

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

**CASE NO: 618/2016
DATE HEARD: 24/11/2016
DATE DELIVERED: 2/2/2017**

In the matter between

KARAS AUTO SPARES

APPLICANT

and

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

RESPONDENT

JUDGMENT

ROBERSON J:-

BACKGROUND

[1] On 1 March 2016 the respondent applied for and was granted a preservation order in terms of s 38 (1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), in terms of which any person was prohibited from dealing in any manner with certain motor vehicles, including a Mercedes Benz Sprinter truck (the Mercedes). The four respondents in the preservation application included the applicant in the present matter, Karas Auto Spares. It was alleged that the applicant was the owner of the Mercedes and it was believed at the time the preservation order was made that the applicant business was owned by one Zelalem Belahw (Belahw), also known as William or Williams. It was alleged that the vehicles were

instrumentalities of a theft which took place on 13 October 2015, during which chocolate products to the value of R16 million were stolen from a Hestony truck. Chocolate products to the value of R600 000.00 were subsequently recovered. The stolen goods were allegedly conveyed in or found in the vehicles which were the subject of the preservation order. Stolen chocolate was found in the Mercedes on the night of the theft and the Mercedes was confiscated that night. Belahw was arrested on 29 October 2015. Six persons have been charged with the theft, including Belahw.

[2] After the preservation order was made, the respondent complied with the notice provisions contained in s 39 of POCA which provides:

“39 Notice of preservation of property orders

(1) If a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order-

- (a) give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and
- (b) publish a notice of the order in the *Gazette*.

(2) A notice under subsection (1) (a) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(3) Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(4) An appearance under subsection (3) shall be delivered to the National Director within, in the case of-

- (a) a person upon whom a notice has been served under subsection (1) (a), 14 days after such service; or
- (b) any other person, 14 days after the date upon which a notice under subsection (1) (b) was published in the *Gazette*.

(5) An appearance under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and shall be accompanied by an affidavit stating-

- (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."

[3] The preservation order was served on the applicant on 2 March 2016 and on 24 March 2016 the applicant delivered a notice of opposition in which it was stated that the applicant intended to "oppose the abovementioned application". The notice did not specify whether the making of a forfeiture order was to be opposed or an application would be made for an order excluding the applicant's interest in the Mercedes from the operation of a forfeiture order. No affidavit accompanied the notice of opposition, as required in terms of s 39 (5) of POCA.

[4] In due course the respondent applied for a forfeiture order in respect of the vehicles, including the Mercedes, in terms of s 48 of POCA, which provides:

"48 Application for forfeiture order

(1) If a preservation of property order is in force the National Director, 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.

(2) The National Director shall give 14 days notice of an application under subsection (1) to every person who entered an appearance in terms of section 39 (3).

(3) A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(4) Any person who entered an appearance in terms of section 39 (3) may appear at the application under subsection (1)-

- (a) to oppose the making of the order; or
- (b) to apply for an order-
 - (i) excluding his or her interest in that property from operation of the order; or
 - (ii) varying the operation of the order in respect of that

property,
and may adduce evidence at the hearing of the application.”

[5] Section 50 of POCA provides:

“Making of forfeiture order

(1) The High Court shall, subject to section 52, make an order applied for under section 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;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

(5) The Registrar of the Court making a forfeiture order must publish a notice thereof in the *Gazette* as soon as practicable after the order is made.

(6) A forfeiture order shall not take effect-

- (a) before the period allowed for an application under section 54 or an appeal under section 55 has expired; or
- (b) before such an application or appeal has been disposed of.

[6] The application for a forfeiture order was granted by default on 7 June 2016. Notice of the application was not given to the applicant, the respondent asserting in his founding affidavit that the applicant’s notice of opposition was defective in that there was no compliance with the provisions of s 39 (5) of POCA. A copy of the notice of opposition was annexed to the founding affidavit in the forfeiture application.

THE PRESENT APPLICATION

[7] The applicant has brought the present application in terms of s 54 (1) of POCA, namely that its interest in the Mercedes be excluded from the operation of the forfeiture order. Alternatively it applied in terms of s 53 (3) of POCA for a variation of the forfeiture order to the effect that the reference to the Mercedes in the order be deleted. These sections provide:

“53 Forfeiture order by default

(1) If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 48 (1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who entered appearances in terms of section 39 (3) have knowledge of notices given under section 48 (2), the Court may-

- (a) make any order by default which the Court could have made under sections 50 (1) and (2);
- (b) make such order as the Court may consider appropriate in the circumstances; or
- (c) make no order.

(2) The High Court may, before making an order in terms of subsection (1), call upon the National Director to adduce such further evidence, either in writing or orally, in support of his or her application as the Court may consider necessary.

(3) Any person whose interest in the property concerned is affected by the forfeiture order or other order made by the Court under subsection (1) may, within 20 days after he or she has acquired knowledge of such order or direction, set the matter down for variation or rescission by the court.

(4) The court may, upon good cause shown, vary or rescind the default order or give some other direction on such terms as it deems appropriate.

“54 Exclusion of interests in forfeited property

(1) Any person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 48 (2), but did not receive such notice, may, within 45 days after the notice of the making thereof is published in the *Gazette*, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

- (2) The application shall be accompanied by an affidavit setting forth-
- (a) the nature and extent of the applicant's right, title or interest in the property concerned;
 - (b) the time and circumstances of the applicant's acquisition of the right, title, or interest in the property;
 - (c) any additional facts supporting the application; and
 - (d) the relief sought.
- (3) The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within 30 days of the filing of the application.
- (4) The High Court may consolidate the hearing of the application with a hearing of any other application filed by a person under this section.
- (5) At the hearing, the applicant may testify and present evidence and witnesses on his or her own behalf, and may cross-examine any witness who appears at the hearing.
- (6) The National Director or the *curator bonis* concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing.
- (7) In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director or the *curator bonis* concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken by commission and that any book, paper, document, record, recording, or other material not privileged be produced at the taking down of such testimony by commission.
- (8) The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order-
- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
 - (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.
- (8A) 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.
- (9) (a) When a person who testifies under this section-
- (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
 - (ii) gives false evidence knowing that evidence to be false or not believing it to be true, he or she shall be guilty of an offence.
- (b) When a person who furnishes an affidavit under subsection (2) makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, he or she shall be guilty of an offence.
- (c) A person convicted of an offence under this subsection shall be liable to the penalty prescribed by law for perjury."

[8] The applicant is a close corporation and its sole member is Mr Levin Soji Kara. Kara deposed to the founding affidavit. The applicant operates mainly as a scrap yard and panel beating business, but also deals in motor vehicle parts and offers a towing service. Kara also sells wholesale liquor to licensed small businesses. The applicant is the registered owner of the Mercedes. Kara stated that he purchased the Mercedes at an auction on 13 December 2011 for a total price of R23 461.20 and it was thereafter registered in the applicant's name. Proof of registration was annexed to the affidavit in the form of a certificate of registration issued on 22 December 2011.

[9] Kara stated that approximately four years ago he met a person known to him only as William. William advised him that he operated a small tavern in Kleinskool, Port Elizabeth. In view of Kara's involvement in the sale of liquor to small businesses, he and William began a business relationship, which endured for some years. William was a loyal customer who paid his debts within a reasonable time and was even allowed to purchase liquor on credit. Kara would deliver liquor to William's business in Kleinskool. William also ran a spaza shop. During 2014 William told Kara that he needed a vehicle for his business and Kara offered to sell

him the Mercedes. They concluded an oral agreement in terms of which Kara sold the vehicle to William for R50 000.00 payable by way of a deposit of R20 000.00 on delivery and the balance of R30 000.00 in full. There was no specific agreement about when the balance would be paid but the understanding was that it would be within a reasonable time and during 2014. The applicant would remain the owner of the Mercedes until the full purchase price had been paid.

[10] Shortly after the conclusion of the agreement, William took delivery of the Mercedes and paid the R20 000.00 deposit. Thereafter Kara experienced great difficulty in obtaining payment of the balance of R30 000.00. He unsuccessfully tried to contact William telephonically on many occasions, and visited his business premises at Kleinskool on more than one occasion, but could not find him there.

[11] Kara did not know if William was involved in the theft of chocolate or if the Mercedes was an instrumentality of the theft, and had no reasonable grounds to suspect that William would use the vehicle as an instrumentality of the theft.

[12] Kara learned of the circumstances in which the Mercedes was confiscated after the preservation order was served on him and he read the founding affidavit in the preservation application. Under the heading "Condonation: non-compliance with section 39 (5)", Kara said that he was not prejudiced by the preservation order because the Mercedes was in the custody of the police, and that is why he did not take any action or file any affidavits at that stage. He decided that it would make more sense to oppose the forfeiture application, rather than deliver an affidavit setting out his defence to the preservation application, which had already been

heard. He intended to oppose the forfeiture application but because that application had not yet been launched, he had no way of knowing what averments would be made in that application. He could not answer in advance to an application which had not yet been launched and intended to file an answering affidavit when the forfeiture application was served on the applicant. The failure to file the s 39 (5) affidavit was not wilful but was caused by his interpretation of POCA.

[13] The respondent opposed the application (i) on the ground that the applicant was not a person who was entitled to receive notice of the forfeiture application in terms of s 48 (2) of POCA, because it had not complied with s 39 (5) of POCA, and (ii) on the merits in that it had not proved that it had an interest in the Mercedes.

NON-COMPLIANCE WITH S 39 (5) OF POCA

[14] It was submitted on behalf of the applicant that notice of the forfeiture application should have been given to it, and any other interpretation of s 48 (2) would be absurd. If the legislature had intended that a party had to comply with s 39 (3) and (5), it would have specifically referred to s 39 (5) in s 48 (2). Alternatively, so it was submitted, even if s 39 (5) was peremptory, the true enquiry is whether the legislature intended non-compliance to result in invalidity.

[15] In my view, s 39 (3) and (5) are inextricably bound. The s 39 (5) affidavit is an integral part of a s 39 (3) notice. A s 39 (3) notice is incomplete if not accompanied by the s 39 (5) affidavit. A reference to s 39 (3) in s 48 (2) must therefore envisage a notice of opposition which incorporates the s 39 (5) affidavit. Specific reference to

39 (5) in s 48 (2) is therefore not necessary because the s 39 (5) affidavit is part of the content of the s 39 (3) notice.

[16] With regard to the alternative submission, I refer to *Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC) where the following was said at para [182] to [184] (footnotes omitted):

“The correct approach

[182] The approach that the use of the word 'shall' in a statutory provision means that anything done contrary to such a provision is a nullity is neither rigid nor conclusive. The same can be said of the use of the word 'must'. Many factors must be considered to determine whether a thing done contrary to such a provision is a nullity. There are cases where the performance of an act in breach of a statutory obligation does not necessarily result in the act being invalid and of no force and effect. When the question arises whether something that was done contrary to a statutory provision is invalid and of no force and effect, the proper approach is to ascertain what the purpose of the legislation is in this regard. Sometimes the purpose of the legislation will be to render it a nullity. At other times the purpose will not be to render such a thing a nullity. In each case the legislation will need to be construed properly to establish its purpose.

[183] Some of the factors that should be taken into account in the construction of the statute to establish its purpose are the following: the purpose of the legislation as a whole, the purpose of the relevant section of the Act, the mischief sought to be addressed, whether the statute makes provision for remedies for its breach, or whether, if the act were not held to be null and void, it would mean that the provision may be breached with impunity. Where the statute does make provision for some remedies for the breach of the relevant provision, the court would also have to take into account whether the remedies provided are adequate. Where they are adequate, there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity. It would be a different case where the remedies provided by the statute are not adequate, particularly if they are substantially inadequate or where such remedies cannot be easily obtained.

[184] This approach is consistent with that taken in *Standard Bank; Metro Western Cape (Pty) Ltd; Palm Fifteen (Pty) Ltd; Pottie v Kotze*; and *Swart v Smuts*. In *Palm Fifteen* Miller JA said:

'The subject-matter of the prohibition, its purpose in the context of the legislation . . . the remedies provided in the event of any breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognisable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity.'

This passage was quoted with approval in *Absa Insurance Brokers (Pty) Ltd*. In that case the Supreme Court of Appeal made the following important point after quoting the above passage from *Palm Fifteen (Pty) Ltd*:

'In answering the question as to whether a contract entered into in contravention of the provisions of s 20bis is a nullity, *the purpose of the section is crucial.*' [Emphasis added.]"

[17] In *Mohunram and Another v National Director of Public Prosecutions and Another* 2007 (6) BCLR 575 (CC) at para [57] Van Heerden AJ stated (footnotes omitted):

"The broader societal purposes served by civil forfeiture under Chapter 6 of POCA have been held to include:

- removing incentives for crime;
- deterring persons from using or allowing their properties to be used in crime;
- eliminating or incapacitating some of the means by which crime may be committed; and
- advancing the ends of justice by depriving those involved in crime of the property concerned."

[18] It seems to me that the purpose of s 39 (5) of POCA is to enable the respondent to know as soon as possible on what grounds a forfeiture order will be opposed or on what grounds an application will be made for the exclusion of an interest in the property concerned. These grounds, especially in the latter case, will often be within the exclusive knowledge of the party opposing the forfeiture order or applying for the exclusion of an interest in the property and the purpose of the civil forfeiture may be thwarted if the respondent has insufficient time to prepare to meet the opposition or the application. This purpose would be negated if the absence of the s 39 (5) affidavit did not render the s 39 (3) notice a nullity, and would render s 39 (5) meaningless and superfluous. Moreover there is no remedy available to the respondent if s 39 (5) is breached. The fact that affidavits would be filed in opposition to forfeiture or in support of an application to exclude an interest, is not a remedy in the sense alluded to in *Steenkamp (supra)*. If non-compliance with s 39

(5) did not render the s 39 (3) notice a nullity, it would mean that s 39 (5) “may be breached with impunity.”

[19] It follows that I am of the view that the applicant is not a person who entered an appearance in terms of s 39 (3) of POCA and service on it was not required in terms of s 48 (2).

MERITS

[20] Even if I am wrong in this conclusion, I am of the view that the applicant did not discharge the onus on it to prove on a balance of probabilities that it was the owner of the Mercedes and thus failed to prove an interest in the Mercedes. This was the basis of the respondent’s opposition on the merits.

[21] Kara’s account of the sale to William, its terms, and his attempts to recover the balance of the purchase price was most unconvincing. It is in my view improbable that he would sell a vehicle to a person for quite a large amount of money without knowing his surname. Kara on his own version is a businessman and the applicant, of which Kara is the sole member, conducts a number of types of business. He produced no documentary evidence of the sale to William. The terms for payment of the balance of the purchase price were extremely vague. It is improbable that he and William did not agree on the period within which William was to pay the balance. The “understanding” between him and William was very vaguely expressed and difficult to grasp. Kara did not say how the deposit of R20 000.00 was paid and whether or not there was a receipt for it in the applicant’s books. Kara

was vague about his efforts to recover the balance of R30 000.00. He did not reveal precisely where William's business premises were. He did not say that William had abandoned his business premises and was untraceable. He merely said that he "could never get hold of him" and that he unsuccessfully tried to contact him telephonically. He did not say for how long his efforts continued. It is probable that a person in his position would have taken legal action on behalf of the applicant to recover the money, yet he did not. I find his decision to wait for the forfeiture application before deposing to an affidavit somewhat strange. The preservation application contained a number of affidavits about the theft of the chocolate and the Mercedes' instrumentality of the theft. Kara stated that he had read the founding affidavit in the preservation application so it was unlikely that he would learn anything more from the forfeiture application. At this stage he had obtained legal representation and it is unlikely that his attorney would advise him to elect not to file an affidavit in compliance with s 39 (5) of POCA. Finally while claiming that the applicant was still the owner of the Mercedes, it is significant that its last registration was in 2011. In my view all these factors point to the alleged sale to William and the reservation of ownership as being a belated fabrication. It is far more probable that Kara on behalf of the applicant disposed of the Mercedes and had relinquished all title to it.

[22] The application in terms of s 54 (1) of POCA therefore cannot succeed.

[23] In the alternative, in terms of s 53 (3) of POCA, the applicant was required to show good cause why the forfeiture order should not be varied to exclude its interest in the Mercedes. Good cause in this context would be what is required in an

application for rescission of judgment at common law or in terms of Rule 31 (2) (b) of the Uniform Rules. In addition to providing an explanation for its default, the applicant would have to set out a *bona fide* defence to the forfeiture order or *bona fide* grounds in support of a variation of the forfeiture order to exclude the applicant's interest in the Mercedes. Kara's improbable and deficient account does not disclose *bona fide* grounds for the variation the applicant seeks, and consequently the applicant failed to show good cause for a variation of the forfeiture order.

[24] The application is dismissed with costs.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

**For the Applicant: Adv A C Barnett, instructed by Shaun Masimla Attorneys,
Port Elizabeth**

For the Respondent: Mr W Myburg, Office of the State Attorney, Port Elizabeth