

FORM A**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT****PARTIES:****Case No: 2190/2009**

In the matter between:

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTION****Applicant**

and

BONSILE MICHAEL MNIKI**Respondent*****In Re:* A red Opel Kadette DNG 846 EC**

- (a) Case Number: **2190/2009**
- (b) High Court: **EASTERN CAPE, PORT ELIZABETH**
- (c) DATE HEARD: 28 January 2010....
- (d) DATE DELIVERED: 29 June 2010
- (e) JUDGE(S): **NEPGEN J ...**

LEGAL REPRESENTATIVES –***Appearances:***

- For the Applicant(s): Mr Ndzengu
- for the Respondent(s): Mr Schoonraad

Instructing attorneys:

- Applicant(s): State Attorney
- Respondent(s): P J Schoonraad Attorneys

CASE INFORMATION -

- *Nature of proceedings:* **Civil Matter**
- *Topic:*
- *Key Words:*

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

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JUDGMENT

NEPGEN, J

[1] During the night of 9 February 2009 two policemen, Coertze and Green, were performing patrol duty on the R75 between Graaff-Reinet and Uitenhage. At approximately 01h20 they noticed an Opel Kadette motor vehicle with registration mark DNG 846 EC (hereinafter referred to as the Opel) being driven in the direction of Uitenhage. The Opel was being driven in an erratic manner and they decided to stop it, suspecting that the driver was under the influence of liquor. After the Opel had been stopped these two policemen went to it. The driver thereof was the respondent. He is also the owner of the Opel. There was one passenger in the Opel, one Khangela Ngqakaza. The policemen noticed that there were three dogs in the vehicle. One of these dogs had what appeared to be blood stains on its neck and chest. On the dashboard of the Opel there was a knife, described as a hunting knife, which was also bloodstained. A portable light, described as a spotlight (kollig) was

observed between the two front seats. Having seen all this, Coertze requested the respondent to open the boot of the Opel, which he did. In the boot Coertze found the carcass of a bushbuck as well as a grysbuck. The throats of the buck had been slit. Coertze asked the respondent where he had got the buck from and the respondent told him that he had found them in the road. He also told Coertze that he had gone to Kirkwood to fetch the dogs that were in the Opel and it was when he was returning that he found the buck. In addition to the other items, there were apparently three knobkieries in the vehicle. Not surprisingly, the police suspected the respondent and Ngqakaza of having illegally hunted the buck and they were arrested. They were taken to the police station in Uitenhage. Sometime thereafter photographs were taken of the Opel as well as of the carcasses of the buck. The photographs also show the head of another grysbuck, but a third carcass was not found.

[2] The respondent was charged with a number of contraventions of the Cape Nature and Environmental Conservation Ordinance, No 19 of 1974 (the Ordinance). These charges can be summarised as the hunting of protected wild animals without a permit (contravening section 27 (1) (b) of the Ordinance); hunting by means of prohibited ways (contravening section 29 of the Ordinance); hunting wild animals and/or removing the carcasses thereof without the landowner's permission (contravening section 40 of the Ordinance); and the illegal possession of wild animals or the carcasses thereof (contravening section 42 (1) of the Ordinance). Not being content with preferring these charges against the respondent, the applicant applied for and obtained a preservation order in terms of section 38 (2) of the Prevention of Organised Crime Act, No 121 of 1998 (POCA), contending that the Opel was an instrumentality of all or some of the offences with which the respondent

was charged as “it was deliberately used by the respondent in contravention of the provisions of Cape Ordinance 19 of 1974”. The order was granted on 11 August 2009. The application presently before me is for an order in terms of section 50 (1) of POCA that the Opel be forfeited to the State. The application is opposed by the respondent.

[3] There can be no doubt that the inference that the respondent had been engaged in illegal hunting of wild game (or poaching) can be drawn from the facts outlined above. However, the respondent denies that he did so. His version is that he had travelled to Kirkwood in the Opel on 8 February 2009 in order to attend a soccer game. A friend of his, one Kwatsha, requested the respondent to try and trace Ngqakaza while he was at Kirkwood as Ngqakaza was in possession of Kwatsha’s dogs. Kwatsha requested the respondent to bring the dogs back to Port Elizabeth if he could find them. The respondent says that he did manage to trace Ngqakaza. After informing him what Kwatsha had asked him to do, Ngqakaza asked if he could also travel to Port Elizabeth with the respondent. When they left Kirkwood the dogs were put in the vehicle and Ngqakaza accompanied the respondent as a passenger. The respondent avers that on two different occasions along the road he encountered injured buck. These were the grysbuck and the bushbuck. Ngqakaza killed the buck by slitting their throats and they were put into the boot of the vehicle. On one of the occasions the dogs also got out of the vehicle and one of the dogs bit the buck. This, according to the respondent, explains the bloodstains which were noticed on the one dog.

[4] The respondent stated that it was obvious to him when he came across the buck that each of them were seriously injured and would not survive the injuries. In the circumstances, so he avers, he regarded the killing of the buck to be “the humane thing” to do. The respondent states further that it seemed to be reasonable to take possession of the buck and to feed his family and that of Ngqakaza. According to the respondent he was unaware that he was committing any offence at the stage when he loaded the buck into the Opel.

[5] The version deposed to by the respondent in opposition to the application is consistent with what he told the policemen immediately after he was stopped. As has been mentioned, as soon as he was asked where he obtained the buck he informed Coertze that he had to fetch the dogs in Kirkwood and on his way back he had found the buck in the road. Although there is no explanation as to why the respondent was proceeding home so late at night and also no explanation as to why a hunting knife and a spotlight were in the Opel, nothing has been advanced by the applicant to indicate that the respondent’s version should be rejected. In fact, a confirmatory affidavit has been filed by Kwatsha, in which he confirms that the dogs in question were his and that he had asked the respondent to fetch them from Kirkwood; and Ngqakaza has also deposed to an affidavit in which he supports the respondents version.

[6] As I have mentioned, the head of a second grysbuck appears on the photographs that were taken at the police station. The respondent denies any knowledge of the head of the grysbuck and says that he has no idea where it comes from. The photograph shows it in the boot of the Opel. However, most significantly,

neither Coertze nor Green made any mention whatsoever of the head of the grysbuck when they described what they found upon inspecting the vehicle and particularly the boot thereof. On behalf of the applicant it was contended, in the replying papers, that as it was not suggested by the respondent that the police planted this grysbuck head in the Opel it must be accepted that he knew it was there. I do not agree. If the respondent has no knowledge of the head of this grysbuck then there is nothing else he can say about it. One would at least have expected Coertze or Green to explain why they made no mention of it when describing what they found in the boot of the Opel.

[7] The applicant did not request that the matter be referred for the hearing of oral evidence. In the circumstances it was quite correctly accepted on behalf of the applicant that the matter had to be decided on the respondent's version. On that version the respondent has contravened section 42 (1) of the Ordinance, which reads as follows:

- “(1) Any person found in possession of any wild animal or the carcase of any such animal shall be guilty of an offence unless, in the event of –
- (f) the animal having been hunted by him on the land of any other person, he is in possession of the written permission contemplated by section 39, or
 - (g) his having acquired such animal or carcase from any other person, he is in possession of a written document contemplated by section 41”

[8] The respondent admits that he is guilty of this offence, although he contends that he was unaware that he was committing an offence at the time he took possession of the carcasses of the buck.

[9] On behalf of the applicant it was contended that the fact that it could not be found that the respondent had in fact poached the buck was irrelevant as the Opel was clearly an instrumentality of the offence of which the respondent is guilty on his own version. To put it another way, it was argued on behalf of the applicant that it was irrelevant whether or not the buck had been hunted by the respondent. The mere fact that he had the carcasses in his possession in the boot of the Opel was sufficient, so it was submitted, for it to be concluded that the Opel was an instrumentality of the offence of unlawfully possessing the carcasses.

[10] I am unable to agree with the submissions made on behalf of the applicant in this connection. In National Director of Public Prosecutions vs Geyser and another, [2008] 2 All SA 616 (SCA) Howie P said the following at 620 g–h [17]:

“To be an instrumentality of an offence the property concerned must by definition in POCA, be “concerned in the commission” of that offence. As the cases have interpreted that definition, the property must facilitate commission of the offence and be directly causally connected with it so that it is integral to commission of the offence.”

[11] In my view it cannot be said that the Opel was “directly causally connected” to the offence of unlawfully possessing the carcasses. On the respondent’s version he happened to come across the two injured buck on the road as he was driving home. After the buck had been slaughtered, he took possession of them and put them in the boot of the Opel. If he had been walking along the road carrying empty sacks and had loaded the carcasses into such sacks it could hardly be said that the sacks were “directly causally connected” to the commission of the offence. Similarly, the Opel was not in any way necessary to enable the respondent to be in possession of the carcasses.

[12] Having come to this conclusion it follows that the application must fail. I make the following order:

The application for an order in terms of section 50 (1) of the Prevention of Organised Crime Act, No 121 of 1998, declaring forfeit to the State the red Opel Kadette DNG 846 EC, is dismissed with costs.

J J NEPGEN

JUDGE OF THE HIGH COURT