



Reportable/Not reportable

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

Case No: 1792/19

Heard On: 29/07/2021

Delivered: 30/07/2021

In the matter between:

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

AND

ELIYA MAGALUSI NGUNGE

Respondent

Coram: MOSES AJ

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

MOSES AJ

Introduction

1. This is an application for leave to appeal my judgment of 28 May 2021, in the above matter. The application was heard by me on Thursday morning 29 July 2021, and after hearing the parties I adjourned the matter to consider

their submissions, pursuant where to I will give my judgment, which I hereby do.

Brief Background

2. On or about 21 January 2018 the Respondent in this matter was arrested together with a truck driver, on Mr Tsotetsi, and subsequently charged in the Upington Magistrate's Court with theft. He was arrested by members of the South African Police Services (SAPS) in circumstances where he was found with a motor vehicle – the Isuzu – parked next to the road, busy uploading certain boxes, later discovered to be containing packets of soup from a truck onto the Isuzu, which was his vehicle.
3. Upon searching the vehicle the members of SAPS also found cash in the amount of R 15 000.00 in the vehicle. According to the Respondent the cash found in his possession was going to pay for the stock that was delivered by the truck driver as per agreement. Both the money and the Isuzu motor vehicle were confiscated by SAPS.
4. As it turned out, the criminal case against both of them, the Respondent and the truck driver, was eventually struck from the court roll of the Upington Magistrate's Court, in and around November 2018.
5. Before that however, in and around May 2018, when the two of them appeared in that Court, on these criminal charges, an application was brought, and recorded on behalf of the Respondent – one of the accused in that matter, for the return and delivery of his motor vehicle. The prosecutor in the matter placed on record that there was no objection to the said application. The presiding magistrate subsequently ordered that his (Respondent's) vehicle be returned to him. It is common cause that the said vehicle was never returned to the Respondent to date hereof, and his cash seized at the time is also still in police custody.
6. It is also common cause that subsequently the Applicant herein brought the preservation application and later the forfeiture application, in respect of the Isuzu vehicle and the cash (the property) in terms of the Prevention of Organised Crime Act, 1998 (Act No 121 of 1998) (POCA), in this Court. I referred to, and dealt with these applications in my afore-stated judgment.

7. After having read the papers filed of record and subsequently having heard counsel on behalf of the Applicant and the Respondent, having reserved judgment at the time, I subsequently gave judgment and made the following order.
 1. “The application is dismissed with costs.
 2. The Applicant is ordered to return and/or cause to return, the Respondent’s property which includes the R 15 500.00 cash and the Isuzu motor vehicle, an Isuzu KB 300 TDI Single Cab vehicle with registration and letters BVV452NC, seized and held by the South African Police Service under Upington CAS 434/01/2018, forthwith, and not later than five(5) days of the date of this judgment.”
8. It is this judgment and order that form the subject matter of this application for leave to appeal.

The Application for Leave to Appeal

9. The applicant thereafter duly filed and served its application for leave to appeal on or about 2 June 2021, setting out the various grounds upon which it relies that another court “could reasonably have come to a different conclusion...” and that “... the Applicant has reasonable prospects of success on appeal.”¹
10. Subsequently the Respondent duly filed and served his “Notice to Oppose Applicant’s Leave to Appeal”, dated 7 June 2021, setting out his various grounds of opposition, inter alia, “that no other court (sic) would come to a different conclusion based on the reasons given ...” and “...that the applicant has no prospects of success on appeal”.²
11. On or about 15 July 2021 the Applicant duly filed and served its Practice Note, together with its Heads of Argument, setting out elaborately its respective grounds of appeal and submissions to substantiate, and in support of, its application for leave to appeal.³
12. On or about 22 July 2021 the Respondent duly filed and served his Heads of Argument setting out his grounds of opposition and submissions in support of

¹ See Applicant Notice of Application for leave to Appeal, dated 2 June 2021.

² See Respondent’s Notice of Opposition, dated 7 June 2021.

³ See Applicants Practice Note and Heads of Argument dated and signed 15 July 2021.

his contention that the application for leave to appeal ought to be dismissed with costs.⁴

13. The Court expressed its gratitude to the parties for these Heads of Argument and their oral submissions in Court on Thursday 29 July 2021.

A summary of the essence of the grounds of Appeal and the grounds of opposition

14. The essence of the Applicant's application for leave to appeal seems to me to be threefold:

14.1 that the Respondent's version was akin to abare denial, that he did not specifically refer to and/or pleaded the existence of the/ a Court order by the Upington Magistrate's Court, and that the said Court order was in any event no bar to the institution of these proceedings under POCA and this Court coming to a decision notwithstanding the said Court order.

14.2 The only explanation given under oath by the Respondent was that the cash found in his possession was going to pay for the stock that was delivered by the truck driver "as per agreement".⁵

14.3 In the event that it is alleged that the Respondent acted in the bona fide belief that he was transacting lawfully with the truck driver at the time, he attracted an onus – in terms of the so-called "innocent owner defence_" in terms of section 52(2A) of POCA, which he then was required to discharge, on a balance of probabilities, but which he failed to do in the circumstanced of this case.

15. The Respondent's case in essence seems to be that the Applicant failed to discharge the onus which was on it:

15.1 to proof on a balance of probabilities that the Respondent's version is not probable;

15.2 hence it did not proof on a balance of probabilities that the Isuzu and money were used as an instrument for unlawful activities "...because by implication the Applicant is saying that simply because the Respondent

⁴ See Respondent's Heads of Argument dated and signed 22 July 2021.

⁵ See Para 56 of Applicants Head's of Argument – HoA; Para 4.1 of Respondent's HoA, P5.

bought along the road on 21 January 2018 was therefore committing an illegal activity”;⁶ and

15.3 the court order of/by the Upington Magistrate’s Court, although not pleaded specifically, formed part of the evidence provided by the Applicant itself, in its court papers, that it constitutes a valid and binding order on the Applicant, and in this regard distinguish the case referred to, and relied on by the Applicant, of **Ismael** ⁷; from this case, (inasmuch as the Applicant *in casu* is/was a party to those court proceedings and the order made by Upington Magistrate’s Court in May 2018, whereas the NDPP was found not to be a party to those orders made and referred to by Franklin AJ in the said Ismael-case⁸.

16. Hence the Applicant’s application for leave to appeal falls to be dismissed with costs.

The Issues For Determination

17. The crisp issues for determination, to my mind, therefore are:

17.1 Was/is the Respondent’s version so “far-fetched or clearly untenable”, so as to be rejected as false, and hence improbable?

17.2 Did the Respondent, based on his version and the facts *in casu*, attracted an *onus*, as a so-called “innocent owner” by virtue of the provisions of Section 52(2A) of POCA, and therefore had to discharge that *onus* on a balance of probabilities? and

17.3 What is the status of that Upington Magistrate’s Court order dated 11 May 2018, and is/was it binding on the Applicant?

⁶ Para 2.1 and 2.2 of Respondent’s HoA.

⁷ The unreported judgment of NDPP v Ismael, Faizel Mamade, Witwatersrand Local Division, Case No: 08/18360, delivered by Franklin AJ on or about December 2008, a copy whereof is annexed as item no. 6, under “Case Law” of the Applicant’s Heads of Argument).

⁸ Paras 2.3, 2.4 and 3 of the Respondent’s Heads of Argument).

18. With regards to the first issue (in 17.1 above), I have expressed my views and furnished the reasons for that in my judgment, and hence it need not be repeated in here, save to add that whilst I agree that the circumstances in which this transaction had taken place might seem “strange” and would certainly be regarded as suspicious by members of SAPS especially, I could not, and cannot, find as untrue the explanation given by the Respondent, in this regard.

19. With regards to the second issue (in paragraph 17.2 above) I tend to disagree with the submissions advanced by Ms van Dyk on behalf of the Applicant, for the following reasons:

19.1 the Respondent *in casu* did not bring any application as envisaged in section 52(2A) of POCA;

19.2 the Respondent, *qua* Respondent resisted and opposed the forfeiture application, initiated, launched and prosecuted by and on behalf of the Applicant, in terms of section 48 read with section 50 of POCA, and hence the Applicant was, and remains burdened with the *onus* of proving on a balance of probabilities that it has made out its case for the relief it sought;

19.3 hence there was no *onus* placed on the Respondent by virtue of section 52(2A) “*to proof his innocence*” so to speak.

20. With regards to the third issue (in 17.3 above) I similarly tend to disagree with the contentions and submissions by and on behalf of the Applicant in this regard, for the reasons stated in my judgment. I add the following more explicitly in this regard:

20.1 Section 50(4) of POCA refers in relevant parts, to “...*the outcome of criminal proceedings*...” It does not refer to an order and/or a decision of a court of law. If it were to be interpreted as such, meaning to include an order and/or a decision of a court of law, it would, to my

mind, have constitutional ramifications and/or implications, more specifically with regards to the status, if any of such a court order, as *in casu*.

20.2 If regard is had to Chapter 8 of our Constitution, more particularly section 165(5)⁹ read with section 166(d) thereof¹⁰ then it seems to me that a court order such as *in casu* cannot be, and is not trumped by any provision in POCA, that it is valid and binding as set out in s165(5) until such time that it – the order – is validly and legally set aside;

20.3 the court order issued by the Uppington Magistrate's Court is/was such an order, which was/is valid and binding on "...all persons to whom and organs of state to which it applies..."; and

20.4 As such that court order applies to, and is valid and binding on the prosecutor at the time, representing and performing his/her functions under the authority of the NDPP, the NDPP itself, the SAPS as well as the Respondent, as an accused person before that court at the time, to date hereof.

21. I was also referred to the case of NDPP v Swart¹¹ in support of the contention that a court order for the return of a motor vehicle in Magistrate's Court proceedings, is not to be regarded as such in circumstances where the parties (the Prosecutor and Defence) were *ad idem* about the return of the vehicle, and the Magistrate's order pursuant thereto not constituting a "*decision*" which could bar an application for forfeiture and/or a forfeiture order in terms of s48 of POCA.

22. I do not express any opinion about the case and/or the judgment of that court at this stage, save to say upon a reading thereof, the facts clearly differ from the facts and circumstances of this case. There the accused was found in

⁹ It reads: "(5) An order or decision by a court binds all persons to whom and organs of state to which it applies".

¹⁰ It reads "166. The courts are-

- (d) The Magistrate's Courts...")

¹¹ 2005(2) SACR 186 (SECLD)

unlawful possession of abalone in his car. He pleaded guilty, was convicted and sentenced to a fine. That court found, that in the circumstances of that case, that motor vehicle was clearly an instrumentality of the offence, and declared the motor vehicle forfeited to the State.

23. In the circumstances, having said the above, the guiding principle in applications of this nature was succinctly summarised by the Supreme Court of Appeal in **S v Mabena and Another**¹² as follows:

“It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree.”

24. This Court, upon reflection is of the view, given the issues referred to above, that there is a reasonable prospect that another, higher court, may disagree with its judgment.

25. In the event, the following order is hereby made:

IT IS ORDERED

The Application for leave to appeal to the Full Bench of this Division is granted.

There is no order as to costs.

J.J. MOSES

ACTING JUDGE OF THE HIGH COURT

¹² para [22] 2007 (1) SACR 482 (SCA))

NORTHERN CAPE DIVISION, KIMBERLEY

For the Applicant: Ms Van Dyk
Instructed by: State Attorney

For the Respondent: Mr Jacobs
Instructed by: Kenneth Juries & Associates