

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

Case No.4190/12

Date Heard: 15/8/13

Date Delivered: 16/8/13

Not Reportable

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

TANGO WORDSWORTH NQINI

Respondent

Prevention of Organised Crime Act 121 of 1998 – application for forfeiture order, preservation order having been granted – requirements for rescission not met – whether dispute of fact created – whether defence that property not proceeds of unlawful activities established

JUDGMENT

PLASKET, J:

[1] On 27 December 2012 Smith J granted a preservation order in favour of the applicant (the NDPP) and against the respondent (Nqini) in respect of an Audi motor vehicle and R 27 000 in cash. The order was made in terms of s 38(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA). The NDPP now applies for a forfeiture order in respect of the motor vehicle and the cash, in terms of ss 48 and 53 of POCA. Nqini has brought what he terms an application for the rescission of the preservation order. For reasons that I shall explain in due course, I shall treat this simply as his opposition to the application for the forfeiture order, rather than as an application for rescission.

Relevant provisions of POCA

[2] The long title of POCA states that it is intended, inter alia, to 'provide for the recovery of the proceeds of unlawful activity', as well as for 'the civil forfeiture of criminal property that has been used to commit an offence' and 'property that is the proceeds of unlawful activity'. It creates various mechanisms to achieve these and other of its objects.

[3] Section 38 deals with preservation orders. It states:

'(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(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.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.'

[4] Once a preservation order has been granted, the NDPP must, in terms of s 39, give notice to anyone of whom he or she is aware who has an interest in the property and publish a notice of the order in the *Government Gazette*. Anyone with an interest in the property may then enter an appearance to oppose the granting of a forfeiture order or apply for the exclusion of his or her interest from the forfeiture order. The entry of appearance to oppose must be made within 14 days of the service of the preservation order on the person concerned. Such an appearance to oppose must, according to s 39(5), contain full particulars of the address of the person concerned, and be accompanied by an affidavit in which is stated:

- '(a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his or her interest in the property concerned; and

(c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.'

[5] In terms of s 40, a preservation order expires 90 days after the date on which notice of the making of the order is published in the *Government Gazette* unless, as in this case, there is an application for a forfeiture order pending before the court.

[6] Section 47 concerns the variation and rescission of preservation orders. It provides:

'(1) A High Court which made a preservation of property order-

(a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.'

[7] Section 48 and following sections deal with the forfeiture of property. Section 48(1) and (2) provide that if a preservation order is in force, the NDPP 'may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order' on 14 days' notice to anyone who has entered an appearance to oppose in terms of s 39(3).

[8] In terms of s 50, a court shall make a forfeiture order (subject to it excluding certain interests from the operation of the order) if it finds on a balance of probabilities that the property is either 'an instrumentality of an offence referred to in Schedule 1' of POCA or is 'the proceeds of unlawful activities' or is 'property associated with terrorist and related activities'. Finally, s 53 empowers a court to make a forfeiture order by default. This application for a forfeiture order was made in

reliance on s 53 because no appearance to oppose had been entered by Nqini or anyone else within the time prescribed.

[9] The case law makes it plain that the preservation and forfeiture provisions here under consideration are 'not conviction based' and 'may be invoked even when there is no prosecution'.¹ As a result, 'the guilt or wrongdoing of owners or possessors of property is "not primarily relevant to the proceedings"' because the focus is really on the role of the property in relation to criminal activity, rather than the state of mind of the respondent.²

[10] With that legislative overview and that briefest of summaries of how the Constitutional Court and Supreme Court of Appeal have categorised the provisions with which this case is concerned, I turn now to the facts and the determination of the issues arising from them.

The facts

[11] On 21 November 2012 cash of approximately R1 000 000 was stolen from the home of Dr Bongani Nqini, the brother of the respondent. Dr Nqini made a statement about the circumstances of the theft. He had left his house locked and with the alarm set. When he returned he found the gate was open. It was not, however, damaged, leading him to believe that the thief had opened the gate with a remote. He first checked the garage but found that the car in it was still there. He entered his home and found everything in order until he entered the main bedroom, which he found to have been disturbed. He discovered that two wall safes had been removed and stolen. They contained about R1 000 000 in cash as well as jewellery and other items.

[12] Dr Nqini stated that only two people could have entered his house and deactivated the alarm system. They were his brothers. His suspicion immediately fell

¹ *National Director of Public Prosecutions & another v Mohamed NO & others* 2003 (4) SA 1 (CC) para 16.

² *National Director of Public Prosecutions v R O Cooke Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA) paras 20-21.

on the respondent for two reasons. First, the respondent had, on a previous occasion, stolen his car, and secondly, he was unemployed.

[13] It is common cause that on the following day, Nqini bought an Audi motor vehicle from Auto Executive in Newton Park. He wanted to pay for it in cash but the manager of the firm, Mr Steve Roberts, told him to deposit the cash in its account and bring proof of having done so. He did so at about 13h00 that day, having deposited 2 600 R100 notes into the account of Auto Executive. The vehicle was handed over to Nqini but he was told to return to collect the licence papers. It was duly licenced in his name.

[14] On 21 December 2012, one Sergeant Moegamet Humphries, the investigating officer in the theft matter, made enquiries of Roberts about the sale. Roberts told him that Nqini had to return to collect the spare keys and licence papers. Humphries asked to be informed when he did so. About an hour later, Nqini arrived and Roberts contacted Humphries who arrested Nqini and searched the vehicle. He found R27 000 in R100 notes in the vehicle.

[15] In a warning statement taken, I presume, after his arrest (in which case, the date of 22 November 2012 is erroneous) Nqini denied having stolen the money from his brother but offered no explanation whatsoever for his purchase of the vehicle or his possession of the cash.

[16] In his affidavit filed in support of what was described as a rescission application, Nqini stated that he had lost his job at the New Law Courts in Port Elizabeth in 2009 and had been unemployed since then. He does not deny, however, the allegation made by his brother that he had stolen a vehicle belonging to his brother. He also made no mention of two rather curious facts that were disclosed in reply: he does not have a driver's licence and the person who is identified for purposes of insuring the vehicle as its regular driver is one Mr M Soloshe, who is mentioned nowhere in the papers. (Leave has not been sought by Nqini to reply to these allegations.)

[17] Nqini's version is this. In July 2002, an old friend, one Mr Thobani Notshokovu, who is a businessman, asked him to assist in managing a night club in King William's Town. Because Notshokovu knew that Nqini needed money and transport, he gave him R260 000 in cash to purchase a vehicle. The idea was that this would be an advance. Later, he gave him R27 000 as well for 'supplies at the club in King William's Town'. That is the extent of the detail provided by Nqini, although he refers to the supporting affidavit of Notshokovu.

[18] Notshokovu states that he is a businessman with, it would appear, business interests of a varied nature. He said that he had hired Nqini in July 2012 as the manager of his night club in King William's Town to work as an office manager. He then says, and this is the extent to which their contractual relationship is explained:

'8. In terms of our verbal agreement, Applicant would not be paid a salary for the first few months but rather I was to advance him a sum of R260 000.00. This money was to buy a car as he desperately needed to have transport. This was to assist him in his duties as manager of the club in King William's Town but also his travels between King William's Town and Port Elizabeth, which is his home. Also, in terms of our plan, Applicant and I are also working together on plans to open another club in Port Elizabeth which we intend to run as partners.

9. Our agreement on this money was never reduced to writing. I have known the Applicant all my life. I have been very close to him all my life. I know him very well and trust him very well. Therefore, the need for this agreement to be reduced to writing and signed by us never arose. We never saw the need to involve third parties in this either. According to our agreement, the Applicant would pay me back out of the business he generated for the club: market etc.'

[19] As for the R27 000, he says prior to meeting Nqini on 20 December 2012 to discuss the operation of the night club in King William's Town, Nqini had requested money for the club, he had obtained the money and had handed it over to Nqini at their meeting.

[20] I have mentioned that, in his replying affidavit, the deponent on behalf of the NDPP states that his office's investigations revealed that Nqini does not have a driver's licence and that, for insurance purposes, he had stated that the regular driver of the vehicle was one Mr M Soloshe. In addition, it appears that the insurance cover for the vehicle amounts to R1 596.24 per month.

The issues

[21] The first issue that must be dealt with is the nature of the respondent's opposition. He claims to have brought an application to rescind the preservation order but not one of the allegations necessary to sustain such an application in terms of s 47 of POCA have been made in his affidavit. Clearly, whatever his intention, he has not brought a rescission application in terms of s 47. I am prepared to treat his opposition as being opposition to the grant of the forfeiture order as contemplated by s 39(3), albeit that it was entered out of time. I am prepared to condone that defect, particularly in the light of the NDPP's attitude that condonation would not be opposed.

[22] From a reading of Ngini's affidavit, it is apparent that the defence that he raises to the application for the forfeiture order is that the vehicle and the cash are not the proceeds of unlawful activities. That requires a consideration of the facts.

[23] It is trite that in motion proceedings such as these where final relief is sought, that relief may only be granted, as a general rule, if 'those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order'.³ This general rule is qualified: it only applies where the denial by a respondent of facts alleged by an applicant 'raise a real, genuine or *bona fide* dispute of fact'.⁴ Where no such dispute of fact is raised, and the court is satisfied as to the inherent credibility of the applicant's version, it will accept the applicant's facts or, where the allegations or denials of the respondent are 'far-fetched or clearly untenable' they may be rejected on the papers.⁵ In summing up the situations in which a court will accept an applicant's version despite a respondent's denial, Harms DP, in *National Director of Public Prosecutions v Zuma*⁶ stated:

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H.

⁴ *Plascon-Evans* at 634I.

⁵ *Plascon-Evans* at 635A-C.

⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

'It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[24] One further aspect bears mention. It concerns what is required of a respondent to create a real, genuine or *bona fide* dispute of fact. In *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*⁷ Heher JA stated:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[25] And, in *Naidoo & another v Sunker & others*,⁸ Heher JA, after referring to his judgment in *Wightman*, stated that what he had said in that case about the adequacy of allegations in answering affidavits for purposes of the *Plascon-Evans* rule 'applies with equal force to a respondent who endeavours to raise a special defence'.

⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

⁸ *Naidoo & another v Sunker & others* (126/11) [2011] ZASCA 216 (29 November 2011) para 23.

[26] I turn now to consider the version put up by Nqini. In my view, it suffers from a number of difficulties. In the first place, the detail concerning every single aspect of the defence pleaded is extremely scanty. So, for instance, the arrangement between Nqini and Notshokovu is described in the vaguest of terms and it is not even clear from the affidavits whether Nqini had started to work at the club in King William's Town. At best, the affidavits are ambiguous on this point.

[27] Secondly, the terms of the agreement that R260 000 would be advanced to Nqini are vague as well, particularly as to how the money would be repaid. All that is said is that '[a]ccording to our agreement, the Applicant would pay me back out of the business he generated for the club: market etc'. This is meaningless, especially when it is borne in mind that Nqini was a mere employee and not a partner in respect of the King William's Town club. I would have expected a detailed explanation concerning the arrangements that may have been made to ascertain the value of the 'business he generated for the club', some structured arrangement for determining the quantum and regularity of the repayment, and what would happen if Nqini did not generate any business for the club. As Nqini was, as his duties were described by Notshokovu, nothing more than the office manager, it was obviously incumbent on Nqini and Notshokovu to explain how he was expected to generate business for the club if this was how he was to repay the advance.

[28] The absence of detail in all of these respects is telling, especially when there is no written record of the agreement. How Nqini was to operate the vehicle without a salary for 'the first few months' also cries out for explanation as does the question of how he managed to pay the monthly insurance policy of R1 596.24 and whether he paid Soloshe as his driver.

[29] Having taken close to four few months in order to secure the assistance of Notshokovu as a supporting witness, it would have been expected that Nqini would have made sure that he was provided with documentary proof of the money having been advanced by his friend and an explanation as to why it had been paid to him in cash, as it clearly had. If it had been in an account, Notshokovu would have been able to have shown the source of the money with ease and if not, I would have expected him to explain where it had come from. Absolutely no detail is provided as

to when and where Notshokovu gave Nqini the money and why R260 000 was decided upon as the advance. (One result of this lack of detail was that, according to the deponent to the replying affidavit on behalf of the NDPP, none of the bald allegations made in the answering affidavits could be verified.) The same criticism can be levelled at the allegations concerning the R27 000.

[30] In these circumstances, I am of the view that Nqini has not done sufficient to create a real, genuine or *bona fide* dispute of fact as to the source of the R260 000 and the R27 000. As I am satisfied that the NDPP's allegations as to the source of this money and Nqini's role in its acquisition are inherently credible, I accept the correctness of those averments.

[31] In any event, I am also of the view that Nqini's version is palpably implausible, far-fetched and clearly untenable. For that reason it can be rejected on the papers. When the facts that follow are stitched together, it stretches the bounds of credulity far too far to accept that Nqini could have acquired the money concerned legitimately. Those facts are that: (a) Nqini's brother was dispossessed of a large sum of money on 21 November 2012; (b) in circumstances in which Nqini was one of only two people who could have gained entry to the house and disarmed the alarm; (c) that he was unemployed and had been for about three years; (d) that, the very next day, he deposited 2 600 R100 notes into the account of Auto Executive in order to purchase a vehicle for R260 000; (e) that he was later found in possession of R27 000 in cash; (f) his explanation is devoid of detail, is irrational and makes no sense; and (g) he gave no explanation of his possession of the money when he was arrested and had the opportunity to do so, and only did so some months later.

[32] In these circumstances, I am of the view that the NDPP has discharged the onus to establish on a balance of probabilities that the property concerned was proceeds of illegal activities. The application must therefore succeed.

The order

[33] The following order is made.

- (a) A blue Audi motor vehicle with registration number FWV771EC, engine number BNS002668 and chassis number WUZZZ8E56N901011 and R27 000 in cash (the property), held under a case registered as Mount Road CAS 673/11/2012 are declared forfeit to the State in terms of section 50 of the Prevention of Organised Crime Act 121 of 1998.
- (b) Paragraph (e) below shall take effect 45 weekdays after publication in the *Government Gazette* of this order, unless an appeal is instituted before this time in which case this order shall take effect on the finalisation of the appeal, in the event of it being dismissed.
- (c) Glyn Fraser, who was appointed in the preservation order to take care of the property is directed to continue acting as such for the purposes of this order.
- (d) Pending the taking effect of this order, the property shall remain in the custody of Fraser, who shall have authority to sign all registration documents pertaining to the property.
- (e) After this order takes effect, as contemplated in paragraph (b) above, Fraser shall cause the Audi motor vehicle to be sold by private sale or public auction and the proceeds of this sale as well as the R27 000 in cash shall be paid to Dr Bongani Nqini.
- (f) Payment to Dr Bongani Nqini shall be regarded as payment to the State.
- (g) The applicant is directed to publish a notice of this order in the *Government Gazette* as soon as is practicable and to serve a copy of the order on the respondent.
- (h) The respondent is directed to pay the costs of this application.

C Plasket

Judge of the High Court

APPEARANCES:

Applicant: S J Cubungu, instructed by the State Attorney

Respondent: N Msizi, instructed by S B Maqungu Attorneys