

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v De Agrela (82916/2018) [2023] ZAGPPHC 609 (27 July 2023) [2023] ZAGPPHC 609

COURT
North Gauteng High Court, Pretoria

BEFORE
Tlhapi

CASE / FILE NUMBER
82916/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 82916/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Date: 27 JULY 2023
In
the matter between
THE
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT
and
GAVIN
PERREIRA DE
AGRELA RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

- [1] This application was launched in terms of the Prevention of Organised Crime Act 121 of 1998 (the Act) and was preceded by an application for the consolidation at the instance of the respondent of two separate applications Case 82916/2018 and 9949/2019. Case 9949/2019 related to an amount of R648 730 seized during the arrest of Ms Nielsen. The applications were brought ex parte in terms of section 38(1) read with section 74(1) of the Act for the preservation of the positive balances in three bank accounts held with First National Bank for two individuals Jimmy Jamail Hayat (6[....]9 and 6[....]4) and Gavin Perreira de Agrela, the respondent herein, (6[....]2).
- [2] The first preservation order in case number 82916/18 was granted on 19 November 2018 and the second order in case number 9949/ 2019 was granted on 15 February 2019 both subject to section 38(2) of the Act. The applications and preservation orders were duly served on the respondent in terms of section 39(1). In terms of section 39(2) he was informed of his right to oppose the application to declare what was preserved from being forfeited. The forfeiture applications seek an order that the preserved amount in the respondents FNB account in the amount R971 756 and that the preserved amount held in a SAPS suspense account in the amount R648 730 be forfeited to the State further directing payment of these amounts to the victim the Government of Denmark. The application is opposed.

BACKGROUND

- [3] It is believed by the applicant that the property intended to be preserved and ultimately forfeited were the proceeds of unlawful activities as defined by the Act. The source being one Ms Anna Britta Troelsgaard Nielsen (Nielsen) mother of three adults. She became the subject of an investigation by the Danish Authorities together with one of her children Jimmy Jamail Hayat (Hayat).

- [4] She was previously employed by the National Board of Social Services of the Ministry of Children and Social Affairs of Denmark (National Board of Social Services). Ms Nielsen fraudulently channelled substantial sums of money from her employer's bank accounts to various overseas bank accounts, held by her and children and in the Republic of South Africa at First National Bank (FNB). Over a decade an amount of approximately R20 million had been transferred from Denmark into Nielsens FNB Account.
- [5] Nielsen and Hayat were helpful in the investigations conducted by the Denmark and South African authorities before they were lawfully deported to Denmark. They deposed to affidavits and Hayat confirmed that the source of the proceeds in his First National Bank accounts as coming from his mother. Nielsen admitted to having transferred between R8-10 million from her Danish account to South Africa. On her arrest about R648 739 was seized from her. The respondent is implicated for having received an amount of R1 050 000 from Hayat. The respondent did not deny this because he explained that it was repayment of monies advanced as a loan.
- [6] A financial investigator Coleen Louise Brown traced the flow of funds from the Danish account of Nielsen to her FNB account and subsequent transfer to Hayat.
- (i) The latter's Maximiser's account on 30 July 2018 had a balance of R 5 653 315 and an analysis shows that the main source was payment from another Hayat FNB account 6[....]8,
- (ii) and all these funds were released from Nielsen's FNB account 6[....]6.
- (iii) On 17 September 2018 an amount of R2 892 860.54 was credited to Hayat from an investment deposit account 716 390 180 95.
- (iv) The Maximiser account received direct transfers from an FNB non-resident current account held by Nielsen 621 249 109 37 where credit transfers were made R350 000 on 28 September 2018; R350 000 on 29 September 2018; R173 000 on 30 September 2018;
- [7] An investigation at SARS and CIPC showed that neither Nielsen or Hayat or the companies they hold interest in had declared any income in South Africa and it was opined that their income could not have supported their lifestyle.
- [8] On 29 October 2018 the respondent's FNB account had a balance of R971 756. Between 23 -27 October 2018 a total sum of R1 050 000 was deposited into the respondent's account having been transferred from Hayat's Maximiser's

Account as follows:

R350 000 on 23 October 2018

R350 000 on 24 October 2018

R350 000 on 26 October 2018

- [9] It is contended that there exists reasonable ground for believing that the positive balances in the account of Hayat and respondent are proceeds of unlawful activities namely fraud or theft and or money laundering, the source being transfers from Nielsen's Maximiser's and Hayat's bank accounts.
- [10] It is contended that the accounts of Hayat and the respondent were considered to be instrumentalities of an offence in schedule 1 of the Act for the following reasons:
- (i) The accounts of Nielsen, Hayat and the respondent received proceeds of crime;
 - (ii) The accounts made it possible for the proceeds to be concealed and disguised;
 - (iii) The accounts of Nielsen and Hayat were used not only to receive and effect further transfers of the proceeds of crime;
- [11] The respondent is a business man and is married with three children. He conducts his business t/a B and G Transport (Pty) Ltd from City Deep. He stated that he was acquainted to a Danish national one Gunther Skarin (Skarin) for six years before the incident which is the subject of this application. He met Skarin when he visited his father-in-law as they live in the same area. He had no business ties with Skarin but they had a cordial relationship as Skarin used to visit his business and home. A year before the incident he lent Skarin an amount of R20 000.00 which was paid back.
- [12] On 21 October 2018 he was contacted by Skarin who came to see him at his home. He was informed by Skarin that he had a friend who was looking for cash but this friend did not want to withdraw money from his own bank account for safety reasons. According to the respondent he did not inform Skarin that he had an excess of R1million rand but merely that he was willing to assist Skarin's friend provided that the money was first cleared through his (respondent's) account before cash was paid out to Skarin.
- [13] On 23 October 2018 respondent gave Skarin his bank details and later that day an amount of R350 000 was deposited into his personal bank account held at the Glen Shopping Mall and on him confirming with his bank that the funds had been cleared, he then paid over the money to Skarin on 24 October 2019. On the same day a second payment of R350 000 was made into his bank account. He once again went to the bank to confirm that payment was cleared and on 25 October 2018 he made a second payment to Skarin. He then informed Skarin that he would assist with one more payment as that was all money he had available to him. On 26 October 2018 a third deposit was made and Skarin collected a third sum of R350 000.
- [14] On 31 October 2018 an investigator who introduced himself as Wimpy (Willem Jacobus Van der Heever as appears on the preservation order papers) from Interpol came to see the respondent at his home. He informed Wimpy who wanted to know more about one Jimmy who was unknown to him. He realised that Wimpy was investigating the various transactions between him and Skarin. He took Wimpy to Skarin's home to verify his version. Unfortunately Skarin was not home but the respondent sent a message via Whatsapp to

Skarin to inform him that Interpol was investigating the transactions and that these involved a someone who had defrauded the Danish Government. Skarin's affidavit and a copy of the whatsapp message is annexed to this affidavit. The respondent informed Wimpy that he was travelling to the US on business on the same day and would return to South Africa on 28 November 2018.

- [15] The respondent explained that besides his business activities he was an avid gambler at various casinos and that he used to withdraw cash for that purpose from his credit card. He kept these funds and winnings in the form of cash. His credit card statements were availed to show the various withdrawals made between May to November 2018 which totalled R1 983 000 (one nine eight three rand). He lost some money, however, when Skarin approached him he had over R1million in cash which he needed to deposit into his personal account to enable him to purchase foreign currency for a planned family vacation in December 2018 to Thailand and another business trip to the US. He was reluctant to carry and deposit that amount of cash into the bank for safety reason and because of the bank charges which would have amounted to R30 000.
- [16] On 22 November 2018 he purchased \$35 000.00 dollars for the 2018 December holiday to Thailand and US trip. During early 2019 he attempted to transfer R505 224.24 via the internet but the internet banking platform advised that he had exceeded his daily limit and he attached annexures. He proceeded to the bank to increase his limit and was informed of the preservation order and a complete set of the papers were received on 28 November 2018.
- [17] With regard to the preservation application the respondent submits:
- (i) He denied having met Nielsen or Hayat directly or indirectly and that the first time Hayat was mentioned was when Wimpy came to see him;
 - (ii) With regard to Wimpy's affidavit he denied having informed Wimpy that Hayat had made payment on behalf of Skarin to settle a loan to Skarin and the only inference he can draw is that the narration in his account referred to the deposit as a loan and he had no knowledge why the payee used that reference. Besides the R20 000 he lent to Skarin he denies further loans made to him, and he denies that he agreed that the funds paid by Hayat be held in his account, the funds belonged to him and the holding thereof has caused severe prejudice;
 - (iii) He admits that a total of R1050 000 was paid into his personal account but he denied that he was aware that it was paid by Hayat and that he admitted that it was for repayment of a loan;
 - (iv) He has not requested the funds to be returned to him but he does so in this application;
 - (v) He bears no knowledge of the source of Hayat's Fund and he denies having allowed Hayat to use his bank account;

(vi) He denies that his account is an instrumentality through which a Schedule1 offence was committed or that his account made it possible for the nature, source, location of the money to be concealed;

(vii) He was a victim of Nielsen and Hayat in the circumstances that prevailed;

(viii) The version of Wimpy, Brown and Molelle present a false version about him being a willing participant;

(ix) The respondent questions why no statement was obtained from Skarin since the applicant had information on him obtained before the order;

THE

ISSUES

[18] The issue relates to the forfeiture of the amount standing to the credit of the respondent's FNB account and of that amount found in Nielson's possession on her arrest. The applicant contends that both amounts must be forfeited, question is whether the proceeds in respondent's account are proceeds of unlawful activities. The respondent contends that the proceeds are as a result of lawful services rendered.

ANALYSIS

OF THE EVIDENCE

[19] The preamble to the Act outlines the purpose for which it was enacted.[1] For purposes of the preservation order the proceeds acquired by theft and or fraud by Nielsen from her employer, the Government of Denmark qualify as 'proceeds of unlawful activities as defined by the Act.

[20] This application deals with forfeiture as provided in Chapter 6 of the Act. Both counsels agree that the proceedings for forfeiture after a preservation order were directed mainly at the recovery of the proceeds and/or the instrumentalities of unlawful activities, that the proceedings were not directed against the individual.[2]; This means that the respondent is not the focus, what the focus is about is the respondent's opposition to the court declaring

that the proceeds in his account and interest accumulated thereon be forfeited. He opposes this application as he maintains he acquired the proceeds under innocent circumstances.

[21] In my view the contention by counsel for the respondent that because the NDPP alleges money laundering, that it has failed to make out case or that the respondent was complicit in the criminal activities of Nielson is misplaced. While counsel for the applicant addresses the conduct of the respondent under the heading of money laundering, I am of the view that those facts mentioned in paragraph 52 of his heads of argument[3] are more appropriate when considering the relationship between the respondent and Skarin. The issue is whether the defence of innocent ownership is justified and whether the proceeds deposited into the

respondent's bank account are the instrumentality of an offence. Lastly in the circumstances of this case whether proceeds in his account are proceeds of impropriety and whether a declaration of forfeiture is apposite. Then lastly to consider is the forfeiture on funds found on the person of Nielson when she was arrested.

- [22] Counsel for respondent contended the respondent's defence was that of an innocent owner who had come to the assistance of a good friend who was looking for cash to be paid to a third party, without having to withdraw large amounts over the counter for safety reasons; [4] The authority relied upon is distinguishable. Yes, I will take judicial notice of the prevalence of crime in South Africa. However, it is not necessary or relevant in this instance.
- [23] Important to determine is whether the proceeds are the instrumentality of an offence and whether the respondent's defence of his innocence entitles him to the proceeds in his bank account and, in this regard taking into consideration that there is no dispute that the victim is said to be the Government of Denmark and the prayer sought is that the proceeds be returned to them.
- [24] It is contended that the respondent had no contact with Nielsen and accepted in good faith Skarini's version and further that Nielsen was not part of organised crime. Counsel for the respondent conceded in his heads of argument that Nielsen's conduct is criminal and that by "transferring the proceeds of her unlawful activities to the Republic such transfers were tainted by her criminal conduct and as such liable to preservation and forfeiture in terms of POCA". In my view, having made this concession should also accommodate the understanding that the transfer of proceeds of crime by Nielson to Hayat in the Republic was also tainted by Nielsen's criminal conduct and, therefore the transaction between them should be interpreted to mean that the proceeds were the instrumentality of an offence since it perpetuated a commission of a crime against the victim, the government of Denmark.
- [24] The report by Ms Brown traces how the proceeds reached the respondent's FNB account and this is not disputed. On this basis alone the respondent cannot claim that he has a right to the proceeds in his account and in my view this should be the end of the matter where his bank account is concerned. The application relating to the forfeiture of proceeds in respondent's bank account must succeed
- [25] The respondent submitted that he had no contact with Nielsen and accepted in good faith Skarini's version about who required the money; respondent claims his innocence and no case has been made out that he committed theft or fraud or money laundering' no case has been made out that he is complicit to data fraud or was in any way involved to crimes perpetrated by Nielsen; Nielsen was not part of organised crime; There can be no doubt whatsoever that the cash found in possession of Nielsen at the time of her arrest originated from the respondent .

- [26] An important consideration is that Nielson has not opposed any of the applications of preservation or forfeiture and that it is the respondent who applied for a consolidation of the applications which was granted. It is contended for the respondent that in the event that the proceeds in his bank account are declared forfeited, then the amount found on Nielsen should escape such declaration as this would be disproportionate to the main and purpose of the Act. My understanding is that the two amounts though not equal involve respondent and that he cannot be penalised twice. The source of proceeds in the respondent's FNB account is Hayat.
- [27] Nielson and Hayat undertook to cooperate with the investigation and filed affidavits which are annexures to the founding affidavit. It is common cause that R648 730 was seized on the arrest of Nielson. In my view the version given in her affidavit that she withdrew R 1 050 000 in three equal withdrawals of R350 000 for her daily expenses and to pay various other people is not the payment made into the respondent's bank account. Nielsen's explanation^[5] does not tally with the narration of deposits in the respondent's bank statement. The only inference I can draw is that the source of the cash found on Nielsen on her arrest was that which emanated from the respondent.
- [29] Although the respondent's version on his transactions with Skarin might look suspicious, there is no evidence that the money seized from Nielson on her arrest is an instrumentality of an offence in terms of the Act or that it is connected to any unlawful transfers of monies by Nielson from Denmark. His version remains uncontroverted and must be accepted. The court cannot rely on speculative suggestions that the respondent's conduct amounts to money laundering there must be proof on a balance of probabilities that the payment of money to Skarin was an instrumentality of an offence.
- [30] Since the respondent is only partially successful, I will direct that it pays costs in the application.
- [31] In the result the following order is granted:
1. It is ordered that the amount of R971 756.00 (nine seven one seven five six) plus interest accumulated thereon in the respondent's account held with First National Bank is forfeited to the State and that it is directed that the amount forfeited be paid to the Government of Denmark.
 2. It is ordered that the amount of R648 730.00 held in a SAPS suspense account be paid to the respondent within 30 days of this order.
 3. It is ordered that the respondent pay the costs of this application.

JUDGE OF THE HIGH COURT

HEARD AND RESERVED ON: 31 OCTOBER 2022

DELIVERED ON 27 JULY 2023

Appearances:

For the Plaintiff:

Adv P Bezuidenhout

(instructed by) State Attorney Pretoria

For the Respondent: Adv HP Van Nieuwenhuizen

(instructed by) Farinh, Ducie Christofi Attorneys

[1]“To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities, to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity; to provide for the establishment of a criminal assets recovery account:

[2]NDPP v Mohamed [2002] ZACC 9; 2002 (4) SA 843 (CC) [16].....Chapter 6 provides for forfeiture of the proceeds and instrumentalities used in crime but is not conviction based; it may be invoked even when there is no prosecution that property has been used to commit an offence or is the proceeds of unlawful activities even when no criminal proceedings are pending”

[3] Para 52: “Her is a successful businessman; he has diligent successful business venture and evn travels internationally, he is an avid gambler that vigilantly keeps etc

[4] Counsel contended that the Court is entitled to take judicial notice of the fact that robberies of individuals withdrawing substantial

amounts of cash from banks in South Africa are rife and a concern in this regard is reasonable and justified

[5] Nielson’s affidavit: “recently I withdrew R1 050 000 (R350 000 x3) for day to day expenses. I used some of these funds to pay various persons to assist me in avoiding the Danish press who were trying to locate me for an interview regarding my alleged fraud in Denmark.”

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