

SOUTH AFRICA / JUDGMENT

National Director for Public Prosecutions v JV Gold Bridge (Pty) Ltd (27670/15) [2017] ZAGPPHC 798 (16 November 2017) [2017] ZAGPPHC 798

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

27670/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 27670/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

THE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS Applicant
and
JV
GOLD BRIDGE (PTY)
LTD Respondent
IN

RE:

4
X 1 KG GOLD BARS HELD AT GERMISTON SAPS

JUDGMENT

D S FOURIE, J:

- [1] This is an application in terms of section 48 of the Prevention of Organised Crime Act No 121 of 1998 ("POCA") for an order declaring 4 gold bars forfeited to the State. These gold bars are the subject of a preservation of property order granted by this Court on 7 May 2015. This property is currently under the control of the South African Police Service in Germiston. The respondent opposes the application.
- [2] Before the hearing of this application I requested counsel for both parties to prepare a joint list of issues to be determined. It is common cause that the issues are the following:
- (a) Whether the late filing of two confirmatory affidavits by the respondent should be condoned;
 - (b) Whether the respondent has locus standi, in terms of section 48(4) of POCA, to oppose the application;
 - (c) Whether the four gold bars constitute "instrumentalities of an offence" referred to in item 27 of Schedule 1 of POCA, in that the bars are alleged to have been possessed by Pillay, Van Zyl and/or Simply Gold in contravention of section 4(3)(a) of the Precious Metals Act No 37 of 2005 ("PMA");
 - (d) In the event that the gold bars are held to constitute "instrumentalities of an offence", whether the respondent's interest in the gold bars should be excluded from the operation of the forfeiture order in terms of section 52(2A) of POCA.
- [3] The first issue was disposed of by means of an order for condonation as requested. The remainder of the issues shall be dealt with insofar as it may be necessary. Bearing in mind the remaining issues, it will not be necessary to deal with the facts in detail.

BACKGROUND:

- [4] During May 2013 a second-hand goods dealer, Simply Gold (Pty) Ltd represented at the time by one Van Zyl, acquired the gold bars from a certain Pillay. Van Zyl who represented Simply Gold then sold the gold bars to JR Technical Services CC. According to the respondent JR Technical Services made payment to Simply Gold with funds advanced by the respondent.
- [5] The applicant's case stands on two legs. First, the respondent does not have the necessary locus standi to oppose the application for a forfeiture order as it does not have an adequate interest in the subject-matter of the litigation. Second, the gold bars constitute "instrumentalities of an offence" referred to in item 27 of Schedule 1 of POCA, in that the bars are alleged to have been possessed by Pillay, Van Zyl and/or Simply Gold in contravention of section 4(3)(a) of the PMA. Put differently, the applicant's case on the merits turns on whether the gold bars can properly be classified as "unwrought precious

metal".

- [6] The defence is that the respondent does have an interest in the gold bars which must be understood against the contractual and commercial relationship between the respondent and JR Technical Services. Furthermore, according to the respondent the gold bars cannot be classified as "unwrought precious metal" and do therefore not constitute instrumentalities of an offence referred to in item 27 of Schedule 1 of POCA read with section 4(3)(a) of the PMA.

LOCUS STANDI OF THE RESPONDENT:

- [7] It was contended on behalf of the applicant that the respondent does not meet the requirements for locus standi to oppose the application for a forfeiture order. Apart from the fact that the respondent funded the purchase of the gold, it does not have an adequate interest in the gold. Furthermore, any interest which the respondent may have in the gold is too far removed to be adequate. Therefore, so it was submitted, the respondent's interest is purely academic and there is no prove that it is entitled thereto.
- [8] It was pointed out by the respondent that already on 1 July 2015 it caused a notice in terms of section 39(3) of POCA to be delivered, notifying the applicant of its intention to oppose the application for a forfeiture order. At the same time the respondent filed a statement in terms of section 39(5) of POCA in which it is alleged that it funded the purchase of the gold by JR Technical Services.
- [9] During November 2016 the respondent filed a further affidavit in response to the applicant's replying affidavit. During May 2017 this further affidavit was allowed by an order of this Court whereafter the matter was postponed to 6 November 2017 for hearing.
- [10] In this further affidavit it is explained that during or about May 2012 the respondent and JR Technical Services entered into an oral joint venture agreement to source and acquire unwrought gold and silver. Once refined, the gold and silver would be sold to third parties and the profit generated by these sales are to be shared between the respondent and JR Technical Services.
- [11] According to the respondent JR Technical Services is the holder of a precious metal beneficiation licence and in this capacity it may buy or receive unwrought precious metal from any person, provided it acquired it from a person that may sell, deal in or dispose of it under the PMA. JR Technical Services, in its capacity as licence holder, would then conclude the transaction for the acquisition of the gold or silver whereas the respondent would advance the funding to JR Technical Services to facilitate the acquisition of unwrought gold or silver.
- [12] It is further explained that the gold or silver acquired by JR Technical Services would then be delivered to Rand Refinery (Pty) Ltd in terms of a written agreement concluded between JR Technical Services and Rand Refinery. Funds generated on the sale of refined gold would then be deposited into the respondent's bank account whereafter it would be distributed as

follows: 99,8% would be retained by the respondent and 0.2% would be transferred to JR Technical Services. Funds received by the respondent would thereafter be applied towards settling the loan advanced to JR Technical Services. The balance constituted profit to be shared between the respondent and JR Technical Services. According to the respondent the transaction concerned was executed within the framework of this joint venture agreement.

[13] It was contended on behalf of the applicant that this belated explanation should not be accepted as it was only raised by the

respondent in a further affidavit in response to the applicant's replying affidavit. It was pointed out by counsel acting for the

respondent that there is corroboration for this explanation and therefore it can and should be accepted. First, it was already

pointed out during July 2015 in the respondent's section 39(5) statement that it had funded the purchase of the gold by JR Technical

Services. Second, according to the written agreement between JR Technical Services and Rand Refinery it appears in clause 1.9.12 that the "designated account" indeed refers to proceeds which shall "be transferred to the bank account in the name of JV Gold Bridge (Pty) Ltd held at ABSA Bank with account number ...".

[14] In terms of clause 16 of this agreement the amount payable for the metal, less any outstanding fees and charges, shall be transferred by Rand Refinery to the depositor's designated account. According to this agreement it appears that the depositor is JR Technical Services and the "designated account" is, as pointed out above, that of the respondent. Finally, it appears that this agreement was entered into on 18 February 2013, a few months before the gold was sold to JR Technical Services. Having regard to all the above considerations, it was argued that this belated explanation does not appear to be a recent fabrication and should therefore be accepted. I agree with this submission.

[15] With regard to the question whether the explanation given by the respondent meets the requirements for locus standi, it needs to be determined whether the respondent has an interest in the property concerned. Whether a litigant's interest is sufficient to clothe him or her with standing involves a consideration of the facts, the statutory scheme involved and its purpose. The issue must, in other words, be determined in the light of the factual and legal context (*JDJ Properties v Umngeni Local Municipality* [2013] 1 All SA 306 (SCA) at par 27). As far as the factual context is concerned, it appears from the respondent's explanation that the respondent and JR Technical Services entered into a joint venture agreement to source and acquire unwrought gold and silver. JR Technical Services, in its capacity as licence holder, would then conclude the transaction for the acquisition of gold, whereas the respondent would advance the funding to JR Technical Services to facilitate the acquisition. Funds generated on the sale would then be deposited into the respondent's bank account. Funds received by the respondent would thereafter be applied towards settling the loan advanced

to JR Technical Services. The balance constituted profit to be shared between the respondent and JR Technical Services. This arrangement was also applicable with regard to the property in question.

- [16] As far as the statutory scheme and its purpose are concerned, it appears that POCA represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes (National Director of Public Prosecutions v Mohamed NO [2002] ZACC 9; 2002 (4) SA 843 (CC) at par 16). In National Director of Public Prosecutions v Cook Properties [2004] 2 All SA 491 (SCA) it was held (par 18) that the interrelated purposes of Chapter 6 (dealing with civil recovery of property) include: removing

incentives for crime; deterring persons from using or allowing their property to be used in crime; eliminating some of the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned.

- [17] From the above it appears that there was a standing agreement in place between the respondent and JR Technical Services with regard to the acquisition, refinement and sale of the gold. It also appears that both these entities have a direct financial interest, not only in the business of this joint venture, but also in the acquisition of the gold concerned to enable them to do business and to share the profit. Also taking into account the legal context and the fact that the Act defines "interest" very widely, as including but not limited to "any right", I am of the view that the respondent has demonstrated a sufficient interest in the property concerned to clothe it with standing to oppose the application for a forfeiture order.

INSTRUMENTALITIES OF AN OFFENCE:

- [18] The next issue to be determined is whether the four gold bars constitute "instrumentalities of an offence" referred to in item 27 of Schedule 1 of POCA, in that the bars are alleged to have been possessed by Pillay, Van Zyl and/or Simply Gold in contravention of section 4(3)(a) of the PMA. Section 50 of POCA deals with the making of a forfeiture order. Subsection

- (1) provides as follows:

"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) ...
- (c) ..."

- [19] Item 27 of Schedule 1 refers to "any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones". Section 4(3)(a) of the PMA provides as follows:

"No person may have in his or her possession any unwrought precious metal unless he or she is -

- (a) a person contemplated in subsection (1); or
- (b) in possession of such precious metal in fulfilment of a contract of employment with any person contemplated in subsection (1)."

[20] The same Act defines "unwrought precious metal" (insofar it is relevant) as precious metal that:

"Is unrefined ... or has been refined to a purity less than 99,9% and has not undergone any manufacturing process other than being refined or formed into a bar (but not a minted bar), an ingot, a button, plate, sponge, powder, granuals ...".

[21] It is common cause that the gold bars are precious metal as defined in section 1 of the PMA. The question is whether these gold bars are unwrought precious metal. The applicant alleges that the gold bars are unwrought precious metal and because Simply Gold, Van Zyl and Pillay are alleged not to fall within any of the categories listed in section 4(1) of the PMA, they could not have possessed or traded in the gold bars.

[22] A Captain in the South African Police Service and the investigating officer assigned to this matter, deposed to an affidavit in support of the application for a preservation order. In this affidavit he referred to an analysis performed on the gold bars by Lieutenant Colonel Espach who is attached to the scientific analysis of the Forensic Science Laboratory in Pretoria. On Espach's analysis, each gold bar possesses a purity level of 99,9%. In a statement made by Espach he explains the methodology adopted during his analysis of the gold bars and confirms the purity level of each gold bar as being 99,9%. These results are common cause between the parties.

[23] The applicant also relies on an affidavit prepared by the Precious Metal and Beneficiation Manager at the South African Diamond and Precious Metals Regulator. This analysis was aimed at demonstrating that the four gold bars were not "minted bars" which fall outside the definition of "unwrought precious metal". It is not the respondent's case that the gold bars are minted bars.

[24] Upon a proper construction of the definition of "unwrought precious metal" in the PMA, it appears that there are two requirements (insofar it is relevant) for a metal to be classified as "unwrought precious metal": it must have been refined to a purity less than 99,9% and has not undergone any manufacturing process other than being refined or formed into a bar. The word "and" indicates that both requirements must be satisfied.

[25] The definition of "unwrought precious metal" must be read with the definition of "refined precious metal". The latter means precious metal that has been refined to or beyond 99,9% purity. Properly construed it means that a precious metal with a purity level equal or beyond 99,9% is classified as "refined" precious metal. If it has a purity level of less than 99,9%, it is classified as "unwrought" precious metal. In the case before me the evidence indicates that the purity level of each gold bar is 99,9%. These gold bars therefore

fall outside the definition of "unwrought precious metal" and can therefore be classified as "refined" precious metal. It means that the applicant has failed to demonstrate that the four gold bars constitute "instrumentalities of an offence" referred to in item 27 of Schedule 1 of POCA, read with section 4(3)(a) of the PMA. The application for a forfeiture order can therefore not succeed.

[26] The respondent has indicated in its answering affidavit that it also serves as support for a counter-application for the discharge of the preservation order granted on 7 May 2015 and for an order directing the applicant to return the four gold bars to the respondent. Nothing further was said in this regard and in conclusion the respondent only requests that the application be dismissed with costs on the scale as between attorney and client, including the costs consequent upon the employment of two counsel.

[27] Counsel for the applicant pointed out (in her heads of argument) that the respondent is seeking the wrong relief as it cannot apply for the discharge of the preservation order. According to counsel for the applicant the only relief that a respondent can claim is set out in section 47(1) of POCA, and that the respondent has failed to meet those requirements.

[28] During argument I requested both counsel to prepare a draft order according to their respective viewpoints. The draft order presented by counsel for the respondent only requests that the application be dismissed with costs (the alternative mentioned therein is no longer relevant). I therefore accept that it is not necessary to determine whether or not the preservation order should be reconsidered. It was also not included in the list of issues to be determined.

ORDER: In the result I grant the following order:

The application for a forfeiture order in terms of section 48 of the Prevention of Organised Crime Act No 121 of 1998 is dismissed with costs.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

Date: 16th November 2017

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