

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Biru (1598/2022)

[2024] ZAECQBHC 30 (23 April 2024)

[2024] ZAECQBHC 30

COURT

Eastern Cape High Court, Gqeberha

BEFORE

PITT

CASE / FILE NUMBER

1598/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GQEBERHA

CASE

NO: 1598/2022

In

the matter between:

THE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS Applicant
And
DAWIT
BIRU Respondent

JUDGMENT

PITT AJ

Introduction.

[1] This is an application in terms of section 48 read with section 53 of the Prevention of Organised Crime Act No. 121 of 1998 ('POCA')

for the forfeiture of a motor vehicle which is the property of the respondent, and which property is in the possession of the applicant.

Before applying for the forfeiture order, the applicant obtained a preservation order in respect of the motor vehicle concerned on 14 June 2022. The basis of the application for forfeiture is that the property was an instrumentality of certain offences.

[2] The respondent opposed the application on the basis that the use of the property was incidental and not instrumental in the commission of the offence.

The facts of applicant's case.

[3] The applicant alleges that Tommy Jacobs (Jacobs), an employee and truck driver of USIFAST Logistics, a logistics transport company, was hijacked on 8 October 2021 whilst he was driving a truck belonging to his employer. The truck contained car parts, tyres, paint, and various other goods. The alleged hijacking took place at around 21h00 at or near the robots at Neave Industrial Area in Gqeberha. The alleged hijackers forced Jacobs into the back of the truck and drove off with him.

[4] Near Alexandria, some 100 km away, the truck came to a stop and Jacobs was put into a Tata bakkie and transported to Motherwell, Gqeberha, where he was held hostage in a shack. On the following day, 9 October 2021, Jacobs was taken from the shack in Motherwell and dropped near the Motherwell police station.

[5] In the meantime, the South African Police Service (SAPS) was alerted to be on the lookout for the truck, and in doing so observed on CCTV footage that the truck was being followed by a Toyota Quantum 2.4 D panel van with registration numbers and letters F[...] with engine number D[...] and chassis number J[...] ('the property'). The value of the property was estimated at R 140 200.00

[6] On the same morning of Jacobs' release, the property was observed by the SAPS members at the Oakley farm stall, close to Alexandria.

The property was being driven by the respondent, who was accompanied by one Mr Wali Mohammed.

- [7] The property was searched, and vehicle parts were found, which were suspected to be part of the hijacked cargo. The respondent said the vehicle parts did not belong to him, and that he was transporting them for someone. He was subsequently arrested and detained at Alexandria police station with his companion, and they were charged with possession of suspected stolen property.
- [8] A representative of USIFAST was contacted by the SAPS members to inspect the vehicle parts seized from the respondent, and it was

confirmed that they formed part of the cargo which was stolen when Jacobs was hijacked on the previous day.

- [9] Mohammed made a statement to the police that the suspected stolen goods were loaded from the hijacked truck into the property, which was parked on a gravel road near Patterson. A photo identity parade was held on 2 October 2021, at which Jacobs identified the respondent as one of the persons who had held him hostage in the shack in Motherwell.
- [10] The applicant noted that the respondent chose to utilise the property repetitively, considering that Alexandria is 100 km from his

residence in Gqeberha.

The respondent's case.

- [11] The respondent set out his defence in his answering affidavit. He alleges that he was arrested on 9 October 2021 with Mr. Wali Mohammed while he was driving the property. He also confirms that he was stopped by the police, his vehicle searched, and the suspected stolen goods were found inside the property.
- [12] The respondent further alleges that he was asked by a Somali gentleman to go to Port Alfred to help with the transport of goods. The name of the man is not mentioned, nor how the respondent knew the man or how the two of them met.
- [13] He further alleges that while he and Mohammed were driving back in the direction of Gqeberha, he was flagged down by two men who were standing along the road. He then stopped and they informed him that their motor vehicle broke down and was already towed away. The two men then loaded the plastic rolls into the property, and they were told to go back to Gqeberha with the plastic rolls, which were destined for delivery to a Somali shop in Korsten, Gqeberha.
- [14] On the way to Gqeberha, the respondent noticed that the fuel light of the vehicle had come on, and he made a U-turn to refuel. He then noticed a police vehicle which had followed him, he was pulled over and was asked why he had made a U-turn, to which he explained that he was running low on fuel and turned to refuel.

[15] The police officials told the respondent that a truck was hijacked and told him to open the back of the vehicle. The police officer started scratching among the rolls of plastic and found the goods that looked like plugs.

[16] The respondent was taken to Alexandria Magistrate's Court, where the charges against him were withdrawn after numerous appearances.

The property was returned to the respondent, but a few months later he was asked to return it to the applicant, which he did.

[17] I have been called upon to decide if the applicant is entitled to have the property forfeited to the State as an instrumentality of illegal possession and transportation of stolen property and/or suspected stolen goods in terms of POCA. I am also required to determine if the respondent falls within the meaning of an innocent owner for the property to be excluded from the operation of the forfeiture order, and whether it would be disproportionate to do so in the circumstances.

The issues to be decided.

[18] Section 48 (1) of the POCA provides that if a preservation of property order is in force the National Director of Public Prosecutions may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

The law.

[19] In terms of section 50(1) –

“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; or

(b) is the proceeds of unlawful activities.”

[20] In *National Director of Public Prosecutions v Ngunge*[1], the learned judge succinctly put it in this manner:

*“The purpose of POCA is to counteract organised crime and criminal gang activities. It is the culmination of a protracted process of law reform aimed at attempting to ensure that criminals do not benefit from their crimes. Chapter 6 thereof (comprising s 37 to s 62) is focused on property that either has been used to commit an offence or which constitutes the proceeds of crime, rather than on the wrongdoers themselves. It provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based and may be invoked even where there is no prosecution. (See *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2002] ZACC 9; 2002*

(2) SACR 196 (CC) (2002

(4) SA 843[2002] ZACC 9; ; 2002

(9) BCLR 970) at paras [14] – [17].)”

Discussion.

[21] The applicant alleged that the offence of illegal possession and transportation of stolen and/or suspected stolen goods during the

hijacking is listed as item 18 in Schedule 1 of the POCA as an offence and is the predicate crime which forms the jurisdictional

genesis of this application. The respondent does not dispute this. I am also inclined to agree with the applicant that the offence does fall within Schedule 1 of the POCA.

[22] It is the respondent’s case, the way I understand it, that the respondent falls within the meaning of an innocent owner for the property to be excluded from the operation of the forfeiture order. It is therefore expected of the court to determine whether the respondent is an innocent owner of the property and whether to exclude it for that reason.

[23] Civil forfeiture provides for the forfeiture to the State of the proceeds obtained from and the instrumentalities used in the commission of crime.[2] It is not necessary to prove that any person was convicted.[3] In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*, [4] it was confirmed that in addition that forfeiture of the instrumentalities used in crime is not conviction-based, such forfeiture may be invoked even where there is no prosecution. Govindjee AJ, as he then was, reiterated this at para 10 of his judgment in *NDPP v Gallant* [5], a decision of this Division.

[24] The two- staged procedure is commenced by an application for a preservation order, which is followed by an application for forfeiture to the State of the property used as instrumentality. It is common cause between the parties that a forfeiture order is already in place as the first step in the process leading up to this application for forfeiture.

Is the property an ‘instrumentality of the offence’?

[25] It has to be determined whether the property was used as an instrumentality of the offence. Section 1 of the POCA defines ‘instrumentality of an offence’ as ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.’

[26] Forfeiture in terms of chapter 6 is permitted where it is established that property has been used to commit an offence, even when no criminal proceedings are pending.[6] “Importantly, and in contradistinction to chapter 5 forfeiture, chapter 6 is ‘...focused, not on wrongdoers, but on property that has been used to commit an offence...’[7]

[27] In *Prophet v NDPP CC*, [8] it was held by the Constitutional Court that civil forfeiture rests on the legal fiction that the property and not the owner has contravened the law. As such, the guilt or wrongdoing of the owners or possessors of property is not primarily relevant to the proceedings.[9]

[28] When forfeiture is sought by the State, a respondent may raise a defence that s/he neither knew nor had reasonable grounds to suspect that the property had been an instrumentality in an offence.[10] This is the so-called ‘innocent’ or ‘ignorant owner defence’.[11] In *Cook Properties* it was held that while the two-stages are tightly intertwined, this does not mean that the property owner’s guilt or innocence plays a role in determining the meaning of ‘instrumentality of an offence’.[12] This confirms that a criminal conviction is not a condition precedent to forfeiture, and why property may be forfeited even where no charge is pending.[13] It was further held in *Cook Properties*[14] that ‘in giving meaning to instrumentality of an offence’ the focus is not on the state of mind of the owner, but on the role the property plays in the commission of crime. The phrase must be interpreted independently of the guilt or innocence of the property-owner...

The question is whether a functional relation between property and crime has been established. Only at the second stage, when (after

finding that the property was an instrumentality) the Court considers whether certain interests should be excluded from forfeiture, does the owner’s state of mind come into play..’

[29] A wide literal interpretation of the meaning of ‘instrumentality of an offence’ cannot be countenanced if it would result in unintended consequences, keeping in mind that the remedial objectives of chapter 6 operate as a punishment.[15] The reference in the preamble of the Act prohibiting the use of property for the commission of an offence provides some limitation, denoting a relationship of direct functionality between what is used and what is achieved.[16]

[30] The words ‘concerned in the commission of an offence must be interpreted so that the link between the crime committed and the property is reasonably direct, and the employment of the property must be functional to the commission of the crime, so that it can be said to play a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must facilitate or make possible the commission of the offence the property must be instrumental in, and not merely incidental to, the commission of the offence.[17]

[31] The following factors were considered by the Supreme Court of Appeal at para 27 in *Prophet v National Director of Public Prosecutions SCA* to measure the strength and extent of the relationship between the property sought to be forfeited and the offence: (a) whether the

use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (b) whether the property was

important to the success of the illegal activity; (c) the period for which the property was illegally used and the spatial extent of its use; (d) whether the purpose of acquiring, maintaining or using the property was to carry out the offence. No one factor is dispositive, and a court must be able to conclude, after considering the totality of circumstances, that the property was a ‘substantial and meaningful instrumentality’ in the commission of the offence(s).

[32] The offence with which the respondent was charged is that of illegal possession and transportation of stolen and/or suspected stolen

goods. In support of this charge, the applicant alleged that the SAPS observed on CCTV footage that the truck that was hijacked was being followed by a Toyota Quantum 2.4 D panel. This evidence in the applicant's founding affidavit was not denied by the respondent.

[33] The applicant also alleged that Jacobs identified the respondent in an identity parade as one of the persons who had held him hostage in the shack in Motherwell after the hijacking.

[34] It is presumed that the 'two guys' were the persons from whom the respondent was to collect the goods to be transported for the Somalian gentlemen referred to by the respondent. The respondent did not in his answering affidavit provide more details about the Somalian gentleman such as his name, what the goods were the respondent was to collect, and who the respondent was to collect the goods from. The two guys are also not identified. The respondent does not venture more facts on the identities of the 'two guys' as to how they knew that the respondent was the person to collect the goods from them, and why the goods were not collected in Port Alfred as requested by the Somalian gentleman. One is left guessing as to all these inconsistencies.

[35] The respondent has also not alleged whether he told the police about the 'two guys' from whom he had received the goods. If he did, the police could or should have pursued them because they gave the goods to the respondent before the police arrived.

[36] The question which must be answered is whether the property was used as an instrumentality of the offence. If this court finds that the property was used as an instrumentality, then it must be found that the property must be forfeited to the State. However, to reach this conclusion, certain questions must be asked to assist the court to reach that conclusion.

[37] The first such question is: was the property used to commit an offence? The applicant alleged that the SAPS members stopped the respondent and Mr Wali Mohammad between Alexandria and Kenton-on-Sea and were found in the possession of the stolen and/or suspected stolen goods. It is not in dispute that the respondent was found in possession of the stolen and/or suspected goods. The respondent in his answering affidavit alleged that when he was being arrested, he was never asked for an explanation and despite trying to communicate with the police official, he was told to keep quiet and that he should explain his story to the Magistrate. The respondent did not venture to give an explanation in his answering affidavit despite having the opportunity to do so. No explanation is provided as to why the respondent did not do so. It may be because the respondent did not want to make allegations which may incriminate him in the criminal case. However, the criminal case has no bearing on this application for the present purposes.

- [38] In terms of the Cook Properties case mentioned above, a respondent may raise a defence that s/he neither knew nor had reasonable grounds to suspect that the property had been an instrumentality in an offence. The respondent has not raised this defence, as is evidenced in the preceding paragraph.
- [39] For the above reasons, I am therefore unable to find that the respondent falls within the meaning of an innocent owner for the property to be excluded from the operation of the forfeiture order on this basis.
- [40] The next question to be asked to determine if the property was an instrumentality of the offence, in terms of the guiding principles in Cook Properties, is whether the link between the crime committed and the property is reasonably direct, and if the employment of the property was functional to the commission of the crime, so that it can be said to play a reasonably direct role in the commission of the offence. In answering this question, one must ask whether the property facilitated or made possible the commission of the offence, and was not merely incidental to, the commission of the offence.
- [41] The offence with which the respondent was charged is illegal possession and transportation of stolen and/or suspected stolen goods. The property was used to transport the stolen and/or suspected stolen goods at the time of the arrest of the respondent by the police. This proves a direct link between the crime committed and the property. There is sufficient evidence that the employment of the property was functional to the commission of the crime. The property facilitated or made possible the commission of the offence and was not merely incidental to the commission of the offence.
- [42] When applying the Prophet (SCA) factors to determine to measure the strength and extent of the relationship between the property sought to be forfeited and the offence, the answer can only be in the affirmative on the facts and evidence in casu. According to the evidence of the applicant, the property was observed on CCTV camera from the day of the hijacking following the hijacked truck and was stopped and the respondent found in the possession of the goods that were reported stolen from the same truck.
- [43] Taking into consideration all the evidence, the applicant has proved on a balance of probabilities that the property was an ‘instrumentality

of the offence’ of illegal possession and transportation of stolen and/or suspected stolen goods. The respondent’s version of events does not sustain a defence to the offence, nor has any of the evidence of the applicant been disputed by the respondent. I therefore conclude, after considering the totality of circumstances, that the property was a ‘substantial and meaningful instrumentality’ in the commission of the offence.

Proportionality.

- [44] The concept of proportionality in instrumentality cases was introduced by the matters of Prophet and Monunram[18]. The court held in Mohunram that the purpose of the proportionality enquiry is to determine whether to grant a forfeiture order would amount to

an arbitrary deprivation of property in contravention of section 25(1) of the Constitution. It was further held that the interpretation of POCA (and more particularly of ‘instrumentality of an offence’) as reaching beyond the ambit of ‘organised crime’ and applying to cases of individual wrongdoing could result in situations of clearly disproportionate and hence unacceptable forfeiture, and court must be sensitive to and on their guard against this.

[45] The Constitutional Court in *Mohunram* then elaborated on the proportionality enquiry as follows:

“[57] The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effects on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other. The broader societal purposes served by civil forfeiture under Chapter 6 of POCA have been held to include:

- removing incentives for crime;[19]
- deterring persons from using or allowing their properties to be used in crime;
- eliminating or incapacitating 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.”

[46] The court in *Mohunram* referred to *Prophet*, and held –

“...whilst acknowledging that the standard for establishing arbitrariness is different to the standard of proportionality, Nkabinde J nonetheless adopted the following factors as some of those which would be relevant to the proportionality enquiry:

- whether the property is integral to the commission of the crime;
- whether the forfeiture would prevent the further commission of the offence and its social consequences;
- whether the “innocent owner” defence would be available to the respondent;
- the nature and use of the property;[20] and
- the effect on the respondent of the forfeiture of the property.”

[47] The applicant submitted that it is for the owner to place the necessary material for a proportionality analysis before the court, and he has failed to do so. I agree with the applicant that the respondent has not placed any facts or proof before this court to decide on the proportionality analysis in *casu*. I therefore find that is proportionate to forfeit the respondent’s property to the state in the circumstances.

[48] In reaching my conclusion above, I had to consider if the respondent falls within the meaning of an innocent owner for the property to be excluded from the operation of the forfeiture order. Since I have already decided the application in favour of the applicant, it is not necessary to make this determination because the respondent does not fall within the meaning of an innocent owner.

[49] During the hearing of the application, Ms du Toit on behalf of the respondent submitted that the applicant in the replying affidavit

alleged new facts to which the respondent could not respond. One such allegation was that the arrest of the respondent by the SAPS was imminent. I asked Ms du Toit if the respondent should not have brought an application for the filing of a further affidavit to address the new facts, and the response was that perhaps that should have been done. Mr Myburgh for the applicant also made this submission in his reply. I am of the view that the facts in the replying affidavit of the applicant, though they may be new and additional facts, do not influence the determination of the issues before me. Those facts were not considered in my decision as they do not make a difference to the outcome of the matter.

Order.

Accordingly, the following order shall issue:

1. In terms of section 53(1)(a) of the Prevention of Organised Crime Act No. 121 of 1998, a Toyota Quantum 2.5D Panelvan with the following details:

1.1 Registration number: F[...];

1.2 Vehicle Registration number: D[...]; and

1.3 Chassis number: J[...] (the property),

be and is hereby declared forfeit to the State.

2. Rina Van Niekerk of Aucor Auctioneers (Pty) Ltd be appointed to act in terms of this order.

3. Pending the taking effect of this order, the property shall remain under the control of Rina Van Niekerk.

4. The applicant is directed to serve a copy of this order, the preservation order and preservation application papers on the respondent.

5. Rina Van Niekerk shall ensure that the property shall be sold either by private treaty or public auction and shall transfer the proceeds of the sale into the Criminal Assets Recovery Account with account number 0[...] held at the Reserve Bank within twenty days of service of this order, the preservation order and preservation application on the respondent in the event that the respondent does not bring an application for the rescission and/or preservation of this order and/or the preservation order.

DV PITT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant :

Adv W Myburgh

Instructed by :

THE STATE ATTORNEY

Gqeberha

Counsel for the Respondents :

Adv du Toit

Instructed by :

CAROL GESWINT

Heard on :

1 February 2024

Date delivered :

23 April 2024

[1] (1792/2019) [2022] ZANCHC 13 (25 March 2022).

[2] Chapter 6 of POCA outlines the requirements and process involved.

[3] NDPP v Mohamed NO 2003

(4) SA 1 CC at para 16.

[4] 2004 (2) SACR 208 (SCA).

[5] (917/2018)

[2021] ZAECPEHC 51 (14 September 2021).

[6] NDPP v Gallant supra; Para 10 of NDPP v RO Cook Properties.

[7] See also Mohamed 1 supra at para 17.

[8] 2007 (6) 169 (CC) at para 58.

[9] Mohamed 1 at para 17, Prophet at para 58, and Mohunram and another v NDPP and others [2007] ZACC at fn 15.

- [10] Cook Properties, in referring to Mohammed 1 supra.
- [11] Mohamed supra at para 18 as cited in Cook Properties at paras 11 and 17.
- [12] Cook Properties supra at para 11.
- [13] Cook Properties supra at para 21.
- [14] Supra.
- [15] Cook Properties supra at para 12.
- [16] Mohamed 1 supra para 17 as cited in Cook Properties supra at para 14.
- [17] Cook Properties supra at para 31.
- [18] Mohunram v NDPP 2007
- (4) SA 222 (CC).
- [19] This purpose will be particularly relevant where one is dealing with the forfeiture of the proceeds of unlawful activities and may rarely be applicable in the context of the forfeiture of the instrumentalities of offences.
- [20] Particularly in the case of immovable property, the question whether, in addition to being “an instrumentality of an offence”, the property is also used as a residence.
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