

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v 999 Music CC (054695/2022) [2024] ZAGPPHC 81 (30 January 2024) [2024] ZAGPPHC 81

COURT

North Gauteng High Court, Pretoria

BEFORE

M P Motha

CASE / FILE NUMBER

054695/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number: 054695/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

REVISED

30/01/2024

In

the matter between:

THE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

and

999

MUSIC CC

RESPONDENT

JUDGMENT

MOTHA, J:

Introduction

[1] Confronting this court is an application in terms of Rule 6(12) (c) of the Uniform Rules of Court. Consequent upon the granting of an order in an ex parte application on 21 December 2022, the respondent's immovable property- described as 85 Carlswald Agricultural Holding, Registration Division Jr. Pretoria- was placed under the preservation order in terms of Section 38 of Prevention of Organised Crime Act 121 of 1998 (POCA). The preservation order affected five properties. Hence, it bears mentioning that this matter deals solely with the property situated at no 85 Carlswald Agricultural Holding.

The parties

- [2] The applicant is the National Director of Public Prosecutions (NDPP), appointed in terms of section 10 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) read with section 179 (1)(a) of the Constitution of the Republic of South Africa, 1996.
- [3] The respondent is 999 Music CC, a close corporation duly incorporated in terms of the Close Corporation Act, 1984.

The

facts

- [4] The main dramatis personae are the National Lotteries Commission (NLC) and South African Arts and Development Association (SAADA), a Non-Profit Organisation (NPO). SAADA was formed, inter alia, to:

“[I]mpart skills in music business, video and film production, dance and the overall business of radio to ensure that young artists are better equipped to manage the professional, social and financial aspects of these industries.”[1]

- [5] On 15 April 2013:

“[T]wo years after it commenced its business, SAADA applied for grant funding from the NLC in terms of section 30 of the Lotteries Act 57 of 1997 which authorizes grants for arts, culture and heritage, in the sum of R18 623 101.23 for a period of 1 year, for purposes of capacitating the youth, especially unemployed youth in the poor and rural areas of the country...”

On 7 June 2014, more than a year after the grant funding application was submitted, half of the amount applied for was approved, in the sum of R9 300 000.00. This amount was further to be paid to SAADA in two tranches of R4 650 000.00 each.”[2]

- [6] SAADA (the “recipient”), represented by its President Arthur Mafokate, entered into a grant funding agreement with the National Lotteries Board (the “board”). For a better understanding of the grant funding agreement, a reference to some of the essential paragraphs in the agreement must be made, starting with paragraph 4 until paragraph 9.

“4. Financial Administration

4.1 The Recipient undertakes to administrate the grand in accordance with general acceptable accounting practices.

4.2 Without detracting from clause 4.1 above, the Recipient shall in respect of the grant keep:

4.2.1 detailed records of all payments received from the board and expenditures incurred which have been set off against all the projects; and

4.2.2 balance sheet detailing the specific assets purchased from the grant received.

4.5 The Recipient must account for all revenue received, be it from ticket sales, broadcasting rights and advertising or received in any other way linked to the projects funded by the board.

5. Progress reports

5.2 The Recipient must ensure that the progress reports reflect each projects activities as stated in the application.

5.3 The Recipient undertakes to submit to the board's interim financial and narrative reports on the utilization of the grant.

8. Procurement

The Recipient must in all procurement activities in terms of this Agreement: ...

- (d) ensure that conflicts of interest or the potential thereof is dealt with appropriately; (e) ensure that procurement procedure are open and transparent in that bias and favoritism are eliminated.

9. General obligations of the Recipient

9.1 The Recipient must: ...

- (e) pay back or seek advice from the board of any interest accrued from the account;
- (f) pay back to the board within six (6) months of the Recipient’s financial year any portion of the grant no longer required; and...

9.2 The Recipient shall not: ...

- (f) allow any other organization to carry out its obligations in terms of the project and/or allow any part of the grant be paid to such an organization.”[3]

[7] On 28 October 2014, the first tranche of R4 650 000.00 was paid to SAADA and the project commenced. A year later, on 13 November 2015, SAADA received the second tranche in the sum of R4 650 000.00.

On 29 April 2016, SAADA produced the final report.

Presidential Proclamation

[8] Following allegations of serious maladministration and corruption at the National Lotteries Commission (NLC), the President of the Republic:

“[I]ssued a proclamation to direct the Special Investigation Unit (SIU) to investigate certain specified matters listed in the proclamation from the period 2014. During the period sanctioned by the proclamation, widespread corruption, fraud, theft and contraventions of the Lotteries Act were discovered by the SIU amongst officials of the NLC and certain Non-Profit Organizations (NPO’s) who applied for NLC grants and who worked in concert with each other.

The grants were paid out by the NLC but not used for its intended purposes. Instead, it was used to buy properties for the benefits of officials of the NLC and members of the NPO's and/or their family members and/or friends.

The SIU’s preliminary investigations revealed that the NLC has lost almost R344 million through their officials and different NPO’s.

The investigation uncovered a vast and intricate network of entities, including trusts, and NPO's and businesses, which were used as conduits to channel the allocated grants in an attempt to hide the provenance of the funds. In almost all instances and to obscure

ownership, the properties were registered in the names of the entities and not in the name of private individuals...”[4]

[9] Pertinently to the matter at hand:

“[A]round January 2016, 999 Music CC, represented by Arthur Mafokate, purchased a property described as 8[...] C[...] road Midrand for R7.5 million. The funds used to purchase the property can be traced back to the R9.3 million grant paid out by the NLC to South African Art and Development Association NPO, represented by Arthur Mafokate, for the purpose of assisting unemployed youth in the poor and rural areas of the country.”[5]

The issues

[10] The applicant submitted that:

“[T]he grants allocated to SAADA, was not used for its intended purpose but instead used to purchase a property for the benefit of Mafokate.”[6]

[11] Prior to receiving the first tranche of R4 650 000.00, on 28 October 2014, SAADA had the balance of R16955.18, this is common cause. The applicant’s submission is that on 13 November 2015, when SAADA received the second tranche of R4 650 000.00, its bank balance

was R57 683.32. After the receipt of the second tranche, SAADA made 5 transfers totaling R4 517 421,00 to Roadshow Marketing CC (Roadshow Marketing). The sole member of Roadshow Marketing is Mr. Mafokate, who is also the director of SAADA. It is noteworthy that prior to receiving the first transfer, the balance in the account of Roadshow Marketing was R226 522.29.

[12] After receiving the transfer from SAADA:

“Roadshow Marketing made 4 transfers totaling R4.4 million to a Nedbank Home Loan account No 8[...].

On 21 January 2016, R4.3 million was transferred from the Nedbank Home Loan account to 999 Music CC’s (999 Music) bank account. The sole member of 999 Music is Mafokate, the same person as referred to above. Prior to receiving the transfer, the positive balance of 999 Music was R879 573.46.

On 22 January 2016, 999 Music transferred R6 750 000 to a firm of attorneys, Cilliers & Reynders Inc for the purchase of the property described as 8[...] C[...] road, Midrand for R7.5 million and on 14 March 2016, Roadshow Marketing transferred a further R361 080.04 to Celliers & Reynders...

The property was subsequently registered in the name of 999 Music which is still the registered owner.”[7]

[13] The respondent submitted that:

“SAADA completed a series of activities during the relevant time period, and I aver that the grant funding, and more, was utilized for these activities. That is, expenses in relation to the activities were incurred during the course of the project and not necessarily on receipt of the tranches paid to SAADA by the NLC. SAADA had to rely on service providers who could fund the project pending the receipt of the grant funding. Only Roadshow Marketing was such a service provider and it duly invoiced SAADA for the services provided. SAADA finance the activities associated with the project and was reimbursed and the expenditure on receipt of the grant funding.”[8]

[14] To amplify its case, the respondent referred to bank statements and invoices from Roadshow Marketing, invoice SM4 for R3 440 121.00 and SM5 for R1 077 300.00, which reflected the work done by Roadshow Marketing. Furthermore, the respondent stated that:

“[T]here is irrefutable evidence of nationwide workshops and talent search competition that led to a number of artists being discovered, who were able to record albums, which the applicant conveniently ignored. Mention must also be made of the female artist, Cici, who was the ultimate winner of the contest and went on to obtain a recording deal with the respondent. This demonstrates that the grant funding from the NLC was indeed used for its intended purpose, and it actually produced tangible results.”[9]

The law

[15] Section 38 of the Prevention of Organised Crime Act 121 of 1998 reads:

“(38) Preservation of property orders

- (1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
- (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned—
 - (a) is an instrumentality of an offence referred to in Schedule 1; or
 - (b) are the proceeds of unlawful activities.
- (3) A High Court making a preservation of property order [may when it makes the order or at any time thereafter,] shall at the same time make an order authorising the seizure of the property concerned by a police official. and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order [, including an order authorising the seizure of the property concerned by a police official].”[10]
- (4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.”

[16] At the risk of stating the obvious, a preservation order is meant to preserve the property in question until a court decides whether it should be forfeited to the state or not. Of necessity, this involves a two-stage process, namely: the first stage which involves an ex parte application, notably with a less than exacting standard of proof, requiring simply reasonable grounds to believe that that the property concerned is the proceeds of an unlawful activity. Thereafter, the second stage is embarked upon, requiring the standard of proof on the balance of probabilities, see section 50(1) of POCA. Explaining this aspect of POCA, the court in *Knoop NO and Others v National Director of Public Prosecutions*[11] held:

“...POCA expressly envisages a two-stage, rule nisi procedure for the grant of a restraint order, with a provisional, ex parte order, preceding the final grant or discharge of the provisional order on a designated return day.”[12]

[17] Dealing with section 38 of POCA, the court in the matter of *National Director of Public Prosecutions and Another v Mohamed NO And Others*[13] held:

“Section 38 forms part of a complex, two stage procedure whereby property which is the instrumentality of a criminal offence, or the proceeds

of unlawful activities is forfeited. That procedure is set out in great detail in ss 37 to 62 of the ACT, which form chapter six of the act chapter 6 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 when no criminal proceedings in respect of the relevant crime have been instituted. In this respect chapter 6 needs to be understood in contradiction to chapter five of the act chapter 6 therefore forecast not on wrongdoers, but on

property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongful doing of the owner or possessor of property is, therefore, not primarily relevant to the proceedings.”[14]

[18] Counsel for the respondent correctly accepted that the applicant was entitled to approach the court ex parte for a preservation order. Accordingly, this point, about which the parties had earlier crossed swords, became a non-issue.

[19] The Respondent approached this court for reconsideration, alternatively rescission or to set aside the order in terms of section 47(3) of POCA. Rule 6(12)(c) of the Uniform Court Rules reads as follows:

“A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.”

[20] Therefore, a reconsideration fits snugly between the two stages. Not only does the court have a wide discretion under 6(12)(c), but also may take into account several factors to reconsider an order obtained ex parte.[15] In essence, this rule addresses the failure to observe one of the critical elements of natural justice, namely audi alterem partem. The court in Industrial Development Corporation of SA v Sooliman[16] elucidates it in the following manner:

“The critical phase in the rule is ‘reconsideration of the order’. The rationale is to address the potential or actual prejudice because of an absence of audi alterem partem when the ex parte order was granted. The rule is not a ‘review’ of the granting of the order. A ‘reconsideration’ is, as has been often said, of wide import. It is rooted in doing justice in a particular respect, i.e. to allow the full ventilation of the controversy. In my view it would be pretends at justice to craft a mechanical approach which disallowed a full ventilation, which would be the outcome if a relevant reply, if any, were to be prevented. The object of the rule should be, ex post facto, to afford an opportunity for a hearing afresh - as if there had been no earlier non-observation of the audi alterem partem doctrine....”[17]

[21] In the matter of ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others[18], the court, referring to the rule, said the following:

“The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.

Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions

thereto.

The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party.”[19]

[22] Having outlined the rule and its purpose, I proceed to examine the

submissions.

Counsel for the respondent’s submissions and discussion

[23] Stripped to its essentials, counsel’s main submission was that to preserve an asset it should be a proceed of a crime or an unlawful activity; since applicant’s papers do not describe a crime or an unlawful activity, it was the end of the matter. His rhetorical question was why would the second tranche be the proceeds of a crime or unlawful activities? The job was done for R9 300 000.00, the complaint is you used part of the money to purchase a lodge. What is wrong with that? He asked.

[24] This court is of the opinion that there is a lot wrong with that. For starters, the money was deposited to an NPO (SAADA) which was prohibited, in terms of the general obligations in paragraph 9.2 (f), mentioned supra, from allowing any other organisation to carry out its obligations in terms of the project and or allow any part of the grant be paid to such an organisation. In casu, SAADA did the opposite by allowing Roadshow Marketing to carry out its obligation. “[The project had been delivered at the expense of Roadshow Marketing].”[20] Secondly, Mr. Mafokate, the self-same person who signed the grant agreement devised a scheme to avoid compliance with this

paragraph for his benefit.

[25] Counsel submitted that only R4 517 421.00 from SAADA was used for the purchase of the house and the other money did not come from the NLC. Clearly, Mr. Mafokate is the central pillar and is infused in all of those costs, he continued. He is the mover and shaker that makes things happen, but there is no individual cost allocated to him, counsel submitted. There is broad cost estimate for every leg, infused in that is the very effort of an individual, he stated.

[26] This court agrees with counsel that Mr. Mafokate had his finger in every pie. From being the President of SAADA, to the sole member of Roadshow Market and owner of 999 Music. However, we part company on the issue on costs allocated to him. This whole project was undertaken without any profit or benefit in mind, hence, subparagraphs 1.1(v) and (vi). Perhaps it is worth mentioning them. The grant funding agreement recorded that the grant is allocated to the recipient (SAADA) subject to the recipient at all times complying with:

“(v) That the Recipient may not pay any commission and/or management fee and/or administration fee and/or professional fee in respect of the grant, unless specifically provided for in this agreement; and

(vi) That the Recipient may not give any other direct and/or indirect benefit for securing the grant or after the grant has been awarded to any person (juristic or natural) whatsoever, be it a member of the Board, a member of any Distribution Agency appointed in terms of the Act, any staff member of the Board or any intermediary, or to any person nominated by such an intermediary.”

[27] With that in mind, I struggled to follow counsel's submission that if Mr. Mafokate achieved the job for R9 300 000. 00 he was entitled to a payment, if there is a cost overrun, he was not entitled to any payment and finally if there was a cost underrun, he had to pay it back to NLC. Counsel's submission was that there is no indication that the full amount was not employed, and, in fact, he spent more than R9 300 000.00. Since he had already paid out money to Roadshow Marketing to achieve the whole project, when the second payment came in, he could square off the books, he submitted. Therefore, when the second tranche came, he was entitled to the money.

[28] Besides, SAADA falling foul of paragraph 1.1 mentioned supra, this begs the question of where Mr. Mafokate got the R 3, 440, 121.00 and R1,077,300.00 to run the project, whilst waiting for the second tranche. Especially, since it is common cause that before the project commenced SAADA had a measly R16955.18 at most and Roadshow Marketing had R226 522.29. This court is of the view that some of the money from the first tranche took care of the whole project. The project was launched on 12 March 2015, at Museum Afrika Newtown, Johannesburg[21], some five months after the first tranche of R4 65 million rands had been received by SAADA. As already mentioned at paragraph 21 of the respondent's affidavit:

“SAADA had to rely on service providers who could fund the project pending the receipt of the grant funding. Only Roadshow Marketing was such a service provider and it duly invoiced SAADA for the services provided.”

[29] The whole case of the respondent hangs on this paragraph. The impression is created that there were several service providers funding the project obo SAADA. A categorical violation of the grant funding agreement, if ever further proof was needed. In a slight of hand, only a Mr. Mafokate owned Roadshow Marketing funded the project. The court is not told about what happened to the other service providers and who these are. It is further stated that: “No other service provider would have agreed to do this work at risk.”[22]As foreshadowed supra under Procurement 8, SAADA is warned against fraud, corruption and conflict of

interest, in particular under (c), (d) and (e).

Unfortunately, it was not heeded.

[30] Interestingly, counsel did not want to deal with the first tranche of R4 650 000.00, submitting that the case before them is about the second tranche. As a result, this court is none the wiser about what happened to the first R4.65 million. The purpose of a reconsideration is to give the respondent an audi alteram partem, which is now encapsulated under section 34 of the Constitution, to air its side of the story fully. In *De Beers NO v North-Central Local Council and South-Central Local Council and Others*, [23] it was stated that:

“It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.” [24]

[31] The respondent’s version leaves this court with more questions than answers. Indeed, this court is left with reasonable grounds to believe that the property was the proceeds of unlawful activities. It also did not help that counsel submitted that it is 8 years later, and the respondent got together what it could.

[32] This court is not persuaded that Mr. Mafokate’s Roadshow Marketing carried the project as alleged. The two invoices relied upon are both dated 21 August 2015. Aside from that each listed item does not bear a date of its occurrence, what is perplexing is that SAADA had been paid R4 65 million before the launch of the project. Why would it seek help to the tune of R4 5 million?

Counsel for the applicant’s submission and discussion

[33] The gist of counsel’s submission was that SAADA, an NPO, transferred over R7.1 million which ended up purchasing a house for Mr. Mafokate, which was against the grant agreement; and there was just over R1.8 million left and enough to cover all the costs of the project. He submitted that the respondent made a meal about the failure to bring evidence of corruption. He argued that at this stage they relied on Section 38 of POCA, which requires them to show only good cause to believe that the property concerned was the proceeds of unlawful activities. He further submitted that they looked at the flow of funds which were paid to SAADA. Arguing that SAADA was not supposed to make a profit, he maintained that, if anything, it did

the project out of the goodness of its heart. He contested the authenticity of invoices SM4 and SM5, not the least because they were issued on the same date, 21 August 2015.

[34] Having examined the final report, which includes inter alia payments to facilitators, travelling to Limpopo, Eastern Cape, Mpumalanga, Western Cape, Free State, KwaZulu-Natal, Northwest and

Gauteng purchased of t-shirts, and the bank statements, he submitted that, according to their own calculations, Mr. Mafokate could not have spent more than R1.8 million for the entire project. Therefore, he was supposed to pay back over R7.1 million, he submitted.

Rhetorically, he enquired, if MS4 and MS5 are legitimate, – combined they come to R4 517 421. 00 - where did the R7.5 million to purchase the house come from?

[35] Trouble by the same question, this court enquired from the respondent. It was submitted that it was money from savings and NLC. If one has regard to that SAADA only had R16800.00 in its bank account, before the first tranche, this answer is unsatisfactory. This court is still in the dark as to where the money used in the purchase of the property came from, apart from NLC.

Conclusion

[36] When all is said and done, the vexed question facing this court is if I were confronted with the facts submitted by both the respondent and applicant would I have given the preservation order, as the court did in the ex parte application? Mindful of the standard of proof required to grant this order, my answer is yes. The respondent has not dealt with the money flow nor given a simple explanation about from where it procured the money to purchase the property in question. It may well be that when the standard of proof is raised the applicants would fail to prove their case. However, at this stage, I am not persuaded that the preservation order should be interfered with.

Costs

[37] It is trite that costs follow the result. I can find no reason to depart from this well-trodden path.

ORDER

1. The application to reconsider, set aside and rescind the ex parte preservation order handed down on 21 December 2022 under case number: 2022-054695 by the Honourable Justice Ledwaba is dismissed.
2. The respondent is ordered to pay the party and party costs of these proceedings.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 14 November 2023

Date of judgement: 30 January 2024

APPEARANCES:

For the Applicant J. Wilson instructed by the State Attorney State Attorney. For the respondent Mr. G. AMM Instructed by M.R. Hellens SC

- [1] Founding affidavit of 999 Music para 11(003-7 caselines).
- [2] Id paras 12 and 13.
- [3] Grant agreement para 4 to 9.
- [4] Practice note dated 29 Nov 2022 paras 7.1 to 7.6.
- [5] Id 7.7.
- [6] Founding affidavit para 35 (001-48).
- [7] Id paras 30 to 35.
- [8] Founding affidavit by Mafokate at para 21.
- [9] Respondent's heads of argument para 5 (013-5).
- [10] Government Gazette no 20447 7 September 1999.
- [11] 2023 ZASCA 141.
- [12] Id para 29
- [13]
- [2002] ZACC 9; 2002
- (4) SA 843 cc.
- [14] Id para 17 page 851.
- [15] Erasmus, Superior Court Practice vol2 at D1-89 s.
- [16] 2013(5) SA603.
- [17] Id para10.
- [18] 1996 (4) SA 484 (W).
- [19] Id para 4H at page 486.
- [20] Respondent's Founding affidavit para 28
- [21] Respondent founding affidavit para 30.1
- [22] Id para 52.
- [23] ZACC 9; 2002 (1) SA 429 (CC).
- [24] Id para 11.

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