

SOUTH AFRICA / JUDGMENT

Moore and Others v National Director of Public Prosecutions (CA&R 59/2022) [2024] ZANCHC 30 (28 March 2024)

[2024] ZANCHC 30

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams, Nxumalo, Tyuthuza

CASE / FILE NUMBER

CA&R 59/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

Number: CA&R 59/2022

Date

Heard: 15 May 2023

Date

Delivered: 28 March 2024

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Regional Magistrates YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between: HENRIËTTE
 CORNELIA MOORE
 FIRST APPELLANT
 CHRISTOPHER
 LEY MOORE
 SECOND APPELLANT
 ROBERTO
 JORGE MENDONCA VELOSA
 THIRD APPELLANT
 THE
 CM PROPERTY
 TRUST
 FOURTH APPELLANT
 and
 THE
 NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
 RESPONDENT

Coram: Williams J, Nxumalo J & Tyuthuza AJ

JUDGMENT

ON APPEAL

Tyuthuza AJ

INTRODUCTION

1. This appeal comes before the Full Court of this Division by way of leave granted to the appellants by the Supreme Court of Appeal (SCA) on 18 August
2022. The Appeal is against the judgment and order of Mamosebo J, handed down on 30 July 2021 under case number 628/2020 and wherein an order in terms of Section 50(1) (b) of the Prevention of Organised Crime Act 121 of 1998 (the Act) for the forfeiture to the state, of the immovable property Erf 1[...] Barkly West, known as 1[...] S[...] Street, Barkly West was granted.

BACKGROUND

2. The first appellant’s partner Abraham Johannes Diedericks passed away on 25 November 2008. The first appellant (Ms Moore) and the late Diedericks were joint owners of a property situated at 2[...] A[...] W[...], Royldene, Kimberley (the property).
3. The first appellant was jointly appointed with Sanlam Trust Limited as the executrix of the estate of the late Diedericks, but was removed on 14 April 2009 and replaced with Suzette Malherbe of the Sanlam Trust Limited.

4. On 13 January 2014, the first appellant offered to sell the Apian Way property to a certain Mr Michael Bareng Raadt, resulting in the parties entering into a rouwkoop sale agreement and a residential property agreement for the said property.
5. Mr Raadt and his family took occupation of the property in March 2014. He paid a monthly occupation rent of R20,000.00 from 20 January 2014, in addition to which he purchased prepaid electricity coupons from the first appellant in the amount of R10,000.00 for use at the property. From March 2014 to December 2014 Mr. Raadt paid a total amount of R1, 478,650.00 towards the purchase of the property.
6. In February 2014, the first appellant entered into an agreement with Mr Lodewikus Theodorus Pienaar, in respect of purchasing properties in Barkly West. It is common cause that the first appellant utilised the monies received from Mr Raadt to purchase the properties in Barkly West. The respondent's forfeiture application was premised thereon that the Barkly West properties are proceeds of unlawful activities.
7. In essence the appellants' case is that the respondent failed to demonstrate, on a balance of probabilities, that the Barkly West properties are proceeds of unlawful activities and as such that the Court a quo had erred in granting the forfeiture order in that:
 - 7.1. the evidence the respondent relied upon, being the content of the statements of Mr Raadt and Mr Ellis, amounted to inadmissible hearsay evidence and ought not to be allowed;
 - 7.2. on a proper interpretation of the redistribution agreement, the first appellant was entitled to sell 2[...] A[...] W[...] property to Mr Raadt;
 - 7.3. the appellants did not have the intention to either defraud Mr Raadt or commit the offences as alleged.

LAW

8. According to section 50 of the Act[1], the High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned—(a) is an instrumentality of an offence referred to in Schedule 1;(b) is the proceeds of unlawful activities; or (c) is property associated with terrorist and related activities.
9. The Constitutional Court set out the purpose of section 50 in the context of Chapter 6 of POCA as follows:

"...Chapter 6 [POCA] provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, Chapter 6 needs to be understood in contradistinction to Chapter 5 of [POCA]. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings."[2]

10. In terms of section 48(1) of the Act, a preservation order in terms of section 38 must be in force when the application is made for a forfeiture order. The preservation order was granted by this Court on 20 March 2020.
11. The Act defines “proceeds of unlawful activities” as “any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful

activity carried on by any person, and includes any property representing property so derived.” The proceeds must in some way be the consequence of unlawful activity.

12. In terms of s 50(1) of the Act, the NDPP bears the onus, on a balance of probabilities, to establish that the property was an instrument used in the commission of an offence. In order to sustain a forfeiture order the court must look at the whole picture and determine whether the property, in the totality of the circumstances of the case, was a substantial and meaningful instrument in the commission of the offence.[3]
13. Whether or not the respondent was entitled to a forfeiture order depends on whether the evidence adduced by the respondent in support of its case establishes, on a balance of probabilities, that the property concerned represents the proceeds of unlawful activities.

WHETHER THE CONTENT OF THE STATEMENTS AMOUNT TO INADMISSIBLE HEARSAY EVIDENCE:

14. It is common cause that at the institution of this matter the first appellant was standing trial in the Kimberly Regional Court on charges of fraud and money laundering.
15. The preservation application in terms of section 38 of the Act was premised on information obtained from the written statements of Mr Raadt and Mr Ellis. These statements were attached to the application launched on 13 March 2020.
16. In its founding affidavit, the NDPP submits that there are reasonable grounds for believing that the property is the proceeds of unlawful activities and thus liable to be preserved and/or forfeited.
17. The appellants deny that the first appellant acted unlawfully in either selling the Apian Way property or receiving payment in terms of such sale agreement from Mr Raadt. The appellants admit that there was receipt of payment of the first instalment and payment in respect of the deposit in terms of the agreements concluded with Mr Raadt. The appellants do not dispute that the first appellant intended to use the money in respect of the Apian Way property to purchase the Barkly West properties.

The appellants submit that the Barkly West properties are not proceeds of unlawful activities.

18. The deponent in the section 38 application, Mr Ontong, a senior state advocate in the employ of the NDPP, deposed to his affidavit on 17 March 2020. According to him, the facts deposed to are derived from affidavits and annexures attached to his affidavit and are within his personal knowledge. He refers to the supporting affidavit of Mr Smit deposed to on 28 February 2020 which, according to him, sets out the facts upon which the section 38 application is based. In my view, the source of Mr Ontong's information is Mr Smit, and thus Mr Ontong does not have personal knowledge of the facts.
19. According to the supporting affidavit, Mr Smit is a senior financial investigator who is also in the employ of the NDPP and he too states that the content of his affidavit falls within his personal knowledge. He is an investigator for asset forfeiture purposes in the criminal trial relating to fraud, theft and money laundering under Kimberley CAS 148/2017. Mr Smit however depends on Mr Raadt, Mr Ellis and Mr Lategan for the information. Mr Raadt's affidavit was attested to in May 2016. Mr Ellis' affidavit was attested to in August 2017. Despite the fact that Mr Smit only deposed to the supporting affidavit in February 2020, he never obtained the confirmatory affidavits of Mr Raadt and Mr Ellis. From what I can glean from the affidavit of Mr Smit, he obtained the information from the affidavits and never held interviews with Mr Raadt and Mr Ellis.
20. Evidently, the affidavits of Mr Raadt and Mr Ellis were not for the purposes of the application but in respect of the criminal investigation. Neither Mr Raadt nor Mr Ellis have deposed to confirmatory affidavits confirming the content of the affidavits in this application.
21. The NDPP's replying affidavit is deposed to by Mr Ntimutse, an advocate and the Acting Deputy Director of Public Prosecutions in the employ of the NDPP. He states therein that the facts deposed to "are derived from both the affidavits and annexures attached hereto which is at my disposal and therefore within my personal knowledge". Despite the appellants' denial that the deponents to the section 38 and 48 applications have personal knowledge of the facts, the NDPP does not amplify its case by attaching the confirmatory affidavits of Mr Raadt or Mr Ellis.
22. Section 3 of the Law of Evidence Amendment Act 45 of 1988 prohibits the admission of hearsay evidence in criminal or civil proceedings unless each party against whom the evidence is to be adduced agrees to the admission thereof; or the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings or unless the court is of the opinion that such evidence should be admitted in the interests of justice. A Court has a wide discretion in terms of section 3(1) of the Law of Evidence Amendment Act to admit hearsay evidence in the interests of justice. In deciding whether or not to admit hearsay evidence, the court must consider six factors, namely: the nature of proceedings, the nature of evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value depends, the prejudice to any party which the admission of such evidence might entail and any other factor which should, in the opinion of the Court, be taken into account.[4]

23. In this matter where a finding needs to be made on a balance of probabilities, whether the Barkly West properties are proceeds of unlawful activities and thus should be forfeited to the State. The evidence which the NDPP bases its application on comes by way of statements compiled by Mr Raadt in 2016 in regard to a criminal investigation and that of Mr Ellis which was written in 2017. The NDPP proffers no explanation as to why it did not obtain the confirmatory affidavits of Mr Raadt or Mr Ellis

in the section 38 application launched in 2020. It is common cause that the criminal proceedings instituted in the Regional Court are as a result of a complaint which was laid by Mr Raadt against the appellants. Mr Raadt in his statement does not disclose the litigious history between the parties. The prejudice to be suffered by the appellants herein is significant. The appellants were not given an opportunity to interrogate the statement of Mr Raadt. The statement of Mr Raadt was made in 2016 and he

did not file an affidavit in these proceedings to confirm the content of the NDPP's affidavit. There is no averment by the deponents to the respondent's affidavits that they have interviewed Mr Raadt on the statement. The probative value of the evidence tendered depends on the credibility of Mr Raadt and not of Mr Ontong, Mr Smit or Mr Ntimutse.

24. The deponents in the application rely heavily on the statements of Messrs Raadt and Ellis. I take the view that it would not be in the interests of justice to allow the evidence due to the deponent's lack of personal knowledge of the material facts and having failed to obtain confirmatory affidavits of Messrs Raadt and Ellis. Those affidavits were compiled almost 4 years before the application was instituted and the NDPP should at the very least have obtained such confirmatory affidavits to prove the veracity of the information.
25. The Court a quo placed reliance on hearsay evidence of Mr Raadt and Mr Ellis and ruled that it did so in the interests of justice. Respectfully,
- in that regard, the Court a quo misdirected itself.

INTERPRETATION OF THE AGREEMENT

26. It is the appellants' case that, by virtue of the provisions of the 2013 redistribution agreement, the first appellant was entitled to deal with the Apian Way property as she deems fit, which included the right to rent out the property and to sell it.
27. According to the redistribution agreement, the first appellant was granted 50% of the deceased's share in the Apian Way property. The other 50% of the property was already registered in the name of the first appellant.

28. The respondent despite being aware of the redistribution agreement and its contents, failed to disclose same in the section 38 application, and submits that the content of the redistribution agreement are irrelevant to the proceedings. I do not agree with this reasoning and I am of the view that the first appellant entered into agreements with Mr Raadt as a result of the redistribution agreement and as such the content therefore must be considered in determining the issues herein.

29. The pertinent clauses of the redistribution agreement state:

“4. Voormelde toekenning van die bates is onderhewig aan die voorwaarde dat:

4.1 HENRIETTA CORNELIA MOORE ‘n kontantbedrag van R200,000 (TWEЕ HONDERD DUSEND RAND) aan die eksekuteur van die boedel sal betaal binne 8 (AGT) maande nadat die Herverdelingsooreenkoms onderteken is deur beide JACOB LE ROUX DIEDERICKS en CHRISTELLE DIEDERICKS;

4.2 Registrasie van oordrag van die eiendom gemeld in 3.1 in naam van voormelde HENRIETTA CORNELIA MOORE sal geskied na ontvangs van betaling van die bedrag in 4.1, vry van wisselkoers of enige ander kostes, of by ontvangs van ‘n onherroeplike waarborg, aanvaarbaar vir die Eksekuteur, uitgereik deur ‘n bank of finansiële instelling, vir betaling van die bedrag van R200, 000 (TWEЕ HONDERD DUSEND RAND), betaalbaar aan die transportbesorger vir krediet van die boedel.”

5. Die boedel sal aanspreeklik wees vir die oordragkoste van die voormelde onroerende eiendomme soos hierbo beskryf, asook vir die kostes vir die opstel van hierdie Ooreenkoms.

6. Die res van die oorledene se boedel sal verdeel word kragtens die verdere bepalings in die oorledene se testament genoem.

7. Dit staan die partye vry om met die bates te handel na goeëddunke sodra die herverdelingsooreenkoms deur all partye onderteken is.”

30. Loosely translated from Afrikaans it means the following:

4. Aforementioned award of the assets is subject to the condition that:

4.1 HENRIETTA CORNELIA MOORE will pay a cash amount of R200,000.00 (TWO HUNDRED THOUSAND RAND) to the executor of the estate within 8 (EIGHT) months from the signing of the redistribution agreement by both JACOB

LE ROUX DIEDERICKS and CHRISTELLE DIEDERICKS;

4.2 Registration of the transfer of the property mentioned in 3.1 in the name of HENRIETTA CORNELIA MOORE will be effected on receipt of payment of the amount mentioned in paragraph 4.1, free from exchange rate or any other costs, or upon receipt of an irrevocable guarantee, acceptable to the Executor, issued by a bank or financial institution

for the payment of the amount of R200, 000.00 (TWO HUNDRED THOUSAND RAND), payable to the conveyancers to the credit of the estate;

4.3. The executor's conveyancers will see to the registration of the transfer into the name of HENRIETTA CORNELIA MOORE.

5. The estate will be liable for the transfer costs of the aforementioned immovable property as described above, as well as the costs for the drafting of this agreement.

6. The rest of the deceased's estate will be divided in accordance

with the further terms of the deceased's Will.

7. The parties have full discretion on how to deal with the assets as

soon as the redistribution agreement has been signed by the parties.

31. The first appellant and the deceased's children signed the redistribution agreement on 28 November 2013, 18 November 2013 and 1 December 2013 respectively.

32. The redistribution agreement inter-alia dealt with the distribution of the deceased 50% shareholding in the property, which was granted to the first appellant subject to certain conditions. When the first appellant entered into the agreement with Mr Raadt, she had already acquired her 50 % ownership in terms of the immovable property and in my view, the appellant was correctly entitled to deal with the property the way she saw fit.

33. The respondent argues that the only relevant fact to take into consideration is that the first appellant was not the registered

owner of the Apian Way property and therefore could not sell the property to Mr Raadt. I disagree with this reasoning. The

Supreme Court of Appeal has confirmed that in our law, it is not an essential feature that the seller must be the owner of the thing sold. The seller is, however, required

to deliver undisturbed possession of the thing sold.[5]

34. According to GRJ Hackwill, Mackeurtan's Sale of Goods in South Africa 5th ed:

"As has been indicated elsewhere, although the parties to a contract of sale usually contemplate a transfer of ownership in the thing sold, this is not an essential feature of the contract, and sales by non-owners are quite permissible. The delivery required of a seller is the delivery of undisturbed possession (vacua possessio) coupled with the guarantee against eviction."

35. Based on the foregoing, I find that the first appellant, as an owner of the undivided share of the immovable property and the heir of the deceased, was not precluded from contracting to alienate the property and therefore entitled to sell the Apian Way property.

WHETHER THE APPELLANTS HAD THE INTENTION TO DEFRAUD MR RAADT AND COMMIT THE OFFENCES AS ALLEGED:

36. The appellants submit that when the first appellant concluded the agreements with Mr Raadt, she had acted lawfully and did not have the intention to defraud Mr Raadt. She always intended to give transfer of the property to Mr Raadt upon payment of the final payment.
37. The appellants further allege that Mr Raadt was informed that 50% of the property formed part of the estate of Diedericks. It is the respondent's case that Mr Raadt only became aware that the Apian Way property was part of a deceased estate when he went to the municipality to buy electricity in November 2014.
38. The respondent has attached to its papers an e-mail dated 24 April 2014, wherein the first appellant advised her attorney that Mr Raadt was aware that the property is an estate property. Thus, on the appellants' version, Mr Raadt had been aware that the property was part of a deceased estate since January 2014 and this version was not seriously contested in the respondent's answering affidavit and there was no affidavit from Mr Raadt to dispute this. Despite the respondent's reliance on this e-mail which is attached to its papers, the respondent failed to deal with this point in its replying papers. Furthermore, on Mr Raadt's version, he only became aware of this in November 2014, but one would have expected Mr Raadt to have immediately laid a complaint with the police. He waited for almost two years to lay the complaint, after the default judgment was granted against him in May 2016.
39. In light of the fact that this Court has ruled that the first appellant was entitled to deal with the Apian Way property in terms of the redistribution agreement, I find that there exist no grounds to announce that the first appellant or the appellants had the intention to defraud Mr Raadt.
40. As a result, I make the following order:
 - (a) The appellants' appeal is upheld with costs.
 - (b) The order granted by the Court a quo is set aside and replaced with the following order:

"1. The application for forfeiture under section 48 of the Prevention of Organised Crime Act 121 of 1988 is dismissed with costs.
2. The provisional preservation order granted on 20 March 2020 and varied on 24 July 2020 is discharged."

T TYUTHUZA AJ

ACTING JUDGE

I concur.

WILLIAMS J

JUDGE OF THE HIGH COURT

NXUMALO J

APPEARANCES:

On behalf of the Appellants: Adv CD Pienaar Instructed by: Mervyn Joel Smith Attorneys On
behalf of the Respondent: Adv L van Dyk Instructed by: The State Attorney, Kimberley

[1] Prevention of Organised Crime Act 121 of 1998

[2] National Director of Public Prosecutions and Another v Mohamed NO and Others (Mohamed
(1))

[2002] ZACC 9; 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) at para 17

[3] National Director of Public Prosecutions v Parker

[2006] 1 All SA 317 (SCA) at para 18

[4] See: Section 3(1)(c) (i to vii) of the Law of Evidence Amendment Act 45 of 1988

[5] Koster v Norval (20609/14) [2015] ZASCA 185; [2015] JOL 34890 (SCA) at para 4

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