

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case no. 456/2015

Date heard: 6/9/16

Date delivered: 27/9/16

Not reportable

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

KALMAR INDUSTRIES SA (PTY) LTD

Respondent

JUDGMENT

PLASKET, J

[1] I dismissed an application brought by the applicant (the NDPP) for a forfeiture order in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of, inter alia, a piece of equipment used to refurbish harbour gantries and described as a Swift 001 purpose-built lifting platform valued at R2 506 000. The NDPP now applies for leave to appeal.

[2] The basis of the application was that the respondent (Kalmar Industries) had stolen the lifting platform from a former sub-contractor, Q6 Management Projects Africa (Pty) Ltd (Q6), and had stolen other property from Q6 and three of its employees.

[3] Section 48(1) of POCA provides that the NDPP may apply to a High Court for a forfeiture order in respect of property if a preservation of property order is in force in respect of that property. Section 50(1) provides that the High Court may make a forfeiture order if it finds on a balance of probabilities that the property:

- '(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.'

[4] It was alleged in the founding papers that the lifting platform was an instrumentality of the offence of theft and was the proceeds of unlawful activity. The second point was not argued in the application, and was raised seriously for the first time in the application for leave to appeal.

[5] I held, at paragraph 19 of my judgment:

'As the lifting platform and the other property in issue in this matter were the very things alleged to have been stolen, they cannot have been instrumentalities of the offence of theft. They were never used to commit or facilitate the offence of theft.'

[6] Accordingly, I found that the jurisdictional requirement for the granting of a forfeiture order was absent.¹ As a result, I dismissed the application without having to decide on the factual bases upon which the application was brought and resisted. In other words, I made no decision on whether Kalmar stole the lifting platform and the other items.

[7] I shall consider first the issue that I was not called upon to deal with in my judgment – whether the property concerned is the proceeds of unlawful activity. This term is defined in s 3 of POCA. It means 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'.

¹ Judgment, para 20.

[8] It is clear that the definition is extremely wide and goes beyond what one would ordinarily understand by the word 'proceeds' – the profit or return derived from a transaction.² It is broadened by the requirements that the property concerned can also have been 'received' or 'retained', and not only 'derived', 'in connection with or as a result of' the unlawful activity concerned.³

[9] In my view, this definition may well be wide enough to include the lifting platform and the other property – the stolen items themselves – as being the proceeds of the unlawful activity of theft, strange as it may seem on the face of it: on the assumption that the NDPP is able to establish the theft and Kalmar's possession of the property, the lifting platform and the other items, once stolen, were retained by Kalmar 'as a result of the unlawful activity' of stealing them.

[10] I am thus of the opinion that there are reasonable prospects of success on appeal. I am less convinced of the strength of the argument that I erred in relation to the second issue – whether stolen property can itself be an instrumentality of the offence of theft but, having concluded that leave should be granted in respect of whether that property is the proceeds of unlawful activity, I believe leave to appeal should not be restricted.

[11] I am of the view that the issues concerned are of sufficient importance to warrant leave being granted to the Supreme Court of Appeal.

[12] I make the following order.

(a) The applicant is granted leave to appeal to the Supreme Court of Appeal.

(b) The costs of this application shall be costs in the appeal.

C Plasket

Judge of the High Court

² *Collins Concise Dictionary* (21st century edition).

³ *National Director of Public Prosecutions v Carolus & others* 1999 (2) SACR 27 (C) at 39c; *National Director of Public Prosecutions v Abrina 6822 Ltd & others* 2011 (1) SACR 419 (KZP), paras 24-27.

APPEARANCES

For the applicant: H van der Linde SC instructed by the State Attorney, Port Elizabeth

For the respondent: CB Garvey instructed by MacLarens Attorneys, Johannesburg and Rob Williams Attorneys, Port Elizabeth