

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Absolon (3373/2016) [2017] ZAECPEHC 58 (12 December 2017)

[2017] ZAECPEHC 58

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

3373/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – PORT ELIZABETH

Case

No.: 3373/2016

In

the matter between:

THE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS
Applicant
And
FRANS
ABSOLON
Respondent

JUDGMENT

REVELAS J:

- [1] On 27 September 2016 a preservation order was granted in terms of section 38 of the Prevention of Organised Crime Act, Act No. 121 of 1998 (“the POCA”), in respect of the respondent’s motor vehicle, to wit, a Nissan Hard Body truck with registration number [H...] (“the respondent’s vehicle” or “the truck”).
- [2] In the present application the applicant seeks the forfeiture of the respondent’s vehicle in terms of sections 48, 49 and 50 of the POCA. The respondent opposes the application and seeks the return of his vehicle.
- [3] The facts relevant to the present application are mostly common cause or undisputed and are set out in two affidavits filed respectively by the respondent and Mr Frederik Bekker (“Bekker”), a sheep farmer from Steynsburg. These are the following:
- [4] On 26 August 2016, and in the afternoon, the respondent and his friend Mr Johann Fleurs (“Fleurs”), were travelling in the respondent’s vehicle between Cradock and Cookhouse. Whilst they were travelling about 50 kilometers outside Cradock, they came upon the aftermath of an accident during which a large truck with its cargo of 432 sheep had overturned. Approximately 380 sheep had perished in the accident. The sheep belonged to Bekker. The respondent and Fleurs stopped at the scene of the accident and alighted from the vehicle. Police, onlookers, traffic officers, ambulance personnel, and members of the SPCA had also arrived and gathered on the scene. It was all rather chaotic and the respondent and Fleurs were still present at the scene of the accident when the owner of the sheep arrived, accompanied by a veterinary surgeon. According to the respondent, he and Fleurs remained on the scene to “assist”, presumably by removing the sheep from the road. Many people were in fact removing dead sheep for their own benefit. Bekker, who was insured against this type of loss, was mostly concerned with the live sheep of which there were 43, which he removed from the scene.
- [5] With regard to the dead sheep Bekker was concerned that they would be stolen. He stated that his broker advised him that the sheep belonged to his insurance company and that he was not entitled to donate any of the sheep carcasses to anyone. Accordingly, he did not give permission to anyone to help themselves to the dead sheep. He did not even consent to donating some of the sheep carcasses to a nearby vulture sanctuary who requested carcasses from him. He was also advised that he would be endangering his life if he attempted to stop those who were removing sheep from the scene and so he did not.

- [6] After spending almost three hours at the scene, the respondent and Fleurs left, but not before helping themselves to nine dead sheep which they loaded onto the respondent's vehicle. According to the respondent he had Bekker's consent to do so. They shared the sheep, and the applicant placed his share in his freezer at home.
- [7] Several days later, the applicant and Fleurs were arrested and charged. The charge sheet did not form part of the papers but I was informed by counsel that the charge leveled against them - possession of property for which they had no explanation - was subsequently withdrawn pending (according to the applicant), "further investigation".
- [8] The applicant pointed out that no certificate was issued to the respondent in terms of sections 6 and 8 of the Stock Theft Act, Act 57 of 1959, which would have indemnified the respondent from prosecution.

The Applicant's Case

- [9] The applicant, in limine, raised the point that the respondent's affidavit ought to be regarded as pro non scripto, since he did not state that the facts and allegations therein fall within his own personal knowledge, or that they are true and correct as such they would constitute hearsay. Counsel for the applicant did not pursue this objection, and wisely so, since the affidavit of the applicant's own witness (Bekker) was lacking in identical respects.
- [10] On the basis that the respondent allowed the vehicle to be used to remove the sheep, the applicant asserts that the respondent's

vehicle was integral to the commission of the relevant offences and consequently an instrumentality in the commission of a crime. in the light of the overall purpose of the POCA.

- [11] The applicant stressed that the respondent in his opposition to the forfeiture application, did not raise the question of a lack of proportionality and submitted that it could therefore not be considered in the present application. I disagree. In matters such as the present, it is the court's duty to consider the question of proportionality, if necessary. The POCA makes serious inroads into the fundamental human rights of persons affected by it and therefore, if the question of proportionality was ignored simply because the respondent did not raise it in his affidavit, an injustice might occur. As it turned out, that is unfortunately what had occurred in this matter.

The Respondent's Case

- [12] The respondent's allegation that he had taken the sheep carcasses with the consent of the owner of the sheep is in dispute. It was argued on his behalf that since the police were present on the scene, it is highly unlikely that the respondent would have taken the sheep without permission, as the police would have prevented such action. That assertion is not borne out by the other facts that are undisputed, namely that members of the public and even ambulance personnel were removing sheep from the scene sheep. The presence of the police on the scene was clearly no deterrent and the police seemed to have little or no

control over the situation. Bekker was advised by his broker to take photographs of the sheep as proof to support an insurance claim as the situation was too dangerous to interfere with persons removing sheep. It is also significant that Fleurs did not file a corroborating affidavit to support the respondent's version that he had permission to remove the sheep. On the probabilities one has to conclude that the respondent did not have the consent of Bekker to remove the sheep.

- [13] It was further submitted on the respondent's behalf, that on the admitted evidence or common cause facts, the sheep belonged to nobody. The argument was that the owner of the sheep accepted the advice from his broker that he was no longer the owner of the sheep. Thereby Bekker divested himself of the ownership and rights to his sheep, passing it on to the insurance company in terms of the contract between them. The respondent further submitted that because there is no evidence of who the actual owner of the sheep was at the time the alleged offence was committed, the sheep basically became *res derelicta* or *res nullius*. This argument does not assist the respondent. At all material times the sheep were insured and on the facts, were owned by either Bekker or his insurer. It hardly matters when the ownership of the sheep was transferred

Discussion

- [14] Based on the submissions made by both counsel, the finding that I was required to make is whether or not the respondent's vehicle was an instrumentality of the offence within the meaning of section 38 of POCA, and if so, whether the forfeiture of his vehicle satisfied the proportionality test.
- [15] The phrase 'instrumentality of an offence', is to be interpreted constitutionally and restrictively, rather than liberally. (See: *The National Director of Public Prosecutions Versus R O Cook Properties (Pty) Ltd* 2004 (2) SACR 208 SCA). The test for instrumentality was also dealt with in *NDPP versus Mohammed*

- [2002] ZACC 9; 2002 (4) SA 843 (CC) where the court stated that:

"The determining question is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality"

- [16] In a very literal sense the respondent's vehicle was perhaps an instrumentality of the offence. It was however, a mere coincidence

that the respondent and Fleurs were in the respondent's vehicle at the time of the accident which presented them with the opportunity to take the sheep, an act which ultimately gave rise to the charges leveled at the respondent. Accordingly, the respondent's vehicle was, restrictively and constitutionally interpreted, not instrumental, but rather incidental to the offence in question.

[17] In addition, a forfeiture order would not pass the proportionality test in this matter. The respondent is a subcontractor in the building industry. He depended on his truck to make a living. A forfeiture order would severely penalize him and the preservation

order and consequent deprivation of his must have set him back considerably from a financial point of view. The forfeiture of the

respondent's vehicle also seems disproportionate to the value of the vehicle and the impact of the offence in question. I was informed from the bar that the value of the respondent's truck was R90, 000.00 whereas the value of the nine dead (but insured) sheep, which were in effect road kill, was only R13, 000.00. Counsel for the respondent also made the valid point that the salvageable value of the sheep was doubtful since it was questionable whether the sheep were fit for later consumption because of the traumatic manner in which they came to their end. It is also difficult to imagine what use Bekker or his insurer could have had for the dead sheep.

[18] During argument, the lack of premeditation on the respondent's part was discussed. The respondent and Fleurs could not have known when they set off that afternoon in the respondent's vehicle, that they would come across several dead sheep on the road outside Cradock. This lack of premeditation is relevant to another question, namely whether the purpose and objectives of the POCA as stated in its preamble would be served by forfeiture of the respondent's vehicle. The relevant portion of the preamble to the POCA, explaining its purpose reads:

"To introduce measures to combat organized crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or .owned or controlled by, or on behalf of an entity involved in terrorist and related activities; (emphasis added)"

[19] The respondent's unplanned offence was clearly not a species of organized crime, which by its very nature requires some planning and premeditation connected with, or associated with organized criminal activity of the kind the POCA seeks to combat. Neither the respondent, nor his vehicle, nor the offence committed by him, fall under any of the categories listed in the preamble of the POCA.

[20] I am mindful that the POCA has an expansive reach. However, the applicant failed to demonstrate that any of the purposes envisaged by the POCA could be served by depriving the respondent from his vehicle. In addition, the applicant was unable to establish that the vehicle was an instrumentality in the commission of a rather negligible offence and the proportionality test was not satisfied. For all of the aforesaid reasons I conclude that a forfeiture order would be arbitrary and a misdirection.

[21] In the circumstances, I make the following order:

1. The application is dismissed with costs.

2. The applicant is directed to forthwith return the respondent's vehicle (Nissan Hard Body with registration number [H...]) to him.

E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Mr W Myburg instructed by State Attorneys, Port Elizabeth

For the respondent: Adv RD Crompton instructed by Nash Vandayar and Associates, Port Elizabeth

Date heard: 30 November 2017

Date delivered: 12 December 2017

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Prepared on 13 October 2026 · Esheria