

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Mniki (CA 85/2011) [2011] ZAECGHC 41 (25 August 2011) [2011] ZAECGHC 41

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D Chetty, A E B Dhlodhlo, D Z Dukada

CASE / FILE NUMBER

CA 85/2011

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA

85/2011

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

.....Appellant

And

BONISILE MICHAEL MNIKI

.....Respondent

In re:

A red Opel Kadette DNG 846 EC
Coram: Dhlodhlo ADJP, Chetty J and
Dukada AJ
Heard: 26 July 2011
Delivered: 25 August 2011

Summary:

The applicant sought an order declaring the respondent's motor vehicle forfeit to the state following his arrest for illegal poaching. The court below dismissed the application on the basis that being motion proceedings, the matter had, there being no request for a referral for oral evidence, to be decided on the respondent's version. On appeal held that the respondent's version was so far-fetched and untenable that it could on that account be rejected as false. The vehicle was directly causally related to the hunting of protected game and an order for forfeiture was clearly not disproportionate. The appeal was upheld and the vehicle seized declared forfeited to the state.

JUDGMENT

Chetty, J

[1] This is an appeal, with leave of the court below, (Nepgen J), against the dismissal of the appellant's application for an order declaring forfeit¹ the respondent's motor vehicle pursuant to the provisions of s 53 (1) (a) of the Prevention of Organised Crime Act² (POCA). Persuaded, no doubt, by the concession made by the appellant's counsel that the matter had to be decided on the respondent's

version given the character of the proceedings, the learned judge found that on his own version, the respondent had merely contravened

s 42 (1) of the Cape Ordinance³. He arrived at this conclusion notwithstanding finding that factually, an inference could properly be drawn that the respondent had been engaged in poaching activities.

[2] As a general statement of the law, the proposition, that where disputes of fact arise in motion proceedings a final order can be granted only if the facts averred in the applicant's papers, which have been admitted by the respondent together with the facts alleged by the latter justify such an order, is trite. The learned judge's finding that accordingly, the matter had to be decided on the respondent's version overlooks an important exception to the general rule. Our case law recognises that where a respondent's version is so far-fetched or untenable, it can, on that ground alone, be rejected. In a long line of decisions our courts have affirmed this principle. Of more recent vintage, Cameron JA, stated the position thus in *Fakie N.O v CCII Systems (Pty) Ltd*⁴ at paragraphs [55] and [56]: -

“[55] That conflicting affidavits are not a suitable means of determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interest of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise ‘fictitious’ disputes of fact to delay the hearing of a matter or to deny the applicant its order. There had to be ‘a bona fide dispute of fact on a material matter’. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon –Evans Paints Ltd v Ban Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

- [56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent’s version can be rejected in motion proceedings only if it is ‘fictitious’ or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.”
- [3] This is precisely the type of case postulated in the quoted passage in the preceding paragraph where it can rightly be found that the respondent’s version is unworthy of any credence. Although the facts are fully set out in the judgment of the court below, it is necessary, in view of the conclusion to which I have come, to traverse them in some detail to show that the court below was unduly charitable in finding that the respondent’s version, notwithstanding corroboration by Messrs Kwatsha and Ngqakaza, could not be gainsaid.
- [4] It is not in issue that at approximately 01h20 on 10 February 2009, two policemen, Johnny Coertze (Coertze) and Dillon Jacques Green (Green) were patrolling the R75 between Uitenhage and Graaff-Reinet when they observed an Opel Kadette motor vehicle bearing the registration

letters and number DNG 846 EC being driven erratically. Suspecting that the driver of the oncoming vehicle may possibly be under the influence of intoxicating liquor, Coertze passed the vehicle, immediately made a u-turn, pursued it and ordered the driver to stop. He and Green alighted from the patrol van and approached the driver. When Coertze shone his torch into the vehicle he immediately observed three dogs on the rear seat of the vehicle. He requested the driver, whom, it is common cause, was the respondent, to produce his driver’s licence. It is furthermore common cause that the respondent produced a temporary licence which had expired in 2006 and falsely identified himself as one Z.H. Hobo.

- [5] Coertze further observed - (i) that the one dog’s snout, neck and chest was blood spattered, (ii) a blood stained hunting knife on the dash board, and (iii) a search light between the front seats. Coertze then ordered the respondent to open the boot. Therein he observed 2 carcasses, a bushbuck and a springbuck, the throats of both having been severed. On

enquiry the respondent proffered the explanation that he found the respective antelope along the road from Kirkwood en route to Uitenhage. Coertze furthermore observed a knobkierrie in the boot, a further one next to the searchlight and a torch on the floorboard on the driver's side.

- [6] Both Coertze and Green concluded that the respondent and his cohort, Mr Ngqakaza, had been engaging in illegal poaching and escorted them to the Uitenhage Police station. A police photographer, who had been summoned to photograph the vehicle and its contents, took a number of photographs during the course of which he observed and photographed

the head of a third antelope in a bag in the boot. It is common cause that neither Coertze nor Green observed this head when they initially saw the two carcasses in the boot.

- [7] The respondent's version was that he had gone to Kirkwood to watch a soccer match. Whilst there, he was contacted by Kwatsha with the request that he trace Ngqakaza and bring his three dogs, which he had left with the latter, to Port Elizabeth. He successfully located Ngqakaza, who in turn, requested transport to Port Elizabeth. The dogs were loaded into the vehicle. En route to Port Elizabeth, with Ngqakaza in the front seat and the three dogs ensconced on the rear seat, he happened to come across the two injured buck at two separate places along the way. Overcome by compassion at the plight of the unfortunate injured buck, Ngqakaza alighted from the vehicle and slit the throats of each as an act of mercy. He furthermore explained that the dogs somehow managed to alight from the vehicle when the buck were found and that one of them bit the buck resulting in its snout becoming blood stained. Ngqakaza's affidavit echoed that of the respondent save that according to him only one of the dogs managed to exit the vehicle. Neither of them could shed any light on the presence of the head of the buck found in the bag in the boot by the photographer Jafta and decried all knowledge thereof.

- [8] During argument before the court a quo, counsel for the appellant submitted that in as much as it had not been suggested that the police planted the buck head in the boot, it should be accepted that the respondent knew of its presence. The learned judge rejected the submission on the basis that on the acceptance of the respondent's averment that he had no knowledge thereof "then there is nothing else he can say about it". The learned judge's reasoning in reaching this conclusion presents some difficulty in my understanding of the matter. The

presence of the third head unequivocally demonstrates the falsity of the respondent's version, on whose own admission, the head was discovered in Ngqakaza's bag. It is inconceivable that the police would have planted the head given the fact that two carcasses were in the boot. The criticism directed at Coertze and Green's failure to advert thereto is furthermore unwarranted. The boot was inspected at the roadside during the early hours of the morning with the aid of a flashlight and it must be accepted that when they observed the two carcasses, their suspicions were confirmed, hence the respondent and Ngqakaza's arrest. It is obvious that they never saw it given the fact that it was in a bag.

- [9] The respondent's furnishing of a false name is furthermore indicative of his deviousness. If, as he suggests, he knew he had done nothing wrong in loading the two buck into his vehicle, then there would surely be no valid reason to furnish the police with false information. These factors, together with the facts outlined hereinbefore, compel the conclusion that the respondent's

version is devoid of any credence and that it can on that account alone be rejected as patently untrue. I am satisfied that the

respondent and Ngqakaza were engaged in illegal poaching. The poaching appurtenances found in the vehicle and the presence of the carcasses and the head in the boot furthermore conclusively establish that the respondent's vehicle was directly causally connected with the hunting of protected wild game without a permit in contravention of s 27 (1) (b) read with sections 2, 85 (a), 86 (1) (c) and 87 of the Cape Ordinance on Nature and Environmental Conservation⁵ and read with section 250 of the Criminal Procedure Act⁶.

- [10] The further question which requires adjudication involves what has been termed the proportionality exercise. In *Mohunram v National Director of Public Prosecutions* (Law Review Project as Amicus Curiae)⁷ Van Heerden AJ, after an analysis of various judgments on this issue, concluded by saying the following⁸: -

"[74] As pointed out above, it may be very difficult to draw a clear distinction in many cases between 'organised crimes', on the one hand, and 'ordinary crimes' on the other. This being so, it is potentially problematic to link a yardstick of 'significant disproportionality' with the former type of crime and that of 'disproportionality simpliciter' with the latter type. To my mind, there should be only one evaluative standard applicable to all the offences that fall within the ambit of the forfeiture provisions of POCA. That standard simply involves asking the question whether the forfeiture of the property concerned is, in all the circumstances of the case (including the nature and seriousness of the offence), disproportionate in the sense discussed above. Adding labels and qualifiers to the degree of 'disproportionality' required can only give rise to unnecessary confusion. The organised crime element, in a particular case, is not necessarily decisive. The criminal activities of an efficient and energetic individual miscreant may well have a more extensive reach and a greater negative social impact. So, for example, an individual drug dealer selling 'tik' (the drug being manufactured in Prophet) through city schools may well have a larger client base and more outlets than a drug syndicate.

- [75] It is the task of this court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a legal one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The onus of establishing that all the requirements for a forfeiture order in terms of s 50 of POCA – including that of proportionality - have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a prima facie case established by the NDPP would in the usual course be well-advised to place this material before the court. This does not, however, shift the onus of proof to the owner in question; it merely places on the owner an evidentiary burden or, as it

is sometimes called, a burden of adducing evidence in rebuttal.”

[11] The vehicle which the appellant seeks forfeited was examined by a sworn appraiser during October

2009. Its general condition was described as “very poor” and it was valued at R10 000, 00. In resisting the order for forfeiture the respondent alleged that the vehicle represented the sole mode of transport for him and his family.

[12] The offence with which the respondent was charged related to hunting protected wild animals without the requisite permit. The uncontroverted evidence of Mike Eksteen of the department of economic development and environmental affairs highlighted the prevalence of these offences. It appears to be widespread and combating it is extremely difficult as it occurs mostly at night. Conservation of our wildlife is a national priority and the ravages of indiscriminate poaching is obvious. The animals poached were in all likelihood the property of other persons and the loss to them not insubstantial. I am satisfied that the appellant has discharged the onus resting upon it and that

the forfeiture of the vehicle is warranted. In the result the following orders will issue: -

The appeal is allowed with costs.

The order of the court a quo is set aside and replaced by the following:

2.1 An order be and is hereby granted in terms of section 53 (1) (a) of the Prevention of Organised Crime Act 2\121 of 1998 (POCA), declaring forfeit to the State a red Opel Kadette 140 4 SPD motor vehicle with licence number DNG 846 EC, chassis number S696190 and engine number 14NV02CG4448 kept under case registered as Uitenhage CAS 194/02/2009 (the property).

2.2 In terms of section 50 (6) of POCA, paragraph 2.5 below shall take effect 45 days after publication of a notice thereof in the Government Gazette, unless an Appeal is instituted before this time in which case this Order will take effect on the finalisation of such Appeal.

2.3 Pieter Kapp (Kapp), who was appointed in the Preservation Order to take care of the property, be and is hereby directed to continue acting as such for the purpose of this Order.

2.4 Pending the taking of effect of this Order, the property shall remain in the custody of Kapp who shall have authority to sign all registration documents in respect of the property.

2.5 On the date on which this Order takes effect, to wit 45 weekdays after publication in the Government Gazette, Kapp in whose custody the property remains shall cause same to be sold by private treaty or public auction and the proceeds deposited into the Criminal Assets recovery Account.

2.6 The Applicant is directed to cause notice of this Order to be served on the Respondent.

2.7 The Applicant is further directed to publish a notice of this Order in the Government Gazette as soon as it is practicable.

D. CHETTY

JUDGE OF THE HIGH COURT

Dhlodhlo, ADJP

I agree.

A. E. B DHLODHLO

Dukada, AJ

D.Z DUKADA

ACTING JUDGE OF THE HIGH COURT

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1The preservation order in terms of s 38 of Poca was granted on 11 August 2009.

2Act No 121 of 1998

3No 19 of 1974

42006

(4) SA 326 (SCA)

5No 19 of 1974

6Act No, 51 of 1977

7[2006] ZASCA 12; 2007

(4) SA 222 (CC)

8At para [74] and [75]

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