

SOUTH AFRICA / JUDGMENT

Southern Ambition 201 CC v Minister of Police (704/2019) [2019] ZAECPEHC 59 (25 September 2019) [2019] ZAECPEHC 59

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Goosen

CASE / FILE NUMBER

704/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

Case

No: 704/2019

Date

heard: 29 August 2019

Date

delivered: 25 September 2019

In

the matter between:

SOUTHERN
AMBITION 201
CC Applicant
And
MINISTER
OF
POLICE
Respondent

JUDGMENT

Goosen J:

- [1] The applicant seeks return to it of a quantity of cigarettes seized by members of the South African Police Services at its premises on 17 October 2017. It founds its application upon the provisions of s 31 of the Criminal Procedure Act (the Act)[1].
- [2] The applicant conducts business as a general trader in what it describes as “fast-moving consumer goods”. These goods include cigarettes. According to its founding affidavit it purchases the cigarettes from suppliers in South Africa in “master cases” which typically comprise of 50 cartons of cigarettes. The cigarettes are sold to persons and entities who are retailers. The applicant asserts that because of the nature of its clientele a substantial portion of its receipts comprise cash. It retains the cash for a period before depositing the sum into its own banking account or those of suppliers.
- [3] On 17 October 2017 members of the South African Police Services conducted a search of the home of the sole member of the applicant at 39 Alyssum Road, Malabar, Port Elizabeth, in execution of a search warrant. The lawfulness of the search and resultant seizure of goods is not in dispute. One thousand seven hundred and six (1706) master cases and thirty (30) loose cartons of cigarettes, of various brands were seized. Also seized on this occasion was cash in an amount of approximately R2.3 million and certain vehicles[2].
- [4] On 28 November 2017 the National Director of Public Prosecutions obtained a preservation order against the applicant in terms of s 38(1) of the Prevention of Organized Crime Act[3] (POCA). The order relates to cash and vehicles seized on 17 October and to certain funds held in a bank account.
- [5] On 19 October 2017 Ashraf Laher, the sole member of the applicant, and his brother Araf Laher appeared in the Magistrates’ Court on multiple criminal charges[4] which include offences in terms of s 80(1)(a) of the Customs and Excise Act[5]; s 7(3) of the Tobacco Products Control Act[6]; fraud; forgery and uttering.
- [6] According to the applicant it is opposing the proceedings under POCA. The present application was commenced on 19 March 2019. This followed the removal of the criminal prosecution against the Laher brothers from the roll. It is common cause that the case against the Laher brothers was struck from the roll because the prosecution had failed to furnish certain requested further particulars to the charge sheet. It is also common cause that the accused have not yet pleaded to the charges.
- [7] The applicant’s case is founded upon the following essential averments. The applicant alleges that it is the owner of the goods seized and that it was, at the time that they were seized, in lawful possession of the goods. It accordingly seeks to be restored to possession of the goods. In the alternative it relies on s 31 of the Act. In this regard it avers that no criminal proceedings have been instituted in connection with the seized goods and that the

goods are not required for trial for the purpose of evidence. It is further averred that the applicant may lawfully possess the goods.

- [8] In support of its claim to ownership of the goods, and also its assertion of lawful possession of the goods, the applicant relies upon a number of invoices issued to it by Smokes Incorporated as evidencing delivery to it of quantities of various brands of cigarettes. The allegation is made that these invoices, which refer to brands of cigarettes seized by the police, indicate that the cigarettes were purchased by and therefore owned by the applicant. The respondent denies these allegations and further alleges that the invoices are fabrications created to clothe the possession of the goods with legitimacy.
- [9] Reference was made in the papers, and in argument, to two invoices relating to transactions on 31 August 2016 and 31 September 2016. The same invoice (No 883 dated 31 (sic) September 2016) is attached. It was submitted however that this is a mere error and duplication. Even accepting that this is so there are several aspects regarding the invoices which bear comment.
- [10] The first is that they are put up by the applicant as evidencing ownership of the goods seized. What is striking, however, is that the applicant relies on two invoices dated 2014 and 2015 respectively; 5 invoices dated 2016 and 8 invoices dated in 2017. One of these is dated 22 December 2017 (invoice 991) i.e. more than two months after the goods, which are the subject of this application, were seized.
- [11] It is also noteworthy that the deponent to the founding affidavit, no doubt mindful of the dates on the invoices, asserts that whereas the applicant trades in “fast-moving consumer goods”, in respect of some brands the retention time is long. Elsewhere in the affidavit it is asserted that the application is time-sensitive. This is so, it is alleged, because the goods are perishable and that both the tobacco and the paper used “have a limited lifespan”.
- [12] The long retention period of stock is specifically denied by the respondent. Vermaak, who deposes to the affidavit, states that the computer records obtained from the applicant’s premises indicate a high volume and rapid turnover of stock. It is therefore denied that the invoices presented by the applicant relate to the goods seized. The deponent to the founding affidavit himself acknowledges that there is no nexus between the invoices and the goods seized when he states:
- “I have attempted to obtain invoices to evidence the purchase of the items. I have simply sought to attach sufficient invoices to evidence the purchase of the quantity of stock seized.”*
- [13] There is, however, a more fundamental difficulty with the invoices. They can at best evidence delivery of a supply of cigarettes by Smokes Incorporated to the applicant indicating the amount payable. The applicant makes no allegation that it has paid the amounts reflected in the invoices. All that it advances is a letter, not confirmed by affidavit, purportedly written by Mu-Aiaz Ismail who is apparently a director of Oraculan 75 CC t/a Smokes Incorporated dated 6 March

2019. The letter states that “ownership of various cigarettes [of which it is the supplier] is vested in Southern Ambition 201 CC t/a Cellular Finatex as soon as delivery of the cigarettes have been made per the various invoices”.

[14] This letter has no evidential value whatsoever. It, in any event, says nothing about Smokes Incorporated’s right to transfer ownership. This is all the more noteworthy given the content of the applicant’s attorney’s letter of demand dispatched to the respondent prior to launching this application. In that letter the attorney states the following:

“5. The affected goods comprises cigarettes purchased by our client from Smokes Inc which in turn purchased the cigarettes from Carnilinx (Pty) Ltd.

6. Our client is the owner of the affected goods. The police are with respect in unlawful possession of the affected goods.”

[15] Then, in contending for some urgency in the matter, the following is stated:

“12. Our client is under pressure to pay the seller for the products. The seller Smokes Inc is under pressure to pay the manufacturer Carnilinx (Pty) Ltd.”

[16] Apart from the assertion of ownership of the goods which the respondent denies, the applicant does not present any acceptable or admissible evidence to support the claim. Nor does the factual presumption of ownership arising from the applicant’s possession of the goods arise, since the lawfulness of the applicant’s possession is put in issue. In *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd*[7]:

“The derivative mode of acquisition of ownership on which the plaintiff relies is delivery. The requirements for the passing of ownership by delivery include, inter alia, (a) that the transferor must be capable of transferring ownership; (b) delivery must be effected by the transferor with the intention of transferring ownership and taken by the transferee with the intention of accepting ownership; and (c) payment where the sale is a cash sale. Joubert (ed) The Law of South Africa vol 27 para 165. In Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others 1976

(4) SA 464 (A) at 489H it was held that

‘. . . ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods . . .’

and at 490A that

‘. . . under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price . . .’

In *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere* NNO 1978

(4) SA 281 (A) at 301H-302A it was held that:

'Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak.'

Such evidential material as is presented suggests that goods, albeit not necessarily the seized goods, were purchased by the applicant from Smokes Incorporated. In this instance there is no allegation made as to the terms of the sale agreement and accordingly no basis to infer that by mere delivery of the goods, ownership vested in the applicant.

[17] The applicant bears the onus to establish its ownership of the goods. I am not satisfied that it has discharged the onus. Even if I am wrong in this and it is to be accepted that the first element of the rei vindicatio is established, the application must fail on the basis that the respondent's possession of the goods is authorised by statute. In this instance the respondent alleges that it lawfully seized the goods, in terms of s 20 of the Act, and retains possession pursuant to s 31. It is to this alternative basis for the relief that I now turn. Section 20 of the Act provides as follows:

"20 State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[18] I have already indicated that the lawfulness of the seizure of the goods on 17 October 2017 is not in issue. The applicant relies for the unlawfulness of the respondent's retention of the goods upon s 31 of the Act. Section 31 provides that:

"31 Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

(1)(a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.

- (b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.
- (2) The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.”

[19] In *Ntoyakhe v Minister of Safety and Security and Others*[8] it was held:

“The provisions of s 20, read with s 31, indicate that the main objective of the seizure authorised in chap 2 is to enable the police to obtain possession of articles for the purpose of investigating crimes and prosecuting suspected offenders. The chap 2 provisions however do not confer on the State the right to deprive a person of the lawful possession of an article indefinitely. Considerations of fairness and reasonableness which underlie our criminal justice system, dictate that the criminal proceedings contemplated in s 31 shall be instituted within a reasonable time. What constitutes a reasonable period will of course depend on the facts of each case. In such regard it seems to me, furthermore, that on general principles the police are required to place facts and circumstances before the court on which the reasonableness of the further detention shall be adjudged.”

[20] In *National Director of Public Prosecutions v Five Star Import & Export (Pty) Ltd*[9] it was stated that:

“[45] It is clear that s 31(1)(a) calls for two enquiries. The first is for an applicant to show on a balance of probabilities that no criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future, as contemplated in s 31(1)(a): 'If no criminal proceedings are instituted . . .'. If this former onus is discharged, then the second enquiry is whether the police can prove on a balance of probabilities that an applicant may not lawfully possess the article seized. In this regard see Dookie supra at 156 – 157.

[21] The first inquiry is therefore whether criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future. Only if this is established does the second inquiry arise.

[22] As indicated at the outset it is common cause that the Laher brothers have been charged with a number of offences. Accordingly, there can be no dispute that criminal proceedings have been instituted. The authority to institute criminal proceedings vests in the Director of Public Prosecutions[10]. It is plain that that authority has been exercised. It is also plain that the proceedings have commenced. Although the applicant’s papers suggest that the striking of the matter off the roll means that no criminal proceedings are pending, that cannot be so. The fact that the trial has not commenced and that the matter has been removed from the roll does not mean that the prosecution has been withdrawn or that it is stayed.

[23] The only question, therefore, is whether the criminal proceedings are “in connection” with the seized items or that the items are not required at trial for the purpose of evidence.

- [24] In this regard it was submitted that the charge sheet specifies particular goods in relation to several charges. These specified goods concern transactions allegedly entered into in contravention of s 80 of the Customs and Excise Act and s 7(3) of the Tobacco Products Control Act. It is further alleged that the seized goods are not particularized and that they are not identified in the charge sheet.
- [25] Whilst it is indeed so that several charges refer to specific goods being the subject of those charges, there are, in the charge sheet as presently framed, a number of charges which refer to the alleged possession of illicit goods, namely cigarettes on which no excise duties/taxes were paid[11].
- [26] In my view, the common cause facts establish that a criminal proceeding, inter alia, concerning the seized goods has indeed been instituted. The further question is whether it has been established by the applicant, that there is no reasonable prospect of the criminal proceedings being pursued. In this regard the applicant relies on the fact that there has been a delay of 17 months since commencement of the proceedings. It also relies on the fact that the matter has been struck off the roll.
- [27] This latter fact is explained on the basis that the requested further particulars to the charge sheet were not produced. I have already indicated that the striking off does not amount to a withdrawal or stay. There can no doubt that principles of fairness in criminal proceedings require that such proceedings be finalized expeditiously. Where there is a delay which prejudices the rights of the accused or potentially prejudices those of an affected third party remedies are available. The proper course is to seek such remedies.
- [28] I am unable to conclude merely on the basis that the matter was removed from the roll, and without hearing the prosecuting authority that there is no reasonable prospect of the criminal proceedings continuing. It follows that I am not satisfied that the applicant has discharged the onus which rests upon it in the first stage of an inquiry in terms of s 31(1)(a). It is accordingly not necessary to reach the question whether the applicant is lawfully entitled to possess the seized goods.

[29] In the result I make the following order:

The application is dismissed with costs.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

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[1] Act No, 51 of 1977

[2] It appears that an amount of R2 242 810,00 was seized under a Gelvandale CAS number and an amount of R58 477,70 was seized under a Uitenhage CAS number.

[3] Act No, 121 of 1998

[4] The charge sheet list 15 counts.

[5] Act No, 91 of 1964

[6] Act No, 83 of 1993

[7] 1993 (3) SA 930 (A) at 933B-E

[8] 1999 (2) SACR 349 (E) at 355h-356a

[9] 2018 (2) SACR 513 (WC) at par 45

[10] S 179(2) of the Constitution read with s 20(1) of the National Prosecuting Authority Act, 32 of 1998.

[11] Counts 5, 8, 9, 12, 15 and 16.

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