

SOUTH AFRICA / JUDGMENT

Nationa Director Public Prosecutions v Maisela (28844/09) [2009] ZAGPPHC 360 (17 December 2009)

[2009] ZAGPPHC 360

COURT

North Gauteng High Court, Pretoria

BEFORE

Omar, AJ

CASE / FILE NUMBER

28844/09

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

NOT

REPORTABLE

HANDED

DOWN: 17 DECEMBER 2009

CASE

NO: 28844/09

IN

THE MATTER OF:

NATIONAL

DIRECTOR PUBLIC PROSECUTIONS

APPLICANT

AND

ELIOT

MAISELA RESPONDENT

JUDGMENT

OMAR, AJ

[1] This is an application for the forfeiture of a blue Toyota Hilux (bakkie) motor vehicle with registration number [.....]

(“the vehicle”) brought in terms of section 48(1) of the Prevention of Organised Crime Act, 121 of 1998 (“the Act”).

[2] The applicant obtained a preservation order in terms of section 38 of the Act on the 19th of May 2009 on an ex parte application before this court. The application was supported by affidavits from PRIYADARSHNEE BISESWAR, MOHUBE JOSIAS MADIGA, TSEPO MOREMI, JANNEL NEL AND MOSTERT VAN SCHOOR.

[3] The respondent being the owner of the blue Toyota Hilux motor vehicle is opposing the making of the forfeiture order in respect of his motor vehicle.

[4] The respondent duly filed a notice to oppose the abovementioned preservation order in terms of section 39(3) of the Act which was accompanied by an affidavit deposed to by the respondent.

[5] The applicant duly published the Preservation order in the Government Gazette on 29 May 2009 and also served a copy of the application for a preservation order on the respondent on 20 May 2009.

[6] The applicant subsequently issued and filed a Notice of Application for a forfeiture order in respect of the vehicle together with the required founding and supporting affidavit and the respondent duly filed a further opposing affidavit.

[7] The applicant contends that the property in question is an instrumentality of an offence contemplated in Part 1 of section 4 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

[8] The respondent opposes the granting of the forfeiture order on the ground that the vehicle in question is not an instrumentality of an offence, and in the alternative seeks an order excluding the property from the operation of any forfeiture order.

[9] The issue to be determined therefore is whether on a balance of probabilities the court can find that the vehicle in question is an instrumentality of an offence referred to above.

[10] The onus is on the applicant to satisfy the court that it has established on a balance of probabilities that the vehicle was used as an instrumentality of the crime referred to above.

[11] The applicant alleges that, as a result of the respondents profile, influence and contact within the Department of Agriculture,

Conservation, Environmental and Rural Development in the North West Province, he was in a unique position to corruptly facilitate the approval of the Record of Decision (which is a public document issued after a basic assessment and scoping processes are done on the portion of land to be developed.) which was needed by the directors of JACARES (PTY) LTD (the complainants) in order to be authorised to establish a health resort and a hotel an plot [.....] within the Madibeng Local Municipality in the North West Province.

The respondent used the vehicle in question as an instrumentality to facilitate the commission of the offence of corruption and to this end travelled in this vehicle on numerous occasions.

[12] Briefly, the applicant alleges that the respondent used the vehicle on the following days and in the following manner:

a) On 27 March 2009 he travelled from his house to meet with the complainants Mr. Nel and Mr Van Schoor in Hartbeespoort. At the meeting he told them that he had instructed to finalise the documents in relation to their application. He also indirectly

requested a sum of money as he asked them what he should tell others when he gets to his office. The next day he sent a text message to Mr. Nel informing him to put together an amount of R1,5 million because he needed to persuade two of his colleagues.

b) On the morning of 30 March 2009, he travelled to Rustenburg to meet Mr Tshepo Moremi to fetch the record of decision.

c) On the afternoon of 30 March 2009, he travelled from Hartbeespoort dam to Wonderpark Shopping centre in Pretoria where the complainants and him agreed that he will accept R1 million instead of R1,5 million.

d) On 2 April 2009 he travelled from – Hartbeespoort to Pretoria North to further negotiate with the complainants.

e) On 3 April 2009, he travelled to Pretoria North to deliver the record of decision and fetch the amount of R1 million. On this day he was arrested by police officers who had arranged for an entrapment and a bag full of papers with only R20 000,00 on top were on the scene.

[13] Further, the applicant denied that the vehicle is merely incidental to the commission of the offence, and stated that:

a) the use of the vehicle in the furtherance of respondents unlawful activities was deliberate as he had a choice between this vehicle and another more expensive car an X500 BMW of which he is also the owner.

b) the use of the vehicle in the furtherance of this unlawful activities was planned. He was able to get to various destinations without the risk associated with public transport, and the vehicle provided a secure method of transport to convey the supposedly large sum of money and also to deliver the Record of Decision.

- c) the vehicle was important to the success of the unlawful activity as the respondent had used the vehicle to travel to various meetings which facilitated the commissioning of his unlawful activities.
- d) the vehicle was used on numerous occasions to facilitate the respondents unlawful activities.
- e) the vehicle was a necessary tool in the commission of the offence as the respondent resides in Hartebeespoort Dam where the availability of public or alternative transport is extremely limited. He used the vehicle to attend all the “corrupt meetings”, to deliver the Record of Decision and also attended to convey the sum of money with it. The commission of the offence may not have been possible without the vehicle in this matter.
- f) The respondent was able to get to the various destinations at his convenience and without the inconvenience of using alternative and more risky forms of transport.

[14] The respondent alleges that at no stage was the vehicle used as an instrumentality during the committal of a schedule 1 offence.

The use of the vehicle, as alleged by the applicant, fails to provide a foundation for the committal of a schedule 1 offence.

The submission by the applicant that:

- a) the vehicle was used for the sake of convenience,
- b) the vehicle was used for the sake of minimising the risk of public transport.
- c) the vehicle was used as a secure method of conveying a large sum of money and valuable documents, does not qualify it as an instrumentality of an offence.

[15] The applicant failed to provide any evidence:

- a) as to which “valuable documents” would have been conveyed in the vehicle;
- b) as to support an argument that the vehicle provided more convenience or safety than any other vehicle, and as such failed to provide evidence as to why the vehicle was specifically important to the success of the committal of the alleged crime.
- c) as to support an argument that the alleged offence could not have been committed without the use of the vehicle;
- d) as to support an argument that the vehicle was specifically adapted or equipped to facilitate the alleged committal of the offence;
- e) to support an argument that the use of the vehicle was deliberate and planned with a view to commit a schedule 1 offence.

[16] The respondent further alleges that he is the owner of Elegant Mags and Tyres in Brits and that although the vehicle is used for personal uses, it is used mainly in his business in order to convey and transport deliveries which includes the purchase and delivery of tools, parts, documents, meetings and other aspects related to the everyday running of such a business.

As a result of the seizure of his vehicle he is prejudiced and suffering severe financial losses due to the fact that he has to make alternate arrangements for orders and deliveries.

[17] It was contended by counsel for the respondent that the respondent does not deny that he met with the complainants, but that the complainants discussed other business options with him and denies any involvement in any corrupt activities. The meeting on 27 March 2009, on the own version of Supt. Madiga served little purpose and it is in clear contradiction to the applicants founding affidavit that this meeting was to further a crime. Neither the affidavit of Mr. Nel or Mr Van Schoor provided a basis for the allegation made by the applicant. Accordingly, the applicant failed to prove why the use of the vehicle on 27 March 2009 would have acted as an instrumentality for the committal of a crime. No mention is made by any of the role players that a crime was being committed or why the conclusion is made that a crime was being committed.

The applicant failed to show on a balance of probabilities, that the meeting on 30 March 2000 in Rustenburg with Mr Moremi was in

furtherance of a schedule 1 offence. It is evident from Mr Moremi's affidavit that there exists no basis for such a

conclusion and as such on the applicants own version, there is no basis for the making of a submission that the respondent travelled to Rustenburg while using the vehicle as an instrumentality of a crime.

With regard to the meeting on 30 March 2009 the applicant relies on the supporting affidavit of Mr J Nel and alleges that the respondent

would have demanded R1,5 million per sms message already sent on 28 March 2009. Mr Nel submits that the amount was requested in order for the respondent to provide him with the Record of Decision. It is not evident from Mr Nel's affidavit that the amount would have been in order for the respondent to facilitate the Record of Decision, should this indeed have been the case, one would have expected the respondent to have met with Mr Moremi prior to this offer, or in the least for Mr. Nel to make a submission to the effect that this amount related to the facilitating of the Record of Decision.

Accordingly, there is no basis contained in the applicant's papers to indicate that the respondent would specifically have used the vehicle in the furthering of a crime. Even if this meeting might have related to the furthering of a crime, no indication is provided by the applicant why the vehicle was specific to such a crime.

With regard to the use of the vehicle on 2 April 2009, had the respondent indeed been busy with corrupt activities as alleged by the applicant, the presence of police officials would have alerted him to the fact that the complainants were involved with the police. Mr Nel indicates that the respondent was looking around and seemed uncomfortable and even voiced his concern. This clearly does not fit in with the picture of someone who is committing a crime, and who is aware of police being present on the scene. Why the respondent would then have proceeded with the “illegal” transaction seems devoid of all logic.

[18] In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 2004

(2) SACR 208 (SCA).

It was held that where a forfeiture order is sought, the court undertakes a two-stage enquiry. First, it ascertains whether

the property in issue was an instrumentality of an offence. Once that has been confirmed the property is liable to forfeiture and the court then proceeds to the second stage of the enquiry, viz, whether certain interests in the property would be excluded from the operation of the forfeiture order.

In interpreting the term “instrumentality”, the court held that the connection must be such “that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In real or substantial senses the property must facilitate or make possible the commission of the offence.”

[19] In *Singh v NDPP* 2007 (3) All SA 510 (SCA) it was held that:

- (a) there must be reasonable direct link between the property and its criminal use, and
- (b) the use of the property must be functional to the commission of the crime and that the property must substantially facilitate, make possible or be instrumental in, and not incidental to, the commission of the offence.

[20] It is evident from Mr Moremi’s affidavit that the respondent did not corruptly facilitate the approval of the Record of Decision which is a public document and any interested and/or affected party can get access to this document. The department does not charge any fee for processing nor for releasing the Record of Decision. The respondent approached Mr Moremi on behalf of a friend/partner regarding the progress of the application. The respondent did not request any favours from Mr Moremi nor any special treatment of the matter.

[21] It is clear from the founding papers that the applicant alleges that the vehicle was used as an instrumentality of a crime referred to above, namely corruption.

[22] The court had to consider the various allegations by the applicant regarding the use of the vehicle, which the applicant denied was merely incidental to the commission of the offence.

- [23] I am of the view, that it is highly unlikely that the respondent, if he had a choice to use his more expensive BMW motor vehicle or the vehicle in question, would actually use his expensive X500 BMW motor vehicle for his intended purposes. It would be impractical for the respondent to use his X500 BMW motor vehicle as it would be heavier on fuel and more expensive to maintain than the vehicle used. It would be more viable for the respondent to use the vehicle in question instead of this more expensive and uneconomical X500 BMW motor vehicle.
- [24] There is to my mind, no logical reason why the respondent would actually plan to use this particular vehicle in question as any vehicle would have sufficed for his intended purposes and the vehicle in question was at his disposal during the instances when he used the vehicle.
- [25] The use of the vehicle in question, in my view, has no reasonably direct link to the alleged crime committed or the success of alleged unlawful activity of the respondent or in the facilitation of his alleged unlawful activities. If this vehicle was not available or at his disposal, the respondent could have borrowed another vehicle or used public transport and that would have no link on his alleged unlawful activities.
- [26] There was nothing special about the vehicle in question in order to facilitate or make possible the commission of the offence. The vehicle was not specifically adapted or equipped to facilitate the alleged committal of the offence.
- [27] It is so that the respondent was able to get to the various destinations at his convenience and without the inconvenience of using alternative forms of transport. It is my view that this is precisely what the vehicle was used for by the respondent-a convenient method of transport.
- [28] I agree with the submission by the respondent's counsel that, should the vehicle be taken out of the process involved, a crime

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