

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

Case No: 324/2022

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

And

DENNIS KABUTHA KARUGA **Respondent**

JUDGMENT

BESHE J:

[1] This is an application for a forfeiture order in respect of a white Nissan Micra motor vehicle with registration number J[...] 9[...] E[...] hereinafter referred to as the property. On the 8 February 2022 a preservation order was made in respect of her property on the basis that there were reasonable grounds for believing that it constituted an instrumentality of an offence, namely drug trafficking. *Section 48* of the *Prevention of Organised Crime*¹ (the Act) 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.

(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 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.”

The application is opposed. It is common cause that respondent’s brother one **Christopher Karuga** was convicted of the crime that led to the preservation order being issued in respect of the property sought to be forfeited to the state.

[2] The basis of the opposition is that the respondent played no part in the commission of the crime. The motor vehicle in question belongs to him, was only registered in his brother’s name to avoid him getting traffic violation tickets because the property was used as Uber and Bolt taxi. Respondent contends that he is the one who “tipped off” the police leading to his brother’s arrest in whose name the property is registered.

[3] Section 39 (3) of the Act in question provides for a procedure in terms of which a person who has an interest in the property which is subject of to a preservation order may oppose the making of a forfeiture order or apply for an order excluding his / her interest in the property concerned, from the operation of the forfeiture order. It would seem that the respondent is approaching this court on the basis of Section 39 (3) of the Act.

[4] Regarding the exclusion of interest in forfeited property, Section 54 (8A) provides for instances in which a court may make an order of exclusion of a person interest's in the property in question. They are:

“(8A) If a court finds on a balance of probabilities that the applicant 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.”

[5] Regarding the first requirement: acquisition of the interest in the property concerned legally, it was submitted on behalf of the applicant that the respondent does not have the *locus standi* to protect any interest in the property against the forfeiture order. The reason advanced for this assertion is that - he is not the owner of the property. It is common cause that the motor vehicle in question was previously owned by one **Madnabhachi** until about 23 January 2019, by the respondent from 17 April 2019. The following year on 8 September 2020 the title holder became his brother **Christopher** who was convicted in connection with drugs found in the same property. Respondent explains that the motor vehicle is registered under his Bolt and Uber businesses. He employed his brother as a driver after purchasing the motor

vehicle for R347 661.04. He provides proof of a payment to a **Mr McWilliams** of R347 661.04 on 30 July 2020. He had, however, been the title holder in respect of the property since 17 April 2019. According to a vehicle valuation report, effective December 2021, the price of a new Nissan Micra 1.2 is R143 900.00. Trade in price is ± R84 000.00. Retail price is ± R96 000.00, depending on the condition of the motor vehicle. This will also have a bearing on the proportionality or otherwise of the confiscation order, should it be found such is justified.

[6] The explanation respondent proffers for registering the motor vehicle in his brother's name is so that he could personally account for the ticket fines he was incurring. It is noteworthy that in a confirmatory affidavit deposed to by his brother on 16 November 2022 and only filed a day before the hearing of this matter, he states *inter alia*: that the motor vehicle was given to him by his brother in order for him to be part of the e-hailing business and added him to his e-hailing profiles as a way of assisting him because he had not been working for some time. He transferred the motor vehicle to his name because he was not maintaining the motor vehicle.

[7] A lot of reliance is placed on respondent's assertion that he is the one who tipped off the police about his brother transporting drugs which led to his arrest.

[8] There is however a lot that does not add up in this regard. The property was seized in Cradock. Respondent draws attention to calls he made to a number in Cradock, which is similar to the number given by the arresting officer (**Etto**) as his office number. However, the question is, if he learnt that his brother was in Mpumalanga, why would he call or tip off police in Cradock? The timeline as to when he got to know that his brother was in Mpumalanga to the time when he was arrested does not seem to add up. In addition, he has provided the court with records of his telephone calls during the period in question. Why is there no record of calls received in the early hours of the 23 or 24 September 2021 from his brother as he suggests he called him in the early hours of the 23 or 24 of September and he established that he was in Mpumalanga Province.

[9] The fact that the property was used as an instrumentality of an offence is not denied.

[10] The main thrust of respondent's case is that he and not his brother in whose name the property is registered owns the motor vehicle. He was not aware that it was to be used as an instrumentality of an offence. In other words, he is an innocent party and had no part in the crime. In my view, his case stumbles on the first hurdle, that of being an innocent owner. All respondent needs to do is to satisfy the court on a balance of probabilities that he is the owner of the property, not his brother **Christopher**. For the reasons stated earlier, I am not persuaded that he succeeded in doing so – showing that he was an innocent owner and therefore has the *locus standi* to apply for the exclusion of his interest in the property.

[11] The objectives of the *Prevention of Organised Crime Act* are clear. They are *inter alia* the civil forfeiture of property that has been used to commit an offence.

[12] It is trite that the Act (POCA) is an important tool in achieving the goal of reducing organised crime.² In ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another***³ the following was stated regarding deprivation of one of his property through confiscation orders or the proportionality thereof:

“[98] The second is that, for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination. Moreover, the requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature (in the case of the United Kingdom between Judiciary and Executive) and suitably flexible to cover all situations. It matters not whether one labels such an approach an ‘extended rationality’ test or a ‘restricted proportionality’ test. Nor does it matter that the relationship between means and ends is labelled ‘a reasonably proportional’

² Prophet v NDPP 2007 (6) SA 169 CC at [59].

³ 2002 (4) SA 768 CC at [98].

consequence, or 'roughly proportional', or 'appropriate and adapted' or whether the consequence is called 'reasonable' or 'a fair balance between the public interest served and the property interest affected'."

In the ***Prophet*** matter *supra*, at page 193 D-E, it was stated that the scheme of POCA seeks to ensure that no person convicted of an offence benefits from its fruits and to ensure that property used as an instrumentality of an offence is forfeited.

[13] The drugs that were found concealed inside the door panel of the property and inside the spare wheel thereof is said to have an estimated value of R26 670.00. I have already alluded to the evidence showing that the motor vehicle could not have been R300 000.00 and alluded to its probable value. I do not think that the forfeiture order in this regard is not proportionate to the purpose for which it is meant.

[14] I have been urged to order that respondent pays costs of the application including those that were reserved previously. I propose not to make an order for costs. *Section 57 (5)* of the Act provide that:

"57 Fulfilment of forfeiture order

(5) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose."

[15] In the result, the following order will issue:

1. The following property namely, a white Nissan Micra motor vehicle with registration number J[...] 9[...] E[...], chassis number M[...] and engine number H[...] seized on 24 September 2022 under Cradock CAS 2[...] (the property), be and is hereby forfeited to the state in terms of Section 50 (a) of the Prevention of Organise Crime Act 121 of 1998 (POCA).

2. Mr Lungelo Matiwane of Michael James Umgalelo, the Auctioneer who was appointed in terms of the Preservation Order, shall cause the property to be

sold and 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 Christopher Karuga.

3. The applicant is to serve a copy of this order on Christopher Karuga.

4. No order as to costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 16 February 2023
Date Reserved : 16 February 2023
Date Delivered : 21 February 2023