

SOUTH AFRICA / JUDGMENT

Qui v National Director of Public Prosecutions (2746/2017) [2020] ZANCHC 13 (28 February 2020)

[2020] ZANCHC 13

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

2746/2017

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTHERN
CAPE DIVISION, KIMBERLEY
Case
No: 2746/2017
Heard
on: 07/02/2020
Delivered
on: 28/02/2020
In

the matter between: YANFANG
 QUI
 APPLICANT
 And
 THE
 NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
 RESPONDENT
 In

re: THE
 NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
 APPLICANT
 JERMAINE
 CHARLES JOHNSON
 FIRST RESPONDENT
 YANFANG
 QUI
 SECOND
 RESPONDENT

JUDGMENT

MAMOSEBO J

[1] The relief sought by the applicant, Ms Yanfang Qui, is firstly, condonation for the late filing of the application for leave to

appeal and secondly, leave to appeal against the whole of my judgment and order granted on 12 July 2019 to the Full Bench of the Northern Cape Division, alternatively, to the Supreme Court of Appeal.

[2] In her notice of the application for leave to appeal, the applicant contends that there are reasonable prospects of success on appeal as contemplated in s17(i)(a)(i) of the Superior Courts Act[1], and further that there is some compelling reasons for the appeal to be heard as contemplated in s17(i)(a)(ii). The applicant's grounds upon which she relies are listed in nine pages comprising of 27 paragraphs. She contends that I erred in my findings. It is not necessary to repeat the grounds because that will render the judgment unnecessarily prolix. See *Songono v Minister of Law and Order*[2]. The Long and the short of it is that the applicant maintains that the VW polo with registration letters and numbers [...] was not an instrumentality in the commission of an offence and that the R2,448,240.00 cash was not proceeds of unlawful activities.

Condonation

[3] A substantive application is important when one seeks condonation. The Supreme Court of Appeal has reiterated the warning sounded in *Uitenhage Transitional Local Council v South African Revenue Service*[3] that:

"[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out. "

[4] The applicant's explanation for the late filing of the application for leave to appeal is the following:

4.1 She has been advised that her application ought to have been brought within fifteen days of the judgment dated 12 July 2019, which,

according to her calculation, would have been on 02 August 2019. She only received a copy of the judgment from her erstwhile attorneys on 23 July 2019 and she does not state the reasons why it was only received then. There is also no confirmatory affidavit from the erstwhile attorney or the current attorney.

4.2 She then says: 'I approached members of the Chinese community to assist me in understanding the judgment as English is not my first language and I did not fully understand the judgment or the implications thereof' She was advised by the Chinese community that she had 45 days from date of publication of the order in the Government Gazette. There is no mention of a person or persons from the Chinese community who rendered the assistance neither are their confirmatory affidavits attached.

4.3 She gave instructions for legal representation to Mr Michael Strauss of Ian Levitt Attorneys on or before 12 August 2019. The attorneys only finalised perusal of the file and briefed counsel on 16 August 2019.

4.4 Two advocates, junior and senior counsel, were briefed on 23 August 2019 by the attorneys.

4.5 She further says: "Unfortunately, at the time that the leave to appeal had been settled by senior counsel, I had already departed to China and only returned to South Africa on 04 September 2019." She explained that her plane tickets were purchased long in advance so as to enable her to support her brother who was to undergo a major operation. No dates are furnished as to when counsel settled the matter and how the communication was made with her and by who and when she left the country. She, without more, ends with the submission that neither the respondent nor the fiscus will suffer prejudice should condonation be granted.

[5] In so far as the non-compliance is time-related the date, duration and extent of any obstacle on which reliance is placed ought to be properly set out in the application. In my view, the application falls far short of the requirements. I am however not persuaded that condonation be refused. The applicant stands to suffer more prejudice should the application be refused. Therefore the application for condonation should succeed.

Application for leave to appeal

[6] In *National Director of Public Prosecutions v Mohamed NO*[4] the purpose of POCA was held to be the following:

"[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act. "

[7] The common cause facts were dealt with fully in the main judgment. Mr Hodes SC, appearing for the applicant, submitted that the only issue or matters for debate are the legal consequences emanating from such facts. Counsel further argued that the NDPP has not succeeded in proving any offence committed and that the VW Polo was an instrumentality of an offence or the seized cash was the proceeds of unlawful activities.

Instrumentality of an offence

[8] Ms Van Dyk, appearing for the NDPP, contended that the VW Polo was an instrumentality of the offence and should be forfeited. 'Instrumentality of an offence' is 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.' It must be borne in mind that the aim of the property clause is not only to protect private property but also to advance public interest. South Africa's international obligation is to ensure that criminals do not benefit from their crimes.

[9] I have already in the main judgment dealt with the averment that Johnson Jnr that was not 'caught' for the first time, referring to being arrested by the police in the performance of this job. The General had confirmed in his affidavit that not only was his son placed in possession of the VW Polo for a period of a month but he has also transported money to Cape Town on four or five occasions using the same Polo vehicle. Johnson Jnr and his cousin were arrested that night for money laundering and possession of stolen property.

[10] Mpati DP et Cameron JA remarked as follows in *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; 37 Gillespie Street, Durban (Pty) Ltd & Another; Seevnarayan*[5]:

"[18] The inter-related purposes of ch 6 therefore seem to us to include: (a) removing the incentives for crime; (b) deterring persons from using or allowing their property to be used in crime; (c) eliminating or incapacitating some of the means by which crime may be committed ('neutralising', as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal ... "

[11] Even if the case against Johnson Jr was removed from the roll, a criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even where no charge is pending.[6] The question that this Court considered when forfeiting the VW Polo was answered in the affirmative regarding the functional relation

between the VW Polo and the crime committed. There was no need for any adaptation of the VW Polo as the money was carried in a locked suitcase in the boot.

[12] The VW Polo was the enabler for the commission of the offence/s. It therefore follows that it stands to be forfeited as it was the means used for this purpose. The vehicle was engaged in and had a practical connection with the commission of the offence.

Proceeds of unlawful activities

[13] The definition of proceeds of unlawful activities was dealt with in the main judgment but needs repetition. Section 1 defines 'proceeds of unlawful activities' as 'any property or any service, advantage, benefit or reward which was derived, received, or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.'

[14] The main judgment has dealt with the arrival of the Wu's in March 2017 and the payment of the amount of R2, 430,000.00 to the applicant in March 2017 for the procurement of oysters from Salmar Trading in September 2017 when Salmar Trading at that time did not even have the permit or licence to trade in oysters. I still reject the version put forward by the applicant in respect of the payment made by the Wu's for oysters as false and fabricated.

[15] It remains clear to me that the origin and purpose of the money for which Johnson Jr was used as the mule or courier, remains reasonably

suspect. If General Johnson availed his son to assist with the transportation of the money from Pretoria to Cape Town, for a legitimate Sandton jeweller's businessman, why would Johnson Jr, not be able to furnish a reasonable explanation for that purpose? He did not have the code to the suitcase. Despite referring to the applicant as his 'acquaintance', he does not contact her for the information to unlock the briefcase but his father, who, in turn, contacts a certain 'Mr Leon' for the code. Mr Leon does not only furnish the code but also the exact amount of what is contained in the briefcase. The so-called 'Mr Leon' did not file any affidavit nor lay any claim to either the cash or the VW Polo. The inference that can be drawn under the circumstances, is that the cash

contained in the suitcase was transported for an illegal purpose. This is supported by the attempts or efforts by General Johnson, one would add using his senior rank as a General, to persuade Captain Stanley Sukazi, Commander of the Colesberg police, to go to the scene where the roadblock was conducted and to instruct the officers there not to have Johnson Jr and his cousin arrested. I am satisfied that the money was transported by Johnson Jr using the applicant's VW Polo as a deliberate attempt to avoid the organised banking and money regulatory environment as well as to hide from detection by the South African authorities.

[16] The failure to account for the money was argued extensively in the applications and in the written submissions. Weighing this failure by the Wu's to account for the money, coupled with Salmar Trading lacking the permit or licence to trade, against the backdrop of the averment that huge sums of money were already transported by the same VW Polo from Pretoria to Cape Town on four or five occasions, inferentially, it can be deduced that the explanations before me failed to convince me otherwise regarding the origins of the funds. Counsel for the NDPP urged me to accept that the cash was, by probable inference, derived from unlawful activities. The main judgment has dealt with the peculiarities in respect of the money. Mr Hodes made the submission that I applied the reverse onus. I disagree.

Interest in the property

[17] The cash amount of R2,430,000.00 could arguably be the property of the Wu's and not that of Ms Qui. She is, however, the legitimate owner of the cash amount of R20,000.00 which was provided to Johnson Jr for travel expenses and the remainder as what he would have earned. The applicant therefore does not have a legitimate interest in the R2,430,000.00 as contemplated in POCA. In so far as the R20,000.00 cash amount is concerned, it is an incentive which must be discouraged. The Wu's did not enter any appearance in terms of s 39(3) of POCA, neither did they oppose the granting of the forfeiture order. Section 52 of POCA empowers the High Court to, on application under s 48(3) or by a person referred to in s 49(1), make an order excluding certain interest in property, which is subject to the order, from the operation thereof. The Wu's, in their application for exclusion of interest, would have stated that they have acquired the cash legally, the 'innocent owner defence', by proving absence of knowledge or absence of reasonable grounds for suspicion. No such application was forthcoming from the Wu's. It then follows that the enquiry to determine exclusion of the cash amount of R2,430,000.00 was unwarranted in the absence of any application concerning that. Ms Qui did not claim the R20,000.00 which she or her husband apparently gave to Johnson Jr for his travel expenses and reward. I do not think it is a disproportionate amount to forfeit in its entirety.

[18] Mr Hodes' critiqued my reference to the Exchange Control Act. A careful reading of what appears at the last sentence of para 18 of my judgment is that: 'the respondents stood to be charged with any offence relating to 'exchange control'. The word Act was a typo. They were not charged but could also have been followed up on on transgressions relating to exchange control which remains within the discretion of the State being dominus litis. The Supreme Court of Appeal provided the proper approach to the interpretation of documents in Natal

Joint Municipal Pension Fund v Endumeni Municipality[7] which, in my view, also applies to the reading of the judgment in casu.

[19] In so far as the VW Polo is concerned, it is common cause that it belonged to Ms Qui. However, it has already been found, on a balance

of probabilities, that it was an instrumentality of an offence and stands to be forfeited to the State.

[20] One of the objectives of POCA in the preamble is that no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence. It is my view that the applicant has not made out a case to be granted leave to appeal and her application stands to fail. There is no reason why costs should not follow the result.

[21] In the result, I make the following order:

1. Condonation is granted.
2. The application for leave to appeal is dismissed with costs.

NORTHERN CAPE DIVISION

For the applicant

: Adv. LM Hodes SC

Adv. G Ngcangisa

Instructed by

: Ian Levitt Attorneys

Duncan & Rothman Attorneys

For the 1st and 2nd respondents : Adv L Van Dyk

Instructed by

: The State Attorney, Kimberley

[1] 10 of 2013

[2] 1996 (4) SA 384 € at 385C - E

[3] 2004 (1) SA 292 (SCA) at para 6; [2003] 4 All SA 37 (SCA)

[4]

[2002] ZACC 9; 2002 (4) SA 843 (CC) at 850 para 14

[5] 2004 (2) SACR 208 (SCA) at 224 para 18

[6] Cook Properties at 226d - e

[7] 2012 (4) SA 593 (SCA) at 603E- 605A

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Prepared on 11 October 2026 · Esheria