

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 3428/2015

Date Heard: 7 September 2017

Date Delivered: 14 September 2017

In the matter between:

SIYABONGA SAMORA STEMELE

First Applicant

SIPHOKAZI EUNICA STEMELE

Second Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT

EKSTEEN, J:

[1] The applicant seeks the rescission of a forfeiture order granted in favour of the respondent pursuant to section 48 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) on 20 October 2015.

Background

[2] The respondent obtained a preservation order on 8 September 2015 prohibiting the first respondent or any other person with knowledge of the order from dissipating, taking possession of or control over, diminishing the value of or otherwise dealing in any manner with the amount of R120 879 in cash (the money) which was held under Kwanobuhle CAS 256/8/2015. In its founding papers the

respondent contended that there were reasonable grounds to believe that the money concerned is the proceeds of unlawful activity as envisaged in section 38(2)(b) of POCA. The applicant relied on an affidavit by one Elroy Ferekelen May. May declared that on 21 August 2015 he obtained a search warrant for premises situated at [...] B. S., Kwanobuhle, Uitenhage to search the premises for dagga and other drugs. He and Constable Mentoer proceeded to the property. May proceeds to declare:

“On our arrival at above mentioned address the gate was locked with a padlock and Cst Mentoer cut the padlock with a equipment (bolt cutter). We then went to the backdoor of the house and we orderly knocked on the door and he Cst Mentoer identified himself and I as police officials. An unknown African male opened the door and we identified ourselves. We then gave a copy of the search warrant after he requested to see it first. He was wearing a sleep short and a black T-shirt. He then opened the burglar guard and he granted us permission to enter the house. We then entered the house, we then noticed an African female present at the house. We then conducted the search room by room. While we searching in one of the rooms in the presence of Mr SAMORA STEMELE, all the time and we found a transparent plastic bag in one of the side cupboards draws next to the bed containing loose MANDRAX tablets and loose powder in his presence.

Furthermore while we were searching in the room we noticed a big chest of drawer lock with a padlock. Cst Mentoer ask him (Mr Samora Stemele) to open the drawer and he said that he do not have a key for it. Cst Mentoer told him that he have to cut the padlock and he agree. Cst Mentoer then cut the padlock and we open the drawer and we searched it.

While we search inside the drawer we find a black cooler bag Amstel Lite, containing transparent plastic bags of Mandrax tablets, a Viceroy Box containing coins unknown amount, Grey Castle Lite bag containing notes of an unknown amount and a red Rage bag with a Old Buck box containing cash notes undisclosed amount to us.

Cst Mentoar ask Mr Samora Stemele to who does the mandrax and the money belong to. He did not answer Cst Mentoar. On this grounds Cst Mentoar explain verbally to Mr Samora Stemele and Ms S Mnikina of their constitutional rights and all was understood by both.” (*Sic*)

[3] He proceeds to state that the coins and notes found in the chest of drawers were later counted and that this represents the money. An affidavit of similar import was attested to by Mentoar.

[4] The preservation order directed the applicant to cause a copy of the order to be published in the Government Gazette and to give notice in terms of section 39(1) of POCA to the respondent and to all persons who become known to the applicant to have an interest in the matter. The notice directed the first respondent to file a notice of his intention to oppose, if he chose to do so, in terms of section 39(3) and (5) of POCA. The order was duly published in the Gazette and the respondent caused the preservation order to be served on the first applicant. A return of service was procured from the sheriff who recorded that he had “served this preservation order upon Nobesutu Stemele, daughter apparently a responsible person residing at the place of residence of the defendant and not less than 16 years of age.”

[5] In these circumstances the respondent proceeded to obtain the forfeiture order. The first and second applicants now seek the rescission of the forfeiture order on three grounds: Firstly, in terms of rule 42(1)(a) of the Uniform Rules of Court (the rules); secondly, in terms of the common law; and thirdly, in terms of section 53(3) and (4) of POCA.

Rule 42(1)(a)

[6] Rule 42(1)(a) provides that a court may *mero motu* or upon the application by any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. It is common cause that the forfeiture order was granted in the absence of both the first and second applicants. In order, however, to obtain rescission of judgment in terms of the rule an applicant is required to show that the order was “erroneously sought or erroneously granted”. A judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. (See **Nyingwa v Moolman NO** 1993 (2) SA 508 (Tk) at 510D-G; **Naidoo and Another v Matlala NO and Others** 2012 (1) SA 143 (GNP) at 153C; **Thomani and Another v Seboka NO and Others** 2017 (1) SA 51 (GP) at 58C-E.)

[7] The applicants allege that they are married to one another in community of property. On this basis it is argued on behalf of the applicants that the respondent ought to have joined the second applicant as a party to the preservation and subsequent forfeiture proceedings from the outset. The failure to do so, so it is argued, renders the proceedings fatally flawed and amounted to a non-joinder which would have precluded this court from granting a forfeiture order had the marriage been disclosed to the judge.

[8] At first glance the argument is attractive. Where parties are married in community of property they are joint owners of the property. Ordinarily therefore they can only be sued jointly where litigation relates to such property. Upon careful consideration of the submissions made to me during argument, however, I do not consider that the argument is sound.

[9] Section 38(1) of POCA authorises the respondent to make application *ex parte* 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. Section 38(2) stipulates that the court “shall” make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned is the proceeds of unlawful activities. In making an order as envisaged in section 38(1) the court is also enjoined to make an order authorising the seizure of the property concerned.

[10] In authorising the respondent to bring an application *ex parte*, it seems to me, that where the respondent is unaware of who the owner (or owners) of the property is, a preservation order may be granted without citing any respondents at all and the court is obliged, in those circumstances, to make a preservation order provided that there are reasonable grounds to believe that the property concerned is the proceeds of unlawful activities. *A fortiori* the respondent is authorised to bring the application against one of several joint owners where, in the circumstances, he is unaware of the identity or existence of other joint owners.

[11] Section 39(1) of POCA provides that the respondent is to give notice of the preservation order granted by the court “to all persons known to the National Director” (the respondent) to have an interest in property which is subject to the order and to publish a notice of the order in the Gazette. Section 39(3) proceeds to provide that any person who has an interest in the property which is subject to the preservation order may enter an appearance by giving notice of his or her intention to oppose the making of a forfeiture order and to apply for an order excluding his or her interest in the property concerned from the operation of the order. Section 39(4) of POCA prescribes that an appearance as envisage in subsection (3) shall be delivered to the respondent: (a) in the case of a person upon whom a notice has been served under subsection (1)(a) (i.e. a person known to the respondent to have an interest in the property concerned), within 14 days after such service; or (b) any other person (i.e. a person not cited and not known to the respondent to have an interest in the property concerned) within 14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette.

[12] As a matter of interpretation, therefore, it seems to me that where there are reasonable grounds to believe that property (in this case the money) is the proceeds of unlawful activity the respondent is entitled to bring an application for the preservation of the property. Where the respondent is aware of persons who have an interest in the property they should be cited and notice of the order should be served upon them. The fact that the respondent is unaware of any or further persons who may have an interest in the property does not preclude the granting of the preservation order. Such persons are nevertheless entitled to enter an appearance to oppose the granting of a forfeiture order pursuant to the publication in

the Gazette. The publication in the Gazette serves as an invitation to any such persons to join in the proceedings. In these circumstances I do not think that the preservation order was erroneously sought or erroneously granted. Knowledge of a marriage in community of property would not, in my view, have had any impact upon the granting of the preservation order. The only effect which knowledge of the marriage may have had is on the form of the order. The respondent would then have been required to serve notice of the preservation order on the second applicant too.

[13] The forfeiture order was granted pursuant to the provisions of section 48 of POCA. There is no challenge to the procedural compliance by the respondent. The sole challenge under rule 42(1)(a) is the fact that the parties are married in community of property and that the second applicant accordingly has an interest in the property. Section 50(1) of POCA prescribes that the court “shall” subject to the provisions of section 52 of POCA, make an order in terms of section 48(1) if the court finds on a balance of probability that the property concerned is the proceeds of unlawful activities. The court is accordingly obliged to make the order in these circumstances. Section 50(3) of POCA specifies, moreover, that 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. The constitutionality of section 50(3) of POCA is not challenged in these proceedings.

[14] Section 52 of POCA provides for a court making an order of forfeiture to exclude certain interests in the property which is the subject of the order, from the operation of the order on an application by a person who has given notice of

opposition in terms of section 39(3) of POCA or who has entered a late entry of appearance as envisaged in section 49 of POCA for such purpose. When no such application is made the order of forfeiture will be granted in terms of section 50 of POCA. The forfeiture order granted in terms of section 50 of POCA must again be published in the Gazette (see section 50(5)) and will not take effect for a period of 45 days. The purpose of the suspension of the order is to be found in section 54 of POCA which provides for any person affected by the forfeiture order who was entitled to receive notice of the application for the order under section 48 of POCA, but did not receive such notice, to apply for an order excluding his/her interests in the property concerned from the operation of the order of forfeiture. The second applicant has not at any stage made an application for her interest in the property to be excluded from the forfeiture order nor does she seek such an order in these proceedings. On the contrary, the applicants in the present application seek the rescission of the entire judgment on the basis that the money does not constitute proceeds of unlawful activities. In the circumstances, on a proper interpretation of POCA, I do not think that the main application can be said to be defective by virtue of the non-joinder of the second applicant. It follows that the preservation order and the subsequent forfeiture order were not sought or granted erroneously.

Rescission in terms of the common law

[15] In order to succeed under the common law in an application for rescission of a judgment granted in default the applicants are required:

1. To provide a reasonable explanation for their default; and
2. To show that they have a *bona fide* defence, which, *prima facie*, carries some prospect or probability of success.

[16] In respect of the explanation for their default the applicants contend that notwithstanding the return of service rendered by the sheriff they did not receive notice of the preservation order and the application for forfeiture. The first applicant states that he first became aware of the preservation order at the end of November 2015 when he discovered the preservation order lying in the yard of his home near his garage. He discovered the document purely by chance and handed it to his attorney for action. The forfeiture order, as set out earlier herein, was granted on 20 October 2015. There is nothing on the papers to gainsay the first applicant's explanation in this regard. These facts, in my view, constitute a satisfactory explanation for their default.

[17] Before I proceed to examine the defence advanced and the *bona fides* thereof it is necessary to revert briefly to the affidavits of May and Mentoore. I have quoted the material portion of May's affidavit earlier herein. Although it is not a model of linguistic clarity the essence of the respondent's case is that May, armed with a search warrant, obtained consent from the first applicant to search his home. Mandrax tablets and loose powder were found in a plastic bag stashed in the drawers of a side cupboard in one of the rooms of the home. Later, during the search, with May's consent the padlock on a chest of drawers found in the home was broken to obtain entry thereto. In the chest of drawers further bags of mandrax tablets and the money was found. The search was conducted at all times in the presence of the first applicant and upon an enquiry from Mentoore as to whom the mandrax belonged to, the first applicant did not reply. In these circumstances,

absent a cogent explanation, I think that there are more than reasonable grounds to believe that the money constitutes the proceeds of unlawful activities.

[18] In the application for rescission the applicants contend that the first applicant conducts a tavern from his home and that they participate in a stokvel where a number of people will contribute a sum of money weekly to the stokvel. It is contended that the money found in the drawer represented takings from the tavern and the stokvel money. These averments are not supported by any documentary evidence nor by evidence by third parties on affidavit. Realising that the averments of the stokvel constitutes a bald statements the applicants sought leave in terms of rule 6(5)(e) of the rules to file a further affidavit by one Knockpaal. The application was granted. The supplementary affidavit declares that Knockpaal is the organiser of a stokvel and he lists the names of a number of persons who participate in the alleged stokvel, including the applicant. He declares that the participants pay their contributions to him and that the total collected is paid to a different participant each week. Knockpaal does not annex any documentation nor does he state when last stokvel money was paid out to the applicant before the search of the applicants' home. He states merely that he "became aware" that applicants' stockvel money had been attached in August 2015. Just how he "became aware" or why he concluded that the money attached constituted stokvel money remains entirely unexplained. This affidavit does not advance the debate at all.

[19] The requirement that an applicant for rescission is to show that he has a *bona fide* defence requires of him to show the existence of a substantial defence. It does not mean that he must show a probability of success and it suffices if he shows a

prima facie case, or the existence of an issue which is fit for trial. (See for example **PLJ van Rensburg en Vennote v Dulk** 1971 (1) SA 112 (W); and **Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd** 1980 (4) SA 573 (W).) On the other hand, whilst the applicant need not deal fully with the merits of the case the grounds of defence must be set out with sufficient detail to enable the court to conclude that there is indeed a *bona fide* defence. In **Standard Bank of South Africa Limited v EL-Naddaf and Another** 1999 (4) SA 779 (W) at 786A Marais J emphasised that:

“...*bona fides* cannot be demonstrated by merely making a bald averment lacking in any detail. To hold that such bald averment is sufficient to demonstrate *bona fides* is a classic oxymoron. It effectively negates the requirement that the Court be *satisfied* that the applicant has a *bona fide* defence. It could with equal validity be held that a mere statement by an applicant that his defence is *bona fide* would be sufficient, which is manifestly absurd.”

[20] I agree with these statements. I do not consider that I can be satisfied on the facts presented that the applicants have shown a *bona fide* defence to the forfeiture. Even if I accept that the first applicant does conduct a tavern from his home and that he does participate in a stokvel it would not, in my view, disturb the conclusion that there are reasonable grounds to believe that the money, discovered in the manner and in the circumstances set out in the affidavit of May is proceeds of unlawful activities. This, it seems to me, the applicants recognise. The essence of their case for rescission is to be found not in the existence of other sources of income, but in their repeated allegations that both May and Mentoer lied in their affidavits. They deny that a search warrant was produced and deny that they agreed to May searching the premises. The first applicant denies that he was ever present whilst the search continued and states that he was forced to lie on the ground at gunpoint whilst May and other police entered into the house. He denies that there was any

mandrax in his home or that any was found in the home or in the chest of drawers where the money was kept. The defence raised lies in the attack on the credibility of May and Mentoer.

[21] There are a number of authorities, in this Division too, indicating that claims for rescission of judgment on common law grounds must be brought by way of trial action, not on notice of motion. (See for example **Peel v National Bank of South Africa Limited** 1908 EDC 488; **Ntondonke v Zilani** 1915 EDL 2; and **Motor Marine (Edms) Bpk v Thermotron** 1985 (2) SA 127 (SE) at 130G-H.) Often it would be prudent to do so. The better view, however, in my view, is that motion proceedings can be used to claim any relief unless otherwise stipulated by legislation or by rule of court, or unless otherwise inappropriate by reason, for example, of a dispute of fact. (See **Santos Erec v Cheque Discounting Co. (Pty) Ltd** 1986 (4) SA 752 (W).) I shall accordingly accept that as a matter of principle, an application for rescission on common law grounds may be brought by way of application. In **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1161 it was held:

“(1) There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed: ... (2) There are on the other hand certain classes of case (... are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which ... according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact.”

(See Herbstein and Van Winsen: *The Civil Practice of the High Court of South Africa* (5th ed) vol 2 p. 292.)

[22] It is not possible on affidavit to determine disputes of fact and it is therefore generally accepted that a court can entertain proceedings on motion only when there is no genuine dispute of fact. Rule 6(5)(g) permits the hearing of oral evidence in motion proceedings in appropriate circumstances. The rule, however, provides for the court, in its discretion, to dismiss an application where a real or genuine dispute of fact arises. The court will dismiss an application if the applicant should have realised when launching his application that a serious dispute of fact incapable of resolution on the papers, was bound to develop. (See **Room Hire Co.** *supra* at 1162 and 1168; **Carrara & Lecuona (Pty) Ltd v Van den Heever Investments Ltd and Others** 1973 (3) SA 716 (T) at 720C; **Campbell v First Consolidated Holdings (Pty) Ltd** 1977 (3) SA 924 (W) at 932B; **Elco Steel Dealers v Blackwood Hodge (South Africa)(Pty) Limited** 1979 (3) SA 1312 (T) at 1319F; **Standard Bank of South Africa Limited v Neugarten and Others** 1987 (3) SA 695 (W) at 699A; **HR Holfeld (Africa) Limited v Karl Walter and Co. GmbH and Another (1)** 1987 (4) SA 850 (W) at 860B; **Cullen v Haupt** 1988 (4) SA 39 (C) at 40E-41B; and **Seloadi and Others v Sun International (Bophutswana) Limited** 1993 (2) SA 174 (BG) at 191C-192C.) In the present instance the fundamental issue for decision in the forfeiture proceedings is whether or not there are “reasonable grounds to believe” that the money is the proceeds of unlawful activities. The inference is to be drawn from the facts which pertained at the time of the discovery of the money. In their founding papers for rescission the applicants deny all the material facts which give rise to this conclusion as set out in the affidavits of May and Mentoer. This genuine dispute of fact was not only anticipated prior to launching the application for rescission, but it forms the very foundation of the application. The defence which is

raised to the forfeiture application is in essence that reasonable grounds do not exist to believe that the money is the proceeds of unlawful activities because the affidavits of May and Mentoore are untruthful in almost every material respect.

[23] In the circumstances the application for rescission under the common law fails both because the court cannot be satisfied, on the averments made in the founding papers, that the applicants have a “*bona fide*” defence and because there was clearly an anticipated dispute of fact which the applicants knew and understood prior to launching the application for rescission.

Section 53(3) and (4) of POCA

[24] Section 53(3) of POCA provides that any person whose interest in the property concerned is affected by the forfeiture order or other order made by the court may, within 20 days after he or she has acquired knowledge of such order or direction set the matter down for a variation or rescission by the court.

[25] It is common cause that the applicants received the notice of the granting of the preservation order at the end of November 2015. The first applicant declares that he handed the preservation order to his attorney on 2 December 2015 who, in turn, immediately made contact with the attorney for the respondent and arranged to obtain from the respondent’s attorneys copies of all relevant documents to enable him to protect his interests. Copies of all the documents were received on 19 January 2016 including a copy of the preservation order and the forfeiture order. The application for rescission was launched on 15 February 2016.

[26] What the applicants astutely avoid in the founding affidavits is to take the court into their confidence as to when they first learned of the granting of the forfeiture order. There is simply no allegation in this regard and the requirements for an application in terms of the provisions of section 53 of POCA are accordingly not met.

[27] Even if I accept that the applicants first learned of the existence of the forfeiture order on 19 January 2016, it seems to me that the application was not launched within 20 days. Where days are laid down in legislation, as opposed to the rules, they are calendar days. (Compare also section 4 of the Interpretation Act, 33 of 1937 in respect of the reckoning of the number of days stipulated in legislation.)

[28] In **Hercules Town Council v Dalla** 1936 TPD 229 it was held that:

“There seems to be one rule that stands clear, and that is that provisions with respect time are always obligatory, unless a power extending the time is given to the court.”

[29] This, as a general rule, is adhered to. Thus, in **Le Roux and Another v Grigg-Spall** 1946 AD 244 at 249 it was stated:

“The passage from MAXWELL cited in *R v Noorbhai* (1945, A.D. 58 at p. 64) makes it clear that by English law a provision as to the time within which an application of this kind must be brought would be regarded as imperative I have no doubt that in Holland the position was the same in regard to the time fixed within which to note an appeal (the *fatalia* or *fatale tyden*). ...The Courts in Holland had power to condone a breach of the rule as to time – but the possession of this power of itself goes far to show that the rule as to time was imperative and not directory”

I think that the same holds true for section 53(3). In the circumstances the application in terms of section 53(3) and (4) of POCA cannot succeed.

[30] In any event, even if it is open to the parties to agree to extend the period, as it is alleged in this case, an applicant under section 53(3) and (4) of POCA is required to show good cause for the rescission of the order. For the reasons set out earlier in respect of rescission under the common law, I am not persuaded that the applicants have demonstrated a *bona fide* defence to the forfeiture application. Good cause has therefore not been demonstrated.

[31] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv JD Le Roux instructed by Lessing, Heyns, Keyter & van der
Bank Inc, Port Elizabeth

For Respondent: Mr W Myburgh instructed by State Attorney, Port Elizabeth