

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Mokatse (A24/2021 SH41/2013) [2021] ZALMPPHC 74 (22 October 2021) [2021] ZALMPPHC 74

COURT

Limpopo High Court, Polokwane

BEFORE

NF Kgomo, Ledwaba

CASE / FILE NUMBER

A24/2021 SH41/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

APPEAL

CASE NO: A24/2021 REGIONAL CASE NO: SH41/2013

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED

Date: 21/

10/ 2021

In the matter between:

NATIONAL DIRECTOR OF
PUBLIC
PROSECUTIONS
APPELLANT
and
MACHUENE
CAROLINE
MOKATSE
RESPONDENT

JUDGMENT

NF KGOMO J et LEDWABA AJ

- [1] This is an appeal against the decision of the Regional Magistrate of Mokopane, Mr. G.C Pretorius, on 30 April 2021 in which the Learned Magistrate refused to hold an enquiry in terms of section 18 (1) of the Prevention of Organised Crime Act, 2008 (Act 121 of 2008) (hereinafter referred to as "POCA") on the ground that the Mokopane Regional Court lacked jurisdiction to do so since it was not the convicting court of the Respondent herein.

FACTUAL BACKGROUND AND HISTORY

- [2] The Respondent was charged in the Regional Court, Mokopane on one (1) count of theft in circumstances where section 1 read with part 2 of Schedule 3 of the Criminal Law Amendment Act, 1997(Act 105 of 1997) ("the Minimum Sentences Act") are applicable as well as three (3) counts of money laundering in contravention of section 6 of POCA.
- [3] The Regional Court at Mokopane (the "Court a quo") acquitted him on all charges/counts at the trial. The Appellant appealed against the acquittal to the High Court here in Polokwane in terms of section 310 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("the Criminal Procedure Act"). The High Court, acting in terms of the applicable section (s) of the Criminal Procedure set aside the acquittal of the Respondent and then remitted the matter back to the Court a quo for sentencing proceedings to be embarked upon.
- [4] On 07 April 2018, the Public Prosecutor, duly authorized in terms section 18 (5) of POCA, applied for a confiscation order enquiry to be held before the actual sentence as required in cases of this nature where wrongdoers are supposed to be stripped of profits or benefits of crime.
- [5] This application was not opposed by the Respondent through her legal representative, i.e the state and the defense were ad idem that the requisite enquiry should be held. To that effect, a draft order was by agreement handed over to the Presiding Magistrate in which the parties agreed that an order should be granted with immediate effect, instituting an enquiry into any benefit the Respondent may have derived from the offence she had been convicted of.
- [6] On 07 August 2018 further, the Court a quo formally ordered that an enquiry as alluded to above be held. The holding of that enquiry was postponed to a further date, to enable the court a quo to make an informed determination in terms of section 18 (2) of POCA, Both the Appellant and the Respondent were ordered (by the court a quo) in terms of section 21 of POCA to file certain affidavits relating to the Respondent's benefits (if any) from the proceeds of her unlawful activities as well as set out her realizable assets (if any).

- [7] Then followed several further postponements, which were also occasioned by the Respondent's appeals against her conviction, which appeals were to the Supreme Court of Appeal as well as the Constitutional Court. Both appeals were unsuccessful.
- [8] The holding of the enquiry was postponed or adjourned to 26 March 2021. On 26 March 2021, the hearing of the confiscation enquiry was postponed to 30 April 2021. The parties were also directed to file heads of arguments on the matter, which directive was duly complied with.
- [9] On 30 April 2021 when the matter was called in Court, the Respondent raised, for the first time, a point in limine to the effect that the Regional Court did not have the jurisdiction to hear or deal with the confiscation enquiry as it (Regional Court) was not the convicting court within the meaning of sections 18 (1), 18 (3) and 18 (4) of POCA.
- [10] After hearing argument from both sides, the Learned Magistrate in the Court a quo agreed with the Respondent's assertions and refused to hold the enquiry. It found among others that what the High Court directed it to do at the Appeal over-turning the acquittal of the Respondent was sentencing and nothing else.
- [11] It should be noted that the Court a quo proceeded to sentence the Respondent to 15 (fifteen) years imprisonment on 17 January 2019 while the requisite confiscation enquiry was still pending.

ISSUES TO BE DECIDED IN THE APPEAL

- [12] The issues to be decided in this appeal are-

12.1 Whether the Learned Regional Magistrate erred in ruling that he was not the Convicting Court within the meaning of section 17 and 18 of POCA, thus lacking the jurisdiction to conduct the requisite enquiry he had already undertaken to hold earlier, and

12.2 Whether in spite of the Court a quo having proceeded to sentence the Respondent in spite of the confiscation enquiry not having been held and concluded, that Court could still proceed to entertain the enquiry post sentence, regard being had to the provisions of sections 17 and 18 of POCA and section 310 (4) and

- (5) of the Criminal Procedure Act.

THE LEGAL FRAMEWORK

- [13] In terms of section 18 (1) of POCA, a confiscation order may only be made once-

13.1 the defendant has been convicted of an offence; and

13.2 the Court finds that he or she has benefited from the crimes or offences of which he or she has been convicted or from any other criminal activities or criminal enterprise sufficiently related to those crimes/offences.

[14] Section 18 (1) reads as follows:

"(1) Whenever a respondent is convicted of an offence, the court convicting the respondent may, or on the application of public Prosecutor, enquire into any benefit which the respondent may have derived from-

- (a) That offence, or
- (b) Any other offence of which the respondent has been convicted of at the same trial; or.
- (c) Any criminal activity which the court finds to be sufficiently related to those offences".

"If the court finds that the respondent has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the respondent for the payment to the state of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of the order". (my emphasis)

[15] Section 18 (3) of POCA reads as follows:

"(3) A court convicting a respondent may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if-

- (a) It is satisfied that such enquiry will unreasonably delay the proceedings in sentencing the respondent; or
- (b) The public prosecutor applies to the court to first sentence the respondent and the court is satisfied that it is reasonable and justifiable to do so in the circumstances".

[16] Section 18 (4) provides that if the judicial officer who convicted the respondent is absent or for any other reason not available, any judicial officer of the same court may consider an application referred to in subsection (1) (of section 18) and hold that enquiry

and he or she may in such proceedings take such steps as the judicial officer who is absent or not available could lawfully have taken.

[17] Section 18 (6) provides that a court before which proceedings under this section are pending, may-

17.1 in considering an application under subsection (1)-

17.1.1 refer to the evidence and proceedings at the trial;

17.1.2 hear such further oral evidence as the court may deem fit;

17.1.3 direct the public prosecutor to tender to the court a statement referred to in Subsection (3)

(a) of that section; and

17.2 Subject to subsection (1) (b) or (3) (b) of section 21, adjourn such proceedings to any day on such conditions not inconsistent with a provision of the Criminal Procedure Act, as the court may deem fit.

[18] Section 310 of the Criminal Procedure Act is also relevant to confiscation orders. It will serve a good purpose to quote its subsections verbatim.

[19] Section 310 (1) read thus: -

"when a lower court has in criminal proceedings given a decision in favor of the accused on any question of law , including an order made under 85 (2) , the attorney general or , if a body or a person other than the attorney general or his representative , was the prosecutor in the proceedings , then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction , settings forth the question of law and his decision thereon and if evidence has been heard , his findings of fact in so far as they are material to the question of law".

[20] Section 310 (2) reads; -

"when such case has been stated, the attorney general or the other prosecutor as the case may be, may appeal the decision in the provincial or local division having jurisdiction".

[21] Section 310 (4) reads thus; -

"If the appeal is allowed, the decision appealed from, shall, subject to the provisions of sub section

(5) and after giving sufficient notice to both parties, re-open the case in which the decision was given and deal with it in the same manner as it should have dealt there with if it had given a decision in accordance with the law as laid down by the provincial or local division in question."

[22] Section 310 (5) reads as follows; -

"in allowing the appeal, whether wholly or in part, the provincial or local division may itself impose such sentence or make such order as the lower court ought to have imposed or made, or it may remit the case to the court to take such further step as the provincial or local division considers proper.

SUMMARY OF APPELLANTS GROUNDS OF APPEAL

[23] In a nutshell, the Appellant's principal grounds of appeal were that the court a quo erred-

23.1 in not applying the principle of fuctus officio in that it belatedly made a U-turn after initially agreeing and deciding to hold the confiscation enquiry and postponing that enquiry several times after the requisite affidavits setting out what each sides arguments are.

"... The Court's belated about turn is irregular and falls foul of the principle of *functus officio* in which decisions of officials are deemed to be final and binding once made and cannot be revoked by the court of its own accord, (more-so) further, that as the court held, the above steps (taken in preparation of the holding of the enquiry) were not for the purpose of simply preventing delays and identification of issues".

(See Page 20 Paragraph 1.4 of Appellant's heads of argument)

23.2 In holding that the reason it was not prepared to hold the enquiry was that it was not the convicting court; that the High Court was the convicting Court since it itself had initially acquitted the Respondent and the High Court subsequently on appeal and found her guilty of theft in the context of POCA.

23.3 In not correctly interpreting section 310 (4) and (5) of the Criminal Procedure Act, which provisions explain how after an appeal, the trial Court still retains the prerogative and duty to conduct the enquiry and also sentence the Respondent once it (High Court) has not arrogated those duties unto itself.

23.4 In that the Court *a quo* generally misconstrued the purposes of holding an enquiry and sentencing, and irregularly regarding them as separate procedures, independent of each other and

23.5 In acting as if the section 18 (1) confiscation enquiry was in issue during the Appeal in the High Court. That-

"... the jurisdictional requirement of section 18 (1) application and enquiry is the conviction of the accused in the criminal case. The High Court could therefore not have pronounced on any application in terms of section 18 during the appeal against the acquittal".

(See page 4 paragraph 2.12 of the Appellant's heads of Argument.)

[23] The high-water mark of the Respondent's argument primarily was based on section 17 of POCA, which reads as follows:-

"17. For the purposes of this chapter, the proceedings contemplated in terms of this chapter against the defendant shall be concluded when-

- (a) The defendant is acquitted or found not guilty of an offence;
- (b) Subject to section 18 (2) the court convicting the defendant of an offence sentences the defendant without making a confiscation order against him or her; or
- (c) The conviction in respect of an offence is set aside on review or appeal; or
- (d) The defendant satisfies the confiscation order made against him or her".

INTRODUCTION OF NEW ASPECT BY RESPONDENT ON THE DATE OF HEARING

25. On the date of the argument of this matter, counsel for the Respondent half-heartedly attempted to introduce a new matter into the arguments, namely, that since the Respondent had filed leave to appeal or petition to the Supreme Court of Appeal, this appeal should be postponed until the Supreme Court of Appeal had ruled over it.
- [26] This court ruled that the issues to be decided here (in this Appeal) were those found within the four corners of the papers filed of record. Furthermore, that the issues here are clearly circumscribed and cannot be delayed by what may or may not happen at the Supreme Court of Appeal.

WHICH IS THE CONVICTION COURT

- [27] The Respondent argues that since the Regional Court had initially acquitted the Respondent and such acquittal was overturned by the High Court, which returned a verdict of guilty of the crime of theft, the convicting court was thus the High Court.
- [28] This was vehemently opposed by the Appellants. They submitted that the court a quo misconstrued the law in finding that it was not the convicting court.
- [29] It is a given that in the scheme under POCA, the court sentencing the accused person must first conduct a confiscation enquiry to determine whether or not the accused person benefited from the commission of the crime.
- [30] The sentencing must be preceded by the confiscation enquiry unless the court of Appeal decides to do the confiscation enquiry and sentence as contemplated in section 310 (5) of the Criminal Procedure Act.
- [31] The words and import of section 310 (4) of the Criminal Procedure Act are clear and unambiguous: once the Appellate Court or court on appeal overturns a judgment of a lower court,-

"... the Court which gave the decision appealed from shall.... , ...re-open the case in which the decision was given and deal with it in the same manner as it should have dealt there with if it had given a decision in accordance with the law as laid down by the Provincial or Local Division.."

- [32] In this case, the High Court overturned the Court a quo's decision and remitted the case back to it (court a quo) for sentencing proceedings.
- [33] Sentencing proceedings here pre-supposed or meant the holding of the confiscation enquiry and the passing of sentence itself.
- [34] The court a quo duly accepted its mandate to do the necessary: it made all preparations to hold the requisite confiscation enquiry before the actual sentencing. After several postponements, it took the conscious decision to proceed with the sentencing of the Respondent while the confiscation enquiry was made to pend.

- [35] That is allowed to the court a quo in section 18 (3) of POCA which states that the Court about to deal with the confiscation application or enquiry and the sentencing may elect to postpone the confiscation enquiry to a later date and proceed with sentence if it is satisfied that such enquiry will unreasonably delay the sentencing proceedings or if the prosecution applied for that to be done.
- [36] In casu, there were several postponements of the confiscation enquiry and ultimately the trial court took that conscious decision to first deal with sentence and only proceed with the enquiry at a later state.
- [37] The above arrangement was disturbed on the date the enquiry was to be held by counsel for the Respondent coming up with the point in limine to the effect that the court a quo was not the convicting court and thus did not have jurisdiction to deal with the enquiry.
- [38] The Appellant submitted that this course of action fell foul of the principle of *functus officio*.
- [39] After careful consideration of the relevant principle and material facts incidental thereto, this appeal court agrees with the Appellant's contentions.
- [40] The Appellants had satisfied the jurisdictional requirements for the Regional Court or the court a quo to hold the confiscation enquiry. The court a quo agreed to the holding thereof and ordered the necessary preparations to be made. It is our finding that by allowing the point in limine tendered by the Respondent, the trial court or court a quo misdirected itself on the law.
- [41] Our higher courts also ruled that the scheme of things in Chapter 5 of POCA where sections 17 and 18 are found talk about the trial court as the convicting court irrespective of the fact that the High Court intervened and overturned the lower court's earlier decision.
- [42] The trial court here is the Regional Court.
- [43] In *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA), Howie P reaffirmed this as follows at paragraph [7]:
- "Chapter 5 comprises sections 12 to 36 (of POCA). In section 18 (1) it is provided that in the event of any confiscation, the trial court may hold an enquiry to determine whether the accused referred to "in the Act as defendant) derived any benefit from his offence. If so, that court may make a confiscation order against him".
- [44] Section 18 of POCA as well as section 310 (4) and
- (5) of the Criminal Procedure Act confer the requisite jurisdiction on the Regional Court, Mokopane in this case to hold the confiscation enquiry in addition to sentencing the respondent.

[45] The confiscation enquiry is intended to determine whether or not the convicted accused benefited from the crimes he or she has been convicted of. As a result, the sentence found to be the appropriate sentence does not have any bearing on the outcome of the confiscation enquiry. Should the court find that the accused has unduly benefitted, he or she should be deprived of such undue benefits. Consequently, the Respondent's arguments that the postponed or anticipated confiscation order could have a detrimental effect on the sentence process is without merit. The court a quo decided to proceed with the sentence part of the proceedings when in possession of the facts and circumstances that are material to the postponed confiscation enquiry.

[46] Furthermore, it should be borne in mind that the appeal to the High Court by the Director of Public Prosecutions related only to the question of law relating to the basis on

which the Learned Magistrates in the court a quo had acquitted the respondent in the case. At that point, there was no pending application in terms of section 18 of POCA.

(47) It is reiterated that the court a quo misconstrued the meaning and import of section 18 of POCA. That court (court a quo) had the requisite jurisdiction to deal with confiscation enquiry.

(48) It should also be noted that at the hearing of this appeal, counsel for the respondent did not say anything concerning the appellant's reliance on the *functus officio* principle. As such, those submissions on this principle remain unanswered.

[49] It is our law as reiterated in section 310

(4) among others, that once the appeal court reversed the "wrong findings" of the court a quo and substituted them with the correct verdict, the trial court retained all the functions and jurisdiction it was empowered with.

[50] O Regan ADCJ put it as follows in *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC) at paragraph [22] - [23]

"[22] It will be useful at this stage briefly to describe this scheme of criminal confiscation contemplated by the Act confers a power on a criminal court to make a confiscation order against a person who has been convicted of a crime where the court has found that the person has benefitted from the crime.

[23] Once a person has been convicted the prosecutor may apply for a confiscation order. In order for a confiscation order to be made, the court must find that the person convicted had benefit from an offence of which he or she has been convicted or of any offence and the court may then make an order that the person pay to the state any amount it considers appropriate".

[51] Once more the Constitutional Court here also reaffirm that the trial court is the court that should deal with the confiscation order and sentencing unless any higher court that interfered with the lower court's ruling, overturning an acquittal for example, decides to do the confiscation enquiry and the sentencing itself.

[52] In our case, the High Court after over-turning the Respondent's acquittal remitted the case back to the court a quo for sentencing.

[53] In the context of the scheme of things in terms of POCA, sentencing means the conduct of the confiscation enquiry and the sentence itself.

[54] The court in *NDPP v Ramluchman* (677/15) [2016] ZASCA 202 (9 December 2016) stated the following at paragraphs [19] and [20], again reaffirming the role of the trial court as follows:

"... there is a close connection between the criminal conviction and the confiscation order and that the discretion conferred upon a court by section 18 is a discretion to determine the amount that it should order a defendant to pay. That determination is made once the court has convicted the defendant of a criminal offence and the same time imposes a sentence upon such a person.

The presiding officer upon whom the discretion is conferred by stature is normally the presiding officer who presided over the criminal trial and had sentenced the accused. Such a judicial officer would have heard all the evidence and the arguments in the criminal trial and would in the circumstances, have been appraised of all the issues in the case.

Consequently, the discretion to deal with the confiscation order is analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings (See *NDPP v Gardner & Another* [2011] ZASCA 25, 2011 (1) SACR 612 (SCA), With that in mind, the legislation sought to ensure that it would be the court which would determine the appropriate amount to be confiscated. It is only in instances where the presiding officer who convicted the defendant is absent or for any reason is not available, that another judicial officer may be approached in his stead in terms of section 18 (4) of POCA".

[55] The above excerpt reaffirms that the trial court is the convicting court.

[56] On the *fuctus officio* principle, the trial court had already issued an order or decided to hold the confiscation enquiry. That decision was final and binding on it. It could not be revoked by that court on its own accord. The principles applicable in "*Oudekraal*" became of issue.

[57] As held in *MEC Health, Eastern Cape Province v Kirkland* (473/12) [2013] ZASCA 58(16 May 2013);

"There is no suggestion,...that the obviousness of the unlawfulness is a factor of any relevance. Indeed, Hoexter understands *Oudekraal* to mean- and she is, in my view, correct- that even an obvious illegality cannot simply be ignored, one can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that

would be caused to the person in whose favour the initial decision had been granted is obvious. Baxter says the following:

"Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interest of private individuals are affected, we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus, when an administrative official has made a decision which bear directly upon an individual interest, it is said that the decision-maker has discharged his office or is *functus officio*.

I therefore conclude that Boya could not validly take the view that because the decision taken by Diliza were invalid, he could treat them as nullities and formally revoke them. For as long as the decisions taken by Diliza had not been set aside on review, they existed in fact and had legal consequences. As Boya had no authority arising from the empowering legislation to revoke final decisions already taken, much less in the absence of a hearing being granted to Kirkland Investments, he was in relation to the decisions taken by Diliza in her capacity as acting superintendent-genera, *a functus officio*".

- [58] As a result, the court a quo erred by revoking its own taken and standing order to proceed to hold the confiscation enquiry and in the face of the *functus officio* principle, make an about turn and refuse to do so.
- [59] We agree with the Appellant's contention that the court a quo erred in its interpretation of the law and application of or failure to apply the terms set out in section 310 (4) of the Criminal Procedure Act when it held that the referral back to it by the High Court was effectively limited to sentence only.
- [60] We further agree with the Appellant's submission that the provisions of section 18 (4) that talk about another judicial officer proceeding to deal with the confiscation enquiry, are not applicable here.
- [61] The court a quo further erred in separating the two functions of sentencing under POCA because such process is dual in nature- the holding of the confiscation enquiry and then the sentence or if the trial court finds it in the interest of justice, postponing the holding of the enquiry and proceeding to sentence the offender with a view to returning to it later.
- [62] This court also concurs with the Appellant's submission to the effect that the court erred in misconstruing the circumstances in which a confiscation enquiry is located and best handled by not considering, among others, the effects of section 18 (6) (a)
- (i) which empowers the court to refer to evidence led at the criminal trial, the court a quo being best placed practically and expediently to refer to and rely on such evidence.

[63] This court thus finds that the court a quo's findings appealed against are not in the interest of justice. It erred in its understanding of the nature and scope of the appeal court's findings and import of its instructions because same did not mean that the trial court is precluded or barred from holding the confiscation enquiry.

[64] In the circumstances the Appellant's appeal stands to be upheld.

COSTS

[65] This is a matter where costs should follow the cause.

ORDER.

[66] The following order is made:

66.1 The appeal is upheld.

66.2 The order granted by the Learned Magistrate G.C Pretorius Mokopane Regional Court refusing to proceed with the holding of a confiscation enquiry herein is set aside and replaced with the following Order:

66.2.1 Mokopane Regional court is hereby mandated and ordered to proceed with the holding of a confiscation enquiry herein following on the overturning of its previous order to discharge or acquit the Respondent of all charges.

66.2.2 The Respondent is ordered to pay the costs of appeal on a scale of between party and party.

I agree

LEDWABAAJ

Attendances/ Appearances

For the Appellant: Adv. T.T Mashalane

Instructed by: State Attorney

For the respondent: Adv. N.C Mathabatha Instructed by: JS Talane Attorneys.

Date of hearing: 10 September 2021

Date of judgment 22 October 2021

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