

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 12382/2019

DATE: 2021/02/03

In the matter between

MR WILLIAM R PETERSEN Applicant

and

THE MINISTER OF POLICE 1st Respondent

10 THE STATION COMMANDER, MITCHELLS

PLAIN SAPS 2nd Respondent

JUDGMENT

BOZALEK, J:

Two interrelated applications were called in front of me yesterday. The main application is by the applicant, Mr Petersen, for an order against the Minister of Police and the Station Commander of the Mitchells Plain SAPS for an order to release to the applicant the cash sum of R480 000,00 which it is claimed was unlawfully seized from him on 30 April 2019. That sum, through various stages, has now diminished to R396 000,00, in itself something of a cause of concern for

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me, but be that as it may.

The monies were seized from certain premises in Mitchells Plain, as I say, on 30 April 2019. The respondents opposed the granting of the relief sought. In the second related application, the National Director of Public Prosecutions, as a so called counter-applicant, seeks to intervene in the main application and applies for a preservation of property order in terms of Section 38 of the Prevention of Organised Crime Act
10 of 1998 in respect of the money seized on 30 April 2019 and also some R6 000,00 seized allegedly from the first respondent, Mr Petersen, on 7 December 2015.

Mr Petersen opposes that application. Although he was initially legally represented in both matters and filed an opposing affidavit in the POCA application, by the time the matter was heard he was no longer legally represented – apparently for financial reasons – and represented himself.

20 The background to the applications is a raid by the Cape Town Metro Police on the house of a Mrs Josephs in Mitchells Plain on 30 April 2019 in search of guns and drugs. Instead they found cash in excess of R400 000,00 in a small cardboard box in a safe and a shoebox. Mrs Josephs informed the Metro Police that the monies found in these boxes was the property

of Mr Petersen and that he had asked her to keep the monies for him as he intended to use them to buy a surprise birthday present for his wife.

The money was seized in terms of Section 31 of the Criminal Procedure Act and shortly thereafter a search of Mr Petersen's home was conducted in Parow in his absence. There some trace of what was alleged to be Mandrax was allegedly found in a container, together with plastic bags and a sealing
10 machine used to seal plastic bags.

Upon his return to Cape Town shortly after the raids, Mr Petersen, assisted by his attorney, claimed the monies found at Mrs Josephs's premises. He explained that they were indeed his property and were the proceeds of his business of buying and selling used vehicles. He kept such a large sum of money in cash because his business required him to have ready access to large sums of cash at short notice, something he was unable to accomplish were he to bank the monies. At a
20 later stage Mr Petersen gave a further explanation, namely that he had indeed intended to use part of the monies to purchase a vehicle as a birthday gift for his wife.

In opposing Mr Petersen's application, the police were unable to rely on any pending criminal charges against him. Instead

they claimed that Mr Petersen had failed to prove that no such charges would in future be preferred against him and that the property or cash would not be required for the purposes of an order at the end of such proceedings. The police did not limit this to criminal proceedings but referred also to possible related civil proceedings, i.e. a forfeiture order in terms of POCA. They referred vaguely to a pending criminal investigation as well as a money laundering investigation by the Asset Forfeiture Unit which would involve it seeking a
10 forfeiture order preceded by a preservation order against the monies on the basis that they were the proceeds of drug dealing and money laundering. The first steps in such a forfeiture application have come to pass with the present preservation order.

At the hearing, upon inquiry, counsel for the police advised that no criminal charges have been instituted against Mr Petersen to date. Section 31(1)(a) of the Criminal Procedure Act provides under the heading:

20 "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 the 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."

Having regard to the fact that 21 months have passed since the monies were seized, that is the R396 000,00, and to the
10 circumstances of this case, it is clear to me that in all probability no such charges will ever eventuate.

Mr Petersen has a chequered history with charges of drug dealing being brought against him on several occasions over the past 28/29 years. He appears to have been convicted only once in 1992. Of three such cases involving illegal substances brought against him since 2015, nothing has come of them despite evidence that he was found in possession of sizable quantities of illegal drugs. That is another mystery that
20 remains unexplained i.e. why charges were withdrawn. Since it is unlikely that any criminal proceedings will follow, on my reading of Section 31 of the Criminal Procedure Act the police have no warrant or right to hold on to the monies indefinitely or permanently.

I am fortified in this view when I read the judgment handed up by counsel in the matter of *Five Star Properties*, where Le Grange, J comes to the same conclusion, namely Section 31 or Section 20 for that matter, of the Criminal Procedure Act certainly do not give the police the right to hold on to someone's property or property claimed by them indefinitely unless they can bring it within the provisions of Section 30 or 31. In the present matter since no trial is likely, Section 31(1)(a) does not avail the police nor does Section
10 31(1)(b), since cash is not an article which cannot be lawfully possessed as opposed to something like illegal substances or an unlicensed firearm.

That leaves the preservation application. As counsel pointed out, proceedings for a preservation application or a forfeiture application are civil in nature and do not depend on pending or past criminal proceedings, certainly not as a jurisdictional requirement. In essence the NDPP's case is that given Mr Petersen's history of involvement in dealing in illegal drugs
20 and given the peculiar circumstances, there are reasonable prospects of the State eventually persuading a court that the R396 000,00 and the R6 000,00, which I will deal with separately later, amounted to the proceeds of crime and accordingly a preservation order should be granted in the meantime pending the forfeiture application.

In determining whether the State indeed has reasonable prospects of proving its case, Mr Petersen's history of criminal activity and his explanation for possessing the monies must be considered. Firstly, Mr Petersen's involvement in dealing in drugs goes back, as I said, nearly 30 years. Despite his claims to having rehabilitated himself over the last six years, various charges of dealing in drugs have been brought against him, albeit unsuccessfully. The April 2019 search of his
10 premises produced paraphernalia associated with dealing in illegal drugs, i.e. plastic bags and a sealing machine and his explanation therefor is less than convincing.

The sum of money seized was substantial and is not adequately explained by him. The evidence he proffers of being in the business of buying and selling second-hand cars was limited to only two vehicles over quite a long period, certainly not on a scale which would justify holding R400 000,00 in cash. Nor is there an adequate explanation of
20 why these monies could not be readily accessed through a bank. Furthermore, even if this explanation was credible, it also does not explain why Mr Petersen would keep these monies with a friend 23 kilometres from his home rather than at his house under a mattress if he chose or in a safe.

Finally, Mr Petersen offered different explanations for the money. At first he stated that it was kept just for business purposes but when Mrs Josephs's evidence about the birthday present surfaced, then he explained that it was also for the purposes, partly, of purchasing a present for his wife. The inference is reasonably clear: the large sum of money was kept elsewhere than at his home to avoid it being found by the police in any raid on his home and was not banked because this leaves a money trail for investigators. In the result I am
10 satisfied that a preservation order should be granted and will make an order to that effect.

As regards the R6 000,00, this was seized by the police as long ago as December 2015 when they conducted a surveillance operation and watched him interact with a Mr Scholtz with the parties coming and going from his car. When the police made their presence known they found the R6 000,00 odd in the car and they found Mandrax tablets in the car. They found Mandrax tablets on Mr Scholtz, who is now
20 allegedly deceased. There is no impediment to granting the preservation order because in his opposing affidavit, Mr Petersen states that the R6 000,00 does not belong to him and he does not oppose the preservation order.

Mr Petersen's application to have the monies restored to him

by the police must, therefore, fail. I will make no cost order against him in that matter, however, since the Minister's defence, involving Section 31 of the Criminal Procedure Act, does not succeed and no criminal proceedings were, in my view, ever really a realistic possibility. In truth what happened is the police held these monies almost as an agent for the NDPP and awaiting the preservation application. That may well be lawful if that action continues for a short while, but certainly the police do not have the authority to hold
10 someone's property indefinitely knowing that there will be no criminal proceedings whilst they wait for the Asset Forfeiture Unit to gear itself up to bring a forfeiture application.

These things must be done with much more expeditiousness. There are redeeming features in this matter inasmuch as the preservation application was launched apparently three months after the raid. It has taken so long to reach this court because it was not done on an *ex parte* basis and it has dragged for all this period of time. For the sake of clarity, in my view, the
20 Asset Forfeiture Unit should have been in front of this court within months of that raid asking for a preservation order on an *ex parte* basis if needs be.

In the result, the following orders are made:

1. Mr Petersen's application for the return of the monies to him is dismissed but there will be no order as to costs.
2. The preservation order against those monies and against the R6 000,00 is granted in the form of the draft order presented by counsel for the NDPP.

L J BOZALEK, J

10 JUDGE OF THE HIGH COURT

DATE: