

SOUTH AFRICA / JUDGMENT

Mantella Trading 522 CC t/a Designer Lighting v National Director of Public Prosecutions (CA104/2022) [2024]

ZAECMKHC 104 (25 September 2024)

[2024] ZAECMKHC 104

COURT

Eastern Cape High Court, Makhanda

BEFORE

F B A Dawood, A Govindjee, T Madyibi

CASE / FILE NUMBER

CA 104/2022

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, MAKHANDA)

Case

No: CA 104/2022

In

the matter between:

MANTELLA
TRADING 522 CC t/a
DESIGNER
LIGHTING
Appellant
and
NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
Respondent
APPEAL

JUDGMENT

DAWOOD J:

Introduction

[1] The appellant, Mantella Trading 522CC trading as Designer Lightning (Mantella), sought leave to appeal against the judgment of Rugunanan J where he granted judgment in favour of the respondent, National Director of Public Prosecutions (NDPP) in the following terms: -

“(i) The property in the amount of R1 380 000 (one million three hundred and eighty thousand rand) is declared forfeited to the state.

(ii) Mr Khayaletu Ncula who was appointed at preservation stage is hereby directed to forthwith deposit the aforesaid property in the amount of R1 380 000 (one million three hundred and eighty thousand rand) into the Criminal Asset Recovery Account number 8[...]held at the Reserve Bank.

(iii) The respondent shall pay cost of the application.”

[2] Mantella’s application for leave to appeal that was brought in the court a quo contained inter alia the following grounds of appeal: -

- (a) That the court a quo failed to apply the proportionality test.
- (b) That the court a quo misdirected himself in finding that Mantella should have applied for an exclusion in terms of section 52 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and that Mantella has the onus.
- (c) That the court a quo misdirected himself in the application of the rule in Plascon-Evans.
- (d) That the court a quo misdirected himself in finding that the sum of R1380 000 paid to the respondent by Victory Ticket was the proceeds of unlawful

activities because it constituted part and parcel of the sum of R5895 000.00 paid by BCMM to Victory Ticket and should have

found that R688 560 was the property of Mantella.

- (e) That the court a quo failed to have any adequate or proper regard to the findings and judgment of Smith J regarding the limitation of the forfeiture order to the extent to which Mantella profited from the sale.

[3] The court a quo based on the aforesaid application for leave to appeal, granted Mantella leave as follows:

“The respondent (Mantella) be and is hereby granted leave to appeal to the Full Court of this division against the proportionality findings made by this court in its judgment and order handed down on 8 April 2021.” (own emphasis)

The court a quo restricted the basis of Mantella's appeal to the proportionality findings only. This court accordingly is called upon to exclusively deal with the proportionality findings as this is the only issue that was made the subject matter of the appeal. The parties were accordingly obliged to restrict their arguments to this aspect.

[4] Mantella's counsel attempted to convince this court to hear arguments on inter alia the issue of unlawfulness and the other points that were part of the Mantella's application for leave to appeal. This approach cannot be countenanced in the present circumstances having regard to inter alia the following: -

- (a) Those matters were raised in the application for leave to appeal.
- (b) Leave was not granted on those issues, despite the same being raised.
- (c) Mantella could have sought leave to appeal from the Supreme Court of Appeal on those issues if it intended to pursue those issues and believed that it had reasonable prospects of success on appeal in respect of those additional issues.
- (d) Mantella instead addressed this court in respect of those issues claiming in its viva voce argument that it was entitled to do so in terms of Rule 49 (b), when asked on what basis it claimed on entitlement to argue those

issues.

- (e) This approach would not only be prejudicial to the NDPP, who came to court to argue a case of proportionality, but would also make a mockery of the relevant procedure pertaining to appeals.
- (f) A party cannot simply ignore the order granted which restricts its appeal to one point and choose to nonetheless argue all the other issues that had been pertinently raised in its application for leave to appeal but for which he was not granted leave.
- (g) This approach would defeat the purpose of following the procedure of obtaining leave to appeal from the judge whose judgment a party wishes to appeal against.
- (h) There is a safeguard provided for a party who is dissatisfied with that refusal, or in this case, restriction of the issues on appeal.
- (i) Mantella is not prejudiced by this court not considering the additional points.
- (j) It had redress available in the form of applying for leave to appeal to the Supreme Court of Appeal, which it chose not to follow.
- (k) Mantella's proposed approach would undoubtedly give rise to a dangerous precedent, if permitted, since a party would be at large to argue

any, and every point whether leave was granted or not on those issues, to the prejudice of the other party and in total disregard of the rules of court.[1]

(l) Mantella has advanced no cogent reasons why this court should entertain any argument on any other aspect save for that of proportionality.

[5] This court accordingly will only deal with the issue of proportionality and accept the findings of the court a quo on other aspects. The court found as follows with regard to the issue of whether or not the monies were proceeds of unlawful activity: -

“I am satisfied that the Applicant (NDPP) has discharged the onus of establishing that the amount paid to the respondent (Mantella)

constitutes the proceeds of unlawful activities ...”

Legal position

[6] Jafta J writing for the majority of the Constitutional Court in Botha’s[2] case extensively dealt with POCA and the procedure to be followed and found inter alia: -

(a) That the proceeds of unlawful activities did not and could not constitute property as envisaged in section 25 (1) of the Constitution;[3]

(b) That he sees the issue with regard to proportionality differently from the first judgment which concluded that a proportionality exercise which is applicable in respect of instrumentality of an offence equally applies to forfeiture of proceeds of an unlawful activity. [4]

(c) ... That Ms Botha had no right in the money paid ...there can be no talk of deprivation of a right in property.[5]

(d) He concluded by saying “All of the foregoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of crime in circumstances where the person from whom the proceeds taken does not have any interest which is lawfully recognised .”[6] (own emphasis)

[7] Applying the above dicta in Botha’s case to the facts of this case it is evident that: -

(a) The sum of R1 380 000 that was paid to Mantella by Victory Ticket was from the proceeds of the R5 985 000 that was unlawfully paid to Victory Ticket.

(b) That the court a quo found that the said amount paid to Mantella indeed constitutes the proceeds of unlawful activities.

(c) The court a quo’s finding of unlawfulness is binding on this court, as already indicated in the context that this appeal is solely to be determined on the issue of proportionality.

(d) Mantella accordingly does not have an interest in the sum of R 1 380 000 that is lawfully recognised.

[8] This court accepts the unchallenged findings of the court a quo that the amount paid to Mantella is indeed proceeds of crime. The court a quo's reliance on Botha in respect of the inappropriateness of employing the proportionality analysis cannot be faulted. The dicta in Botha above finds application in the circumstances. There can be no application of the proportionality test in light of the fact that the forfeiture was sought and granted on the basis of the monies being the proceeds of unlawful activities and accordingly Mantella had no interest thereto which is legally recognised.

[9] In the circumstances the following order is made:

(i) The appeal is dismissed with costs.

F B A DAWOOD

JUDGE OF THE HIGH COURT

I agree.

A GOVINDJEE

T MADYIBI

ACTING JUDGE OF THE HIGH COURT

Heard: 23 July 2024 Delivered: 25 September 2024 Appearances For the Appellant: Adv R P Quinn SC & Adv L Mati Chambers on Beresford, East London Instructed by: Schoombe Van Der Nest Inc. Attorneys for the Appellant 39 Vincent Road East London Tel: 043 743 1267 Email: andres@schoombee.co.za C/o: Huxtable Attorneys 22 new Street Makhanda Email: law1@huxattorneys.co.za For the Respondent: Mr M Wolmarans Attorney for the respondent 5 Betram Street Makhanda Email: marius@dullabhs.co.za

[1] Harlech-Jones Treasure Architects CC and Others v University of Fort Hare 2002

(5) SA 32 (E) at para 56.

[2] National Director of Public Prosecutions v Botha N.O. and Another [2020] ZACC6.

[3] Botha above at para 121.

[4] Botha above at para 122.

[5] Botha above at para 127.

[6] Botha above at para 131.

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