

REPORTABLE

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

CASE NO.: 917/2018

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

and

J P GALLANT

RESPONDENT

JUDGMENT

GOVINDJEE AJ

- [1] The Prevention of Organised Crime Act, 1998, ('POCA' / 'the Act')¹ introduced additional measures to combat organised crime, money laundering and criminal gang activities, and provides for the civil forfeiture of criminal property that has been used to commit an offence.²

¹ Act 121 of 1998.

² The Preamble to the Act provides: 'And Whereas no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence...legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.'

The primary objective of key parts of the Act is to remove the incentive for crime, not to punish criminals.³

- [2] The applicant seized a white Volkswagen Touran (registration number F [...] EC) on 24 January 2018 ('the property'). The property is presently held by an Enforcement Officer of the applicant in terms of a Preservation Order granted on 20 March 2018. The applicant alleges that:⁴

'...the property constitutes an instrumentality of an offence to wit contravening sections 3(1) and 3(2) of the Marine Living Resources Act 18 of 1998 (the MLRS) by harvesting and / or being in possession of abalone without the requisite permit...Contravention of the MLRS falls within items 25 and 33 of Schedule 1 of the...POCA.'

- [3] The applicant, in terms of sections 48 read with section 50 of POCA, claims forfeiture of the property to the state. The respondent argues that the Preservation Order ought not to have been granted, being based on factually incorrect information, so that rescission is appropriate.⁵ The respondent also claims that the property in question is not an 'instrumentality of the offence' and that it would be disproportional to

³ *National Director of Public Prosecutions and Another v Mohamed NO and Others (Mohamed (1))* 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC).

⁴ Paras 6 and 7 of the founding affidavit, p 43 of the index. Also see p 48 of the index: 'Gallant and his two accomplices were arrested for harvesting and / or being in possession of abalone without the necessary permit...'

⁵ The *ex parte* application for the Preservation Order, granted on 20 March 2018, mistakenly made reference to 'the boat' as opposed to the property. Reference was also made, erroneously, to a certain 'Wait' in the papers. Incorrect reference was, furthermore, made to 226 kilograms of abalone, with a street value of R113 000,00, instead of 34 kilograms. A subsequent forfeiture order granted on 12 July 2018 was rescinded, in terms of s 53(4) of the Act, following a judgment by Mullins AJ on 28 May 2019. The respondent failed to apply for rescission of the Preservation Order itself until 13 January 2020. That application was refused by Rawjee AJ on 3 March 2020, and the possibility of rescission need not be considered further. The parties then agreed that the application would be construed as a s 52 exclusion application, with the applicant to file opposing papers by 27 March 2020.

order forfeiture of his rights to the property. Finally, the respondent suggests that he has a valid defence, so that the property should be excluded from the operation of the Forfeiture Order, if that order is in fact granted.

The facts

[4] The applicant's version of events is as follows:

- Members of the South African Police Service were performing patrol duties in Walmer on 24 January 2018;
- They came across the property, being driven by the respondent, and decided to search it with his consent and in his presence;
- The search of the property yielded two plastic bags containing abalone;
- The respondent and two accomplices were arrested for harvesting and / or being in possession of abalone without the necessary permit in terms of sections 3(1) and 3(2) of the MRLS, and the property together with the contraband was seized and taken to the Walmer police station.

[5] The respondent provided the following explanation of events:

- He and a friend (Prinsloo) were relaxing, having a braai and drinking with other friends at Marine Drive, Port Elizabeth;
- They decided to pack up and leave when it became dark. Whitebooi, a person unknown to the respondent, approached them and asked which direction they were heading. He requested

a lift to Cleary Park, which was *en route* to the respondent's destination;

- Once they had consented, Whitebooi indicated that he would return with a bag containing his clothes. Prinsloo and the respondent were already seated in the vehicle when Whitebooi returned and sat in the backseat. He placed a black bag between his feet at the back seat when entering the vehicle. The respondent was unsuspecting regarding the contents of the bag;
- The police stopped the vehicle, to the respondent's surprise. The respondent obeyed all instructions and, when asked whether there was any illegal substance on board the vehicle, he indicated in the negative. The police searched the boot and did not find anything. Whitebooi was sitting directly behind the passenger seat and was asked to exit the vehicle and open the black bag on the floor of the rear seat. Two other waste bags were inside that plastic bag;
- The respondent experienced the smell of fish as the bags were opened. He did not see what was inside the bags at that stage. He, together with Prinsloo and Whitebooi, were then arrested for possession of abalone. It became clear at the Walmer police station that the bags contained 34kg of abalone, valued at approximately R20 000,00. All three were charged. The respondent and Prinsloo were eventually discharged once Whitebooi had pleaded guilty and was sentenced. It was during that process that the respondent's vehicle was seized and forfeited to the state. The respondent was subsequently able to obtain rescission of the forfeiture order;

- The respondent denied that he or Prinsloo were accomplices of Whitebooi, as alleged, or that he had ever been involved in harvesting abalone, or assisting others to harvest the substance.⁶ The preservation and forfeiture of the property impacted detrimentally on the respondent's life. The vehicle was normally used to drive school children around in lift clubs as part of providing daily and monthly income.

[6] The applicant averred in reply that the bag had been placed on the rear backseat of the vehicle, and not on the floor. In addition, it is suggested that 'it is a known fact that abalone is wet and it (is) having an odour...Gallant must have known that what was contained in the bags was abalone.'⁷

The applicable law

[7] Part 3 of POCA incorporates both section 48 and section 50 of the Act, and is headed 'Forfeiture of Property':

'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...

⁶ For the sake of completeness, it may be added that the respondent alleges that 'I was at no stage aware of the fact that my passenger who had sought a lift had illegal stuff in his possession, to wit abalone without a permit. My possession was innocent and there was never any reason for me to believe on consideration of all the relevant facts advanced, that the bag containing two other bags inside, was having abalone in them.' (at p 131 of the index). As indicated below, Whitebooi deposed to an affidavit along similar lines: p 145 of the index.

⁷ At p 188 of the index.

(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 the 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...

50. 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.’

[8] It is convenient to commence the analysis which follows by focusing on the question related to the property as an ‘instrumentality of an offence’.⁸ Various issues have to be considered as part of this enquiry, including the

⁸ A secondary enquiry, in the event that the property is considered to be an instrumentality of an offence, is to consider the issue of proportionality. This is not a statutory enquiry but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture, and amounts to a constitutional imperative based on the need to avoid arbitrary deprivation of property and excessive punishment: *Mohunram* at paras 130; 141 *et seq.*

nature of the offence(s) relied upon by the applicant and whether those offences are referred to in Schedule 1 of the Act.⁹

Is the property an ‘instrumentality of an offence’?

[9] ‘Instrumentality of an offence’ is defined to mean ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.’¹⁰

[10] In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and other cases*,¹¹ the Supreme Court of Appeal gave detailed consideration to the meaning of the phrase. It confirmed that forfeiture of the instrumentalities used in crime is not conviction-based, and may be invoked even when there is no prosecution.¹² Chapter 6 forfeiture is permitted where it is established on a balance of probabilities that property has been used to commit an offence, even when no criminal proceedings are pending.¹³ Importantly, and in contradistinction to chapter 5 forfeiture, chapter 6 is ‘...focused, not on wrongdoers, but on property that has been used to commit an offence...’¹⁴ As such, the guilt

⁹ See *National Director of Public Prosecutions v Engels* 2005 (3) SA 109 (C) at para 16.

¹⁰ S 1 of the Act.

¹¹ *National Director of Public Prosecutions v RO 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* (‘Cook Properties’) 2004 (2) SACR 208 (SCA).

¹² At para 7. The Act provides that the validity of a forfeiture order is not affected by the outcome of criminal proceedings, or of an investigation with a view to instituting such proceedings, in respect of an offence with which the property concerned is in some way associated: s 50(4).

¹³ At para 10.

¹⁴ *Mohamed 1 supra* at para 17. The aspects of the various judgments cited pertaining to property linked to *proceeds of crime* are irrelevant for present purposes. In *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (‘Prophet CC’), the Constitutional Court held that civil forfeiture rests on the ‘legal fiction that the property and not the owner has contravened the law’ (at para 58). Reference to this ‘legal fiction’ also

or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.¹⁵

- [11] There is, however, a defence at the second stage of the proceedings when forfeiture is being sought by the State. At that stage, an owner can claim that he neither knew nor had reasonable grounds to suspect that the property had been an instrumentality in an offence (the so-called ‘innocent’ or ‘ignorant owner defence’).¹⁶ While the two stages are ‘tightly intertwined’, this does not mean that the property owner’s guilt or innocence plays a role in determining the meaning of ‘instrumentality of an offence’.¹⁷ This explains why a criminal conviction is not a condition precedent to forfeiture, and why property may be forfeited even where no charge is pending.¹⁸

appears in the judgment of Moseneke DCJ (as he then was) in *Mohunram and another v National Director of Public Prosecutions and others* [2007] ZACC 4 at fn 15.

¹⁵ *Ibid.*

¹⁶ *Mohamed 1 supra* at para 18 as cited in *Cook Properties supra* at para 11; *Cook Properties supra* at para 17.

¹⁷ *Cook Properties supra* at paras 19, 20.

¹⁸ *Cook Properties supra* at para 21. This Court is bound by the interpretation given by the SCA in *Cook Properties* in respect of the interplay between section 50 and 52, and the possibility of an application for exclusion of a person’s interest in property from the operation of a forfeiture order, seemingly even in circumstances where this amounts to the same as opposing the making of the order. The SCA did, however, note that ‘this section burdens the owner with an onus to prove certain facts on a balance of probabilities *before the Court can make an exclusionary order*’ (own emphasis): at para 24. Importantly, the SCA also noted that *Cook Properties* proceeded ‘on a narrow reading of “instrumentality of an offence”’. As a result these cases do not require us to give a determinative reading of the second-stage provisions...we therefore express no final views on the interpretation of s 52.’: at paras 25, 26. Notably, s 48(4) provides for various options for a person who entered an appearance in terms of s 39(3): ‘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 the operation of the order...’ (own emphasis). S 39(3) also uses ‘or’ in the same manner. The ‘or’ seems to confirm that opposition to a forfeiture order is distinct from an application for exclusion, which would be appropriate in circumstances where, for example, property subject to forfeiture is co-owned, so that a completely innocent party, such as a spouse married in community of property to a wrongdoer, applies for an order excluding her property from a forfeiture order. For an illustration of the analytical effect of equating ordinary ‘opposition’ to an application for exclusion, see *National Director of Public Prosecutions v Mpahlwa* [2020] ZAECHMC 18. Also see *Brooks and Another v National Director of Public Prosecutions* [2017] 2 All SA 690 (SCA) at para 17, for an example of the second phase of the enquiry being identified as relating to ‘exclusion’, as opposed to ‘proportionality’. The facts in *Brooks* made an ‘exclusion’ application apposite, the second appellant being an ‘innocent’ spouse. The reference in s 52(a) to an ‘application under section 48(3)’ appears to be erroneous, and should in all likelihood refer to s 48(4)(b).

‘...in giving meaning to ‘instrumentality of an offence’ the focus is not on the state of mind of the owner, but on the role the property plays in the commission of the crime. The phrase must be interpreted independently of the guilt or innocence of the property-owner...At this stage the owner’s guilt or wrongdoing, knowledge or lack of it, are not the focus. The question is whether a functional relation between property and crime has been established. Only at the second stage, when (after finding that the property was an instrumentality) the Court considers whether certain interests should be excluded from forfeiture, does the owner’s state of mind come into play...’

- [12] As indicated above, the definition of ‘instrumentality of an offence’ embraces all property ‘which is concerned in the commission or suspected commission’ of an offence. But a wide, literal interpretation cannot be countenanced if it would result in unintended consequences, bearing in mind that the remedial objectives of chapter 6 operates as a punishment.¹⁹ The reference in the Act’s preamble prohibiting the ‘use (of) property for the commission of an offence...’ provides some limitation, denoting a relationship of direct functionality between what is used and what is achieved.²⁰ The words ‘concerned in the commission of an offence’ must be interpreted so that the link between the crime committed and the property is reasonably direct, and the employment of the property must be functional to the commission of the crime, so that it can be said to ‘...play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence...the property must be

¹⁹ See the examples cited in *Cook Properties supra* at para 12. The other reason for a restrictive interpretation relates to the constitutional prohibition of arbitrary deprivation of property: *Cook Properties supra* at para 15.

²⁰ *Mohamed 1 supra* para 17 as cited in *Cook Properties supra* at para 14.

instrumental in, and not merely incidental to, the commission of the offence...'²¹

[13] In *Prophet v National Director of Public Prosecutions*,²² the Supreme Court of Appeal had regard to the following factors in measuring the strength and extent of the relationship between the property sought to be forfeited and the offence, and in assessing whether the property was an instrumentality of an offence: (a) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (b) whether the property was important to the success of the illegal activity; (c) the period for which the property was illegally used and the spatial extent of its use; (d) whether its illegal use was an isolated event or had been repeated; and (e) whether the purpose of acquiring, maintaining or using the property was to carry out the offence. No one factor is dispositive and a court must be able to conclude, after considering the totality of circumstances, that the property was a 'substantial and meaningful instrumentality' in the commission of the offence(s).²³

[14] In *S v Bissessue*,²⁴ a magistrate declared a motor vehicle and fishing rods used in fishing without a licence to be forfeited to the state. This was in

²¹ *Cook Properties supra* at para 31.

²² 2006 (1) SA 38 (SCA) ('*Prophet SCA*') at para 27, as cited in *Prophet* (CC) at para 22. The Constitutional Court upheld the findings of the Supreme Court of Appeal in respect of the property in question being an 'instrumentality of an offence'.

²³ *Prophet* (SCA) at par 27, with reference to *United States v Chandler* 36 F 3d 358 (4th Cir, 1994).

²⁴ [1980] (1) SA 228 (N), cited with approval in *S v Mjezu and Another* 1982 (2) PH H164 (C) and *Cook Properties supra* at para 32. Cf *S v Maswanganyi and Another* 1989 (2) SA 759 (O), where it was held that a motor vehicle played a reasonably direct part in the offence of possession for sale of dagga. In that case the vehicle had been used to acquire possession of the dagga for sale and was subsequently involved in arrangements for its disposal (at 764). The full court in *Bissessue* held (at 230 C-E) that 'On the facts of this case it cannot be said that the motor car was used in this sense for fishing as one might, for instance, perhaps have concluded if its headlights

terms of an ordinance that, in addition to a criminal penalty, required the court to declare any article used ‘in, for the purpose of, or in connection with the commission of the offence’ forfeit. On appeal, the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The Court held that ‘to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the *actual commission* of the offence in question’. The SCA in *Cook Properties*, having considered this decision, concluded that ‘the same...applies to “instrumentality of an offence”’.²⁵ The determining question, in each case, is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.²⁶

- [15] It is important to note that the specific offences in question, as reflected in the applicant’s own papers, was ‘harvesting and / or being in possession of abalone without the requisite permit.’ Whitebooi’s statement in terms of section 112(2) of the Criminal Procedure Act, 1977²⁷ similarly reflects his admission of unlawful possession of abalone.²⁸ There is no clear, direct reference to linking the property to conveyance. It might be added that the papers, including the preservation order, made repeated reference to

had been used to attract fish at night as part of the fishing operation. The motor car was in fact used ‘for the purpose of’ the journey from the place of departure to the Chelmsford Dam and the fishing was a subsequent and unrelated act.’

²⁵ *Ibid.*

²⁶ *Cook Properties supra* at para 32.

²⁷ Act 51 of 1977.

²⁸ At p 148 of the index. Whitebooi’s statement, attached to the respondent’s affidavit, included the following: ‘On the day in question I was requested to collect abalone in Marine Road. I was told that I would be paid R500,00 for the delivery of the abalone. On the same day I took a taxi to Walmer and then walked to Marine Drive and collected a black bag containing two smaller bags of abalone. I then saw Jacobus Gallant and Angus Prinsloo enjoying themselves at a braai area along Marine Drive. I enquired from them what direction are they driving...I asked for a lift and they accepted. I sat at the back of the car with the black bag containing the abalone.’

section 3(1) and 3(2) of the Marine Living Resources Act, 1998,²⁹ ('MRLA') instead of Regulation 36(1) of the Regulations in terms of the MRLA.³⁰ This is unfortunate, to say the least. In *Cook Properties*, the SCA confirmed that the applicant cannot claim forfeiture of property 'by oblique invocation of statutory infractions, still less by mistaken allusion to them.' While it might be over-technical to non-suit the applicant on this basis alone, the papers must set out clearly the case that a person in the position of the respondent is called to answer.³¹ Property owners must, in other words, be told clearly what scheduled offence or offences the NDPP relies on to establish forfeiture.³²

[16] It may be assumed, for present purposes and in the applicant's favour, that the respondent was aware of the case he was called upon to answer, and that this related to the property being an instrumentality of an offence related to harvesting and / or possession of abalone, even though the charges against him had been withdrawn.³³ Has the applicant

²⁹ Act 18 of 1998.

³⁰ GNR 1111 of 2 September 1998; p 14 of the index read with p 81. The applicable regulation provides that 'No person shall engage in fishing, collecting, disturbing, keeping, controlling, storing, transporting or be in possession of any abalone, except on the authority of a permit.' See *National Director of Public Prosecutions v Engels* 2005 (3) SA 109 (C) at paras 17 *et seq.*

³¹ Paras 43, 44. The Court added that such a technical approach was warranted on the basis of seriousness of assets forfeiture.

³² *Cook Properties supra* at para 45. The applicant does note in the application that contravention of the MLRA falls within 'items 25 and 33 of Schedule 1 of the POCA'. See *Engels supra*, at para 24, for the view that abalone falls within the notion of 'endangered, scarce and protected game or plants' in item 25 of Schedule 1.

³³ Par 6 of the founding affidavit, p 43 of the index. The applicant's replying affidavit belatedly, and in a single line, introduced a new issue in relation to transportation: p 187 of the index. To the extent that the respondent (or Whitebooi) may have been charged in a way to include conveyance of abalone, the charge having been withdrawn that offence falls away so that there cannot be the suggestion of an instrumentality of *that* offence: see A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) (LexisNexis, Durban) 116. Also see *National Director of Public Prosecutions v Smith* [2010] ZACGHC 60 at para 11, noting that the plea explanation of a person charged in circumstances where the owner of the property was not charged 'placed (a vehicle) beyond the reach of instrumentality'. Also see, in the context of a proportionality analysis, *National Director of Public Prosecutions v Gouws* 2005 (2) SACR 193 (EC) at 197C-D.

demonstrated on a balance of probabilities that the property is an 'instrumentality of an offence' so that it is entitled to forfeiture?

[17] For forfeiture to be appropriate, the focus must be on the property and its correlation to an applicable offence, and the link between the crime committed and the property must be reasonably direct. The property's role must, in other words, be functional to the commission of the crime in a real or substantial sense. A bit part role cannot suffice.

[18] On the evidence that I have accepted, and including Whitebooi's statement, the property was only used to transport the abalone on a single journey.³⁴ The use of the property in the offences of harvesting and possession of abalone was not deliberate or planned and, on a balance of probabilities, was merely incidental and fortuitous to the offences.³⁵ While the property might appear, at first glance, to be important to the success of the abalone remaining undetected, a deeper enquiry suggests that this is not necessarily the case. The abalone was concealed in two bags that were themselves contained within another black bag and could have been transported on any public or private motor vehicle away from Marine Drive. The property was illegally used for a short period of time over a distance of only a few kilometres.³⁶ There is no evidence to suggest that this was not an isolated, once-off occurrence. The property itself was not acquired, maintained or used specifically for the purpose of carrying out offences related to the harvesting, possession or conveyance of

³⁴ On the applicable approach to evidence, see *Plascon Evans Paints Limited v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51. Also see *National Director of Public Prosecutions v Pusani* [2010] ZAECGHC 67, for circumstances where a referral to oral evidence was appropriate.

³⁵ See *National Director of Public Prosecutions v Absolon* [2017] ZAECPEHC 58 at paras 16, 18.

³⁶ See *National Director of Public Prosecutions v Kulati* [2018] ZAECGHC 127 at para 19, confirmed on appeal.

abalone. It was certainly not modified or adapted for the purpose of hiding or possessing the substance.

[19] As such, the property must be found to have played only a limited and incidental role in the actual offences. The property's link is connected only to Whitebooi's possession of abalone in transit, which led to his conviction. The role of the property in respect of his crimes is limited, or incidental, to say the least. It certainly cannot be said to have a close enough relationship to those particular offences to amount to an 'instrumentality'. A finding that it constitutes an 'instrumentality of an offence' is, in this instance, therefore inapposite.

[20] In coming to this conclusion, it must be noted that the facts at hand differ markedly from those in *National Director of Public Prosecutions v Engels*, where the opposite conclusion was reached.³⁷ In that matter, a fishing vessel was launched with a number of people on board. The following day, the owner and skipper of that vessel returned to the harbour, alighted and boarded a Toyota 4x5 Landcruiser. The boat was loaded onto a trailer attached to that vehicle. When the vehicle was stopped by police a few minutes later, nine people were found in the back seats. Diving equipment and two fishing baskets were found on board and a hidden compartment was discovered in the boat itself. A substantial quantity of abalone and crayfish was found in this compartment. The respondent was the owner of the vehicle, trailer and boat and was then placed under arrest 'on the suspicion of being in possession and transportation of

³⁷ 2005 (3) SA 109 (C). The facts also differ in significant respects from *National Director of Public Prosecutions v Bezuidenhout and Another* [2011] ZAECPHC 10, at para 16.

abalone in contravention of the MLRA'.³⁸ The NDPP in that case had the benefit of an affidavit from an employee of the owner, confirming his participation in the owner's activities, including the illegal harvesting of abalone, for a period of a year. The matter was approached on the basis that the owner was a part of the illegal activities that had taken place on the boat out at sea on the night in question, which continued when the abalone was hidden in the boat compartment and transported away from where the boat had docked. Against that background, Griesel J concluded that:³⁹

'...the boat played a direct role in the commission of the offences and, in a real or substantial sense, facilitated or made possible the commission of such offences. Similarly, as far as the motor vehicle and trailer are concerned, they were directly involved in the illegal transportation of the abalone.'

[21] Given the totality of evidence available, this is also not an appropriate case to consider the respondent's denial of involvement to be bare or uncreditworthy, wholly fanciful or untenable, or subject to a robust approach in favour of the application for forfeiture.⁴⁰ The respondent's version of events and supporting documentation inevitably impacts on many of the questions applicable to considering the use of the property itself in relation to the offences. In coming to this conclusion, I have considered the suggestion in the replying affidavit whether judicial notice

³⁸ *Engels supra* at para 5.

³⁹ At para 40.

⁴⁰ See *National Director of Public Prosecutions v Maziyana and Others* [2015] ZAECGHC 122 at paras 8, 38; *Pusani supra* at para 40 and *National Director of Public Prosecutions v Mniki* [2011] ZAECGHC 41. In the last-mentioned case, and unlike the present circumstances, a factual inference could be drawn that the respondent had been engaged in poaching activities: at paras 1, 2. Cf *National Director of Public Prosecutions v Skapu* [2015] ZAECGHC 2 where it appears to have been common cause that a vehicle was an instrumentality of an offence, also based on its previous use and history: at paras 4, 11 and 12.

should be taken of the smell of 34kg of abalone contained in bags, so that the respondent's version must be rejected. I am unable to conclude that it is appropriate in the circumstances to make such findings. The uncertainty regarding the state of the abalone at the time, wet or dry, is one reason for this, and the applicant failed to place any information before the court to support such a finding. I have also considered the interactions with counsel during argument as to whether the respondent should have enquired about the contents of the bag before admitting Whitebooi to the vehicle, and whether he should be non-suited as a result of having failed to do so. I find the respondent's failure in this regard to be unremarkable in the context of a once-off lift being offered at night to a stranger who proceeds to sit in the backseat with a bag.

- [22] A court considering the possible forfeiture of property must be mindful of the fact that unrestrained application of chapter 6 of POCA may violate constitutional rights, especially the protection against arbitrary deprivation of property.⁴¹ Courts have consistently noted that civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections, and can produce unjust and arbitrary consequences.⁴² Courts must, therefore, be vigilant in ensuring that civil assets forfeiture in terms of POCA does not amount to overreaching and an abuse.⁴³ On the approach adopted, it is unnecessary to consider the further question whether forfeiture is proportional in this instance, including matters such as whether forfeiture is likely to prevent further wrongdoing, the likely

⁴¹ *Prophet* CC at para 61, with reference to s 25(1) of the Constitution and *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.

⁴² *Mohunram* at para 120.

⁴³ Ponnar JA in *Prophet* (SCA) at para 45. Also see *Gouws supra* at 196I-197B.

effect of the forfeiture on the respondent and his family, and whether the applicant has placed sufficient facts before the Court to determine whether forfeiture would be constitutionally proportionate in this instance.

Order

[23] In the result:

1. The application for forfeiture of the respondent's white Volkswagen Touran (registration number F [...] EC), presently subject to a Preservation Order granted on 20 March 2018, is dismissed with costs.
2. The Preservation Order granted on 20 March 2018 is hereby set aside.
3. The applicant is to return the respondent's vehicle, referred to in paragraph 1, to him forthwith.

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant : Mr W Erasmus

Instructed by : State Attorney

For the Respondent : Adv JP Vermeulen

Instructed by : Masiza Harker Inc

Heard on : 29 July 2021

Delivered on : 14 September 2021