

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 1060/2022

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

And

ELTON BOOYSEN

First Respondent

CRYSTAL ADALENE BAARTMAN

Second Respondent

JUDGMENT

BESHE J:

[1] The *Prevention of Organised Crime Act*¹ is designed *inter alia*, for the civil forfeiture of property that has been used to commit an offence. *Section 48* sets out the manner in which a forfeiture order can be obtained. It provides that:

“48 Application of 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.”

¹ Act 121 of 1998.

This section is to be read with *Section 50* which provides that:

“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.”

Section 52 provides for the exclusion of interests in the property that is subject to forfeiture. More about *Section 52* later.

[2] This is an application in terms of the abovementioned provisions. It is opposed by the respondents.

[3] The following appears to be common cause:

The respondents who are life partners and part owners of the property – a Volkswagen Polo GTI. The said property was seized by the police on the 20 February 2022. A preservation order in respect of the property was issued on the 12 April 2022.

The property was seized by **Constable Siviwe Buzani** who is attached to the Cookhouse Police Station, after having been stopped whilst travelling on the R61 road towards Tarkastad. Both respondents were occupants in the property, first respondent being the driver with second respondent as his passenger.

[4] It is alleged that upon searching the boot of the property, in a backpack containing nappies, (underneath the said nappies) in a blue plastic bag: 1005

mandrax tablets, 450 grams of tik were found. The estimated value of the drugs is said to be R300 000.00.

[5] This led to the property being seized by the police as it was deemed to constitute an instrumentality of crime.

[6] First respondent deposed to the opposing affidavit. Therein, he placed evidence to prove that he bought the property in January of 2022 for R80 000.00 and paid for it cash. He goes on to show set out where the money came from. Namely by providing bank statements reflecting transaction made between January and April 2022. A contribution towards the purchase price of R46 000.00 from the second respondent being proceeds from a certain policy she owned. This is confirmed by second respondent. Belatedly, albeit not raised in respondents' answer / opposition to this application, in their heads of argument,² respondents submit that besides the say-so of the police officials who stopped the property, there is no evidence that what was found inside the boot of the property was indeed drugs. No reasons are advanced by the two officials why they concluded that the tablets found in the property were mandrax tablets and the other substance was tik. There is no evidence that those were drugs.

[7] Evidence by **Constable Buzani** who stopped the property, together with his colleagues, reveals that they were on the lookout for the motor vehicle in question. He had received a tip-off that it was transporting drugs. Moreover, as asserted by applicants' legal representative, at no stage did the respondents in their opposition deny that the substances found in their property were drugs. Despite the fact that *Section 39 (5) (c)* requires that in opposing the making of a forfeiture order, the person concerned state the basis of the defence upon which they intend to rely for opposing a forfeiture or for applying for the exclusion of their interests from the operation of the forfeiture order. Respondents' counsel attributed this failure on their part on the fact that, being laymen, they were not legally represented at the time they deposed to the opposing affidavits. Relevant to this issue, at paragraph [31] of his affidavit, first respondent states that he is innocent and that the state bears the

² The heads were filed in the morning on the date the matter was scheduled for hearing.

burden of proving his guilt. Further that applicant's papers do not show, *inter alia* that he is involved in drug smuggling or in selling or distributing illegal substances. Nothing is said about the substances found inside the boot of the property.

[8] In light of what is stated hereinabove, I have no difficulty in finding that at the preservation order stage, there were reasonable grounds for believing that the property was an instrumentality of an offence listed under *Schedule 1* of *Prevention of Organised Crime Act*.

[9] As rightly pointed out by the applicant, the respondents seem to be missing the point of the application. They seem to be misconstruing the nature of the application. The forfeiture of the property is sought on the basis that it is an instrumentality of crime³ and not that the property was acquired by means of proceeds of unlawful activities.⁴ At best for them, respondents assert that the applicant has not succeeded in showing that *Section 38 (2)* is applicable. *Section 38 (2)* concerns the application at the preservation stage namely the requirement that the court shall make a preservation order if there are reasonable grounds to believe *inter alia* that the property is an instrumentality of crime.

[10] Do the interests of the respondents deserve to be excluded in terms of *Section 52*? This section provides for instances where a court can make an order excluding certain interests in the property from being affected by the forfeiture order. Those instances are; *inter alia*; in respect of proceeds of unlawful activities; where the interest concerned was acquired legally. In the case under consideration, that is not the allegation, namely that the property is proceeds or was acquired by means of unlawful activities or is proceeds thereof.

[11] In relation to the instrumentality of a crime / offence referred to in *Schedule 1*, as is alleged in this matter, interests in the property can be excluded if the court finds, on a balance of probabilities that the applicant for such exclusion did not know or have reasonable grounds for suspecting that the property is an instrumentality of an offence listed in *Schedule 1* and the interest was acquired legally. The grounds

³ Section 50 (1) (a).

⁴ As provided for in Section 50 (1) (b).

for exclusion of the interest do not apply in *casu*. The allegation is that the respondents were travelling together in the property, in which a substantial amount of drugs were concealed inside a nappy bag in the boot of the property in question. The allegation is further that first respondent upon being stopped by **Buzani** tried to turn the property around and drive to the direction from which he came. After the drugs were discovered inside the backpack and upon being asked to whom the drugs belonged, first respondent looked at the second respondent, who started crying.

[12] In the circumstances, I am satisfied that the applicant has succeeded in showing on a balance of probabilities that the property was used by the respondents as an instrumentality of an offence referred to in *Schedule 1* to this Act.

[13] Accordingly, there will be an order in terms of the draft forfeiture order marked “A”.

N G BESHE
JUDGE OF THE HIGH COURT

ANNEXURE “A”
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

On Tuesday, 24 January 2023
Before the Honourable Ms Justice Beshe

Case Number.: 1060/2022

In the application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

And

ELTON BOOYSEN

First Respondent

In re: A grey Volkswagen Polo GTI motor vehicle with registration number J[...] 9[...], seized on 20 February 2022 under Cradock C[...] 2[...] (the property)

Having heard Mr. Barrow, Attorney for the Applicant and Mr. Pienaar, Counsel for the Respondents, and having read the Notice of Motion and other documents filed of record:

IT IS ORDERED THAT:

1. The following property namely, A grey Volkswagen Polo GTI motor vehicle with registration number J[...] 9[...], chassis number A[...] and engine number B[...] seized on 20 February 2022 under Cradock C[...] 2[...] (the property) be and is hereby forfeited to the state in terms of section 53(1) (a) of the Prevention of Organised Crime Act 121 of 1998 (POCA).
2. Tirhani Mabunda (Mabunda), an auctioneer at Tirhani Auctioneers, who was appointed in terms of the Preservation Order and is within the jurisdiction of the Honourable Court and who is in possession of the property, shall cause the property to be sold and cause the cash to be deposited into the Criminal Asset Recovery Account (with account number 8[...] held at the Reserve Bank) within 20 days after service of this Order on Booysen and Baartman.
3. The Applicant to serve a copy of this Order on Elton Booysen (Booyesen) and Crystal Adalene Baartman (Baartman).

By order of Court

State Attorney

Registrar

APPEARANCES

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For the Respondents :Adv: A J Pienaar
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GEORGE
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Date Heard : 19 January 2023
Date Reserved :19 January 2023
Date Delivered :24 January 2023