

SOUTH AFRICA / JUDGMENT

Moyo v National Director of Public Prosecutions (38893/2017) [2019] ZAGPPHC 639 (18 November 2019) [2019] ZAGPPHC 639

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

38893/2017

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
(1)

REPORTABLE:

NO/YES

(2)

OF

INTEREST TO OTHER JUDGES: NO/YES

Case Number: 38893/2017

18/11/2019

In

the matter between:

THABANI

ARCHIBALD MOYO

APPELANT

and

NATIONAL

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT**KUBUSHI J**

- [1] The appellant seeks in this application leave to appeal against the whole of the judgment I delivered on 15 March 2019. The facts of the matter appear in the said judgment.
- [2] The appellant's submission is that I misdirected myself when I dealt with the application for the variation of the forfeiture order in terms of section 53 (4) of the Prevention of Organised Crime Act 121 of 1998 ("the POCA") when I should have used the inherent jurisdictional powers of the court.
- [3] The court order the appellant sought to vary pertained to the forfeiture order (clause 1.2 thereof) granted by Janse van Nieuwenhuizen on 17 January 2018.
- [4] Mr Mayo in his founding papers stated that he approached court, for variation of the forfeiture order granted, in accordance with clause 10 of the forfeiture order. The clause provides that any person who is interested in the property concerned, and affected by the forfeiture order, may within twenty one days set the matter down for variation or rescission by the court. He was, consequently, before me on the strength of this clause.
- [5] An application for an order for forfeiture in the circumstances of the present matter is normally sought by the respondent in terms of section 48 of the POCA. In this instance, the forfeiture order was specifically granted in terms of section 53 which allows for the granting of the order by default. It is common cause that the forfeiture order was granted in default. Having regard to the aforesaid, I, in my judgment dealt with the appellant's application in terms of the provisions of section 53 (4) of the POCA.
- [6] It needs to be mentioned that the respondent, on the other hand, opposed and argued the application for the variation of the forfeiture order based on the provisions of Uniform Rule 42 (1). It should also be mentioned that, even though the respondent relied on the provisions of Uniform Rule 42 (1) in its opposition of the application, this was never denied by the appellant since no replying affidavit was filed.
- [7] The jurisdictional requirements of section 53 of the POCA and Uniform Rule 42 (1) are in some respect similar in that the order sought to be varied must have been granted in default. I, in that vein, found in my judgment that on this ground alone, the appellant's application ought to fail because it was not granted by default *per se*.
- [8] Section 53 (4) of the POCA however, provides further that the order may be varied upon good cause shown. Having traversed all the requirements of 'good cause' in my judgment, inclusive of what I referred to as the bona fide defence of the appellant, namely, the arbitrary deprivation of property, I came to the conclusion that the application ought to be dismissed with costs.

- [9] However, it is the appellant's argument in the application for leave to appeal my judgment and order dismissing the variation application, that it was not the his case that the forfeiture order be varied either in terms of section 53 (4) of the POCA or Uniform Rule 42 (1). The appellant's argument is that he approached court on the strength of the inherent jurisdiction of the court to vary the forfeiture order on the ground of section 25
- (1) of the Constitution, the provisions of which prohibits the arbitrary deprivation of property. The contention is that the forfeiture order together with the repudiation of the claim by Discovery Insure had the effect of depriving the appellant of his property arbitrarily.
- [10] During argument of the application for variation, the appellant referred me to judgments in support of his argument that the forfeiture order can be varied using the provisions of section 25 (1) of the Constitution. I found the said judgments to have no relevance to the issue before me and distinguishable on the facts because they dealt with the validity of statutory enactments vis a vis the provisions of section 25 (1) of the Constitution. It is, however, the appellant's contention that I misconstrued his reliance on those judgments. The submission being that the judgments were referred to only to give guidance as to how other courts gave meaning to the provisions of section 25 (1) of the Constitution.
- [11] The grounds provided by the appellant in his founding papers, and in argument during the application for leave to appeal, why he argues that he has been deprived of his property arbitrarily is that there is no reasonable or sufficient explanation for the deprivation of his property or the deprivation is procedurally unfair. The further submission is that on the respondent's own version, there is no rational connection between the January 2018 court order [forfeiture order], the ownership of the motor vehicle by the appellant, the substitution of the cash for the motor vehicle, and the deprivation of the property. There is no end sought to be achieved by the respondent rationally connected to the court order since the purpose of the POCA is the lawful seizure of property where there is a link between that property and the unlawful proceed from crime, That link, according to the appellant is missing because no criminal activities are imputed to the appellant.
- [12] In my judgment, I did not consider whether the forfeiture order granted in terms of the provisions of the POCA may be varied on the grounds of the provisions of section 25
- (1) of the Constitution. It is on that basis I find that another court might come to a different conclusion. Therefore, the application for leave to appeal ought to be granted.
- [13] I make the following order:
1. The appellant is granted leave to appeal to the Full Court of this Division against the whole of my judgment and order delivered on 15 March 2019.
 2. Costs are costs in the appeal.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel

: Adv. Sam Cohen

Appellant's Attorneys

: Dempster Mckinnon Inc.

Respondent's Counsel : Ms De Villiers

Respondent's Attorneys : State Attorneys, Pretoria (NDPP)

Date of hearing

: 14 November 2019

Date of judgment

: 18 November 2019

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