

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

CASE NO. 2712/2021

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

And

MARIAAN MULLER

Respondent

JUDGMENT

GQAMANA J

[1] The applicant, National Director of Public Prosecutions, seeks a forfeiture of the respondent's motor vehicle namely, a white chevrolet corsa bakkie with registration letters and numbers [...], which was seized on 30 August 2020 ("the property"). The application is brought in terms of section 48 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The applicant has already obtained a preservation order in respect of the property. The application is opposed by the respondent, Mariaan Muller, a police by profession.

[2] The underlying facts which gave rise to this application are as follows. On 27 August 2020, the respondent accompanied by Constable Daniels, visited one Zememkhun Anose ("Mr Anose") at his shop in Joe Slovo informal settlement, Kariega. Both Daniels and the respondent were in full police uniform. They instructed Mr Anose to accompany them to Kamesh police station under false pretense that they

investigating a robbery that apparently occurred previous months. Without any hesitation Mr Anose duly complied and was ferried in a red VW Polo driven by Daniels with no registration plates. Instead of taking Mr Anose to Kamesh police station as they indicated, they travelled with him along the R75 National Road towards Kirkwood. They drove with him to a remote and bushy area where a tall black male with a firearm was awaiting for them. Mr Anose's hands and legs were tied up with cable ties and thereafter, he was assaulted. In the course of the assault, the respondent and her accomplices demanded from him a ransom amount of R120 000 with threats to kill him. Later they drove back to Daniels' residence with him squashed in the boot of the said Polo. Daniels, the respondent and Brekwa contacted his brother Mulatu and demanded the sum of R120 000, but the latter was only able to raise an amount of R15 000. Concerned of his brother's safety, Mulatu reported the incident to the police at Kamesh police station. Mr Anose was locked up at Daniel's house overnight. The following morning, he was again transported in the aforesaid polo to a bushy area and a white corsa bakkie with tinted windows driven by the respondent followed them. At the bushes he was taken out of the polo and loaded into the back of this white corsa bakkie which was still driven by the respondent. The respondent drove around with him in the property and was later taken back to a house where he was locked up and left with his hands tied. He, however succeeded to rescue himself and seek refuge to a neighboring house.

[3] On 30 August 2020, the respondent was pointed out to the police and she was arrested and charged for *inter alia*, kidnapping. The criminal charges are still pending. On the same day of her arrest, a white corsa bakkie with tinted windows was also found in the respondent's premises and was seized by the police. This is the property concerned herein.

[4] The applicant thereafter instituted an *ex parte* application in terms of section 38(1) of POCA and obtained a preservation order for the property on 10 November 2020. The notice envisaged in section 39 of the POCA was advertised in the

Government Gazette on 20 November 2020,¹ and the respondent was served personally with the preservation application and the order on 1 December 2020.²

[5] Armed with the aforesaid preservation order, the applicant approached this court for forfeiture order. In opposition to the relief sought, the respondent denied that the property was used in the commission of the offence concerned. *Mr Thyse*, respondent's counsel argued that the sole issue for determination is whether the property was instrumental in the commission of the offence concerned. His submission premised on the respondent's contention that the applicant failed to prove on balance of probabilities that the white corsa bakkie referred to by Mr Anose was indeed the property.

[6] In terms of section 50(1)(a) of POCA empowers this court to grant a forfeiture order if it finds on a balance of probabilities that the property is instrumental in the commission of the offence referred to in Schedule 1.³

[7] The applicant's case hinges on the contention that the property was instrumental in the commission of the offence concerned, namely kidnapping. As alluded in paragraph 5 above, the respondent denied that the applicant has made out a case on a balance of probabilities that the property is liable for forfeiture. Her defence being that, the property was not involved in the commission of the offence concerned.

[8] Section 1 of POCA defines "*instrumentality of an offence*" 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 POCA whether such offence was committed within the Republic or elsewhere.

¹ Index page 101.

² Index page 102.

³ See section 50(1) reads:

"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 instrumental of an offence referred to in Schedule 1."

[9] The Supreme Court of Appeal,⁴ dealing with *inter alia*, the interpretation of s 50(1)(a) of POCA said:

“[31] ... For now it is enough to say that the words ‘concerned in the commission of an offence’ must, in our view, be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must 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. As the term ‘instrumentality’ itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence. Otherwise there is no rational connection between the deprivation of property and the objective of the Act: ...”
[My emphasis]

[10] The onus is upon the applicant to prove on a balance of probabilities that the property is liable to forfeiture.⁵ In so far as they may be dispute of facts, I will resolve those by applying the *Plascon-Evans* rule.⁶

[11] The applicant’s contention is that the respondent was amongst the persons that were involved in the kidnapping of Mr Anose on 27 August 2020. Furthermore, the property was used in the commission of this offence in that, on Friday 28 August 2020, Mr Anose was transported to the bushes again in a red polo with the property following them. At bushes he was taken out of the Polo and loaded into the property. The property was driven around by the respondent for an estimated distance of 60 km. Thereafter he was transported in the property back to a house, where he was locked up and left by the respondent and the other accomplices. He remained in this house until he successfully managed to escape and seek refuge from a neighbouring house. This is

⁴ In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd – 37, Gilesapie Street Durban Pty Ltd and Seevnarayan* 2004 (2) SACR 208 (SCA).

⁵ See Section 50(1) of POCA.

⁶ *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634H–635C.

the extent of the involvement of the property in the commission of the offence concerned on the applicant's version.

[12] However, the respondent denies that, the property was used and/or involved in the commission of the offence.⁷ In her affidavit she made the following allegations:

"10 AD PARAGRAPH 17

10.1 While I cannot dispute that Anose was kidnapped, I deny that I was involved in this kidnapping. There is no evidence connecting me to the crime.

10.2 There is no evidence that my Corsa bakkie was used during the crime. I note that as I have travelled around, I see numerous white Corsa bakkies on the road, in the Uitenhage / Dispatch area. The applicant has provided no proof that it was my vehicle that was used in this alleged crime.

10.3 I am advised that the order that the applicant seeks can only stand if it can be proven that the vehicle was an instrumentality of crime or the proceeds of unlawful activity. I deny that the applicant has provided any proof that it was my white Corsa bakkie that was used in the crime."

[13] The applicant in reply to the above allegations responded as follows⁸:

"Ad paragraph 10 or sub-paragraph 10.1 thereof

72 Save to state that it is admitted that Anose was indeed kidnapped, the rest of the of this sub-paragraph is denied.

*73 Anose pointed out to the SAPS that the Respondent is the one who sat next to Daniels in the Polo, drove the property on **28 August 2020** and who assisted in his kidnapping, to the extent that she made the ransom demand.*

*74 Khusal saw the Respondent at Anose's shop on **27 August 2020** and pointed her out on **30 August 2020**. The Respondent does not explain why these two witnesses point to her.*

⁷ Index p64 para 10.1 to 10.3 and p 123 paras 10 and 19.

⁸ Index pp 96–97.

75 There is thus sufficient evidence connecting the Respondent and the property to the offences, which she has been charged with.

Ad sub-paragraph 10.2 thereof

76 It is denied that there is no evidence that the property was utilized in the commission of the offence. In amplification of the denial the following factors are worth highlighting:

76.1 The Respondent owns the property (which is common cause), which is fitted with tinted windows and would like to have it back;

76.2 The property is a white Corsa bakkie with the official registration details of the property, which was inside and seized from her garage on **30 August 2020**, with no protestation from the Respondent;

76.3 The Respondent does not whatsoever alleged that someone else, without the Respondent's consent or knowledge had or drove the property at all material times in this matter;

76.4 The Respondent does not state that the numerous Corsa bakkie she allegedly seen on the road are with tinted windows or not; and

76.5 Khusal identified the Respondent as one of the police women who kidnapped Anose from his shop.

Ad sub-paragraph 10.3 thereof

77 It is admitted that the Applicant is required to prove that the property (which she has done) was an instrumentality of an offence (as in casu).

78 I refer the Honourable Court in this regard to the evidence of Anose and Prince on the direct, meaningful and substation role the property played in Anose's kidnapping on the two day.

79 The rest of the content of this paragraph is denied as if specifically traversed."

[14] The applicant's aforesaid allegations are supported by the evidence of Warrant Officer Prince⁹, Constable Kagiso Montshojang¹⁰ and Mr Ridgewume Khusal.¹¹ In addition, Mr Anose in his statement to the police¹² explained in detailed the involvement of the respondent and the property in committing the offence concerned and corroborates the applicant's case as to the issue for adjudication in this application. Given all this evidence, I am satisfied the respondent's denial of the involvement of the property in the commission of the offence concerned is just a bare denial and it is far-fetched and can be rejected merely on the papers.

[15] Consequently, I am also satisfied that there is a direct link between the commission of the crime and the property. The property played a reasonably direct role in the commission of the offence. It facilitated and made possible for the offence to be committed. Kidnapping by its very nature is a continuous offence. Although the property was not involved on the first day, on 27 August 2020, when Mr Anose was taken from his shop to the bushes and back to the Daniel's house, however, on the following day on 28 August 2020, it was directly involved as indicated above. Mr Anose was kidnapped on 27 August and only managed to free himself on 28 August 2020 when he was left locked up in the house.

[16] Given all this, the applicant has proved on balance of probabilities that the property was "an instrumentality of an offence" as envisaged in section 50(1)(a) of POCA. Accordingly the applicant has made out a case for the forfeiture of the property in terms of Section 48(1) of POCA. The property played a reasonable direct role in the commission of the offence.

[17] In the circumstances the following order will be issued:

17.1 In terms of section 53(1) (a) of the Prevention of Organised Crime Act 121 of 1998 (POCA), the sum of a white Chevrolet Corsa Bakkie with registration

⁹ Index p 104-105 paras 5-12.

¹⁰ Index p 113-114.

¹¹ Index pp 109-113.

¹² Index pp

letters and numbers FSL 286 EC seized on 30 August 2020 and held by SAPS under Kamesh CAS 159/08/2020 (the property), be and is hereby declared forfeit to the State.

17.2 The Kamesh SAP 13 clerk who was appointed in the Prevention Order dated 10 November 2020 as custodian of the property be and is hereby directed to continue to act as such for the purpose of this order.

17.3 Pending the taking effect of this order the property shall remain under the control of the Kamesh SAP 13 clerk.

17.4 The Applicant serve a copy of this order on Mariaan Muller (Muller).

17.5 The Applicant is directed to cause a copy of this order to be published in the Government Gazette as soon as reasonably possible after the grating of this order.

17.6 The Kamesh SAP 13 clerk (with the assistance of the Applicant's employees) sells the property either by private treaty alternatively public auction and transfer the proceeds of such sale into the Criminal Assets Recovery Account (with account number [...] held at the Reserve Bank), 20 days after service of this Order on Muller in the event of her not bringing an application to vary or rescind this Order, such transfer to take place within 10 days of the Applicant furnishing the Kamesh SAP 13 clerk with a copy of this Order.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant	:	Mr W Myburgh
Instructed by	:	State Attorney
		Port Elizabeth

For the Respondents: Mr *J C Thysse*
Instructed by : G Malgas and Associates
C/O Boqwana Burns Attorneys
Port Elizabeth

Date heard : 21 October 2021
Date delivered : 30 November 2021