

**Not Reportable
In the High Court of South Africa
(Eastern Cape, Port Elizabeth)**

Case No 3339/2010

**Date heard: 24 March 2011
Delivered: 29 March 2011**

In the matter between

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

HENDRIK CORNELIUS BEZUIDENHOUT (JUNIOR)

First Respondent

HENDRIK CORNELIUS BEZUIDENHOUT (SENIOR)

Second Respondent

Summary [Application to declare Blue VW Microbus with registration number DPF033 EC forfeit in terms of section 53(1) of the Prevention of Organised Crime Act, 121 of 1998.].

JUDGMENT

GOOSEN AJ

1. This is an application brought in terms of section 48 (1) read with section 53(1) of the Prevention of Organised Crime Act, Act 121 of 1998 (hereinafter the Act), to declare a VW Microbus with registration letters and numbers DPF033EC, owned by the Second Respondent, forfeit to the state. The application is opposed by the Second Respondent, he having filed a Notice of Intention to Defend to which is annexed a handwritten statement setting out the basis of his defence.

2. A preservation order was granted by Tshiki J on 9 November 2010. A copy of the Order was served on the Second Respondent on 17 November 2010. He also accepted service on behalf of the First Respondent, who was not present his residence, on that day. The Notice in terms of section 39(1) of the Act was published in the *Government Gazette* on 19 November 2010.
3. On 23 November 2010 the Second Respondent delivered a Notice of Intention to Defend to the office of the State Attorney. Annexed to that Notice is an affidavit deposed to by the Second Respondent in which he states that the motor vehicle, which is the subject matter of the application, was taken by the First Respondent without his knowledge and permission. He further states that he is a member of the Norwich Taxi association and that he uses the vehicle to earn an income. The affidavit goes further to state that this is the second occasion when his son, the First Respondent, has used a vehicle belonging to him without his permission to transport abalone and that on the previous occasion he was compelled to sell the vehicle.
4. This application was issued on 14 January 2011 although it was only served on the Respondents on 27 January 2011. The matter came before Hartle J on 8 February 2011 and was then postponed to the opposed motion court roll on 24 March 2011. When the matter came before me, both the First and Second Respondent were present at court and the Second Respondent appeared in person to make submissions to me regarding the forfeiture sought.

5. The essential facts upon which the Applicant relies are not in dispute. They are that on 21 July 2010 on the R330 road in the vicinity of Humansdorp members of the South African Police Services stopped a blue VW Microbus, with registration letters DPF033EC. The vehicle was being driven by the First Respondent. Having received permission to search the vehicle from the First Respondent, a green bag was found. The First Respondent opened the bag in the presence of the police officer, disclosing a large number of abalone. When asked whether the bag belonged to him the First Respondent apparently replied that he was transporting it to Port Elizabeth. The First Respondent was arrested and taken to the Humansdorp police station where the abalone was counted – some 277 units being found – photographed and seized as evidence. The vehicle in which the First Respondent was transporting the abalone was impounded. The First Respondent was subsequently charged with possession of abalone without a permit and is, so I understand it, soon to stand trial in Humansdorp.

6. In terms of section 48 the National Director of Public Prosecutions may apply to court, if a preservation order has been made, for an order forfeiting to the state all or any of the property which is the subject of a preservation order. Section 50 (1) provides that:

The High Court shall, subject to s 52, make an order applied for under s 48 (1) if the Court finds on a balance of probabilities that the property concerned –

- a) Is an instrumentality of an offence referred to in Schedule 1; or
- b) Is the proceeds of unlawful activities.

7. The term “instrumentality of an offence” is defined in section 1 as “any property which is concerned in the commission or suspected commission of an offence...”
- In this instance the offence which is included in Schedule 1 is that concerned with dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance. It is clear from the evidence presented by the Applicant that the possession of abalone constitutes an offence as contemplated by the Schedule.
8. The determination as to whether property is “concerned in “ the commission of an offence requires, on a proper construction of the Act, a determination as to whether the property concerned facilitates the commission of the offence and is directly causally connected with the commission of the offence.¹
9. There can be no dispute that the property in this instance facilitated the commission of the offence for which the First Respondent has been charged and is directly and integrally connected with that offence.
10. In terms of section 50 of the Act a court is obliged, subject to section 52, to make

¹ National Director of Public Prosecutions v Geyser and Another 2008 (2) SACR 103 (SCA) at par. 17; see also National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 2008 (SCA); Mohunram and Another v National Director of Public Prosecutions (Law Review Project as Amicus Curiae) 2007 (2) SACR 145 (CC) (2007 (4) SA 222)

a forfeiture order if it finds, on a balance of probabilities, that the property concerned is an instrumentality of an offence. That section is however subject to the court's discretion not to order forfeiture if it is not satisfied that the consequences of the forfeiture are proportionate to the purpose for which such order is made.²

11. Section 52 makes provision for the exclusion of an interest in property when a forfeiture order is made, on application made by a person who entered an appearance to defend the matter or a person granted leave in terms of section 49 of the Act. Section 52(2A) provides that:

The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and –

- a) Neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities; or
- b) Where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.

12. The Second Applicant has not made application for the exclusion of an interest in the subject property. All that has occurred is that the Second Respondent, in filing an appearance to defend, alleged that the motor vehicle, which is owned by him, was used by his son, the First Respondent, without his knowledge and permission and that he uses the property to earn an income as a taxi operator.

13. At the hearing of the matter the Second Respondent re-iterated his prior

² NDPP v Geyser (supra) at par 19

statement and asked that the court should not declare the vehicle forfeit on that basis and having regard to the fact that he utilises the motor vehicle as a taxi with which to earn income. Significantly, the papers contain an affidavit deposed to by the Chairperson of the taxi association of which the Second Respondent is a member stating that the motor vehicle had not been registered as taxi with the association because it had been under repair for more than a year prior to its seizure. The Second Respondent confirmed this when he explained in his submissions that the vehicle had been inoperative for “more than a year” because he could not afford to have it repaired. He said that he had only managed to have the vehicle repaired some days before the First Respondent was arrested.

14. Even if the Second Respondent’s appearance at the hearing and the submissions made by him are generously construed as an application for exclusion of his interest in the motor vehicle, it must fail. It is common cause that the First Respondent has on a previous occasion utilised the Second Respondent’s vehicle to transport abalone illegally for “his friends”. The Second Respondent was aware of the fact that the First Respondent was associated with persons involved in illegal abalone trading. There is no evidence as to what steps the Second Respondent took to prevent his son from gaining access to and utilising his motor vehicle. Rather than establish on a balance of probabilities that the Second Respondent did not know or did not reasonably suspect that the property was or would be used as an instrumentality of an offence, the evidence and material before me establishes the contrary.

15. In my view the granting of an order of forfeiture will not be disproportionate. The offence for which the First Respondent is charged is prevalent in this area. Substantial quantities of abalone are illegally removed along our coastline and then transported to various locations before it is shipped out of the country to be sold in countries in the east. This basic pattern of the illegal abalone trade is a matter of public record. This illegal trade poses a serious threat to the abalone resource. This too is a matter of public record.

16. In this instance the First Respondent was found in possession of a bag containing 277 abalone. This is a sizeable quantity, the value of which is substantial. The value of the property sought to be forfeited is not such as would render such forfeiture disproportionate.

17. In the circumstances I make the following order:

1. An order is granted in terms of section 53(1)(a) of the Prevention of Organised Crime Act, No 121 of 1998 (the "Act") declaring forfeit to the state a blue VW Microbus with registration number DPF033EC held under case registered as Humansdorp CAS 309/07/2010 (the 'Property');
2. In terms of section 50(6) of the Act paragraph 5 below shall take effect 45

days after publication of a notice of this Order in the Government Gazette unless an appeal is instituted before this time, in which event this Order will take effect on the date of finalisation of such appeal;

3. Pieter Kapp, who was appointed to take charge and care of the property in terms of the Preservation Order issued by this Court, is authorised and directed to continue to act in accordance with such Order for the purposes of this Order;
4. Pending the taking effect of this Order the property shall remain in the custody of Pieter Kapp who is authorised to sign all registration documents in respect of the property;
5. Pieter Kapp shall, upon the coming into operation of this Order, cause the property to be sold by private treaty or public auction and is directed to deposit the proceeds of such sale into the Criminal Assets Recovery Account;
6. The Applicant shall cause a copy of this Order to be served on the Respondents; and
7. The Applicant is directed to publish a notice of this Order in the

Government Gazette as soon as is practicable.

GOOSEN AJ

For the Applicant: Mr W. Kingsley *instructed by* The State Attorney

For the Second Respondent: In person