property “(was) required at the trial for purposes of evidence or for purposes of an order of court”.

[45.] It is therefore not necessary to consider whether all of the property had been lawfully seized. Suffice it to say that, as far as the property that was seized without a warrant is concerned, the first respondent did not so much as allege that the police officers involved “... on reasonable grounds believe(d) –

(i) that a search warrant (would) be issued ... under paragraph (a) of section 21(1) if ... applie(d) for ...; and

(ii) that the delay in obtaining such warrant would defeat the object of the search”

as required by the provisions of section 22(b) of the Act.

[46.] In the circumstances I am of the view that the return of the property to the appellants should have been ordered, and that the order dismissing the application for an order to that effect should be set aside. There is no reason why the costs of the appeal should not follow this result.

[47.] This would mean that the appellants had been successful in the application, and it has not been argued that they would not in such

event have been entitled to their costs.

[48.] As regards the costs occasioned by the postponement to afford the Director of Public Prosecutions the opportunity of joining, which

were reserved for later determination, I am of the view, in the light of what I have already said in this regard, that the appellants

should pay those costs.

[49.] In the premises the following orders are made:

1. THE APPEAL SUCCEEDS AND THE ORDERS OF THE COURT A QUO THAT:

“1. The application is dismissed.

2. Each party is to pay their own costs.”

ARE SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING ORDER:

“1. THE RELIEF SOUGHT IN PARAGRAPH 1 OF THE NOTICE OF MOTION DATED 27 OCTOBER 2016 IS GRANTED.

2. THE FIRST RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPLICATION.”

2. THE FIRST RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPEAL, INCLUDING THOSE OF THE APPLICATION FOR LEAVE TO APPEAL.
3. THE APPELLANTS ARE ORDERED TO PAY THE COSTS OCCASIONED BY THE POSTPONEMENT OF THE APPEAL ON 16 APRIL 2018.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

I concur.

C C WILLIAMS

ACTING DEPUTY JUDGE PRESIDENT

M MAMOSEBO

For the appellants: ADV. JJ SCHREUDER

(Instructed by Legal Aid South Africa, Kimberley)

For the respondents: MS N PHAKAMA

(Instructed by Office of the State Attorney)

[1] Erroneously cited in the heading of the application as Louis Buys

[2] 51 of 1977

[3] See, inter alia, the provisions of section 20 of the said Act.

[4] 121 of 1998

[5] 1992 (1) SACR 239 (W) (Also reported at [1992] 3 All SA 585 (W))

[6] 2014 JDR 0373 (GNP)

[7] 1991 (2) SACR 153 (D) (Also reported at [1991] 1 All SA 390 (D))

[8] Compare *Venter v Minister Van Polisie*, supra, p 3

[9]

[2014] 4 All SA 147 (SCA)

[10] Of the Act

[11] Ibid, para [34]

[12] Dookie v Minister of Law and Order, *supra*, at 156 a

[13] *Ibid*, at 156 d

[14] See Choonara v Minister of Law and Order and Others, *supra*, at 246 g

[15]

[2015] JOL 34129 (GJ) (2014 JDR 1238 (GJ) para [24]

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Prepared on 13 October 2026 · Esheria