

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Matika (1678/2019) [2020] ZAECHGHC 99 (1 September 2020)

[2020] ZAECHGHC 99

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

1678/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 1678/2019

Date heard: 13/08/2020

Date delivered: 01/09/2020

In the matter between

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

AND

MZWABANTU MATIKA

Respondent

JUDGMENT

ROBERSON J:

- [1] The applicant has applied in terms of s 48 (1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), for the forfeiture to the State of cash in the sum of R114 281.00, allegedly the proceeds of an unlawful activity, namely dealing in drugs. The cash is the subject of a preservation order granted in terms of s 38 of POCA. Section 50 (1)
- (b) of POCA provides that the court shall make a forfeiture order if it finds on a balance of probabilities that property is the proceeds of unlawful activities. The application is opposed by the respondent.
- [2] The affidavits before the court when the preservation order was granted included affidavits from two police officers who executed a search warrant at the house of the respondent on 24 May 2019. These affidavits were incorporated in the present application. The contents of their affidavits can be summarised as follows. The respondent gave permission to search the premises and when asked if there were illegal substances in the house, replied that there were none. While searching what was termed the main room/lounge, the officers found a pistol under a pillow for which the respondent said he had a licence. It contained a magazine with six rounds. There was a safe attached to the wall but the respondent said that he had lost the key. The officers moved to the dining room and found two small plastic bags full of mandrax in a room divider and cash in the sum of R100 112.30 in a sofa panel. They left the house and searched the respondent's vehicle with his permission. In the vehicle they found 32 sachets of Tik, a money bag full of Tik and cash in the sum of R14 169.00. The Tik was described as being found "in the passenger foot". They also found a plastic bag containing dagga in the respondent's storeroom. The respondent was thereafter informed of his rights and arrested.
- [3] In his answering affidavit the respondent stated that he is a businessman, operating a cash based taxi business. He is a member of the Border Alliance Taxi Association and the Ginsberg Taxi Association. He is the registered owner of eight passenger vehicles and operates from King Williams Town, transporting passengers to various destinations in South Africa. He annexed to his affidavit copies of operating licences for two of his vehicles, stating that at the time of deposing to the affidavit the other vehicles were in transit.
- [4] The respondent stated that his vehicles operate seven days a week and at the end of each day all the drivers hand in their total cash takings for the day. He earns about R3 000.00 per day from local trips. This sum can increase to R6 000.00 or R8 000.00 when long trips are undertaken. The respondent keeps these cash takings on his premises and banks it when it is convenient to do so. He does not bank on a daily basis.
- [5] The respondent maintained that the cash found in the search was lawfully earned in his lawfully operated taxi business. He did not deal in his affidavit with the drugs found on his premises and in his vehicle.

- [6] It was submitted on behalf of the applicant that the respondent had failed to provide affidavits which supported his averment that the cash found was earned from his taxi business. It was further submitted that in the absence of the production of operating licences for all of his vehicles, those vehicles could not provide lawful income and therefore the cash found would also be the proceeds of the unlawful operation of a taxi.
- [7] I prefer not to extend the scope of the alleged unlawful activities. The preservation order was sought on the basis that the cash was the proceeds of drug dealing.
- [8] On behalf of the respondent it was submitted that there was no nexus between the drugs and the cash found as a result of the search, and that the respondent had provided a satisfactory explanation for the cash on his premises and in his vehicle.
- [9] A similar set of circumstances was the subject of the judgment in *National Director of Public Prosecutions v Maila* [2018] ZALMPPHC 70 (20 September 2018). The respondent was arrested by members of the police service for, inter alia, dealing in drugs. During his arrest the police seized cash in the sum of R92 100.00 and two motor vehicles. A preservation order was subsequently granted in respect of the cash and the motor vehicles and in due course the applicant applied for a forfeiture order. In respect of the cash, the application was brought on the grounds that it was the proceeds of unlawful activities. The respondent's explanation for the cash which was found in a safe and in one of the vehicles was that it was the proceeds of two businesses which he ran, namely a taxi operation and a tavern. Makgoba JP at paragraph
- [24] found that the respondent had failed to support his version by at least attaching copies of financial statements and motor vehicle carrier permits to his answering affidavit, which he said could easily have been made available if the respondent was earning a living through lawful means.
- [10] Similarly in the present matter the respondent, who claims to run a lawful taxi business, provided no financial statements which recorded income received, when it was received and in respect of which vehicle it had been earned. As Makgoba JP said in *Maila* (supra), these would have been easily available, especially if the respondent is running a lawful business, which would include keeping a meticulous record of income received and from what source. Operating a lawful business includes declaring income to the revenue services and to do that one needs meticulous records. The respondent did annex to his affidavit three poor copies of what appear to be passenger lists for 17 June 2019, 24 June 2019 and 5 July 2019. These lists included destinations, cellphone numbers and fares. However these were for dates after the discovery of the cash and are no substitution for a proper accounting for the cash. The respondent also annexed quotations for fares for various trips but again these were no substitution for an accounting of the cash which was found on his premises.

- [11] In addition, there were no affidavits from his drivers who had collected the cash and brought it to the respondent. Again these affidavits would have been easily available and would have been weighty corroboration of the respondent's explanation for the presence of the cash.
- [12] In my view the respondent's evidence of his banking habits is inherently improbable. It is not in keeping with the running of a lawful business. As pointed out on behalf of the applicant, if the takings were at the maximum of R8 000.00 a day, it would take 14 days to accumulate the amount of cash which was discovered by the police. If one struck a balance between R3 000.00 and R8 000.00 of say R5 000.00 per day, it would take 22 days to accumulate the amount found. It simply does not make business sense, leaving aside questions of risk, not to bank the proceeds regularly. The respondent gave no reasons why it is not convenient to bank before the cash collected reaches such a large amount. And in any event, such a large amount, if legitimately earned, would, if not banked, at least be kept in a safe, and not hidden in furniture.
- [13] Further, as in Maila, the respondent failed to produce permits in respect of all his vehicles used in the taxi business, despite having had an opportunity to do so since deposing to his answering affidavit.
- [14] These deficiencies must be viewed in the light of the evidence adduced on behalf of the applicant. There is no dispute that the drugs were found in the respondent's home and car, with the cash in close proximity to the drugs. In my view, and especially in view of the fact that the respondent did not mention the drugs at all, it can reasonably be inferred that there is a direct link between the drugs and the cash. His silence in regard to the drugs supports the inference that the cash found in close proximity to the drugs was linked to the drugs. The respondent has not proffered any acceptable explanation to disturb this inference.
- [15] I am therefore satisfied that the applicant has established on a balance of probabilities that the cash found in the search by the police was the proceeds of illegal activities, namely dealing in drugs.
- [16] On behalf of the applicant, I was referred to the judgment in *National Director of Public Prosecutions v Botha NO and Another* 2020 (1) SACR 599 (CC) where Jafta J stated the following at paragraph [130]:

"All of the foregoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of a crime in circumstances where the person from whom the proceeds are taken does not have any interest which is lawfully

recognised."

This dictum applies in the present matter.

- [17] The following order will issue:

[17.1] An order is granted in terms of the draft Annexure A to the notice of motion, with the deletion in prayer 1 of the words “ in terms of the provisions of section 53 of the Prevention of Organised Crime Act 121 of 1998” and the substitution therefor of the words “in terms of the provisions of section 50 (1) of the Prevention of Organised Crime Act 121 of 1998”.

[17.2] The respondent is to pay the costs of the application.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Applicant: Mr M Wolmarans, N N Dullabh & Co, Makhanda.

Respondent: Mr B Dlanjwa, Malusi & Co Attorneys, c/o Netteltons, Makhanda.

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