

SOUTH AFRICA / JUDGMENT

Mtoko v National Director of Public Prosecutions (M505/2017) [2019] ZANWHC 46 (30 August 2019)

[2019] ZANWHC 46

COURT

North West High Court, Mafikeng

BEFORE

M E Mametse

CASE / FILE NUMBER

M505/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

Case

Number: M505/2017

In

the matter between:

NOMPUMELELO

LUCY MTOKO

Applicant

and

THE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT

MAMETSE AJ

INTRODUCTION

- [1] This is an application for the rescission of judgment granted against the Applicant on 25 October 2018. The Applicant's Motor Vehicle "Prado" (motor vehicle) was confiscated under the provisions of Section 53 of Prevention of Organised Crime Act, 121 of 1998 (herein referred to as POCA).

BACKGROUND

- [2] The Applicant and her two sons are charged with murder, robbery and attempted murder in the High Court sitting at Mahikeng. The Respondent obtained a preservation order against the Applicant on 23 November 2017. This preservation order relates to the motor vehicle which the Respondent alleged is an instrument of the crime which the Applicant is charged. This preservation order was obtained in the absence of the Applicant.
- [3] The Applicant was served personally with a preservation order and an application for forfeiture order regarding the motor vehicle on 11 September 2018. The notice for forfeiture order did not have a date of hearing. The application for forfeiture order was set down and granted on 25 October 2018. The Applicant filed a notice to oppose a day after the forfeiture order was granted. The Applicant filed a notice for rescission of the forfeiture order on 5 November 2018.
- [4] The Applicant avers in her founding affidavit that she was not served with a preservation notice or order. She left her physical addresses both in Mahikeng and Eastern Cape with the Investigating Officer, but did not receive any notification.
- [5] She was served with the preservation order and she immediately presented the document to a Legal Aid Officer. This Legal Aid Officer did not understand proceedings under POCA. She intended to oppose the forfeiture order however notice to oppose was filed a day after the order was granted. The motor vehicle that was confiscated under preservation order and forfeiture order is not an instrumentality of an offence. She used it to conduct her businesses. On the day of the alleged offences she was transporting the deceased to Johannesburg to buy a Quantum.
- [6] She did not conspire with her sons to commit the crime. She is also a victim of the said crime.
- [7] The value of the amount robbed is less than the value of the confiscated motor vehicle.

LEGAL FRAMEWORK AND CASE LAW

- [8] Section 53(3) of POCA provides as follows:

"Any persons whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1), may, within 20 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court."

[9] The Applicant set down this application for variation or rescission of forfeiture order granted within the required stipulated time.

[10] Section 53(4) of POCA provides that:

“The court may upon good cause shown vary or rescind the default order or give some other direction on such terms as it deems appropriate.”

In *Stemele and another v National Director of Public Prosecution* (3428/2015) [2017] ZAEPEHC 44 (14 September 2017) the court dealt with application for rescission of a forfeiture order and stated the following:

“[15] In order to succeed under common law in an application for the rescission of judgment granted in default the Applicant are required:

1. To provide a reasonable explanation for their default;
2. To show that they had a bona fide defence, which prima facie, carries some prospect or probability of success.”

This entails an existence of a substantial defence. The Applicant must not show a possibility of success as it suffices to show a prima facie case or an existence of an issue which is fit for trial.

(See *PLJ van Renburg en Vernote v Duik* 1971 (2) SA 112 (W))

[11] The Applicant need not deal fully with the merits of the case. However, the grounds of defence must be set out with sufficient detail to enable the court to conclude that there is indeed a bona fide defence.

[12] In *Standard Bank of South Africa Limited v Naddaf and Another* 1999(4) SA 779 (W) Marais J emphasised at 786 that:

“[A] bona fide defence cannot be demonstrated by merely making a [bold] averment lacking in any details. To hold such [bold] averment is sufficient to demonstrate bona fides is a classical oxymoron.”

Good cause required in terms of Section 53(4) of POCA is similar of what is required in Rule 31(2) of the Uniform Rules.

[13] In *Sigh v National Director of Public Prosecutions* [2007] 3 ALL SA 510 (SCA), the following is stated at para 17:

“[17] Property only qualifies as an instrumentality if it is used to commit the offence and its use must be such that it plays real and substantial part in the actual commission of the offence. The fact a crime is committed at a certain place does not by itself make that place an instrumentality of that offence. A closer connection is required.”

[13] This forfeiture order was granted against the Applicant whilst the criminal case is still pending against her. She is stripped of control and usage of the motor vehicle. The principle of natural justice requires that she be heard in this instance.

[14] The expenditure, if any, that the National Director of Public Prosecutions (NDPP) suffered for storage of the motor vehicle is not as a result of the conduct of the Applicant. The Applicant therefore is not supposed to bear the costs.

CONCLUSION

[15] I am satisfied on the facts presented before me that the Applicant has a bona fide defence. The Applicant did not pray for a costs order but the Respondent requested a costs order against the Applicant. Under the circumstances of this case, I am of the view that the most appropriate costs order should be costs in the application.

ORDER

[16] Accordingly, I make the following order:

16.1 The forfeiture order granted on 25 October 2018 is set aside.

16.2 Applicant is granted leave to enter a notice of intention to oppose, within 14 days of the date of this judgment.

16.3 Costs shall be costs in the application.

M E MAMETSE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

APPEARANCES:

Date of hearing

: 06 JUNE 2019

Date of judgment

: 30 AUGUST 2019

Counsel for the Applicant : MR M. E. SETUMU

Counsel for the Respondents : ADV E. MATHEBULA

Attorneys for the Applicant : Legal Aid

Attorneys for the Respondents : State Attorneys

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