

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Smith (3438/09) [2010] ZAECHGHC 60 (29 July 2010) [2010] ZAECHGHC 60

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas

CASE / FILE NUMBER

3438/09

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

Case No: 3438/09

Date Heard: 13/05/10

Date Delivered: 29/07/10

In the matter between

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

GEORGE SMITH Respondent

JUDGMENT

REVELAS J

- [1] On 15 September 2009, an order was made in this Court, in terms of Section 38(1) of the Prevention of Organized Crime Act, 121 of 1998 (the Act), preserving a white Nissan 1400 motor vehicle, the property of George Smith, (the respondent), which was seized at Aberdeen on 10 August 2009 and placed under the control of the South African Police Services. The usual ancillary relief regarding the control of the vehicle pending the outcome of the forfeiture proceedings to be instituted in terms of Sections 48(1) and 53(1) of the Act was also granted.

- [2] On 25 March 2010, the applicant approached this court again in terms of the latter provisions of the Act, to have the vehicle in question declared forfeit to the State and that it remains under the control of Captain P Kapp of the Asset Forfeiture Unit in Port Elizabeth, dispensing with the appointment of a curator bonis. The matter was postponed to 13 May 2010 so that the respondent, who appeared in person, could be given the opportunity to obtain legal representation.
- [3] On 13 May when the matter came before me, the respondent appeared again in person. I refused to postpone the matter. For the reasons that follow in this judgment I was unpersuaded that I should grant the order sought by the applicant.

- [4] The facts which gave rise to the seizure of the vehicle are the following:

The respondent (Smith) who resides in Aberdeen was arrested on 10 August 2009 on the Graaff-Reinet road just outside Aberdeen at night. Constable Luyanda Dyonta, stated in his affidavit in support of application for the preservation order, that he was waiting in a police van on the side of the road for a bus from Oudshoorn to fetch a colleague, Constable Nortje who was on the bus. Once Nortje was in the van with him he turned the vehicle around facing Aberdeen. They noticed the vehicle in question, which Dyonta recognized as Smith's vehicle. He knew Smith as Johnny, a man whom he heard was suspected of being involved "in stock

theft and dagga in the Aberdeen area". Because he suspected that "they might be up to no good and illegal" he decided to follow Johnny and his passengers.

- [5] It is common cause that the three persons in the vehicle were Smith (the driver), Godfrey Noble and David Jaar. According to Dyonta and Nortje, one of them sat on the back of the respondent's vehicle. According to Smith, who filed an affidavit in opposition to the relief sought in this application, the passenger at the back of his vehicle was Godfrey Nobles, whom he found hitchhiking next to the road and he then gave him a lift. According to Dyonta, while they were following the vehicle, the passenger who sat inside the vehicle threw an object out the door. They stopped to look for the object and found a sports bag next to the road, filled with dagga. In town they searched for Smith's vehicle, detected it and followed it. Once it stood still, the three occupants were arrested. Godfrey Noble pleaded guilty to the illegal possession of 3kg dagga in the Magistrate's Court in Aberdeen. The charges against Smith and Jaar were withdrawn.
- [6] Inspector Clinton Brown, who also filed an affidavit in support of the preservation order application, stated that he investigated two separate incidents in February 2005 and February 2009 with regard to offences committed by Smith involving dagga. In February 2005 Smith and Noble each had a small amount of dagga on them and a small amount was found in the Toyota they were travelling in, which also belonged to Smith. Two plastic bags with dagga were found some time later near the place where the vehicle was parked. Smith was charged and pleaded guilty to being in possession of one gram of dagga.

- [7] In February 2009, Smith's house was searched and he, was subsequently charged and pleaded guilty to the illegal possession of 300g dagga on 9 February 2009. I assume his sentence was suspended.
- [8] With regard to the present matter, Smith denied any knowledge of the dagga in his vehicle. The applicant submitted that Smith's bakkie (the vehicle sought to be forfeited), was "clearly an instrumentality" in criminal conduct and it relied on all the aforesaid facts to support this submission. In my view, that submission was not as clearly established as the applicant would have it.
- [9] In order to curb excesses in civil forfeiture, which is an arbitrary process which could visit real hardship upon the persons against whom they are made, the equitable requirement of proportionality has been developed in the Courts. See: NDPP v Gouws 2005(2) SACR 193(EC); Mohunram v NDPP 2007(4) SA 222 (CC). In Gouws the respondent's Opel Monza motor vehicle was taken into custody after 62 units of shucked abalone was found in the boot of his vehicle. The vehicle was seized by the police. He pleaded guilty in the Magistrate's Court in Port Elizabeth and was sentenced to pay a fine of R1500.00 or undergo 90 days' imprisonment. The magistrate ordered the release of the vehicle.
- [10] The police did not return the vehicle despite the magistrate's order to do so, and successfully applied for a preservation order before Ludorf J, who also heard the later application for forfeiture of the respondent's vehicle. The learned Judge dismissed the application for forfeiture and set aside the preservation order. At paragraph 196 i-197 b of his judgment the learned Judge held that: "The public's interest of course also demands due consideration and recognition of the sanctity of ownership and the protection thereof by law" and warned that the power to deprive ownership should be exercised conservatively and observed that justice demanded a balanced approach in weighing the interests of the community in protecting a national asset such as abalone against the sanctity of private ownership. The learned Judge concluded as follows:
- "What is required is what has been termed a 'proportionality analysis' in which the nature and the value of the property subject to forfeiture is assessed in relation to the crime, the roll the property played in its commission and the interests and deprivation of owners, and those of the community in insisting on the prevention of crime".*
- [11] In the matter before me, Smith was not formally charged with the offence. His passenger was. His two previous convictions of possession of dagga was for such small quantities that it could hardly be said with conviction that he lived off the proceeds of dealing in dagga. The State elected not to charge Smith for possession of the dagga, but Noble. The State accepted his plea explanation which put Smith in the clear. The considerations that were applied when this election was made are also applicable to the decision whether or not to order forfeiture of the vehicle. The possibility that the vehicle was an instrumentality of crime is perhaps not a remote one, but Noble's plea explanation placed it beyond the reach of the instrumentality category for purposes of forfeiture. The public interest would not be served

in my view, to declare the vehicle forfeit.

[12] I make the following order:

The application for forfeiture of the respondent's white Nissan Bakkie 1400, with registration CFL 305 EC, presently subject to a Preservation Order, is dismissed.

The aforesaid Preservation Order is hereby set aside.

The applicant is to return the respondent's vehicle, referred to in paragraph 1, to him forthwith.

E REVELAS

Judge of the High Court

Counsel for the Applicant: Adv Hack

Instructed by: State Attorney, Port Elizabeth

For the Respondent: In Person (George Smith)

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Prepared on 13 October 2026 · Esheria