



Case Number: **8271/2018**

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

ALDENO JOSEPH	First Respondent
A AND C AID (PTY) LIMITED	Second Respondent

DATE: 07 September 2018

JUDGMENT

MACWILLIAM AJ:

THE APPLICATION

[1] The Plaintiff brought the present application in terms of Section 38 of the Prevention of Organised Crime Act, 121 of 1998 (“POCA”) for an order preserving the amounts of R20 000,00 and R232 051,20, being the amounts of cash which were seized from the First Respondent on 15 July 2017 and 2 January 2018 by members of

the South African Police Services stationed at Grassy Park Police Station.

- [2] The application was commenced by way of an *ex parte* order in terms of which, *inter alia*, all persons with knowledge of the order were prohibited from taking possession of this money. This order also provided for the manner in which service was to be effected and for affected persons to oppose the application in due course.
- [3] The First and Second Respondents thereafter gave notice of their intention to oppose the application and filed an Opposing Affidavit.
- [4] The Applicant now applies for an order preserving the amounts of R20 000,00 and R232 051,20 in cash (“the property”) in terms of Section 38 of POCA, pending the outcome of an application for a forfeiture order in terms of Section 47 of POCA.
- [5] In their Heads of Argument, the Respondents opposed the granting of this order on a number of grounds which will be dealt with later in this judgment.

SECTION 38 OF POCA

- [6] Section 38 of POCA provides that:

“(2) *The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned -*

(a) *is an instrumentality of an offence referred to in Schedule 1;*

(b) *is the proceeds of unlawful activities; or*

(c) *is property associated with terrorist and related activities.”*

[7] In this matter the Applicant relies only on Section 38(2)(b) of POCA, i.e. that the property “*is the proceeds of unlawful activities*”.

[8] The proceedings in this matter were commenced by way of an *ex parte* application in accordance with the terms of Section 38(1) of POCA, which expressly authorises this procedure.

[9] In terms of Section 38(2) of POCA, if there are reasonable grounds to believe that the property concerned is the proceeds of unlawful activities, the Court must make a preservation order. See National Director of Public Prosecutions v Mohamed N.O.¹

THE STANDARD OF PROOF

[10] The authorities which both parties referred me to related almost exclusively to forfeiture orders and not to orders in terms of Section 38 of POCA.

[11] The applicable principles in relation to the standard proof to be applied when an application is heard in terms of Section 38 of

¹ 2003 (4) SA 1 (CC) at [17] p. 9H-I

POCA are set out in NDPP v Starplex 47 CC and Others² in the following terms:

“[8] As regards the standard of proof required in order to obtain a preservation order, in National Director of Public Prosecutions v Kyriacou 2004 (1) 379 (SCA) [also reported at [2003] 4 All SA 153 (SCA) - Ed], Mlambo AJA, on behalf of the majority of the court, rejected the notion that disputed evidence in such applications must be dealt with in accordance with the principles set out in Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) [also reported at [1957] 1 All SA 123 (C) - Ed] and Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) [also reported at [1984] 2 All SA 366 (A) - Ed]. He stated as follows (at 384I-385B):

‘Section 25(1)(a) confers a discretion upon a court to make a restraint order if, inter alia, “there are reasonable grounds for believing that a confiscation order may be made ...”. While a mere assertion to that effect by the appellant will not suffice ..., on the other hand the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence

² [2008] 4 All SA 275 (C)

that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.'

[9] Although the Kyriacou case (supra) dealt with restraint orders under chapter 5 of the Act rather than preservation orders under chapter 6, the two procedures are analogous inasmuch as they are temporary orders pending the institution and determination of a forfeiture action. In *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) [also reported at 2002 (a) BCLR 41 (W) - Ed] in dealing with the question of what degree of proof is required of the applicant in section 26 ie restraint proceedings in terms of chapter 5 of the Act, Heher J, as he then was, stated as follows at paragraph [12]:

'In my view an application for a restraint order is analogous (although not identical) to an application for an interim interdict and attachment pendente lite. Insofar as such relief contains elements of finality, the Legislature could never have intended that it should be defeated by reason of conflicts of fact per se. Nor would a reference to evidence be appropriate: that might well anticipate the enquiry at the criminal trial and impinge on the right of silence. The prima facie case is proof of a reasonable prospect of obtaining both a conviction in respect of the charges levelled against the respondent and a subsequent confiscation order under section 18(1). It is appropriate in determining whether the onus has been discharged to

apply the long accepted test of taking the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the innate probabilities, the applicant should on those facts obtain final relief at a trial (for this purpose, the confiscation hearing). The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the applicant's case, he cannot succeed.'

This approach was endorsed by this Court in the case of National Director of Public Prosecutions v Van Heerden and others 2004 (2) SACR 26 (C) (at 33-34) [also reported at [2003] 4 All SA 459 (C) - Ed], where Meer J stated as follows:

'A preservation order under section 38 of POCA is akin to an interim interdict. Its aim is to preserve property for up to 90 days pending proceedings for a forfeiture order under section 48 of POCA ... The appropriate standard of proof at the preservation order stage must therefore be the well established one of prima facie proof applicable to interim interdicts. In Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 as qualified in Gool v Minister of Justice 1955 (2) SA 682 (C) at 688C-D the degree of proof required was formulated as follows:

"In an application for a temporary interdict the applicant's right need not be shown on a balance of probabilities; it is sufficient if such right is prima facie established, though open to some

doubt. The proper manner of approach is to take the facts set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts obtain final relief at a trial. The fact set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the applicant's case, he could not succeed."

At the preservation stage therefore the applicant is required to establish under section 38(2) no more than a prima facie case that there are reasonable grounds to believe that the property concerned is (a) an instrumentality of an offence referred to in schedule 1; and [sic] (b) is the proceeds of unlawful activitiesc [sic]. It is only at forfeiture stage under section 48 that proof on a balance of probabilities is specified by the Legislature. Had the intention been for the higher standard to have applied also at the preservation stage, the legislature would also have specified. It provided instead for reasonable grounds to believe.'

I am in agreement with the approach to standard of proof as set out in Phillips's and Van Heerden's cases (supra)."

- [12] I too, am in agreement with the approach to the standard of proof as set out in both Phillips' and Van Heerden's cases, as endorsed in the Starplex case.

THE FACTS WHICH ARE ALLEGEDLY COMMON CAUSE

[13] In paragraph 56 of the Applicant's Amended Heads of Argument, the Applicant's counsel summarised the facts which he alleged were common cause, namely:

"56. it is common cause that:

56.1 cash in the amounts of R20 000 and R232 051.20 was seized from first respondent;

56.2 first respondent has not presented documentary proof of the source of the cash that was seized;

56.3 On 15 July 2017 cash in the amount of R20 000 was seized with dagga from the first respondent;

56.4 First respondent later pleaded guilty on this case;

56.5 During the period between 2008 and 2012 first respondent was arrested for drug related criminal activities (although First Respondent plays down these cases' relevance to the current application);

56.6 It is submitted that the first respondent derives his money from unlawful activities which placed him in a position to possess large quantities of cash that is not banked."

[14] Paragraph 56 was not addressed in the Respondents' argument.

[15] Paragraph 56.2 is not entirely accurate. While no such documentary proof was attached to the Respondents Opposing Affidavit, certain documentation obtained from the First Respondent was attached as part of the Applicant's founding papers. I deal with this documentation later in this judgment.

[16] The facts referred to in paragraph 56.5 cannot be so simply stated. The allegations made in the affidavits filed of record reveal that:-

[a] in paragraph 22 of the Founding Affidavit of Van Zyl, he states that the relevant facts appear from paragraphs 8 to 24 of a further affidavit of Abrahams-Hans to the effect that the property was the proceeds of unlawful activities as defined in Section 1 of the POCA;

[b] in paragraph 16 of the Opposing Affidavit, the First Respondent states no more than that *"I have no knowledge of the allegations contained in these paragraphs [which included paragraph 24], cannot confirm or deny same, and put the Applicant to the proof thereof"*;

[c] at no time did the Respondents attempt to deal with the specific allegations made in paragraphs 8 to 24 of Abraham-Hans' affidavit;

[d] in paragraph 24 of Abraham-Hans' affidavit, she described four prior *"drug dealing related case dockets [which] were registered against the First Respondent"*;

- [e] it is apparent from the annexures to Abraham-Hans' affidavit that at best, they substantiate that the Appellant was in possession of drugs on a number of occasions;
 - [f] in any event, it appears from the annexures that in at least two of the matters the First Respondent paid admission of guilt fines;
 - [g] in paragraph 44 of the Founding Affidavit, Van Zyl states that *"it further appears that First Respondent has paid a number of admission of guilt fines for drug-related offences"*. In their Opposing Affidavit, the Respondents admit that the First Respondent had *"paid a number of admission of guilt fines for drug-related offences"*;
- [17] Insofar as paragraph 56.6 is concerned, it is not apparent how the contents thereof could be said to be common cause, in circumstances where the Respondents deny that the cash was sourced from unlawful activities, albeit that this denial amounts to no more than a bare denial.

THE RESPONDENTS' ORAL ARGUMENT

[18] At the commencement of the application, the Respondents moved an application for condonation which was granted. More specifically, the Respondents' counsel, Mr Houze, moved an application for condonation for the late filing of the Respondents' revised Heads of Argument which had only been filed the previous day. Notwithstanding that condonation was granted, it is striking that Mr Houze was simply unable to give a satisfactory explanation as to why his Heads of Argument were filed late.

[19] Thereafter, and during the course of his argument, it became apparent that Mr Houze's knowledge of the papers was woefully inadequate.

[20] Not only that, but when asked to justify a submission which he had made with reference to a particular passage in his clients' Opposing Affidavit, it transpired that he did not even have a copy of his clients' Opposing Affidavit with him in Court. He was requested to obtain it during the tea adjournment.

[21] He only returned to Court 45 minutes after the commencement of the tea adjournment. When asked for his explanation for the delay, he stated that he was not aware that the tea adjournment was only 15 minutes, notwithstanding that he stated that he had been at the Bar for the last 4 years.

[22] When he was thereafter asked to refer the Court to a passage in the Applicant's Founding Affidavit in support of another submission made by him, he was unable to do this. As it turned out, he did not have the Founding Affidavit before him and it was clear that he had not had it during the proceedings up until that time. He stated that it was, however, in his case. As a result, the matter had to be paused for some time while a copious number of documents were retrieved by him from his case and he searched through them for the Founding Affidavit.

[23] As it turned out, the reference which he was looking for was not in the Founding Affidavit. When it was pointed out to him by the Court that the passage in question was in the supplementary affidavit of Abrahams-Hans, he once again had to pause in order to search through the aforesaid pile of documents to find the supplementary affidavit.

[24] Even more astounding was the fact that Mr Houze argued, as part of his own clients' case, that in terms of Section 38 of POCA, the onus of proof was on the Respondents, although no-one had suggested this up until that stage and his argument was seriously adverse to his clients. When the court expressed its surprise at this submission, Mr Houze reiterated that *"the First Respondent has the onus to prove that the cash was not the proceeds of unlawful activities"*.

[25] Mr Houze made this argument, he said, with reference to the definition of an *"instrumentality of an offence"* which is defined in

POCA to mean “*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 is not apparent in what possible way this definition gave rise to Mr Houze’s argument.

[26] When Mr Houze was then asked how his clients had satisfied this onus which he argued his clients bore, he could only refer to two passages in his clients’ Opposing Affidavit, being the following passages:

[a] “5. *I respectfully submit that, in my founding affidavit for a spoliation order under case number **RCC/WYN/104/18**, which is pending in the Wynberg Regional Court, I have established that:*

(a) *I was in peaceful and undisturbed possession of the property; and*

(b) *that I was forcibly and wrongfully deprived of the property. Therefore I submit that I am entitled to a spoliation order in terms of the property, and that this current application for a preservation order is both improper and misconceived, and stands to be dismissed, with punitive costs”.*

Quite plainly, all this passage related to was the possession of the property and the First Respondent’s deprivation

thereof. It did not in any way substantiate that the property was sourced from lawful activities.

[b] Paragraph 25 of the Opposing Affidavit, which states that:

“25. Save to admit that I was requested to accompany the SAPS to Grassy Park Police Station to count the confiscated cash, I deny that such cash was the proceeds of drug dealing activities.”

Plainly, a denial that the cash *“was the proceeds of drug dealing activities”* does not constitute positive evidence to discharge the onus which Mr Houze had argued his client bore.

[27] Further, Mr Houze was unable to point to any other paragraph in the Respondents’ Opposing Affidavit in which the Respondents gave any explanation for the First Respondent’s possession of the large sums of cash which were found in his car and home.

[28] In the result, the inevitably consequence of Mr Houze’s concession must have been that the Respondents had no defence to the present application.

[29] However, for the purposes of this judgment, I will disregard Mr Houze’s argument and/or concession.

THE APPLICANT HAS DISCHARGED THE ONUS RESTING ON IT

[30] In any event, I have come to the conclusion that the Applicant has, on the papers before the Court, succeeded in proving that *“there are reasonable grounds to believe that the property concerned ... is the proceeds of unlawful activities”*. In particular:

[a] The amount of R20 000,00 was seized from the First Respondent on 15 July 2017. It was seized at the same time that 11 bank bags of dagga were seized from him. The money and the dagga were found together in his motor vehicle. R20 000,00 is a large sum of cash to have in one's motor vehicle. In the opposing papers, no attempt was made to explain why that sum of money was found in his motor vehicle together with the quantity of dagga that was found there.

[b] The Respondents have taken no action to recover that R20 000,00 from the police. In fact, no explanation was given in the Respondents Opposing Affidavit why the Respondents were content to let the seizure of the R20 000,00 go unchallenged for so long. This is especially puzzling if in fact the R20 000,00 was received by the Respondents in the lawful course of business.

[c] R232 051,20 is a very large sum of money for anyone to have in cash secreted on his property. Not only that, but according

to the Respondents, this cash had been on the First Respondent's property since November 2017. Furthermore, he alleged that he left this cash on his property while he was away on holiday.

[d] A portion of this cash was found in a plastic bag in the First Respondent's fridge. Not only is this a very odd place in which to keep so large a sum of money, but the evidence from the Applicant is that when they recovered this packet of money from the fridge, it was not cold: the inference being that it had recently been placed there and that it may have been the same packet which the First Respondent was seen by the SAPS members removing from his motor vehicle and taking inside his house shortly before the cash was found. The fact that the packet was in the fridge, but was not cold, is curious, as is the Respondents' failure to address this issue in their Answering Affidavit.

[e] A significant amount of cash was found in the First Respondent's stove under the plates. One would have thought that this was the last place that one would keep money which had been obtained from a lawful source, if for no other reason that one would not want the risk that the bank notes might be burnt. While it could be suggested that this was to mislead potential thieves while the property was

unoccupied, the money was allegedly kept in the same place after the First Respondent had returned from holiday.

- [f] Two further bags of money were found in a bin outside the premises, also having been allegedly left there since November of the previous year. Once again, it seems inconceivable that so large a sum of money, which had been lawfully obtained from a reputable source, would be dealt with in so cavalier a fashion.
- [g] The fact is that it is difficult to accept that with crime as it is in South Africa, almost a quarter of a million rand, which had been earned by way of lawful activities, would be kept in cash and unbanked for an extended period of time, in the circumstances such as those described by the Respondents.
- [h] The Respondents argued that the cash belonged to the Second Respondent and was the proceeds of its lawful activities. However, apart from bald denials, these allegations were not substantiated in the Respondent's Opposing Affidavit.

In fact, this issue was addressed as part of the Applicant's founding papers, and the Applicant attached copies of the invoices which the SAPS had received from the First Respondent, but no argument to substantiate how these invoices supported the Respondents' case was addressed to

the Court and I was not able to substantiate how the amount of R232 051,20 came to be in the First Respondent's possession from these documents. In any event, if the sum of R232 051,20 was earned by way of lawful activities there must be a substantial body of evidence to substantiate this - none of which was produced by the Respondents as part of their Opposing Affidavit.

[31] In its Founding Affidavit, the Applicant alleged that the First Respondent is a well-known drug dealer. However, no facts to substantiate this allegation were put up by the Applicant. What there is, is the fact that 11 bags of dagga found in the First Respondent's car together with R20 000,00 and no explanation for the presence of that money in those circumstances was advanced by the Respondents. Furthermore, the First Respondent has paid a number of admission of guilt fines in respect of possession of drugs.

[32] In terms of Section 38(2) of POCA, the Applicant is only obliged to establish that there are reasonable grounds to believe that the property concerned is the proceeds of unlawful activities. The Applicant does not have to prove, at this stage of the proceedings precisely what those unlawful activities are.

[33] The fact is that it is notorious that unlawfully dealing in drugs will inevitably generate large amounts of cash. Not only that, but there are a number of other unlawful activities which would give rise to

the accumulation of large amounts of cash. When this is viewed against the strange circumstances in which the cash was found and the fact that the Respondents failed in their opposing affidavit to answer these allegations, I am of the view that the Applicant has discharged the onus on it in terms of Section 38(2) of POCA.

[34] The Respondents in their Heads of Argument raised a number of specific defences, namely that:

[a] The Applicant was not entitled to proceed by way of urgency. However, the Applicant did not purport to proceed by way of urgency.

The Applicant proceeded by way of an *ex parte* application in accordance with the procedure expressly sanctioned by Section 38(1) of POCA.

[b] The Respondents complained that the Applicant proceeded in terms of POCA with a view to defeating the Respondents' spoliation application.

However, it is not apparent what else the Applicant should have done when faced with the spoliation application. In any event, the Applicant exercised its rights in terms of POCA to obtain an order authorising it to retain the property. The spoliation application in and of itself is no bar to this application.

- [c] The Respondents referred to and relied upon Sections 25, 26 and 28 of POCA.

However, those sections are sections which have application to restraint orders, which are dealt with in Part 3 of POCA. This application is an application in terms of Section 38 of POCA which forms part of Chapter 6 of POCA. In these circumstances, the Respondents' reliance on those sections does not assist them.

- [35] The Applicant has furnished the Court with a draft order which sets out the relief which it seeks. Surprisingly, that draft order did not make provision for the Respondents to pay the costs occasioned by their opposition to this application, which order I would otherwise have made.

- [36] In the circumstances, an order is made in terms of the draft order annexed hereto marked "X".

MACWILLIAM AJ

APPEARANCES

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