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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1792/2019**

Heard: **17/01/2022**

Delivered: **25/03/2022**

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

ELIYA MUGALUSI NGUNGE

Respondent

Coram: Mamosebo J et L Lever J et Nxumalo J

JUDGMENT ON APPEAL

Mamosebo J

[1] On 16 August 2019, Phatshoane ADJP granted an order in terms of s 38(2) of the Prevention of Organised Crime Act¹ (POCA) *ex parte* for the provisional preservation of property preserving R15,500.00 in cash and an Isuzu KB 300TDi with registration numbers and letters [...] with chassis number [...] and engine number [...]. The rule *nisi* was extended on several occasions but confirmed by Vuma AJ on 13 December 2019.

[2] On 14 May 2021 the applicant, now the appellant in this appeal, the National Director of Public Prosecutions (the NDPP), sought a forfeiture order in terms of s 48 r/w s 50 of POCA on the basis that the property was an instrumentality of an offence and/or proceeds of unlawful activities listed under Schedule 1 to POCA. The respondent, Mr Eliya Mugalusi Ngunge, opposed the application. The trial court dismissed the application and ordered the NDPP to return or cause to return to the respondent the cash amount of R15,500.00 and the Isuzu motor vehicle. This appeal is with the leave of the trial court.

[3] The appeal is premised on the following grounds that the trial court erred in finding that:

3.1 The appellant did not prove on a balance of probabilities that the property is an instrumentality of an offence;

3.2 It is common cause that the order made by the Magistrate on 31 May 2018 is an order that has to be appealed or reviewed before the appellant can proceed with an application in terms of section 38 and 48 of the Prevention of Organised Crime Act, 121 of 1998 (POCA);

3.3 The appellant conceded the lawfulness of the aforementioned court order by the Uppington Magistrate Court;

3.4 The respondent had a *bona fide* belief that he is entering into a lawful agreement with Tsotetsi;

3.5 The long delay in bringing the preservation application in terms of POCA was unexplained, put differently, should have been explained;

3.6 No significant losses and/or damage was suffered by the lawful owner of those goods; namely the truck, boxes of soup and the cell phone;

¹ 121 of 1998

- 3.7 The respondent was prejudiced in these circumstances;
- 3.8 Reliance by the appellant on s 50(4) of POCA is misplaced;
- 3.9 Relevant information, facts and circumstances which might have had an impact on the decision of the Court in the preservation application was not brought to the attention of the Court and/or remains unexplained;
- 3.10 The respondent was and/or had an innocent owner defence; and
- 3.11 Costs be awarded to the respondent [Mr Ngunge].

[4] Before turning to the circumstances that gave rise to this appeal, it is necessary to sketch the factual background of the events which are mainly common cause or are not seriously disputed. Louw Transport in Harrismith, Free State Province, employed Mr Tshepiso Enoch Tsotetsi. On 19 January 2021, his truck was loaded at Petermaritzburg Unilever with 64 pallettes of soup boxes with three different flavours to be transported to Mr Nicolaas Thiart of Wutow Trading, Windhoek, Namibia.

[5] On 21 January 2018, Mr Tsotetsi was in the vicinity of Upington and was about to cross through the Ariamsvlei Border Post into Namibia. Mr Tsotetsi pulled his truck to the side of the road on the Upington/Groblershoop road where he was joined by the respondent who arrived at the scene in the Isuzu bakkie already described above. They were seen offloading boxes from the truck into the Isuzu bakkie. A report was made to Capt. Hermanus van Wyk who was on duty when the information was received.

[6] Captain van Wyk attended the scene, which was 15 kilometres from Upington, Tsotetsi, the driver of the truck, was not present. Van Wyk requested back-up. His colleagues arrived shortly thereafter. The respondent was at the Isuzu bakkie. Van Wyk observed boxes not only inside the Isuzu but also at the back of the Isuzu under a canopy. He enquired from the respondent about the boxes. His reply was that he and the truck driver had off-loaded the boxes from the truck onto the Isuzu. Van Wyk's further observation was that although the truckload was covered with a canvas, which he pulled away, there were open spaces between the boxes packed at the back of the truck. The respondent informed van Wyk that he had an

arrangement with Tsotetsi to meet next to the road to exchange 170 boxes for a cash amount of R10,000.00 (Ten Thousand Rand).

[7] Tsotetsi later appeared on the scene barefoot from the Groblershoop direction. He furnished different versions to van Wyk. First, that he was hijacked by three men in the Isuzu bakkie but later somersaulted and confirmed the arrangement alluded to by the respondent. Van Wyk contacted Mr Christoffel Johannes Olivier of Louw Transport who confirmed the truck's destination to Windhoek. Olivier made no mention of a stopover in Upington or offloading of some of the boxes in Upington but merely confirmed that the entire truckload was meant for delivery in Namibia.

[8] Van Wyk enlisted the assistance of the members of the Local Criminal Record Centre (LCRC) who took photographs at the scene. He proceeded to search the Isuzu and found a cash amount of R15,500.00 (Fifteen Thousand Five Hundred Rand) which was seized together with a blue Nokia phone belonging to Tsotetsi and the Isuzu which he took to Upington Police Station. The cash and the cell phone were booked in the SAP13 register while the Isuzu was booked at the Vehicle Safeguard Section in Upington under reference VSS 08/2018. The 125 boxes of soup which were in the Isuzu were estimated to cost R87,000.00 (Eighty Seven Thousand Rand).

[9] The respondent and Tsotetsi were arrested and charged with theft under Upington CAS 434/01/2018. Mr Jacobus Smit, who is attached to the Asset Forfeiture Unit as a Senior Financial Investigator, with 16 years' experience in commercial and organised crime cases, established ownership of the Isuzu bakkie as that of the respondent but was pre-owned by MM Islam and Numul Alam. Both Islam and Alam furnished confirmatory affidavits renouncing ownership of the bakkie now valued at R95,200.00 (Ninety-Five Thousand Two Hundred Rand).

[10] Louw Transport substituted Tsotetsi with another driver who completed the trip to Windhoek. Upon delivery of the boxes in Windhoek, it was established that 134 boxes were missing. Olivier later identified 124 boxes at the police station as his and they were handed over to him.

[11] Tsotetsi and the respondent appeared in the Upington Magistrates Court on 23 January 2018 and were released on R1,000.00 (One Thousand Rand) for the respondent and R500.00 (Five Hundred Rand) for Tsotetsi. Of significance is that on 31 May 2018 an attorney Van Zyl legally represented the respondent in the said magistrate's court. The case was postponed to 05 June 2018 for Tsotetsi to secure the services of a legal aid attorney, the record reads:

"Mr Van Zyl applies that vehicle of his client (No.1)[the respondent] be returned to his client. State has no objection. It is ordered that motor vehicle of No 1 which was confiscated by police be returned to No 1."

The case was postponed several times thereafter for different reasons and on 27 November 2018, as appearing on the face of the charge sheet, the case was struck off the roll because the state witnesses were not present in court. The Isuzu bakkie remains in the custody of the SAPS under the authority of the preservation order.

[12] In the application for the provisional preservation order, the respondent was advised in terms of s 39 of POCA to, if he has an interest in the property, to enter an appearance to oppose the forfeiture order, disclose the basis of his defence upon which he wished to rely for his opposition, and to have his interests excluded from the forfeiture order.

[13] A notice was issued to the respondent in terms of s 39(1)(b) of POCA the contents of which are relevant:

"This notice is addressed to Eliya Mugalusi Ngunge and all other persons who may have an interest in the R15 500 cash and the Isuzu KB 300 TDi with registration numbers and letters [...] (the property). The National Director of Public Prosecutions applied for and was granted a preservation of property order in terms of s 38 of the Prevention of Organised Crime Act, No. 121 of 1998 in the High Court of South Africa (Northern Cape, Kimberley). A copy of the application and order can be obtained from the person mentioned in par 9 hereunder."

Take notice that:

1. *If you have an interest in the property, you should understand that it is now at risk. You are advised to obtain legal advice on whether your interest can be protected and, if so, on how to protect it.*

2. *You are notified that the National Director will, within 90 days of publication of this notice, apply to the High Court under section 48 of POCA for a forfeiture order. The preservation order will remain in force until the application for a forfeiture order is finalised, and until any forfeiture order that is made is satisfied.*

3. *If you intend to oppose the application for a forfeiture order, or you intend to apply for an order excluding your interest from a forfeiture order in respect of the property, you must enter an appearance in terms of the order. The requirements for such an appearance are set out in the order and are also dealt with in sections 39(3), (4) and (5) of POCA. An appearance must comply with these requirements and must be delivered to the office of the State Attorney at the address mentioned in paragraph 9, below.*

4. *Your attention is specifically drawn to the **14-day time limit prescribed in section 39(4) for the entry of an appearance** referred to in paragraph 3 above.*

5. *If you enter an appearance in terms of the order, you will be entitled to be given 14 days' notice of the application by the applicant for a forfeiture order in respect of the property.*

6. *If you fail to enter an appearance in terms of the order or to comply with the above requirements, you will not be given notice of the application for a forfeiture order and you will not be entitled to appear at the hearing of the application. In such a case, the court may grant a default order forfeiting the property to the state under section 53 of POCA.*

7. *You may, on good cause shown (including the non-availability of any other suitable remedy to protect your legitimate rights or interests), on 3 days notice in urgent instances and at least 7 days notice in other instances to the applicant, and within 8 days of becoming aware of the order, apply for reconsideration of the order.*

8. *You are specifically advised that even if you intend to apply for reconsideration of the preservation order in this case, you must, in addition, comply with paragraphs 5 to 7 above if you intend to oppose the forfeiture application at a later date. Failure to do so can result in a forfeiture order being granted against the property by default and without further notice to you.*

9. *Whenever this order states that you must deliver or serve any notice, affidavit or other process document on the applicant, you must deliver or serve them on the applicant at the following address: Office of the State Attorney, Mrs Gcilitshana, First Floor, Woolworths Building, Cnr Lennox and Chapel Street, Kimberley. Telephone number 053 807 7800. (Own emphasis).*

[14] Mr Eugene Brian Ontong, a Senior State Advocate in the office of the Director Public Prosecutions, deposed to the founding affidavit in the forfeiture application. Of significance is the following paragraph in the founding affidavit of Mr Ontong pertaining to the purported opposition:

“[22] The respondent has not entered an appearance following service upon him and publication in the Government Gazette. The respondent’s attorney, Mr van Zyl from Upington, however and by way of a letter has requested the return of the Isuzu to the respondent. This in itself does not constitute a proper entering of an appearance or opposition in terms of POCA.”

[15] What is pertinent in this forfeiture application is that the trial court moved from the premise that the answering affidavit as contained at page 99 of the paginated papers was in respect of the forfeiture application whereas it related to the

preservation application. My finding is informed by the following: Whereas Mr Ontong deposed to the following at para 21.18 of his founding affidavit:

“Smit established that the respondent is the owner of the Isuzu.”

In his answering affidavit, the respondent said the following in respect of 21.18:

“The allegations contained in this paragraph are hereby denied. The applicant is put to the proof thereof.”

At para 9 (above) I have referred to the ownership of the Isuzu vehicle and the passing of ownership to the respondent. If the respondent persists in denying ownership of the Isuzu, as it appears in his answering affidavit, the question to be answered is how does he derive *locus standi* in this application? Ms Van Dyk, for the NDPP, however, submitted, correctly that it is unquestionable that the respondent is the owner of the Isuzu bakkie.

Ground 1: did the appellant succeed in proving that the Isuzu bakkie is an instrumentality of an offence

[16] Chapter 1 of POCA defines:

[16.1] *“instrumentality of an offence” as meaning “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.*

[16.2] *“unlawful activity” means “conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.”*

[17] Howie P in *National Director of Public Prosecutions v Geyser and Another*² pronounced:

“[17] To be an instrumentality of an offence the property concerned must by definition in POCA, be ‘concerned in the commission’ of that offence. As the cases have interpreted that definition, the property must facilitate commission of the offence and be directly causally connected with it so that it is integral to commission of the offence.” (references omitted)

[18] In *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)*³ Van Heerden AJ in the ConCourt held:

“In other words, the determining question 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.’” (reference omitted)

[19] The R15,500.00 cash is also an instrumentality of the offence when viewed against the lens of the respondent and proceeds of an unlawful activity and juxtaposed with the conduct of Tsotetsi. The cash was necessary, in other words, it played an integral part to the unlawful transaction between the respondent and Tsotetsi. But for the cash, Tsotetsi would not have offloaded the boxes of soup onto the Isuzu. But for the Isuzu, there would not have been a mode of transport to facilitate and complete the transaction.

[20] Mr Jacobs, for the respondent, initially went off script and lengthily argued on what was not contended in the papers. When his attention was drawn to the absence of an explanation by the respondent who resides in Pabalello, Upington, along the route he had to follow, why he would meet with Tsotetsi on the roadside and not at a physical address counsel submitted that it is not pleaded that the truck was from

² 2008 (2) SACR 103 (SCA) at 110 para 17

³ 2007 (2) SACR 145 (CC) at 165d – e

Natal to Namibia. The answering affidavit spans pages 99 to 107 and there is no averment that the truck may not deviate.

[21] As the shoe started to pinch Mr Jacobs made the submission that the impediment of the defence regarding the insufficiency of the explanation was caused by the respondent's erstwhile attorneys. On the contrary, on 16 March 2020, Matlejoane Attorneys served and filed the respondent's opposing affidavit. At para 1.3 the respondent states:

"Where I make submissions of a legal nature in this affidavit, I do so based on the advice that I have received from my legal representative which advice I verily believe to be correct. I have read the affidavit of Eugene Brian Ontong which is attached to the Notice of Application for preservation order and which is sought against me and would like to respond as follows...."

The respondent confirmed that he believed the above by his erstwhile attorneys to be correct.

[22] The respondent, through the assistance of his erstwhile attorneys or the current attorneys and counsel, has not dealt with POCA or its requirements at all. Mr Jacobs was constrained to concede that had the respondent's current legal team been of the view that papers required to be supplemented leave would have been sought to take care of the inadequacy. Blaming the erstwhile attorneys for a lacuna that could have been cured by the current team does not assist the respondent. The argument has no merit.

[23] Mr Jacobs argued that the NDPP has not succeeded in proving on a balance of probabilities that the property is an instrumentality of an offence. Counsel made the submission that the respondent was offloading the boxes whereas they had already offloaded. The quantity of boxes, 170, at a cost of R10,000.00, is also significant. $R10,000 \div 170 = R58.82$ per box. It means the respondent was paying R58.82 per box of soup according to his arrangement with Tsotetsi. According to the evidence, there was 125 boxes of soup on the Isuzu with an estimated value of R87,000.00. A quick calculation shows that $R87,000.00 \div 125 = R696.00$ per box.

Surely, the respondent knew or ought to have known that the transaction is suspicious. It boggles one's mind why the respondent would persist that he was buying soup from a legitimate source. The burden of proof in a POCA case is on a balance of probabilities and not beyond reasonable doubt.

[24] Mr Ontong made this averment at para 21.14 of his founding affidavit:

“Van Wyk when he searched the Isuzu found R15,500.00 in cash in the Isuzu.”

In his answering affidavit, at p104 the respondent said:

“The allegations contained in this paragraph are hereby admitted. The said cash found in my possession was going to pay for the stock that was delivered by the truck driver as per agreement.”

Mr Jacobs urged us to deduce that the respondent and Mr Tsotetsi had previously spoken. This came on the backdrop of the contention by Mr Jacobs that the erstwhile attorneys wrongly drafted the opposing papers and that the responses do not include what the respondent conveyed when he consulted with him. The choice of legal representative rested with the respondent and consequences of his choice are usually his to bear. However, as has already been pointed out the respondent's present legal representative could have taken steps to rectify the position, yet failed to do so.

[25] This Court, per Olivier AJ then, in *National Director of Public Prosecutions v Seleokane*⁴ had the opportunity to deal with a matter where a motor vehicle was stopped on a public road and found to contain 56.10kg of dagga, justifying an inference that an offence of dealing in dagga was being committed. The Court held that the vehicle was the means of transporting the dagga in the commission of an offence and therefore an instrumentality. The vehicle was declared forfeit to the State.

⁴ [2003] 3 All SA 102 (NC)

[26] In my view, the mere fact of the arrangement by Tsotetsi and the respondent to meet at the side of the road, offload boxes from the truck onto the Isuzu, cargo destined for Windhoek belonging to a third party, satisfies the requirement. The Isuzu facilitated the transportation of the boxes. When the police intervened the deal was sealed and complete. Unquestionably, the Isuzu and the cash were sufficiently linked and played a direct role in the commission of an offence to render it an instrumentality. The Schedule 1 offences that are relevant in this matter are theft, whether under the common law or a statutory provision and any offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955) and any conspiracy, incitement or attempt to commit an offence referred to in this Schedule.

I am therefore satisfied that the NDPP has made out a proper case of instrumentality (on a balance of probabilities in respect) of both the Isuzu and the cash.

[27] The Constitutional Court's remarks in *Mohunram*⁵ pertaining to proportionality are instructive:

"[56] Turning now to the question of proportionality, the purpose of the proportionality enquiry is to determine whether the grant of forfeiture order would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution. The interpretation of POCA (and more particularly of 'instrumentality of an offence') as reaching beyond the ambit of 'organised crime' and applying to cases of individual wrongdoing could result in situations of clearly disproportionate (and hence constitutionally unacceptable) forfeiture, and courts must always be sensitive to and on their guard against this.

[57] The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effect on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other. The broader societal purposes served by civil forfeiture under ch6 of POCA have been held to include:

⁵ (Supra) Page 168 paras 56 and 57

- *removing the incentives for crime;*
- *detering persons from using or allowing their properties to be used in crime;*
- *eliminating or incapacitating some of the means by which crime may be committed; and*
- *advancing the ends of justice by depriving those involved in crime of the property concerned.”*

[28] Nkabinde J, writing for the unanimous court in *Prophet v National Director of Public Prosecutions*⁶ held:

“[63] In this case some of the relevant factors appear to be the following: whether the property is integral to the commission of the crime; whether the forfeiture would prevent the further commission of the offence and its social consequences; whether the “innocent owner” defence would be available to the applicant; the nature and use of the property; and the effect on the applicant of the forfeiture of the property.”

[29] In *National Director of Public Prosecutions v Botha NO and Another*⁷ Jafta J insightfully remarked:

“[110] The purpose of forfeiture, namely, combating serious crimes and removing an incentive to commit such crimes, coupled with the fair procedure prescribed by POCA refute the assertion that forfeiture made in compliance with POCA is arbitrary.”

[30] I have already found that the appellant did not raise the ‘innocent owner’ defence. I could not discern in the papers where the appellant dealt with POCA or the aspect of proportionality. The property in issue has already been found to be an integral part to the commission of the crime. The estimated amount of goods (125 boxes of soup) found in the respondent’s Isuzu was R87,000.00. The uncontested

⁶ 2006 (2) SACR 525 (CC) at para 63

⁷ 2020 (1) SACR 599 (CC) at para 110

current estimated value of the Isuzu according to Mr Jacobus Smit, guided by TransUnion Auto Dealers Guide is approximately R95,200.00. I am of the view that granting forfeiture of the vehicle under these circumstances would not amount to an arbitrary deprivation of property. I am also convinced that forfeiture will discourage the respondent from committing further offences. The purpose of not incentivising crime will be served.

The appellant conceded the lawfulness of the Upington Magistrate Order granted on 31 May 2018; Such an order has to be reviewed or appealed before the appellant can proceed with the application in terms of sections 38 and 48 of POCA.

[31] The submission by Ms Van Dyk is that there was no averment by the respondent in his papers that despite the order by the Magistrate the State failed to adhere to the order. In the premises the conclusion was arrived at by the trial court on its own which resulted in an adverse finding against the NDPP. Differently put, the trial court decided a dispute on an issue that was not raised on the papers before the Court.

[32] Ms van Dyk argued that NDPP was entitled to bring the s 38 application in terms of POCA and denies having concealed any material facts, more particularly, the order by the Upington Magistrate, when the preservation application was made. The Isuzu was not an exhibit before the Court and the respondent could have applied for the handing back of the vehicle from the police. Counsel, for the appellant invoked the unreported judgment in *NDPP v Mamade*⁸.

[33] Counsel further submitted that the NDPP and the SAPS are separate institutions governed by different legislation and the Isuzu was in possession of the police. This therefore meant that the NDPP was not bound by the release order. According to her the NDPP was not prohibited from launching preservation proceedings in terms of POCA.

⁸ NDPP v Ismael, Fazel Mamade Case No 08/18360, delivered on 2 December 2008

[34] Leach J, then, in *National Director of Public Prosecutions v Swart*⁹ faced with a similar matter where the Magistrate, having sentenced the accused, issued an order that the motor vehicle be returned to the respondent (Swart) and the NDPP decided to seek a forfeiture order, succinctly put it in this manner:

“The purpose of POCA is to counteract organised crime and criminal gang activities. It is the culmination of a protracted process of law reform aimed at attempting to ensure that criminals do not benefit from their crimes. Chapter 6 thereof (comprising s 37 to s 62) is focused on property that either has been used to commit an offence or which constitutes the proceeds of crime, rather than on the wrongdoers themselves. It provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based and may be invoked even where there is no prosecution. (See National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (2) SACR 196 (CC) (2002 (4) SA 843; 2002 (9) BCLR 970) at paras [14] – [17].)

[35] Regard being had to the above authorities, the finding by the trial court that the NDPP had first to exhaust the remedy of a review or appeal of the Magistrates’ order prior to launching the proceedings in terms of POCA is misconceived. A criminal conviction is not a condition precedent to forfeiture¹⁰ and the NDPP was entitled to pursue the POCA proceedings. Accordingly, in the current circumstances, the magistrates order to return the vehicle cannot and does not preclude the NDPP from following a forfeiture process in respect of the relevant vehicle. The only consideration being in the forfeiture proceedings, the question of whether the vehicle was an instrumentality of or the proceeds of crime as defined in POCA.

The respondent had a *bona fide* belief that he was entering into a lawful agreement with Tsotetsi.

[36] The surrounding circumstances of this matter, when assessed in totality, do not support the contention by the respondent of a *bona fide* belief that he was

⁹ 2005 (2) SACR 186 (SECLD) at 188f - g

¹⁰ National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA) at 226 para 20

entering a lawful agreement with Tsotetsi. The respondent's answering affidavit is replete with either denying the contents, noting the contents, or that he can neither admit nor deny the allegations in the founding affidavit. It is only where he is responding to the NDPP's para 21.14 in respect of which he admitted that the cash found in the Isuzu was in his possession and was meant to pay for the stock that was delivered by the truck driver as per agreement.

[37] The defence, if any, of the respondent must be found in his answering affidavit. I have not discerned any. The court *a quo* seems to have accepted on face value or attached weight to the contention of a *bona fide* belief raised on behalf of the respondent that he was entering into a lawful agreement by pronouncing:¹¹

"[46] In the circumstances, and on the probabilities of this case, the respondent could have been harbouring under the mistaken, but bona fide belief that he was concluding a legitimate business transaction with the said Tsotetsi."

[38] The respondent could have furnished an explanation in response to s 39(3) of POCA to protect his interest after receiving the notice informing him that his property was at risk. The answering affidavit does not even furnish any explanation as to how he and Tsotetsi knew each other, how this so-called 'lawful' transaction was conceived and whether or not the respondent has verified the source of supply to determine its lawfulness. The laughable fraction of the real value of the goods the respondent and Tsotetsi agreed on as the purchase price of the goods concerned. This argument by the respondent lacks merit. The court *a quo* ought to have seen through the ploy.

The long delay by the NDPP in bringing the preservation application in terms of POCA

[39] POCA's legislation is aimed at combating crime, more particularly, organised crime and ensuring that no one benefits from the incentives of crime. The Act acknowledges in its preamble that there is a rapid growth of organised crime, money

¹¹ At para 46

laundering and criminal gang activity nationally and internationally. Since organised crime has internationally been identified as an international security threat, no time frame has been particularly set for the launching of the POCA applications. The only time frame with a bearing in this application relates to the duration of preservation of property orders which expires 90 days after the date on which notice of the making of the order is published in the *Gazette* in terms of s 40 of POCA. Challenging the appellant's delay in launching the preservation application does not take the matter any further and this aspect should not detain us.

The lawful owner of those goods, namely, the truck, boxes of soup and the cellphone, suffered no significant losses and or damages

[40] The aforementioned finding by the court *a quo* is, in my view, missing the point. The issue is whether the Isuzu and the cash were instrumentalities of an offence from the perspective of POCA. I have already found that they were. It is therefore immaterial on whether the lawful owner suffered any damages or not.

The respondent was prejudiced in the circumstances

[41] Whether the respondent was prejudiced, is prejudiced, or not ought to be assessed in terms of POCA. The *onus* was on him to utilise the applicable provisions of POCA to state his defence. The respondent failed to state his defence appropriately and in the current circumstances, he cannot avoid the consequences of this failure.

That reliance by the appellant on s 50(4) of POCA is misplaced

[42] Section 50(4) of POCA stipulates:

“(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

[43] The court *a quo* found that because there is an existing order by the Magistrate dated 31 May 2018 for the return of the vehicle to the respondent, and since the order was not taken on review or appeal, reliance by the NDPP on s 50(4)

is misplaced. In this regard, I have already invoked the *Mamade* and *Swart* decisions. Of significance though is that nothing bars the NDPP from pursuing the relief in terms of POCA, even when there was no criminal trial or it was pending, withdrawn or struck off roll. To reiterate, the remarks by Franklin AJ in *Mamade*¹² that the NPA and the SAPS derive their powers and duties from different legislations and cannot simply be painted with the same brush. Each one accounts according to its legislation. The instructive remarks by the Constitutional Court in *Botha*¹³ however bear repeating:

“[107] POCA prescribes an elaborate procedure which must be followed before an order of forfeiture is made. In order to safeguard the rights in the property concerned, section 48 obliges the NDPP to give notice of the application for forfeiture to every person who has recorded in terms of section 39 that they have interest in the property in question. Once served with the papers, such person may appear at the hearing of the application and oppose the order of forfeiture or request that the operation of the order should exclude her interest in the property. She is entitled to adduce evidence at the hearing of the application.”

[44] At the hearing of the forfeiture application before Moses AJ, no evidence was adduced despite the fact that the respondent was served with a s 39 Notice to which there was no response or reaction. In this instance, the NDPP followed the correct elaborate POCA procedure. I am also not persuaded that there was any information that the NDPP did not disclose to the Court in the preservation application which could have had an impact on the outcome. There is no basis for the trial court to have ordered costs against the NDPP in the forfeiture application.

[45] **What remains is the question of costs.** There is no reason why costs cannot follow the result.

[46] In the result, the following order is made:

1. The appeal is upheld with costs.

¹² At para 11.2

¹³ At para 107

2. The order of the court *a quo* is set aside and replaced with the following order:

“2.1 An order is hereby granted in terms of the provisions of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), declaring forfeit to the State the Isuzu KB 300 TDi Single Cab with registration numbers and letters [...] and chassis number [...]356064 and engine number [...] (the Isuzu) and R15,500.00 (in cash) held by the South African Police Service (SAPS) under Calvinia CAS 117/09/2018 (the property) which is currently subject to a preservation of property order granted by this Court on 16 August 2019.

2.2 In terms of s 50(6) of POCA, paragraph 2.5 below shall take effect 45 days after publication of a notice thereof in the Government Gazette.

2.3 The SAPS Commanding Officer, Upington shall take care of the property, be and is hereby directed to continue acting as such for the purposes of this order.

2.4 Pending the taking effect of this order, the property shall remain in the custody of the SAPS Commanding Officer, Upington.

2.5 On the date on which this order takes effect, to wit, 45 days after publication in the Government Gazette, the SAPS Commanding Officer, Upington shall hand the property to the Senior Special Investigator, Jacobus Smit, of the applicant who shall:

- a. Assume control of the property and take it into his custody;
- b. Sell the Isuzu at a best price either by public auction or private treaty;

- c. Sign all documents necessary to effect the sale, transfer and registration of the Isuzu; and
- d. Pay the proceeds thereof, less any commission and incidental expenses occasioned by the sale as well as the cash into the Criminal Asset Recovery Account number [...] established in terms of s 63 of POCA.

2.6 The applicant is directed to publish a notice of this order in the Government Gazette as soon as it is practicable.”

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Lever J and Nxumalo J concur in the Judgment by Mamosebo J.

For the appellant: Adv. L van Dyk
Instructed by: The Office of the Director Public Prosecutions

For respondent: Adv. A Jacobs
Instructed by: Kenneth Juries & Associates